



# Study for the Fitness Check of EU consumer and marketing law

Final report Part 3 – Country reporting

Prepared by Civic Consulting  
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Consumers*

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# Study for the Fitness Check of EU consumer and marketing law

## Final report Part 3 – Country reporting

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# 1. Study to support the Fitness Check of EU Consumer law – Country report AUSTRIA

## 1.1. Unfair commercial practices and marketing

### 1.1.1. Effectiveness of the UCPD in establishing a high level of consumer protection

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

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

Unlike some other Member States, Austria has a fairly long history of unfair competition law as the first Act against Unfair Competition (UWG) dates back to 1923.<sup>1</sup> The UCPD, as well as the MCAD, was implemented by the so-called UWG amendment of 2007.<sup>2</sup> Due to the long history of dealing with unfair commercial practices, the implementation of the UCPD should, in the opinion of the Austrian legislature, not lead to any fundamental changes.<sup>3</sup> However, this assessment was subject to critique.<sup>4</sup> The CJEU's interpretation of the UCPD led to 'hidden amendments' of the UWG.<sup>5</sup> This is why the UWG has in the meantime been amended twice, once in 2013 and most recently in 2015.<sup>6</sup>

With both amendments, some core regulations of the Austrian UWG were revised, for instance the general prohibition of bonus sales in Sec. 9a UWG and the requirement of prior approval of clearance sales by a government body (Sec. 33a seqq. UWG).<sup>7</sup> Stakeholders ranging from consumer organisations to government officials indicated that the level of consumer protection decreased due to these changes. Admittedly, a high level of harmonisation among the Member States may be the positive result of the full harmonisation approach of the UCPD, but especially in Member States with a highly elaborated tradition of unfair commercial practices law, this leads to a deterioration of the protection standard. For example, in Austrian law, the principle-based approach has been of great importance throughout time. In practice, this approach was well recognized since it allows a great flexibility when adapting to new developments.<sup>8</sup> Over time, it has proven to be an essential tool to properly adjudicate new unfair commercial practices. Thus the principle-based approach was and still is assessed as effectively preserving fair competition. However, as a consequence of the UCPD, the effectiveness of such principle was slightly deteriorated. Further, the

<sup>1</sup> *Kraft/Steinmair* (2013) "Einleitung UWG", rec. 8; *Handig/Wiebe* "Einleitung", recs. 2-3 in: *Wiebe/Kodek* (2016); the recent amendment to the UWG was announced on 22.04.2015 in the Federal Law Gazette I (Bundesgesetzblatt, BGBl.) I, No. 49/2015.

<sup>2</sup> Federal Law Gazette I, No 79/2007.

<sup>3</sup> This is the view of the Austrian legislature as expressed in the explanatory remarks accompanying the legislative materials, see Regierungsvorlage (RV) 144, Beilagen zu den stenographischen Protokollen des Nationalrates (BlgNR) Gesetzgebungsperiode (GP) no 23. These materials can be found at <[www.parlinkom.gv.at](http://www.parlinkom.gv.at)>.

<sup>4</sup> *Schuhmacher wbl* 2007, 557, 558.

<sup>5</sup> *Seidelberger* (2016) in: *Augenhofer/Alexander* (eds.), p. 111 and *Seidelberger* (2014) in: *Staudegger/Thiele* (eds.), p. 263, referring, for example, to the CJEU judgments ECLI:EU:C:2010:660 (*Mediaprint/Österreich*) and ECLI:EU:C:2013:14 (*Köck/Schutzverband*).

<sup>6</sup> Federal Law Gazette (BGBl.) I, No. 13/2013, which mainly abolished Sec. 9 UWG (general prohibition of bonus sales) and altered the rules for the permission of clearance sales by a government authority as well as 33a seqq. UWG; and Federal Law Gazette (BGBl.) I, No. 49/2015, which mainly adopted suggestions by the Commission after its having instituted treaty violation proceedings against Austria (No. 2013/2168) for an insufficient transposition of the UCPD.

<sup>7</sup> Cf. *Schuhmacher wbl* 2010, 612, 615; *Heidinger MR* 2013, 135; *Prunbauer-Glaser RuW* 2013, 4; *Rungg/Walser MR* 2011, 90.

<sup>8</sup> Cf. e.g. *Heidinger* "§ 1 UWG", rec. 1 in: *Wiebe/Kodek* (2016); *Kraft/Steinmair* "§ 1 UWG", rec. 1.

linguistic and systematic quality of the UCPD has been criticised by Austrian legal scholars, as having led to a reduced quality in the transposed law.<sup>9</sup>

However, these criticisms do not stem from the principle-based approach of the UCPD, which is evaluated rather positively since that approach was already known in Austria before the implementation of the UCPD.

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

Austrian legal scholars attributed a high impact to the black list in regards to it promoting legal certainty and clarity in unfair competition law.<sup>10</sup> According to one view, the black list addresses some practices used especially by online businesses, which are the most important businesses when it comes to cross-border trade; hence the list is seen as leading to a decrease in internal market barriers.<sup>11</sup>

By contrast, stakeholders argue that the black list is barely applied in Austria, since most stated practices are covered by the general rules and the application of the black list proves to be difficult due to the narrow conditions of the commercial practices included in the black list. Hence, courts seem reluctant in applying the black list until certain important questions of interpretation are clarified by the CJEU. Moreover, it is criticised that the static nature of black lists does not do justice to a very agile area of law such as unfair commercial practices. This is considered especially problematic with regard to typically country specific practices (e.g. 'Werbefahrten', which are promotional tours organised by businesses and aiming especially at elderly people).

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

The Austrian legislature did not introduce any explicit provisions with regard to financial services, banking and investments in the UWG. Nevertheless, there are fragmented provisions in banking and financial services law which effect unfair commercial practices law.<sup>12</sup>

For instance, Sec. 69 Trade, Commerce and Industry Regulation Act ('Gewerbeordnung', GewO)<sup>13</sup> enables the Austrian government to enact government codes of conduct for certain trades, published as ordinances. Particularly relevant in the context of Art. 3 para. 9 UCPD are the Ordinances for financial intermediaries ('Verordnung über Standes- und Ausübungsregeln für Personalkreditvermittler', IMMV)<sup>14</sup> and real estate agents ('Verordnung über Standes- und Ausübungsregeln für Immobilienmakler', IMMV).<sup>15</sup> As far as these codes cover immovables and financial services, they are in any event in line with the UCPD as they fall under the exception in Art. 3 para. 9 UCPD. Outside the parameters of this exemption clause, it remains to be seen in every single case if the ordinances will be treated as bans – therefore violating the UCPD – or as mere concretisations of the term 'professional diligence' under the UCPD. The government codes of conduct regarding financial intermediaries, inter alia, prohibit special misleading advertisements. Sec. 4 para. 1 no. 9 IMMV contains a prohibition against doorstep-selling of mortgage loans, unless the visit was

<sup>9</sup> Cf. *Anderl/AppI* "Anhang zu § 2 UWG", rec. 6 in: Wiebe/Kodek (2016); *Wilttschek/Majchrzak* ÖBI 2008, 4, 5; *Ummenberger-Zierler* (2016), p. 25 seqq.

<sup>10</sup> *Anderl/AppI* "Anhang zu § 2 UWG", rec. 15 in: Wiebe/Kodek (2016); *Schumacher* wbl 2005, 506, 507.

<sup>11</sup> *Anderl/AppI* "Anhang zu § 2 UWG", rec. 18 in: Wiebe/Kodek (2016).

<sup>12</sup> For a comprehensive study of the interplay between the UCPD and these exceptions cf. *Augenhofer* (2011), p. 11 seqq.

<sup>13</sup> Federal Law Gazette (BGBl.) I, No. 194/1994, recently amended by Act of 21.08.2016, Federal Law Gazette (BGBl.) I, No. 50/2016.

<sup>14</sup> Federal Law Gazette (BGBl.) I, No. 505/1996, recently amended by Ordinance of 21.04.2016, Federal Law Gazette (BGBl.) II, No. 86/2016.

<sup>15</sup> Federal Law Gazette (BGBl.) I, No. 297/1996, recently amended by Ordinance of 25.08.2010, Federal Law Gazette (BGBl.) II, No. 268/2010.

requested by private persons. In summary, with regard to financial services there are provisions that take advantage of the minimum harmonisation clause, whereas with regard to immovable property no stricter rules exist.<sup>16</sup>

It should be noted that there are stricter provisions than the UCPD, especially in the field of banking transactions and consumer credit. However, these stricter rules are based on the corresponding directives, such as the Payment Service Directive 2015/2366/EU or the Consumer Credit Directive 2008/48/EC. These rules therefore comply with the conflict rule of Art. 3 para. 4 UCPD and hence do not fall within the scope of Art. 3 para. 9 UCPD.

Stakeholders seem to be in favour of the minimum harmonisation clause as it allows national legislatures to react to problems causing difficulties in only one specific Member State. An example for this would be the charging of extra fees for the withdrawal at certain ATMs in Austria. Currently, some American companies providing ATM-services are charging an additional fee for every processed money withdrawal without properly notifying the user of this extra charge. Instead, the information of charging said amount is hidden in small print right at the end of the transaction, nearly unnoticeable to the user. A brief prepared by the Legal and Constitutional Service of the Federal Chancellery of Austria has already declared that a charge of extra fees whilst withdrawing from an ATM machine is not inadmissible under the Austrian Consumer Protection Act ('*Konsumentenschutzgesetz*', KSchG)<sup>17</sup>. Both the Minister of Consumer Protection Alois Stöger and the Minister of Finance Hans Jörg Schelling have greatly emphasized the need for a statutory ban on charging additional fees during a withdrawal from an ATM.

- 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 what 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?*]

While environmental claims may violate the Austrian UWG and scholars as well as courts have pointed out the importance of references to the environment for the decision-making process of consumers,<sup>18</sup> in practice there seems to be little experience with such cases. One stakeholder reported that in the environmental/energy sector, special problems arise from the fact that expensive testing might be required before legal action can be taken. This might be a reason for the limited amount of court decisions.

One example in the energy sector is the case '*VKI/Care Energy*',<sup>19</sup> where a company claimed to have already concluded a contract with customers and sent them personalised post. Claims labelling food as being organic as well as untrue statements about environmental sustainability in connection with a purchase have also been observed in practice. There seems to be uncertainty with regard to certain means to improve consumer standards with regard to the energy market due to full harmonisation. An example is provided by the Austrian regulation of price increases for motor fuel,<sup>20</sup> according to which 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 disputed among Austrian legal scholars whether this regulation violates the UCPD. The Austrian Federal Administrative Court ('*Verwaltungsgerichtshof*') requested the

<sup>16</sup> Cf. conclusions of *Augenhofer* (2011), p. 21 and 29.

<sup>17</sup> Federal Law Gazette (BGBl.) I, No. 140/1979, recently amended by Federal Law Gazette (BGBl.) I, No. 35/2016.

<sup>18</sup> For example cf. OGH 29.11.2005, 4Ob200/05y (*naturrein*); *Enzinger* (2012), p. 100.

<sup>19</sup> OLG Wien 18.04.2016, 1 R 45/16v.

<sup>20</sup> Act on Price Transparency of Motor Fuel ("*Preistransparenzverordnung 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.

ECJ for a preliminary ruling in this matter but later, on 02.03.2016, withdrew this motion.<sup>21</sup>

- 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 your country rigidly?*]

Austrian law used to be more consumer protective and also protected the careless consumer.<sup>22</sup> This interpretation had to change due to the CJEU's definition of the average consumer as 'reasonably well-informed and reasonably observant and circumspect'.<sup>23</sup> Austria has the principle of a 'referring consumer expectation' (*Prinzip der verweisenden Verbrauchererwartung*). This principle means that a product is flawless if it is manufactured in a way that the experts have deemed correct and thus the consumer expects the product to be as the experts do.<sup>24</sup> The concept is applied rigidly and deemed to be compatible with European law.<sup>25</sup>

There seem to be no general problems with regard to the average consumer model, which seems to work in practice. However, consumer organisations expressed concern that Austrian courts are reluctant to apply the special rules for consumers needing more protection (as acknowledged by the UCPD).

- 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 in your country recognised new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted)?*]

Sec. 1 para. 2 UWG lists the same criteria as the Directive; there is no indication that additional groups have been recognised by jurisprudence within the scope of the UCPD.<sup>26</sup> Outside the UCPD's scope some argue that the Austrian Supreme Court in context of financial services applies a slightly different notion of 'vulnerable consumers'.<sup>27</sup>

Some stakeholders would find it important to leave Member States leeway for new categories (e.g. indebted consumers) which are not always defined in advance. Moreover, the general concept is criticised by some stakeholders since the context of a purchase is deemed more important than the specifically targeted group. According to their feedback the law in some situations should take into account rather the circumstances of a purchase than the question whether one party is part of a group of vulnerable consumers.

<sup>21</sup> VwGH 21. 10. 2015, 2012/17/0097 and ECLI:EU:C:2016:227 for the withdrawal of the case.

<sup>22</sup> *Enzinger* (2012), p. 28 seq.

<sup>23</sup> ECLI:EU:C:1998:369 (*Gut Springheide*).

<sup>24</sup> *Enzinger* (2012), p. 29; *Wiebe* (2016), p. 293.

<sup>25</sup> *Prunbauer-Glaser/Seidelberger* (2015), p. 28.

<sup>26</sup> *Enzinger* (2012), p. 31; *Prunbauer-Glaser/Seidelberger* (2015), p. 28; *Wiltschek* (2013), "§ 1 UWG" rec. 16.

<sup>27</sup> Cf. therefore question 1.4.4.

- 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?*]

Self-regulation is not very common in Austria.<sup>28</sup> As one example, one may refer to the Austrian Werberat, a self-regulatory body which mainly addresses advertisements violating principles and decency.<sup>29</sup> One might also consider the Schutzverband – a private organisation which is funded by the Wirtschaftskammer (a business organisation) – as form of self-regulation.<sup>30</sup>

Code of conducts are – since the implementation of the UCPD – defined in Sec. 2 para. 3 subpara 2 UWG. If a company refers to a code of conduct in its advertisement and does not obey it, this constitutes an unfair commercial practice as long as the code constitutes a clear, binding obligation for the company.<sup>31</sup> However, codes are of little practical relevance in Austria.<sup>32</sup>

- 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?

Yes, the fear has been expressed that the black list cannot respond adequately to economic developments and therefore might prove outdated rather quickly.<sup>33</sup> Moreover, it has been argued that the black list is too indefinite in its scope and that guidelines are more effective for producing legal certainty, though this view is disputed.<sup>34</sup> Hence, some stakeholders suggest changing the UCPD into a minimum harmonisation directive, affording room for national law and reactions to changes. Further, the wording of Annex I and the black list was criticised and it was suggested that it should be revised. For example, the Austrian Federal High Court of Justice recently raised the question whether services are also covered by lit. 28 Annex I UCPD.<sup>35</sup>

Regarding the proposal of a Regulation ensuring the cross-border portability of online content services in the internal market,<sup>36</sup> it would have been a reasonable option to put the banning of unjustified geoblocking in the Annex to the UCPD instead of drafting a separate Regulation, in the view of one stakeholder.

The following practices have been reported by stakeholders to cause recurring problems:

- In some retail sectors it is common to change the price a number of times a day, e.g. the price of gas for cars;
- Further it has been observed by stakeholders that in the field of the direct sales of dietary supplements and non-prescription drugs, aggressive and misleading commercial practices are on the rise;
- In the telecommunication sector, deviation between the actual internet speed and the advertised one happen rather frequently. Further, in this sector the

<sup>28</sup> Cf. therefore and for a more comprehensive analysis of self-regulation in Europe after the UCPD *Augenhofer* (2010), p. 19.

<sup>29</sup> Cf. for more information <<http://werberat.at>> (accessed on the 21.08.2016).

<sup>30</sup> Cf. for more information <<http://www.schutzverband.at>> (accessed on the 21.08.2016).

<sup>31</sup> *Wiebe* (2016), p. 358.

<sup>32</sup> *Schulze/Schulte-Nölke* (2003), p. 19.

<sup>33</sup> *Anderl/Appi* "Anhang zu § 2 UWG", rec. 12 in: *Wiebe/Kodek* (2016); *Fehring/Freund* MR 2007, 115, 118.

<sup>34</sup> *Gamerith* (2011), p. 169.

<sup>35</sup> OGH 15.06.2016, 4Ob126/16g.

<sup>36</sup> Cf. COM(2015) 627 final of 09.12.2015.



European legislature should seek coherence with other relevant European legislation, such as the BEREC guidelines or Regulation (EU) No. 2120/2015;

- Some Austrian stakeholders stress that the prohibition of national rules generally forbidding sales with bonuses – a prohibition which resulted from the UCPD and the ECJ's interpretation – did serve to lower the level of consumer protection.<sup>37</sup> Sales with bonuses should therefore be categorised as a per-se unfair commercial practice and included on the black list.

- Are there other measures that could improve the effectiveness of the UCPD in establishing a high level of consumer protection in your country? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

As mentioned above, some stakeholders advocate a modification of the 'black list' into a 'grey list'. Such a grey list is considered advantageous: On the one hand, it would still provide those countries without long tradition in the area of unfair competition law some guidance. On the other hand, a grey list would allow Member States to adopt a black list which corresponds to national characteristics. One stakeholder mentioned cease-and-desist-letters as a best practice which should be introduced on the European level.

#### 1.1.2. Effectiveness of the PID in establishing 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;

In Austria, the PID was implemented by the *Preisauszeichnungsgesetz*, (PrAG).<sup>38</sup> Infringements of price indication regulations are enforced by unfair competition law, especially if they are usually considered as misleading or misleading omissions.<sup>39</sup> Further, infringements of the PrAG are considered as unfair under the general clause Sec. 1 UWG ('*Rechtsbruch*').<sup>40</sup> According to Sec. 15 para. 1 PrAG, infringements of the PrAG are considered an administrative offence, so that they are enforced by authorities of the federal states (Sec. 16 para. 1 PrAG).

The harmonisation of the indication of a price per unit is well recognised in promoting the clarity of prices and enhancing confident consumer decisions. According to a biannually conducted study, the so-called '*Konsumentenbarometer*'<sup>41</sup>, approximately two-thirds of consumers are well aware of the basic price and regularly use basic price information before making a buying decision. However, according to this study, the awareness depends on the age of consumers: Whereas young consumers are less aware, elder ones (60 years and older) are significantly more aware than the average consumer. However, consumer organisations are concerned that the basic price indications are often too small and therefore hardly readable.<sup>42</sup>

In order to tackle this problem, the main food, groceries and drugstore retailers agreed in a voluntary commitment (so called '*Charta zur Grundpreisauszeichnung*' of

<sup>37</sup> Cf. ECLI:EU:C:2010:660, which led to the decision of the Austrian legislature to abolish Sec. 9a UWG; cf. *Appl/Homar* MR 2012, 349 for a summary of the long tradition of bonus sales prohibition in Austria.

<sup>38</sup> Federal Act on the indication of prices of 19.03.1992, Federal Law Gazette (BGBl.) I, No. 146/1992, recently amended by Federal Act of 21.11.2011, Federal Law Gazette (BGBl.) I, No. 100/2011.

<sup>39</sup> *Kraft/Steinmair* (2013), "§ 2 UWG", rec. 56 and rec. 90; *Robertson RdW* 2015, 379.

<sup>40</sup> OGH 19.12.2000, 4 Ob 288/00g (*Mini-Scooter*); *Enzinger* (2012), p. 210.

<sup>41</sup> KonsumentInnen-Barometer of the Austrian Federal Ministry of Labour, Social Affairs and Consumer Protection (2015), available at: [http://www.konsumentenfragen.at/cms/konsumentenfragen/attachments/5/2/9/CH0948/CMS1432297796248/konsumbarometer\\_2015\\_charts\\_final.pdf](http://www.konsumentenfragen.at/cms/konsumentenfragen/attachments/5/2/9/CH0948/CMS1432297796248/konsumbarometer_2015_charts_final.pdf) (accessed on 26.08.2016).

<sup>42</sup> KonsumentInnen-Barometer (2015), slide 83.

01.09.2010) to indicate the basic price in a 4mm font size and to standardise the arrangement of the basic price and the selling price.<sup>43</sup> It is reported by stakeholders that this system works well, but especially from the consumer's point of view an EU-wide harmonisation would be preferable.

Some stakeholders also stated that the effectiveness of the PID is limited by its many exceptions, e.g. for various groups of products or small and medium-sized businesses. For example, small bakeries fall under this exception, something which concerns consumer protection stakeholders as they might also sell dairy products. One stakeholder expressed the wish that carpets and tiles should be priced per square meter and wallpaper per meter.

Another stakeholder concern is the commercial practice by some retailers to sell fewer units for the same price, this being allowed since the Act on Nominal Quantities of Prepacked Goods was liberalised in 2009 in order to comply with Directive 2007/45/EC.<sup>44</sup>

- 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?

In Austria, prices of detergents are usually indicated by the performance of the sold product. According to one stakeholder assessment, this kind of price indication is advantageous, where the performance differs significantly despite the same amount. In such cases, a proper comparison based on performance is a prerequisite of a confident consumer decision.

- The effects of the regulatory choices/derogations allowed by the Directive and applied by Member States. [Note: Only relevant if you write a report for one of the countries that use the derogation for small businesses from the requirement to indicate the unit price on the basis of Article 6 of the Directive (AT, BE, EL, DE, FR, NL, SI, UK). In this case key aspects to consider are: Is the derogation relevant? Do companies make use of it? Are there consumer complaints because of this? If so, approximately how many per year?]

Austria took advantage of this derogation in Sec. 10b para. 3 PrAG, and this exception is indeed used by privileged retailers. The Austrian legislature specified the PID's provisions with quantitative criteria. Under Sec. 10b para. 3 PrAG, the exception applies only to enterprises which do not employ more than nine full-time employees (No. 1), to those which do not provide self-service, or to 'mom-and-pop' stores with up to 50 employees (No. 2). Equally, the exemption applies to those businesses that have a maximum place of sale of 250 m<sup>2</sup> and do not maintain more than ten subsidiaries (No. 3), or to market stalls (No. 4). However, as already stated above, this may deteriorate the effectiveness of the PID.

According to stakeholders, no consumer complaints were reported.

<sup>43</sup> Cf. "Charta zur Grundpreisauszeichnung" (Charta on price indication) of 01.09.2010, that was signed e.g. by Hofer, REWE-Group and SPAR, id. the main Austrian supermarkets.

<sup>44</sup> "Fertigpackungsverordnung", Federal Law Gazette (BGBl.) I, No. 867/1993, cf. the amendment of 20.04.2009, Federal Law Gazette (BGBl.) II, No. 115/2009.



### 1.1.3. Effectiveness of the MCAD in providing protection for businesses

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

- 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 is transposed in Secs. 2 and 2a UWG. Sec. 2 UWG contains a general prohibition of misleading commercial practices that include, but are not limited to, advertising. Additionally, Secs. 2 und 2a UWG cover B2B- as well as B2C-transactions. Insofar, commercial practices in B2B-transactions which do not fall under the definition of 'advertising' are already covered by Austrian unfair competition law.<sup>45</sup>

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

According to stakeholders, the application of the MCAD does not cause any relevant problems in Austria, since Austrian unfair competition law has been applied to B2B-transactions since its inception and the Austrian UWG has always been based on a principle approach. Further, it can be observed that particularly small enterprises are affected by misleading or comparative advertisements.

- The effects of the minimum harmonisation provisions on misleading advertising; [*Key aspects to consider are: Which national rules that go beyond the MCDA, 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)?*]

Austria transposed the UCPD's provisions also for B2B-transactions. Hence, B2B-transactions are also regulated by Austrian unfair commercial practices law. Except for invitations to purchase in Sec. 2 para. 6 UWG, misleading commercial practices in B2B-transactions are subject to the same requirements as commercial practices directed towards a consumer. Following the approach of the Austrian legislature as well as the common opinion in Austria that unfair commercial practices law should not merely protect consumers but rather the fairness of competition itself and therefore competitors as well as business customers, a high level of protection is already realised.<sup>46</sup> That is why stakeholders emphasise the necessity of a minimum harmonisation in order to react flexibly and adequately to new developments on a national level.

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

Comparative advertising has an eventful past in Austria. While it was considered admissible after the introduction of the first UWG in 1923, it had been considered an unfair commercial practice since the 1930s.<sup>47</sup> In 1990, the Austrian Supreme Court of Justice ruled in a landmark decision that comparative advertising is generally admissible. The Supreme Court of Justice acknowledged in its decision that comparative advertisement promotes a consumer's capability to make a rational decision and that interests of competitors have to recede in cases where the advertisement is objective and true.<sup>48</sup> So, comparative advertisement was, following this decision, basically admissible in Austria, although the Supreme Court of Justice

<sup>45</sup> *Enzinger* (2012), rec. 219; *Wiltscheck* (2013), "§ 2 UWG" recs. 1 and 3; *Wiebe* (2016), p. 338.

<sup>46</sup> Cf. *Wamprechtshamer* ÖBl 2000, 147, 148; the Austrian legislature expressed this view in the explanatory remarks accompanying the legislative materials of the 1999 UWG amendment, see Regierungsvorlage (RV) 1998, Beilagen zu den stenographischen Protokollen des Nationalrates (BlgNR) 20. Gesetzgebungsperiode (GP), p. 38. These materials can be found at <www.parlinkom.gv.at>.

<sup>47</sup> Cf. for a more in-depth historic overview *Seidelberger* (2004) in: Schutzverband gegen den Unlauteren Wettbewerb (ed.), p. 220.

<sup>48</sup> OGH 26.06.1990, 4 Ob 41/90, MuR 1990, 144.

tended to be very restrictive in such cases.<sup>49</sup> Since the transposition of the MCAD, however, there exist some uncertainties especially regarding the scope of Art. 8 para. 3 MCAD. The Supreme Court of Justice consequently requested a preliminary ruling of the CJEU.<sup>50</sup> The CJEU then clarified that the Austrian requirements for comparative advertisement were stricter than the MCAD's provision and insofar not in line with a full-harmonisation approach.<sup>51</sup> In order to reach the European requirements, the legislature consequently passed Sec. 2a UWG, in accordance with Art. 4 MCAD.<sup>52</sup> However – again – the legislature did not fully harmonise on account of the meanwhile enacted Art. 14 UCPD, that abolished the exception for special offers in Art. 3a para. 2 Directive 97/55/EC. But Austrian legal scholars and the legislature considered this an editorial mistake and hence still treated the transposition provision in Sec. 2a para. 2 cl. 2 UWG as compatible with EU law.<sup>53</sup> But since the MCAD clarified that Art. 14 UCPD was certainly not a legislative error, the Austrian government revised the respective legal provisions with the 2015 amendment of the UWG. Therefore, now an adequate legal framework exists.

As shown above, there have been only minimal changes due to the European provisions, and hence stakeholders assess the MCAD's effect neutrally or positively. One also has to note that comparative advertisement is not used by companies very often in Austria. However, stakeholders warned against extending the full harmonisation to other B2B transactions in general.

- 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;

Stakeholders did not report any special problems in this regard.

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

It is a common opinion among stakeholders that the legal framework protecting businesses from misleading and comparative advertising, was sufficient before the MCAD and remained efficient after the transposition. Regarding cross-border transactions, government authorities mentioned the impact of other directives, such as the ID, the E-commerce Directive 2000/32/EC and the Service Directive 2006/123/EC.

- Are there measures that could improve the effectiveness of the MCAD in providing protection for businesses (see also 1.1.6 below)? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

According to stakeholder assessment, currently of concern are advertisements which create the impression of being invoices or a sales confirmation for a recording in a public or private business register, and other similar 'directory scams'.<sup>54</sup> This is a typical unfair commercial practice addressed to businesses. In addition to a claim for injunctions or damages, in Austria these practices may constitute an administrative offence under Sec. 28a UWG (with a fine of up to EUR 2900).<sup>55</sup> Stakeholders believe that the private enforcement approach is useful and effective, especially regarding

<sup>49</sup> Cf. *Kraft/Steinmair* (2013), "§ 2a UWG", rec. 2.

<sup>50</sup> OGH 19.12.2000, 4 Ob 259/00, ÖBl. 2002, 223 (*Brillenvergleich I*).

<sup>51</sup> ECLI:EU:C:2003:205 (*Pippig Augenoptik*), for more references cf. *Augenhofer RdW* 2003, 682.

<sup>52</sup> Federal Law Gazette (BGBl.) I, No. 79/2007.

<sup>53</sup> Cf. for example *Gamerith* ÖBl 2006, 204; *Kraft/Steinmair* (2013) "§ 2a UWG", rec. 15.

<sup>54</sup> Cf. already *Seidelberger* ÖBl 2010, 244.

<sup>55</sup> Cf. *Kraft/Steinmair* (2013) "§ 28a UWG", rec. 14.

costs. Maintaining this system – or maybe even introducing it on a European level – is of very high importance in their view.

#### 1.1.4. Effectiveness of current rules 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;
- The effects of the uniform black list of unfair commercial practices annexed to this directive on the free movement of goods and services;
- Whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade. [*Do the national differences play a role in a business perspective? Have they caused problems?*]

Stakeholders did not report any relevant experiences thereof. From a purely academic view, a different application of the same general clauses is possible and thus capable of deteriorating the effectiveness. However, stakeholders argue that language barriers and obstacles outside the legal sphere may also prevent consumers from purchasing in other Member States.

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

Cf. the answers given above.

#### 1.1.5. Interplay amongst UCPD information requirements according to Article 7(4) with the information requirements in the horizontal consumer law instruments

Regarding the information requirements according to Article 7(4) UCPD ("invitation to purchase") in the advertising stage, please analyse:

- The level of awareness of traders as regards information requirements at the advertising stage, as in particular demonstrated by their practical application; [*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?*]

According to stakeholders, no problems were reported and traders and retailers make – in the view of the stakeholders – reasonable efforts to meet the information requirements (at least insofar as the business is not per se fraudulent). Nevertheless, especially online-traders often fail to meet the exact requirements and especially the indication of the final price often causes considerable problems in practice. Cases were

reported especially in the following areas: final prices for rental cars, which often fail to inform consumers of the price of comprehensive insurance coverage; and pricing on online travel platforms, where additional service fees or additional transaction fees for payments with common credit or debit cards, were charged.

However, it has been repeatedly mentioned that the 'information-model' has reached its limits, causing too many obligations for businesses. Further, an information overload is also harmful for consumers. Since in Austria 'information overload' is considered a misleading commercial practice (in cases in which the information is not legally mandatory), it has been observed that the current legal information requirements have reached a level which would result in their being deemed misleading if not for their being mandatory.<sup>56</sup>

- 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?

Yes, there are overlaps, but in the view of some stakeholders they are not avoidable. The UCTD, the E-commerce Directive and the Service Directive all have different scopes and therefore should in the view of those stakeholders coexist. Especially Art. 7 para. 5 UCPD (transposed in Sec. 2 para. 5 UWG) is essential to enforce information requirements of the CRD or other consumer-protective provisions.<sup>57</sup> In contrast, other stakeholders stressed that the overlap and the multitude of information, make it difficult for businesses to comply with legal requirements and cause high costs for them.

#### 1.1.6. Relevance for business-to-business transactions

Regarding the area of unfair commercial practices/marketing, please analyse:

- 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 cross-border trade;

From a theoretical perspective, a harmonised law in every Member State might promote cross-border trade. However, the interviewed stakeholders were not able to provide relevant data regarding this question. According to their assessment, cross-border claims for using unfair commercial practices are not an issue in practice, and other factors (like language barriers) might be more important.

- 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;

The Austrian legislature decided to implement the UCPD in the UWG rather than in a separate consumer law statute or in the KSchG, with the effect that the UWG in general applies to all commercial practices regardless of the involved parties. The Austrian legislature justified this decision with the argument that the protection of business interests and consumer interests is not separable.<sup>58</sup> This effect, however, was not carried through entirely, especially with regard to Sec. 1 UWG (general clause) and misleading omissions (Sec. 2 para. 6 UWG).<sup>59</sup>

<sup>56</sup> *Anderl/Appl* "§ 2 UWG", rec. 498 in: Wiebe/Kodek (2016); also critically towards the current information requirements and doubting their effectiveness, *Dehn VbR* 2015, 22.

<sup>57</sup> Cf. *Zemann ecolex* 2014, 928, 930.

<sup>58</sup> Regierungsvorlage (RV) 144, Beilagen zu den stenographischen Protokollen des Nationalrates (BlgNR) 23. Gesetzgebungsperiode (GP) no 23. These materials can be accessed at <[www.parlinkom.gv.at](http://www.parlinkom.gv.at)>.

<sup>59</sup> *Augenhöfer* EuCML 2016, 92.

Prima facie, a harmonisation on the European level would not bring any changes on the national level. Nevertheless, business organisations as well as ministries warn against harmonising B2B transactions also by a similar full-harmonisation approach. They thus refer to experiences with this approach in implementing the UCPD, which lead to a decreasing level of protection for businesses. Further, it has to be mentioned that the current UCPD was designed with the goal of raising the level of consumer protection. But unfair competition law with regard to B2B relations needs to address different aims and other commercial practices, such as exploitation, unfair hindrance of competitors or advantages gained by breaching the law (*Rechtsbruch*).

- 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 also cover unfair commercial practices during and after the transaction;

As noted above, the Austrian implementation of the UCPD also applies to B2B transactions. Hence, unfair commercial practices after the conclusion of a contract in B2B relations, are also within the scope of the Austrian UWG.<sup>60</sup>

- Whether there is a need to have a black-list of practices in the business-to-business marketing area;

In Austria, the black list is generally applicable to B2B relations as well.<sup>61</sup> However, as far as aggressive commercial practices are concerned, only No. 24 and No. 26 are applied to B2B situations, as the other numbers explicitly refer to ‘consumers’. According to the prevailing view in Austrian legal literature, an extension of the other aggressive commercial practices listed in the black list, is impermissible.<sup>62</sup> As far as misleading commercial practices are concerned, the situation is similar: Generally, the provisions listed in the black list are applicable, but only those which do not explicitly mention consumers, e.g. Nos. 8, 10, 11 and 14, apply in particular.<sup>63</sup>

- What should be the enforcement cooperation mechanism in the business-to-business marketing area;

The right to sue for injunction for infringements of the UWG is currently laid down in Sec. 14 UWG. Under this provision, competitors, 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 are responsible for the enforcement of infringements of Secs. 1, 1a, 2 and 2a.<sup>64</sup> While competitors will often be interested in pursuing infringements of the UWG, in many instances they are neither capable nor willing to invest the necessary resources in legal actions. The complementary right of business associations to bring legal action is meant to compensate for this problem.<sup>65</sup> Under Austrian law, business associations have legal standing when they manage to demonstrate that either their statutory interests or interests of their affiliated members were affected by a misleading advertisement (or any other unfair commercial practice). Even associations which have the sole statutory aim of pursuing unfair commercial practices (*Klageverbände*) have standing as long as they ensure that their members are representative for all economic sectors.<sup>66</sup> This right is similar to consumer organisations’ right to sue for an injunction pursuant to the Injunction

<sup>60</sup> *Heidinger* “§ 1 UWG”, rec. 36 in: Wiebe/Kodek (2016).

<sup>61</sup> Cf. *Burgstaller* “Anhang zu § 1a UWG”, rec. 6 in: Wiebe/Kodek (2016).

<sup>62</sup> Cf. *Burgstaller* “Anhang zu § 1a UWG”, rec. 7 in: Wiebe/Kodek (2016).

<sup>63</sup> Cf. *Anderl/Appl* “Anhang zu § 2 UWG”, rec. 8 in: Wiebe/Kodek (2016).

<sup>64</sup> *Kraft/Steinmair* (2013) “§ 14 UWG”, rec. 1 seq.

<sup>65</sup> *Kraft/Steinmair* (2013) “§ 14 UWG”, rec. 36.

<sup>66</sup> *Kraft/Steinmair* (2013) “§ 14 UWG”, rec. 42.

Directive. In practice, this system is very efficient, and hence some stakeholders recommended that more Member States should introduce such an enforcement system.

- Whether there is a need to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive;

Regarding contractual consequences, it is referred to 1.1.7. These remarks apply to misleading and comparative advertisement too. However, the development of special contractual remedies is a sensitive issue. Of course, the contractual consequences in some cases are the more decisive consequences than a mere injunction. The interplay and coordination with national contract law is thus highly complex.

- Whether there is a need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive.

As already stated in section 1.1.3, some stakeholders indicated the need to pass rules – like Sec. 28a of the Austrian UWG – concerning commercial practices involving feigned invoices or a sales confirmation for a recording in public or private business register, and concerning other ‘directory scams’ (*‘Adressbuch- und Verzeichnisschwindel’*). Besides that, stakeholders favoured a further observance of the *status quo*.

#### 1.1.7. Relevance of contractual consequences of unfair commercial practices

Please analyse whether there are in your country:

- 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;
- Any case law (enforcement decisions, court rulings) providing for such consequences;
- Whether there is, based on past experience in your country, a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

The Austrian UWG does not provide for any special contractual remedies,<sup>67</sup> nor was the introduction of such special remedies discussed during the process of implementing the UCPD.<sup>68</sup> However, despite the lack of special contractual remedies, there are still some correlations between unfair commercial practices and the general contract law provisions of the Austrian General Civil Code (*‘Allgemeines Bürgerliches Gesetzbuch’*, ABGB):<sup>69</sup>

##### 1. Unlawfulness or unconscionability (*‘Gesetzes- und Sittenwidrigkeit’*)

It needs to be considered whether a violation of the UWG may lead to the invalidity of a contract between a business and its contractual partner under Sec. 879 para. 1 ABGB. Pursuant to the prevailing view, the unlawfulness as defined by Sec. 879 para. 1 ABGB has to originate from the content of the contract and not from the circumstances of its conclusion.<sup>70</sup> Violations of the UWG, however, will mostly

<sup>67</sup> Krutzler (2015), p. 34.

<sup>68</sup> See the statements accompanying the ministerial draft (“Ministerialentwurf”) concerning the UWG amendment in 2007, where none of the statements proposed the introduction of special contract law remedies. See eg the opinions of the Federal Chamber of Labour (“Bundesarbeiterkammer”, BAK) of 27.04.2007 and the Federal Ministry of Social Affairs and Consumer Protection of 30 April 2004, where the introduction of only a right to claim surrender of profits was proposed. All opinions are available at <[www.parlament.gv.at/PAKT/VHG/XXIII/ME/ME\\_00050/index.shtml](http://www.parlament.gv.at/PAKT/VHG/XXIII/ME/ME_00050/index.shtml)>, accessed 22.08.2016.

<sup>69</sup> Most recently amended by Federal Law Gazette (BGBl.) I, No. 43/2016. As general contract law, the provisions of the ABGB apply to all contract relationships and therefore not only to B2C relationships.

<sup>70</sup> Riedler “§ 879 ABGB”, rec. 3 in: Schwimann/Kodek (2014).



be related to issues concerning the formation of a contract. The same applies for the unconscionability of contracts, which similarly has to derive from the content of a contract in order to lead to the invalidity of a contract under Sec. 879 para. 1 ABGB.<sup>71</sup> In cases of a severe discrepancy between performance and consideration, invalidity may result pursuant to Sec. 879 para. 2 no. 4 ABGB. This provision states that a contract is void if someone takes advantage of another's imprudence, predicament, inexperience or discomposure in exchange for a consideration to be promised or granted which is clearly disproportionate. In addition, in cases with an objective disparity of at least 50 percent, the contractual partner may invoke *lesio enormis* (Sec. 934 ABGB).

Besides the high barriers for Secs. 879, 934 ABGB, it is usually the case that the contractual partner has no interest in the contract being labelled completely invalid as the consequence of a breach of the UWG. In fact, the contractual partner will normally be interested in performance rather than the unwinding of the contract in cases concerning unfair commercial practices.<sup>72</sup> Something else might be true only where, for instance, a product claimed to have health benefits by the manufacturer in fact turns out to be dangerous.

## 2. Warranty rights (*Gewährleistung*)

Unfair commercial practices can also trigger warranty rights when the consumer has bought a good not in conformity with the contract. Warranty rights are regulated in Sec. 922 et seqq. ABGB.<sup>73</sup> The consumer has four remedies in case of non-conformity pursuant to Sec. 932 para. 1 ABGB: The consumer can claim for repair, replacement, reduction of the price or rescission of the contract. Reduction of the price and rescission of the contract are, however, only possible if certain preconditions are met, basically if repair and replacement fail or are not possible; and for rescission of contract the non-conformity must also be not merely of a minor nature.<sup>74</sup> In addition to these non-fault based remedies, consumers can – at least since the implementation of the Directive on the sale of consumer goods – file for differential damages by means of warranty claims.<sup>75</sup> An extensive examination of the details would go beyond the scope of this study.<sup>76</sup> Pursuant to Sec. 933a para. 1 ABGB, a consumer can claim damages relating to the non-conformity itself if the non-conformity occurs due to the fault of the seller.<sup>77</sup> However, Sec. 933a para. 2 ABGB requires (just as Sec. 932 ABGB regarding reduction of the price and rescission of the contract) that the consumer must seek repair or replacement first, and only in cases where these remedies have failed is the consumer entitled to claim damages.<sup>78</sup> This leads to the question of the relationship between tort-like damages under the UWG and contractual damages pursuant to Sec. 932 and Sec. 933a ABGB. According to settled case law, § 933a ABGB is *lex specialis* or higher-ranking than tort law damages pursuant to Sec. 1295 et seqq. ABGB.<sup>79</sup> Conversely, the law of unfair commercial practices and contractual statutory rights have a different scope of protection.<sup>80</sup> Hence, it seems more convincing to hold both claims as equal and concurrently applicable.<sup>81</sup>

## 3. Law of mistake (*Irrtumsrecht*)

<sup>71</sup> Riedler "§ 879 ABGB", rec. 8 in: Schwimann/Kodek (2014).

<sup>72</sup> Cf. Sack GRUR 2004, 637.

<sup>73</sup> For details, cf. e.g. Welser/Jud (2001); Faber (2001).

<sup>74</sup> See Sec. 932 paras 2-4 ABGB.

<sup>75</sup> Council Directive (EC) 1999/44 of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

<sup>76</sup> For a comprehensive description of the issues involved cf. Augenhöfer (2002); Krutzler (2015) p. 45.

<sup>77</sup> Cf. Krutzler (2015), p. 49.

<sup>78</sup> Kolmasch (2015) in: Deixler-Hübner/Kolba (eds.), p. 61, 96.

<sup>79</sup> Cf. OGH 04.07.2007, 2 Ob95/06v; OGH 11.04.2013, 1 Ob184/12h; OGH 23.05.2015, 7 Ob23/13b; OGH 27.5.2015, 9 Ob14/14w; OGH 02.09.2015, Ob51/15w.

<sup>80</sup> Cf. Krutzler (2015), p. 49.

<sup>81</sup> Krutzler (2015), p. 59.

The use of unfair commercial practices, especially misleading commercial practices, may induce misconceptions of reality at the consumer level.<sup>82</sup> Such a misconception can lead to a consumer's right to rescind the contract under Sec. 871 para. 1 ABGB.<sup>83</sup> Sec. 871 para. 1 ABGB requires that the misconception concern the transaction as such and not its underlying motives ('*Geschäftsirrtrum*').<sup>84</sup> Furthermore, a person who has no intention whatsoever to make a declaration with that content ('*Erklärungsirrtrum*') can rescind the contract.<sup>85</sup> Unfair commercial practices often create misconceptions regarding characteristics of the product.<sup>86</sup> Such misconceptions are legally relevant – that is to say, they qualify as '*Geschäftsirrtrum*' – if these characteristics determine the price.<sup>87</sup> For example, this can be the case if the manufacturer states that the advertised car needs only regular petrol but in fact, the car requires super petrol.<sup>88</sup> Or, to stick with cars, in the recent VW-scandal consumers might want to rescind their purchase contracts for the reason that they had been left with a misconception about the low level of emissions or about the fact that the car was not manipulated.

The right to rescind the contract requires that the other party has caused – or at least has noticed and did not dispel – the misconception.<sup>89</sup> With regard to unfair commercial practices, the other party will have caused the consumer's misconception most of the time.<sup>90</sup> It has to be noted, though, that the right to rescind a contract pursuant to Sec. 871 ABGB does not fully correspond with remedies in the UWG (e.g. 'misleading' within the meaning of the UWG looks at the average consumer while Sec. 871 ABGB requires that the specific person was under a misapprehension).<sup>91</sup> Difficulties with the preconditions of Sec. 871 ABGB may, however, occur in unfair commercial practices originating from third parties,<sup>92</sup> e.g. advertising agencies.<sup>93</sup> But the other party will usually be liable under Sec. 1313a ABGB, as this party is under a duty to inform itself about the statements advertised by the agency. Whereas such a right of rescission might be useful for the consumer in some cases, it certainly has limitations:

If the misconception is related to the price, the requirement of a '*Geschäftsirrtrum*' is – according to the prevailing view – not fulfilled.<sup>94</sup> However, this can be different if a misleading statement has caused the misconception relating to the price, and the consumer did not realise the full amount to be paid.<sup>95</sup> Here, the consumer had no intention whatsoever to make a declaration with this content, and was not merely mistaken regarding the price.<sup>96</sup> In such a case, the misconception qualifies as

<sup>82</sup> Cf. *Sack* GRUR 2004, 626; see also *Bollenberger* (2011) in: Schenk/Lovrek/Musger/Neumayr (eds.), p. 65; *Augenhofer* WRP 2006, 169, 173.

<sup>83</sup> Moreover, Sec. 871 para. 2 ABGB allows rescission if the misconception concerns circumstances the other party was obliged by law to disclose. This leads to the question if, for example, Sec. 2 para. 4 UWG (misleading commercial practices through omission) fulfils Sec. 871 para. 2 ABGB. The limited scope of this contribution does not allow for elaboration on this question. For an analysis and further reference, see e.g. *Bollenberger* (2011) in: Schenk/Lovrek/Musger/Neumayr (eds.), p. 74-77.

<sup>84</sup> For details, see e.g. *Riedler* "§ 871 ABGB", recs. 7 and 12-14 in: Schwimann/Kodek (2014); *Bollenberger* (2011) in: Fischer-Czermak and others (eds.), p. 877, p. 880-883; *Bydlinski* ÖBA 2010, 646, 647.

<sup>85</sup> Cf. e.g. *Bollenberger* (2011) in: Fischer-Czermak and others (eds.), p. 881.

<sup>86</sup> *Bollenberger* (2011) in: Schenk/Lovrek/Musger/Neumayr (eds.), p. 72.

<sup>87</sup> Cf. e.g. *Bollenberger* (2011) in: Fischer-Czermak and others (eds.), p. 883.

<sup>88</sup> See also *Augenhofer* WRP 2006, 169, 173.

<sup>89</sup> For further reference, cf. *Riedler* "§ 871 ABGB" recs. 22-29 in: Schwimann/Kodek (2014).

<sup>90</sup> *Augenhofer* WRP 2006, 169, 173.

<sup>91</sup> *Koppensteiner* JBI 2015, 137, 147; *Thöni* ÖJZ 2010, 698, 702.

<sup>92</sup> *Griss* JBI 2005, 69, 71 seqq.

<sup>93</sup> *Kodek/Leupold* "§ 16 UWG" rec. 24 in: Wiebe/Kodek (2016); *Henning-Bodewig* GRUR 1981, 164, 173 seq; *Nennen* GRUR 2005, 214, 220 seqq.

<sup>94</sup> Cf. eg OGH 28.03.2007, Ob 111/06h; OGH 28.09.1950, 1 Ob507/50; *Riedler* "§ 871 ABGB" rec. 19 in: Schwimann/Kodek (2014); *Fezer* WRP 2003, 138 seq.

<sup>95</sup> Cf. *Bollenberger* (2011) in: Schenk/Lovrek/Musger/Neumayr (eds.), p. 73.

<sup>96</sup> *Bollenberger* (2011) in: Schenk/Lovrek/Musger/Neumayr (eds.), p. 73.



'*Erklärungsirrtum*'.<sup>97</sup> By contrast, consumers cannot rescind the contract if they are wrong about their underlying motive, e.g. if they order a good to increase his chances of winning a competition.<sup>98</sup> In this context, it should be noted for the sake of completeness that Sec. 5c KSchG states that an entrepreneur who sends promises of a prize or a similar notification to a consumer shall deliver such prize to the consumer if the design of such notification has created an impression in consumers that they have won the prize.<sup>99</sup> Moreover, in blatant cases the consumer may be granted a right of rescission because of ploy or duress pursuant to Sec. 870 ABGB.<sup>100</sup>

Since in Austria the law of mistake is based on the idea that the other party (who must have adequately caused the misconception) does not deserve protection, it cannot be applied to the detriment of a retailer who himself was unaware of the basis of the misconception (cf. Sec. 875 ABGB).<sup>101</sup> On the other hand, the non-fault based warranty rights allow for claims also against the retailer.

#### 4. The principle of culpa in contrahendo (precontractual liability)

The consumer may claim damages for incurred expenses caused by unfair commercial practices, particularly by misleading advertising, pursuant to the principle of *culpa in contrahendo* (c.i.c).<sup>102</sup> For example, consumers may have expenses for driving to the outlet of a retail business, only to find out that the special offer they were looking for ran out of stock.<sup>103</sup> Some commentators argue that the advertising does not in itself create a confidence in the consumer requiring protection.<sup>104</sup> However, it seems more convincing to apply the principle of c.i.c in such cases.<sup>105</sup> The role of pre-contractual liability is especially to include the period prior to the conclusion of a contract.<sup>106</sup> If the seller expresses a certain promise in its advertising, it creates a certain confidence in the consumer which deserves protection.<sup>107</sup> Consumer cannot be expected to know that they cannot trust the promotional statement of the seller.<sup>108</sup> If so, there would be a conflict between the legal situation prior to the conclusion of a contract and after the conclusion of a contract.<sup>109</sup> If the parties conclude a contract, a promotional statement is indeed relevant provided that it was not merely puffery. As discussed above, it can be the basis for claims based on non-conformity, or it can lead to the right of rescission in cases of misconception. Therefore, it is not convincing to argue that a promotional statement only gains legal relevance at the time of concluding a contract.<sup>110</sup> It is rather the purpose of the principle of c.i.c. to protect the consumer from unfair commercial practices prior to the conclusion of a contract.<sup>111</sup> Likewise the UCPD applies to unfair commercial practices in B2C relationships prior, during and after sales transactions.<sup>112</sup> Moreover, the recognition of liability according to the principles of c.i.c. does not create an unpredictable liability risk for the business

<sup>97</sup> For more details on "Erklärungsirrtum": Riedler "§ 871 ABGB", recs. 8-11 in: Schwimann/Kodek (2014).

<sup>98</sup> Cf. Sack GRUR 2004, 630.

<sup>99</sup> See for more information Kolba/Leupold (2014), p. 188 seq.

<sup>100</sup> For further reference, cf. Riedler "Sec. 870 ABGB" in: Schwimann/Kodek (2014); see also Bollenberger (2011) in: Fischer-Czermak and others (eds.), p. 887.

<sup>101</sup> Cf. Riedler "Sec. 871 ABGB", rec. 1 in: Schwimann/Kodek (2014).

<sup>102</sup> See also Augenhofer WRP 2006, 169, 175. For the principle of *culpa in contrahendo* cf. e.g. Koziol (1984), p. 70 seqq.

<sup>103</sup> See for example OGH 26.4.2005, 4 Ob 65/05w.

<sup>104</sup> Cf. e.g. Köhler GRUR 2003, 271; see also Alexander (2002), p. 140, 144 seqq.

<sup>105</sup> Sack GRUR 2004, 628; Lehmann (1981), p. 295 et seqq; Lehmann NJW 1981, 1233, 1239 seqq.

<sup>106</sup> Cf. Koziol (1984), p. 70 et seqq.

<sup>107</sup> See also Leupold ÖBl 2010, 164, 169.

<sup>108</sup> This argument has already been brought forward by the author in Augenhofer WRP 2006, 169, 175. See for the contrary opinion Köhler GRUR 2003, 271.

<sup>109</sup> Augenhofer WRP 2006, 169, 175.

<sup>110</sup> But cf. e.g. Köhler GRUR 2003, 267; Alexander (2002), p.145 et seqq.

<sup>111</sup> Cf. e.g. Lehmann NJW 1981, 1233, 1239.

<sup>112</sup> See also for the intersection between unfair competition law and contract law Bydlinski (2013), p. 596-630; Micklitz/Keßler GRUR Int. 2002, 885, 890; Schulte-Nölke ZGS 2003, 41.

party.<sup>113</sup> Every business party has the freedom to choose whether to act fairly and to put (without additional costs) a note on his sales announcement as to how long the special offer will last. In the case we began with, the retailer could have indicated on his website that the special offer had ended. Moreover, the principle of c.i.c. contains pre-contractual informational duties.<sup>114</sup> Hence, if consumers trusted the misleading advertising statement of the seller, they can invoke c.i.c.<sup>115</sup> In this regard, it does not matter for the application of c.i.c. if a contract has been concluded or not.<sup>116</sup> If consumers can prove that they would not have concluded the contract otherwise, they have a right to terminate the contract.<sup>117</sup> Moreover, the principle of c.i.c. allows the claiming of damages if the preconditions of Sec. 1295 ABGB are met.<sup>118</sup> In some cases, however, consumers will not have suffered economic damages. In the absence of the misleading statement or if the seller had provided them with the relevant information, they simply would not have concluded the contract.<sup>119</sup> Considering that the UWG also aims at protecting economic self-determination, the contracting party must be allowed to invoke c.i.c.<sup>120</sup> For the relationship between c.i.c. and warranty rights, this means that they do not exclude each other: While the former aims at protecting the freedom of will, the latter protects the equivalence of payment and goods.<sup>121</sup>

Only consumer organisations showed some interest in the introduction of specific contractual remedies for breach of the UCPD. Other stakeholders advocated against such contractual remedies.

## 1.2. Contract conclusion and performance

### 1.2.1. Effectiveness of the current rules in establishing 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;

Standard contract terms were regulated in Austria already prior to the transposition of the UCTD, as Sec. 6 KSchG (which dates from 1979) as well as Sec. 897 para. 3 ABGB already provided such control long before the UCTD was passed.<sup>122</sup> Hence, the transposition of the UCTD led only to small changes. The most important change results from the codification of the transparency requirement (see Sec. 6 para. 3 KSchG).<sup>123</sup>

As the principle-based approach of the UCTD has been known in Austria since the introduction of Sec. 897 para. 3 ABGB, stakeholders did not report any difficulties.

<sup>113</sup> See for that argument *Köhler GRUR* 2003, 271.

<sup>114</sup> *Koziol/Welser* (1992), p. 206 seq. See also *Welser ÖJZ* 1973, 282 seqq.

<sup>115</sup> Cf. e.g. *Leupold ÖBI* 2010, 164, 169.

<sup>116</sup> Cf. *Koziol/Welser* (1992), 139.

<sup>117</sup> Cf. e.g. *Leupold ÖBI* 2010, 169.

<sup>118</sup> *Koziol/Welser* (1992), p. 139.

<sup>119</sup> See also *Augenhofer WRP* 2006, 169, 175.

<sup>120</sup> Cf. recital 14 to the UCPD. See also *Augenhofer WRP* 2006, 169, 175.

<sup>121</sup> Cf. *Ofner "§ 922 ABGB"*, rec. 32 in: *Schwimann/Kodek* (2014); *Koziol/Welser* (1992), p. 267 (regarding the law of mistake and warranty rights).

<sup>122</sup> The criteria for determining whether a standard term became part of a contract are stated in Sec. 864a ABGB, cf. *Bollenberger, "§ 864a ABGB"*, rec. 9 seq. in: *Koziol/Bydlinsky/Bollenberger* (2014).

<sup>123</sup> *Kiendl* (1997), p. 220.

- 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 your MS? Does this work in practice or are there problems?*]

The different terms of the indicative list partly overlap with the provisions in Sec. 6 para. 1 and 2 KSchG. This section covers terms which are not binding for the consumer (black list) under any circumstances<sup>124</sup> (*ex tunc* effect).<sup>125</sup> By contrast, Sec. 6 para. 2 KSchG lists terms which are not binding for the consumer unless the business proves that the given term was individually negotiated.

The listed terms provide guidance when interpreting the general clause established in Sec. 879 para. 3 ABGB.<sup>126</sup> Both the indicative list of the UCTD and the provisions in Sec. 6 KSchG are considered not to be conclusive, instead being flexible enough to ensure that all problematic cases are covered.

It is important to note that the Austrian Supreme Court of Justice held that a term stating that the contract was individually negotiated is void pursuant to Sec. 6 para. 1 No. 11 KSchG).<sup>127</sup>

- 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; [*Note: If a black/grey list exists in your country, key aspects to consider are: How does the list work in practice? Does it make a difference to have such a list?*]

The two black lists in Austria work very well in practice: Courts apply the list and the general clause extensively.

- 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: In your country, have the effects of court decisions establishing the unfairness of an unfair term been extended to all contracts of the trader concerned or to the contracts of any other trader containing such a term? If so, how does this work in practice? What are the impacts on businesses? If there are no such effects of court decisions on unfair terms: what are the effects of this situation?*]

According to Austrian law, court decisions have effect only *inter partes* with regard to the subject matter in dispute, Sec. 411 Austrian Civil Procedure Code ('*Zivilprozessordnung*', ZPO),<sup>128</sup> Sec. 12 ABGB. An extension regarding unfair contract terms law is neither in existence nor planned.

The general clause and the concretisations can only protect the respective parties to the contract.<sup>129</sup> This applies to private persons submitting an individual lawsuit and also to injunction proceedings under Sec. 28 seq. KSchG.<sup>130</sup> Therefore, if a term used by a business is considered to be void by a court decision, another business using the same term is not bound by this specific decision. Nevertheless, the second business has to fear subsequent lawsuits as court decisions at higher instances are usually highly influential for future cases at first instance.

<sup>124</sup> Schurr "§ 6 KSchG", recs. 1, 6 in: Fenyves/Kerschner/Vonkilch (2006).

<sup>125</sup> Langer "§ 6 KSchG", rec. 1 in: Kosesnik-Wehrle (2015).

<sup>126</sup> Riedler "§ 879 ABGB", rec. 35 in: Schwimann/Kodek (2014).

<sup>127</sup> OGH 11.10.2006, 7 Ob 78/06f.

<sup>128</sup> Federal Law Gazette (BGBl.) No. 113/1895, recently amended by Federal Law Gazette (BGBl.) I, No. 54/2015.

<sup>129</sup> Riedler "§ 879 ABGB", rec. 40, in: Schwimann/Kodek (2014).

<sup>130</sup> Langer "§ 28 KSchG", rec. 1 in: Kosesnik-Wehrle (2015); see also answers given under 1.3.

In order to simplify this outcome, standard terms have to be handed over to associations who request them, in accordance with Sec. 28 para. 2 KSchG; also, the publication of court decisions is codified under Sec. 30 KSchG, Sec. 25 UWG.<sup>131</sup>

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

Since the transposition of the UCTD's transparency requirement in Sec. 6 para 3 KSchG, a large number of decisions have been based on this provision. This shows that Sec. 6 para. 3 KSchG has become a very important part of Austrian unfair contract terms law.<sup>132</sup> Due to the high amount of case law in this specific field of law, the level of consumer protection has increased noticeably.<sup>133</sup> One stakeholder, however, expressed the fear that Austrian courts apply Sec. 6 para. 3 KSchG too extensively, making it too difficult for businesses to forecast whether a term will be considered as transparent or not.

- 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. [*Note: Question only relevant for MS that have put in place extensions of application of UCTD*]

Under Austrian Law, neither Sec. 879 para. 3 ABGB nor Sec. 6 KSchG are applicable to the main subject matter. This question is rather one of general civil law, cf. Sec. 879 para. 2 line 4 and Sec. 934 ABGB.<sup>134</sup>

The listed terms in Sec. 6 para. 1 KSchG are considered void, regardless of whether they are standard contract terms or individually negotiated terms.<sup>135</sup> According to some stakeholders, this level of protection assures a certain advantage as the respective differentiation becomes redundant.

An extension of the application regarding the adequacy of the price has not been established.

- 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?*]

The majority of legal scholars as well as stakeholders consider the effectiveness of the sanction as positive overall. In this respect, see also the answers given above.

However, some stakeholders pointed out that it could be helpful to codify the *ex officio* approach, which has been implemented due to the CJEU Asbeek judgment,<sup>136</sup> at least in cases that fall under the scope of application of the Directive.<sup>137</sup> This *ex officio* approach differs from the general rule of Austrian procedural law that a consumer has to plead a procedural defence before court, in order for the term to be declared as void.

<sup>131</sup> Prunbauer-Glaser/Seidelberger (2015), p. 254.

<sup>132</sup> Langer "§ 6 KSchG", rec. 107 in: Kosesnik-Wehrle (2015).

<sup>133</sup> OGH 17.02.2016, 7 Ob5/16k; OGH 25.07.2014, 5 Ob 118/13h; OGH 30.08.2012, 2 Ob 59/12h; Schurr "§ 6 KSchG", para. 3, rec. 3 seq. in: Fenyves/Kerschner/Vonkilch (2006).

<sup>134</sup> Bollenberger "§ 879 ABGB", rec. 22 in: Koziol/Bydlinski/Bollenberger (2014).

<sup>135</sup> Schurr "§ 6 KSchG", rec. 7 in: Fenyves/Kerschner/Vonkilch (2006).

<sup>136</sup> ECLI:EU:C:2013:341 (Asbeek).

<sup>137</sup> Langer "§ 6 KSchG", rec. 6a in: Kosesnik-Wehrle (2015); Schurr "§ 6 KSchG", rec. 12 seq. in: Fenyves/Kerschner/Vonkilch (2006).

As far as CJEU guidance is concerned, some scholars point out that the guidelines do not provide the necessary clarity when applied to individual cases.<sup>138</sup>

There is no administrative remedy for consumers in this area.

- In a forward looking perspective: Are there other measures that could improve the effectiveness of the UCTD in establishing a high level of consumer protection in your country? Would a graphical presentation model improve the readability and comprehension by consumers of the T&Cs? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

Some stakeholders pointed out that the question whether a term concerns the main subject matter is still heavily discussed in each individual case, which leads to legal uncertainty. Therefore, either the whole differentiation should be dropped in the future or – subsidiary to that – a clearer definition should be provided in order to facilitate legal certainty.

Furthermore (as mentioned above), according to some stakeholders a legal codification and clarification regarding the *ex officio* approach would be useful. In addition, the European view regarding the possibility of reducing an unfair term to its legally permitted core (*'geltungserhaltende Reduktion'*) should be stated as well.

However, all stakeholders stressed the importance of the 'minimum harmonisation' approach of the UCTD. Hence, a change in this matter is not considered to be necessary.

As far as graphical models are concerned, stakeholders doubt their effectiveness in practice and therefore do not support their implementation.

### 1.2.2. Effectiveness of the current rules 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 disparities have an impact on cross-border trade; [*Key aspects to consider are: Do national differences in the application/implementation of the Directive play a role for businesses? Have these differences led to changes in their business strategy? Have these differences caused problems?*]

With the exception of the early ruling *Freiburger Kommunalbauten*,<sup>139</sup> the CJEU leaves to the national courts the ultimate decision as to whether a particular term is unfair or not. As a consequence, it is difficult to develop uniform European standards for unfair terms and there is a possibility that disparities may occur.

However, none of the stakeholders mentioned any disparities in Austria having an impact on cross border trade.

- 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;
- 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.

So far no evidence was found. None of the stakeholders mentioned any problems.

<sup>138</sup> Langer "§ 6 KSchG", rec. 4 in: Kosesnik-Wehrle (2015) with reference to ECLI:EU:C:2014:282 (*Kásler*).

<sup>139</sup> ECLI:EU:C:2004:209 (*Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v. Ludger Hofstetter and Ulrike Hofstetter*).

### 1.2.3. Relevance for business-to-business transactions

Regarding the area of contractual fairness and in relation to the Unfair Contract Terms Directive, please analyse:

- Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;

As Sec. 879 para. 3 BGB applies to B2B relations too, and Sec. 6 KSchG is used to interpret the general clause of that provision (despite the fact that it is not directly applicable to B2B relations), no need to further strengthen the protection of businesses was reported.

- 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;

The answer to this might be yes, as the respective sections are already applicable to B2B transactions. The bargaining power and the level of weakness are always determined individually and with reference to the current situation.<sup>140</sup>

- 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;

It has been argued that the need to distinguish whether a term regulates the main subject matter or not leads to uncertainty, as no clear definitions are provided. As a result, individual court decisions might differ slightly.<sup>141</sup> However, as the current system regarding B2B transactions seems to work quite well in practice (see the answers given above), stakeholders do not report any need for such an extension. Hence, an extension is not planned or necessary.

- 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;

Whether a term in a B2B relationship is unfair or not is more difficult to determine than in B2C relationships because it is presumed that neither one of the parties is in a weaker bargaining position per se. This is why it is inevitable that the individual situation of the contracting parties is taken into account in each case. None of the stakeholders indicated that there are any specific contractual terms which could be regarded as unfair in all circumstances or presumed to be unfair.

- Whether there is a need for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive;

Under Austrian Law, the transparency requirement in Sec. 6 para. 3 KSchG does not apply to B2B transactions directly. Some scholars have argued that the provision could be applied to B2B relationships by way of analogy or that the transparency requirement could be read into Sec. 879 para. 3 ABGB.<sup>142</sup> Businesses can equally be in need of protection from non-transparent terms.<sup>143</sup> Other scholars reject this approach

<sup>140</sup> Langer "§ 6 KSchG", rec. 2 with references to OGH 09.06.1999, 7 Ob 105/99p; and "§ 879 para. 3 KSchG" recs. 32, 34 in: Kosesnik-Wehrle (2015).

<sup>141</sup> Langer "§ 879 para. 3 KSchG", rec. 7 seq. in: Kosesnik-Wehrle (2015).

<sup>142</sup> Cf. for an overview of the issue with further references *Parapatits* (2008) in: Knyrim/Leitner/Perner/Riss (eds.), p. 35, 37 seq.

<sup>143</sup> *Leitner* (2005), p. 130 seq.



and argue that businesses can be expected to put more effort into understanding contract terms.<sup>144</sup> The question has also not been decided by the Supreme Court of Justice thus far, though one decision mentions that taking transparency issues into account when applying Sec. 879 para. 3 ABGB in B2B cases is worth considering.<sup>145</sup>

- 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.

Austrian – as well as German – law already knows such an extension. Hence, it seems that such an extension would not hinder cross-border trade.

### 1.3. Injunctions

#### 1.3.1. Effectiveness of the current rules in establishing a high level of consumer protection

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

- To what extent is the use of the injunction procedure in your country contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment?<sup>146</sup>

The ID is transposed into Austrian law by Secs. 28 and 28a KSchG and Sec. 29 para. 2 KSchG as well as Sec. 14 UWG. However, injunction proceedings were already possible prior to the transposition of the ID since the initial version of the KSchG, which entered into force in 1979, had already contained a provision on injunctions.<sup>147</sup>

According to Sec. 28 KSchG, injunction proceedings may be brought against any natural or legal person whose standard terms and conditions contravene a statutory prohibition or are contrary to public policy. The organisations with standing include the Association for Consumer Information, the Austrian Economic Chamber, the Federal Chamber of Labour, the Council of Austrian Chambers of Agricultural Labour and the Austrian Trade Union Federation (Sec. 29 KSchG).<sup>148</sup> Consequently, individual consumers have no *locus standi*. It should also be noted that an individual consumer cannot oblige an organisation to bring a claim. Annex I of the Directive is implemented in Sec. 28a para. 1 KSchG. This provision provides for injunctions against traders contravening laws in connection with doorstep transactions, negotiations away from business premises, consumer loan relationships, package tour arrangements, time share relationships, distance sales, the agreement of unfair terms, legal or commercial warranties for the purchase of manufacturing of movable tangible assets or in connection with IT services in e-commerce transactions, investment and asset management services, payment services or the act of issuing e-money as well as the laws transposing Directive 2006/123/EC.<sup>149</sup> The provision also allows for injunctions against a trader who violates the rule on general information requirements

<sup>144</sup> 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).

<sup>145</sup> OGH 15.10.2003, 7 Ob 146/03a.

<sup>146</sup> 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.

<sup>147</sup> Langer "§§ 28-30 KSchG", rec. 2 in: Kosesnik-Wehrle (2015).

<sup>148</sup> Rechberger/Simotta (2010), rec. 156 seq.

<sup>149</sup> Directive of the European Parliament and of the Council of 12.12.2006 on services in the internal market (OJ L 376, 27.12.2006, p. 36).

(Sec. 5a KSchG) or the rule regarding payments for phone costs (Sec. 6b KSchG), the rule regarding additional payments (Sec. 6c KSchG), the rules regarding the performance deadline (Sec. 7a KSchG) or the passing of risk ('*Gefahrenübergang*') (Sec. 7b KSchG), the rule on alternative dispute resolution (Sec. 19 ASTG) or the rules on online dispute resolution (Art. 14 para. 1 and 2 Regulation (EU) No. 524/2013)<sup>150</sup> – by covering those violations, as well as with the inclusion of the rules on investment and asset management services, payment services and the act of issuing e-money, Sec. 28a para. 1 KSchG goes beyond the Directives mentioned in Annex I to the UCTD.<sup>151</sup> No. 11 of the Annex UCPD has been transposed in Sec. 14 UWG. No. 9 of the Annex Directive 2001/83/EC<sup>152</sup> has been transposed into Austrian law by Sec. 85a Act on medical products<sup>153</sup>.<sup>154</sup> Sec. 28a para. 1a KSchG goes beyond the scope of application of the Directive as well and covers nursing home contracts. Contrary to Sec. 28 KSchG, Sec. 28a KSchG does not require the use of standard contract terms.<sup>155</sup> It sanctions certain – unfair – practices.<sup>156</sup> However, the scope of Sec. 28a para. 1 KSchG is also narrower compared to Sec. 28 KSchG since it enumerates the situations covered and presupposes a violation impairing the general interests of consumers.<sup>157</sup> Sec. 28a KSchG is not subsidiary to Sec. 28 KSchG (contrary to the corresponding provisions in German law, Secs. 1 and 2 UKlaG).<sup>158</sup> Accordingly, the use of unfair terms is covered by both provisions if the term in question forms part of standard contract terms and also violates one of the provision enumerated in Sec. 28a KSchG.<sup>159</sup>

Both stakeholders and legal scholars consider the injunction procedure as a very helpful tool to combat violations of consumer protection laws.<sup>160</sup> They also point out, however, the lack of (sufficient) protection for individual consumers regarding the consequences of a violation of consumers rights. In particular, there is no claim for remedial action under the KSchG.<sup>161</sup> This has been especially criticised by stakeholders, who highlighted the lack of efficient means to either redress ongoing faults or skim profits of the trader (see also the reform proposals below). Some stakeholders also argue that the introduction of a remedial action in the KSchG is necessary in order to satisfy the effectiveness principle under European law, as only a remedial action guarantees effective law enforcement and effective deterrence.

- What measures in your national legislation on injunction procedure are considered to be particularly effective, if any: measures regarding the cost of the procedure, the 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?

In Austria, the costs of court proceedings in general (and thereby also injunction procedures) are borne by the losing party. Stakeholders point out that this might lead

<sup>150</sup> Regulation (EU) No. 524/2013 of the European Parliament and of the Council of 21.05.2013 on online dispute resolution for consumer disputes (OJ L 165, 18.06.2013, p. 1)

<sup>151</sup> However, these additions to Sec. 28a KSchG were made to transpose other EU Directives not mentioned in the Annex, see *Langer* "§§ 28-30 KSchG" rec. 32a in: Kosesnik-Wehrle (2015).

<sup>152</sup> Directive 2001/83/EC of the European Parliament and of the Council of 6.11.2001 on the Community code relating to medicinal products for human use (OJ L 311, 28.11.2001, p. 67).

<sup>153</sup> "Arzneimittelgesetz (ArzneimittelG)", Federal Law Gazette (BGBl.) I, No 77/1983.

<sup>154</sup> See also *Langer* "§§ 28-30 KSchG" rec. 32a in: Kosesnik-Wehrle (2015).

<sup>155</sup> *Kathrein/Schoditsch* "§ 28a KSchG" rec. 1 in Koziol/Bydlinski/Bollenberger (2014); *Kühnberg* (2005), p. 122.

<sup>156</sup> See e.g. *Apathy* "30 KSchG" rec. 23 in: Schwimann/Kodek (2015).

<sup>157</sup> *Donath* "§ 28a KSchG" rec. 2 in: Schwimann (2015).

<sup>158</sup> *Kühnberg* (2005), pp. 127-128.

<sup>159</sup> *Eccher* "§ 28 KSchG" rec. 4 in: Fenyves/Kerschner/Vonkilch (2006).

<sup>160</sup> *Langer* "§§ 28-30 KSchG" rec. 1 in: Kosesnik-Wehrle (2015).

<sup>161</sup> See e.g. *Riss RdW* 2007, 395, 398. Sec.15 UWG, conversely, establishes a claim for remedial action.



to interim injunctions being pursued reluctantly since organisations with *locus standi* might be afraid of the high costs in the event of losing the case. In this regard, particularly interim legal relief is not as efficient as it could be. Due to limited funding, organisations have to evaluate which cases to take on. Moreover, the effects of the decision are insufficient. Firstly, there is no claim to remedial action. Secondly, a decision is not binding on other courts and consumers<sup>162</sup> but only *inter partes* (see also the reform proposals, below, being made to the EU legislator). However, the 'indirect effect' of a decision on individual consumer proceedings should be noted: pursuant to Sec. 28 para. 1 clause 2 KSchG, traders cannot invoke standard contract terms which have been found unlawful. Furthermore, the Austrian Supreme court allows businesses a period of about four months in order to adapt contracts<sup>163</sup> - a practice which is highly criticised by stakeholders.

By contrast, both stakeholders and legal scholars assess the effect of the publication of decisions more positively<sup>164</sup> (even though the winning party is obliged to finance the publication in advance and can then claim back the costs, which creates (in-)solvency risks).<sup>165</sup> On the other hand, there are shortcomings in this area, too: if the plaintiff loses the case, the defendant has also a right to have the decision published, stating that his terms are lawful.<sup>166</sup> This again causes high costs and might deter organisations with standing from initiating an injunction in the first place. The sanctions for non-compliance with the injunction order follow from general procedural law (Secs. 346 et seqq. Enforcement Act).<sup>167</sup> The sanctions can include payments up to EUR 100 000 a day. However, in practice the amounts are usually much lower. Furthermore, Austria has not introduced a compulsory procedure requiring the party who seeks an injunction to achieve the cessation of the infringement in consultation with the defendant prior to formal proceedings (see Article 5 of the Directive).<sup>168</sup> However, experts consider such consultation necessary since it is not quite clear among Austrian scholars whether - and, if so, under what conditions - a cease-and-desist statement issued by a trader precludes an injunction (see Sec. 28 para. 2 KSchG). Moreover, if prior consultation take place, there is no rule determining the allocation of costs.

- Has your country extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunction Directive? If yes, what are the additional consumer rights covered?

The scope of application of the injunction procedure has been extended beyond the pieces of EU legislation listed in Annex I of the Directive in Sec. 28a para. 1a KSchG so as to include nursing home contracts. For further extensions, see the answer to the first question above.

- Analysis of the obstacles to the effective use of the injunction procedure, in particular by analysing which progress in removing obstacles has been made and/or new difficulties that have emerged in your country since 2012.

Again, experts point to the shortcomings with regard to interim legal relief. Moreover, several obstacles regarding injunction actions against traders from other countries are perceived as rather difficult to overcome (see below).

<sup>162</sup> *Langer* "§§ 28-30 KSchG" rec. 1 in: Kosesnik-Wehrle (2015).

<sup>163</sup> See e.g. OGH 28.01.2009, Az. 10 Ob 70/07b, RdW 2009, 355, 401; *Rechberger* "§ 409" rec. 1b in: Rechberger (2014).

<sup>164</sup> See e.g. *Apathy* "§ 30 KSchG", rec. 2 in: Schwimann/Kodek (2015).

<sup>165</sup> See on the publication requirement *Langer* "§§ 28-30 KSchG" rec. 10 seqq. In: Kosesnik-Wehrle (2015).

<sup>166</sup> See also *Langer* "§§ 28-30 KSchG", rec. 10b in: Kosesnik-Wehrle (2015).

<sup>167</sup> "Exekutionsordnung (EO)", Imperial Law Gazette (RGBl.) I, No. 79/1896, recently amended by Act of 11.08.2014, Federal Law Gazette (BGBl.) I, No. 69/2014 Federal Law Gazette (RGBl.) No 79/1896.

<sup>168</sup> *Langer* "§§ 28-30 KSchG" rec. 40 in: Kosesnik-Wehrle (2015).

- In a forward looking perspective: Should the coverage of the Injunctions Directive be extended (by including additional legislation into Annex I to the Directive)? If so, which EU legislation should be included? Are there other measures that could improve the effectiveness of the ID in establishing a high level of consumer protection? Should the scope of the Injunctions Directive be extended to the protection of collective business' interests? Are there best practices in your country that could be relevant for other countries and considered as model for the injunction procedure at EU level?

The fact that other courts and consumers are not bound by a decision is one of the biggest deficiencies in Austrian injunctions law. Not least due to the CJEU's decision in *Invitel*,<sup>169</sup> the Union's legislature should consider implementing a rule stating that a decision is binding on all consumers concerned.<sup>170</sup> Moreover, EU legislation could provide for a claim of remedial protection. Such a claim could include the skimming of profits. Furthermore, in the area of telecommunication law, judicial relief could be enhanced (in particular within the scope of the Universal Service Directive).<sup>171</sup> Finally, the EU legislature could rethink the requirement that a measure must harm 'the collective interest of consumers.'<sup>172</sup> This is often hard to prove. Therefore, this requirement should be abolished or at least a rebuttable presumption could be introduced.

### 1.3.2. 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:

- How effective is the injunction procedure in addressing infringements originating in another EU country?

This is considered very difficult in practice. First of all, these difficulties include the general risks that are known to effect the fight against infringements of the law in other countries (difficulties regarding, for example, notification of the claim, difficulties of proof, travel expenses for witnesses, translation costs, knowledge of the law/higher risk of losing the case etc.). More specific difficulties are listed below.

- How effective is it to address infringements originating in another EU country that qualified entities in your country are enabled to seek injunctions in the other Member State (Article 4 of the Injunctions Directive)?

Practitioners consider cross-border enforcement to be very difficult, since the costs are considered as quite high and such court actions are subject to considerable legal uncertainty. The risks involved include not only language barriers but also risks due to different procedural and substantive laws. Moreover, qualified entities are in need of specific rules regarding international jurisdiction and the applicable law in order to reduce legal uncertainty. This is especially true for consumer entities who – according to the jurisprudence of the CJEU – do not fall under the jurisdiction over consumer contracts (Art. 17 Brussels I Regulation).<sup>173</sup>

<sup>169</sup> ECLI:EU:C:2012:242.

<sup>170</sup> See also *Langer* "§§ 28-30 KSchG", rec. 1 in Kosesnik-Wehrle (2015).

<sup>171</sup> Directive 2002/22/EC of the European Parliament and of the Council of 07.04.2002 on universal service and users' rights relating to electronic communications networks and services.

<sup>172</sup> Art. 1 para. 2 of Directive 2009/22/EC of the European Parliament and of the Council of 23.04.2009 on injunctions for the protection of consumers' interests.

<sup>173</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12.12.2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)

- In a forward looking perspective: Are there non-legislative or/and legislative measures that could improve the effectiveness of the injunction procedure in addressing infringements originating in another EU country? Are there best practices in your country that could be relevant for other EU countries and could be considered as a model for the injunction procedure at EU level?

Stakeholders suggest different means to improve the effectiveness of the Directive, including a better enforcement of judgments. This proves problematic with regard to subsequent violations, because in some countries penalty payments are already included in the judgment, whereas in Austria, for instance, they are determined later by a different court. Hence, it remains unclear whether a court from a different country can later order this penalty payment, i.e. whether this court has the competence to do so.

Moreover, stakeholders argue that consumer entities should fall under Art. 17 seq. Brussels I regulation. At least the mosaic principle established by the CJEU<sup>174</sup> should be abolished. Equally, it has been suggested that one could consider establishing a Europe-wide legal effect of a national court's decision. Quite problematic is the question of the applicable substantive law. This is especially relevant in countries such as Germany and Austria, where the provisions regarding the right of action in injunction proceedings are part of the substantive law, too. It should be clarified that this type of arrangement does not preclude the right of action in different Member States. With regard to the question which article of the Rome II regulation covers the claim for an injunction, one stakeholder said that from a consumer perspective, the application of Art. 6 para. 2 Rom II Regulation<sup>175</sup> is preferable. The CJEU has just recently decided likewise.<sup>176</sup>

### 1.3.3. Interplay between the Injunctions Directive and other enforcement instruments of consumer law

#### Please analyse:

- Is the injunction procedure as designed by the Injunctions Directive regulated separately in your country (in a separate legal act or as a separate procedure regulated within the same legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (UCPD, UCTD and by the Consumer Rights Directive)?

Yes, they are regulated in different provisions (UCPD: Sec. 14 UWG, UCTD: Sec. 28 KSchG, ID: Sec. 28a KSchG, CRD: part of Sec. 28a KSchG). A general coherence is ensured by cross-references between the provisions. Moreover, Sec. 29 para. 1 KSchG establishes the same right of action with regard to claims under Sec. 28 KSchG and Sec 28a KSchG.<sup>177</sup> In addition, the same civil procedure rules are applicable, too.

- If these procedures are regulated separately: What are the main differences between them? How is the coherence between these procedures ensured? If these procedures are regulated in a single legal act (possibly as a single procedure): In what way do these procedures (or this procedure) go beyond measures foreseen by the Injunctions Directive?

In theory, there should be differentiation regarding the question whether it is necessary to discontinue the challenged activity unconditionally in response to cease-and-desist-warnings (*Abmahnung und Unterlassenserklärung*, Sec. 28 para. 2

<sup>174</sup> ECLI:EU:C:1995:61 (*Shevill*).

<sup>175</sup> Regulation (EC) of the European Parliament and of the Council of 11.07.2007 on the law applicable to non-contractual obligations.

<sup>176</sup> ECLI:EU:C:2016:612 (*Amazon*).

<sup>177</sup> *Langer* "§§ 28-30 KSchG", rec. 4 in: Kosesnik-Wehrle (2015).

KSchG) in order to establish that there is no risk of repetition (*Wiederholungsgefahr*). The Supreme Court of Justice is much stricter on this issue with regard to claims under Sec. 28 seq KSchG. However, in practice this difference appears not to be relevant, as the statute of limitations regarding UWG claims is rather short (cf. sec 20 UWG), and consequently cease-and-desist-warnings do not happen very often in this context.

Furthermore, some qualified entities have only a limited right of action under the UWG, while there are no limitations with regard to Secs. 28, 28a KSchG.<sup>178</sup> One stakeholder has considered this as unfitting. With regard to the use of unfair standard contract terms, claims can be brought both under the KSchG and the UWG, as the use of unfair standard contract terms constitutes an unfair commercial practice, too.<sup>179</sup>

## 1.4. Cross-cutting issues

### 1.4.1. Cost and benefits of the directives covered by the study

- To what extent is there evidence for benefits for consumers stemming from the protection provided by both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of benefits for consumers from the protection against unfair commercial practices and unfair standard terms in contracts; [*Note: a relevant aspect in this context is whether the costs for consumers in exercising their rights under these directives are limiting these benefits or not.*]

When it comes to substantive law, consumers are well protected against unfair commercial practices and unfair standard terms. In this regard, stakeholders highlighted the contribution the PID has made to consumer information. In particular, they pointed out that the PID not only classifies which information regarding to the price has to be indicated, but also how this has to be done. This facilitates the comparison of prices, which is particularly important in Austria where consumers in areas near the border often shop in other EU states. Stakeholders also consider the character of the PID as minimally harmonised as beneficial for consumers as in their view each Member State can determine best what its citizens consider as 'unambiguous, easily identifiable and clearly legible'. Also the above-mentioned '*Charta zur Grundpreisauszeichnung*', a voluntary commitment of several businesses that goes even beyond the PID's scope is noteworthy.

However, these benefits are compromised by difficulties in enforcing consumer rights. In Austria, infringements of both the UCTD and the UCPD are enforced before civil law courts either by individual consumers or certain (qualified) organisations which can bring an injunction. It has often been analysed that consumers tend to have a rational disinterest in exercising their rights. This is, amongst other reasons, due to the fact that a court procedure triggers costs while the outcome of the process is uncertain.<sup>180</sup> For example, in a case where the consumers' claim is dismissed by the court, they have to bear the costs of the court proceeding as well as those of the opposing party (Sec. 41 para. 1 ZPO). There are some measures to confront this problem. For instance, parties before a local court (this is the court of first instance for claims which are not higher than EUR 15 000) are not required to be represented by a lawyer if the claim does not exceed EUR 5000 (see Sec. 27 para. 1 ZPO). In order not to undermine their chances to win the case without legal assistance, the court is obliged to give reasonable hints to parties (Sec. 182 ZPO).<sup>181</sup> There is also the possibility to apply for state aid (*Verfahrenshilfe*) for people having special financial needs

<sup>178</sup> Competitors can bring claims (for damages as well as injunctions) under the UWG but not under the KSchG.

<sup>179</sup> *Wiebe* (2016), p. 320. It appears that this issue is less contested in Austria than it is, for instance, in Germany.

<sup>180</sup> Also *Roth* (2012) in: Reimann (ed.), p. 69.

<sup>181</sup> Cf. *Fucik* "§ 182", rec. 1 in: Rechberger (2014).

(Sec. 63 seqq. ZPO). Although Austrian civil procedure law does not provide a special procedure for small claims, it is discussed to which extent Sec. 273 para. 2 ZPO should be used to ease the procedure in the case of claims below EUR 1000.<sup>182</sup>

Moreover, some of the obstacles consumers face in enforcing their rights are overcome by the so-called 'Austrian style class actions'.<sup>183</sup> Consumer organisations – the VKI and BAK in particular – have used the possibility of collecting several claims into one action under certain circumstances ('*objektive Klagehäufung*', Sec. 227 ZPO), a process requiring consumers to assign their claims to the organisations in order to bring all claims in one action before one court. One of the advantages is the reduction of legal fees for the individual consumer.

One has also to note the new ADR-procedure.<sup>184</sup> However, it is too early to assess if it will contribute to a more efficient enforcement of consumer law. Furthermore, in 2007 the Austrian Ministry of Justice presented a draft that provided for a group action procedure as well as a test case procedure. The draft faced great resistance and no further actions have been taken so far (despite the introduction of a group action as part of the government programme).<sup>185</sup>

- To what extent is there evidence for benefits for traders stemming from both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of creating a level playing field for honest traders by providing a legal basis to eliminate or at least constrain dishonest market practices, such as the use of unfair standard terms in contracts or unfair commercial practices, including through the application of the Injunctions Directive;

In theory, harmonization has benefits for traders because it leads to (some) legal certainty. This makes it easier to trade across borders, saving costs, avoiding changes of practices etc. However, this only applies if traders can rely on a certain level of harmonisation, i.e. that there is actually legal certainty and not a profoundly different interpretation among the courts or an (undue) interrelation of the harmonised consumer rules with the legal system of the other Member State in question. In addition, it has to be noted that other factors – outside the law – have important impact on cross-border trade as well, e.g. language barriers.

With regard to violations of the UCPD not only consumer organisations but also competing traders can initiate proceedings, which of course can prove to be beneficial. With regard to the use of unfair contract terms, however, one stakeholder argued that because of the missing claim for remedial action and the fact that there is no possibility of skimming unlawful profits either, the dishonest trader can keep the profits of the unlawful behaviour to a great extent. This may create an incentive to behave unlawfully to the detriment not only of consumers but also of other honest traders.

- What are costs for traders due to the need to respect the requirements under the directives covered by the study? [*Note: Such as costs of research, legal advice and compliance as well as the amount of time necessary to comply with the directives*]

Stakeholders were mostly concerned about compliance costs caused by the multitude of information obligations.

<sup>182</sup> Cf. *Trenker* RZ 2015, 74, 78.

<sup>183</sup> This model is often referred to as "Austrian style class actions". In the view of the author, this label is misleading and not well chosen since it suggests similarities with the American class action. Cf. *Augenhofer* (2012) in: *Festschrift Simotta*, p. 39 seqq. with further references.

<sup>184</sup> Austrian Alternative Dispute Resolution Act, Federal Law Gazette (BGBl.) I, p. 105, implementing the Directive 2013/11/EU and the Regulation (EU) No. 524/2013.

<sup>185</sup> See *Rechberger/Simotta* (2010), p. 176 seqq.

- What are the costs involved in the public enforcement of these rules?

Please note that the enforcement system in Austria relies on the private enforcement before civil law courts. There is certainly not any public enforcement. Although the Austrian government is the primary funder of some private organisations and insofar financially assists private enforcement, this does not make the system a public enforcement system.

First, the BAK (*Bundesarbeiterkammer*, Federal Chamber of Labour) – which is one of the organisations having standing to file actions – employs three members of staff dealing with representative actions/injunctions. However, it is difficult to assess the exact amount of costs involved. In particular, there is the risk of losing the process with the consequence of bearing all costs (see above). The risk of litigation costs has been estimated at about EUR 30 000. However, it should be noted that the suits brought by the BAK have been highly successful.

Secondly, the Federal Ministry of Labour, Social Affairs and Consumer Protection finances the VKI (*Verein für Konsumenteninformation*, Association for Consumer Information) with around EUR 640 000 a year in order to cover wages and the risk of litigation costs. Furthermore, there might be additional funding for some cases. Here, too, most of the cases are won with the consequence that actual litigation costs are relatively low. In addition to that, the Federal Ministry of Labour, Social Affairs and Consumer Protection employs two academics who are in charge of selecting and monitoring the proceedings (costs: around EUR 200 000 per annum).<sup>186</sup>

- Are there indications that the directives covered by the study are not implemented in your country in a cost-effective manner?
- Could the costs for implementing and enforcing the rules of the directives covered by the study be reduced without lowering the level of protection for consumers? If so, how?

Regarding the UCTD and ID, some stakeholders would consider the implementation of a claim for remedial action to be more cost-efficient approach. It was mentioned that abolishing overlapping information duties may reduce costs.

<sup>186</sup> Conversely, the also-mentioned “Schutzverband gegen den unlauteren Wettbewerb” is funded privately, mainly by its members, such as business associations or firms.



#### 1.4.2. Interplay with EU sector-specific consumer protection legislation

Regarding the interplay of the horizontal EU consumer legislation [mainly UCPD and UCTD] with EU sector-specific consumer protection legislation in the areas of electronic communications, passenger transport, energy and consumer financial services, please:

- Analyse the levels of awareness of the requirements of the horizontal EU consumer legislation (mainly UCPD and UCTD) of businesses and consumers and the specific public enforcement bodies in the relevant sectors, as in particular demonstrated by their practical application; [*Note: Key question here is: Are UCPD and UCTD applied in practice by national authorities and courts as a legal basis to combat unfair commercial practices and unfair standard terms in contracts in the regulated sectors?*]

Stakeholders consider there to be a high level of knowledge amongst organisations with standing and amongst businesses and consumers, with regard to the UCPD and UCTD (or, more correctly, the national implementation laws). There is also comprehensive case law on both directives. Consumers regularly report misleading or aggressive practices as well as unfair contract terms to consumer organisations. Whilst consumers grasp the unlawfulness of a practice, they do not know the exact legal classification of the problem.

- Specify whether in your country the same authority is responsible for the enforcement of the horizontal EU consumer law 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 UCPD/UCTD in the regulated sectors, as specified in the previous bullet?*]

In Austria, (horizontal) consumer law enforcement takes place first and foremost in front of civil courts, through proceedings by organisations having standing, in particular the VKI and BAK. Pursuant to Sec. 16 para. 1, authorities of the Austrian federal states enforce the PID, but they may also be enforced by civil courts (see 1.1.2). In regulated sectors (telecommunication and energy), traders are obliged to notify the regulators about the content of their standard contract terms prior to their use.<sup>187</sup> The review focuses on sector specific rules. At the same time, apparent violations of general consumer law might be also identified. This avoids serious violations in advance, and allows organisations with standing – considering their limited funding – to focus on other cases.

<sup>187</sup> For the telecommunication sector the “Telekom-Control-Kommission” is competent pursuant to Sec. 24 para. 1 Telecommunication Act (“Telekommunikationsgesetz”, Federal Law Gazette (BGBl.) I, No. 70/2003 recently amended by Federal Act of 26.11.2015, Federal Law Gazette (BGBl.) I, No. 134/2015); for the energy sector (gas and electricity) “E-Control” is competent pursuant to Sec. 80 Federal Act on Regulation and Organization of Electricity Industries (“Elektrizitätswirtschafts- und -organisationsgesetz”, Federal Law Gazette (BGBl.) I, No. 110/2010, recently amended by Act of 06.08.2013, Federal Law Gazette (BGBl.) I, No. 174/2013) and Sec. 125 Federal Act on Regulating Gas Industries (“Gaswirtschaftsgesetz”, Federal Law Gazette (BGBl.) I, No. 107/2011, recently amended by Act of 14.08.2015, Federal Law Gazette (BGBl.) II, No. 226/2015).

- Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning contractual fairness, 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 and UCTD in the regulated sectors? What are the costs due to the 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.

The complementary application of the UCPD and the UCTD in the regulated sectors (e.g., energy, telecommunication, financial services and transport) is of high importance for consumers – here too it is important to protect consumers against unfair commercial practices and unfair contract terms. Stakeholders consider the general provisions of the UCPD and UCTD as necessary alongside the sector specific rules since the latter do not tackle all problematic practices (especially in sectors as dynamic as the areas mentioned above). However, stakeholders also stress the need for a harmonisation of the different rules and note especially the importance of reducing overlaps in information duties.

#### 1.4.3. Relevance of consumer law directives for consumer-to-business transactions

- Please analyse the need and potential for the application of the consumer law directives (mainly UCPD and UCTD) to 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).

Even though stakeholders consider the cases involving C2B relations as quite rare, some stakeholders are in favour of extending the UCTD and UCPD to C2B relations. If a consumer, for example, sells goods to a trader, it is the consumer who usually is in need of protection, as opposed to the trader. Since in Austria standard contract terms are (partly) governed by the General Civil Code,<sup>188</sup> it should be noted that these provisions already apply to C2B relations.

#### 1.4.4. Specific protection for vulnerable consumers

Please analyse:

- Whether the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined in the consumer law directives and relevant jurisprudence, and as applied by national authorities and courts in your country, continue to be valid and fit for purpose.
- To what extent the existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers and whether, based on the experiences in your country, specific provisions should be introduced in other directives concerned, in particular the Unfair Contract Terms Directive.

Courts apply the concepts of 'consumers', 'vulnerable consumers' and 'average consumers' consistent with the relevant CJEU case law. These concepts are further seen, in accordance with Rec. 18 UCPD, as normative legal questions, and certainly not as question of facts.<sup>189</sup> So, there are no general problems in application of these concepts, although there might be some minor issues regarding the definition and

<sup>188</sup> Secs. 864a and 879 para. 3 ABGB.

<sup>189</sup> *Wiebe* (2016), p. 295; *Anderl/Appf* "§ 2 UWG", rec. 71 in: *Wiebe/Kodek* (2016).



classification of specific groups of vulnerable consumers.<sup>190</sup> Further developments at EU level in this regard, such as Directives 2009/72/EC, 2009/73/EC, 2012/27/EU or 2014/92/EU, which also introduced the concept of 'vulnerable consumers', have been well recognised by Austrian legislators. Nevertheless, some stakeholders emphasised the advantage of a definition of the several groups of 'vulnerable consumers' based on the Member States' needs and circumstances. Some scholars even doubt the competence of the EU legislature to create comprehensive definitions in this context, e.g. for the term 'child'.<sup>191</sup>

However, regarding the concept of 'consumer' one stakeholder – which is a regulatory authority – mentioned that the concept should be extended to small enterprises. The characteristic structural imbalance between two parties is also observed in transactions among small companies and big ones. Small businesses are often less experienced and educated in legal matters, which is why they deserve the same protection as consumers. In a similar context, the Austrian legislator recognised the need for protection: Sec. 1 para. 3 KSchG extends the notion of 'consumer' to persons setting up their own business. Generally this complies also with fully harmonisation approach of the directives, since those persons are not within the scope.<sup>192</sup> However there have not been reported any problems with this extension and the directives discussed.

It should be noted that there is some debate among Austrian scholars whether the notion of consumer applied by the Supreme Court of Justice in cases pertaining to financial services, differs from the general consumer concept. The Supreme Court of Justice had to decide in a series of cases, on the applicability of the law of mistake and the UWG with regard to misleading statements for investment products. In one of the decisions, the Supreme Court of Justice differentiated between consumers who had invested previously and consumers who were first-time investors and wanted to invest their money in something as safe as a savings accounts.<sup>193</sup> While the advertisement in question directly approached 'first-time-investors' – by showing the particular investment opportunity as an alternative to a savings account – it could not be excluded that also consumers with prior experience were attracted by the advertisement. However, since this judgment falls within the exemption of Art. 3 para. 9 UCPD, it complies with UCPD's full-harmonisation approach; nevertheless, it offers an example of an additional category of consumers.<sup>194</sup>

Stakeholders pointed out that there may arise legal uncertainties and considerable costs for businesses if the concept of 'vulnerable consumers' is also applied within the scope of the UCTD: Businesses would need to provide different terms and conditions and would need to assess whether a prospective contracting party is a 'vulnerable consumer' or not. In summary, there is currently no need to intervene in this regard. Moreover the Member States' courts should be put in the position to further concretise the concepts for now.

#### 1.4.5. EU added value

- Overall, would you consider that protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in your country since the implementation of the UCPD and the UCTD in national legislation?

As already noted above (1.1.1), the UCPD has not led to an increase in consumer protection in Austria. To the contrary, stakeholders argue that the level of protection decreased since its implementation due to the ECJ's broad interpretation of the full

<sup>190</sup> Cf. e.g. *Kaps/Bräunlich* wbl 2013, 614.

<sup>191</sup> *Kaps/Bräunlich* wbl 2013, 614, 616; *Prunbauer-Glaser* ÖBl 2008, 164, 166.

<sup>192</sup> Cf. for further details *Kosesnik-Wehrle* "§ 1 KSchG", rec. 17 in: *Kosesnik-Wehrle* (2015).

<sup>193</sup> OGH 20.1.2009, 4 Ob 188/08p.

<sup>194</sup> Cf. for further references *Augenhofer* (2011), p. 21.

harmonisation approach. However, it should be stressed that the level of protection against unfair competition was high in Austria before and still remains high.

As far as the UCTD is concerned, the level of consumer protection increased slightly since the introduction of the directive. However, stakeholders doubt that this is a result of the Directive (apart from the codification of the transparency rule in Sec. 6 para. 3 KSchG) but rather a result of fact that the Austrian legislature could maintain and introduce more protective provisions under the directive's minimum harmonisation approach.

- Overall, would you consider that the information of consumers regarding unit prices has improved since the implementation of the PID in national legislation?

In contrast to the UCPD and UCTD, the effect of the PID was assessed positively, as corresponding rules were not known before the implementation of the PID. The directive is especially important since the enacted legislation liberalising the quantities of prepacked goods (see above).

- Overall, would you consider that the protection of businesses against unfair marketing in your country has improved since the implementation of the MCAD in national legislation?

Again, Austrian unfair competition law already covered B2B relations before the introduction of the MCAD. Due to Austria's longstanding tradition in the area of unfair competition law, a substantial increase in the level of protection of businesses cannot be reported. Moreover, the level of business protection might have been decreased by the liberalisation of comparative advertising, which was only allowed under narrow circumstances prior to the implementation of the MCAD. However, it should be noted that comparative advertisement might also work in favour of competition by fostering it and enhancing consumer decision-making.

- Overall, would you consider that it has become easier for businesses in your country to directly trade cross-border to final consumers located in other EU countries in recent years? Has it become easier for consumers in your country to directly purchase cross-border from traders located in other EU countries?

Stakeholders did not report any experiences thereof.

- To what extent are these improvements, if any, due to the mentioned directives?

As already emphasised, the effect of the directive is hard to assess, due to the fact that the protection level was high before and the Directive has hardly led to any changes.

## Annex

## A. Transposition fact sheet

**Table 1: Fact sheet on transposition of directives in Member States' law – AUSTRIA**

Directive	Transposition legislation (National law, Article)	Comments	Specific provisions going beyond minimum harmonisation requirements/use of exemptions	Included in national legislation		Comments
<b>Directive 93/13/EEC on unfair terms in consumer contracts</b>	Bundesgesetz vom 30.03.1979, BGBl. Nr. 140/1979 (Konsumentenschutzgesetz), slightly extended by Art. 1, Bundesgesetz vom 10.01.1997, BGBl. I, No. 6/1997 ("KSchG-Novelle")		'Black list' of terms considered unfair in all circumstances	Yes	Sec. 6 para. 1 KSchG	
	Bundesgesetz vom 30.03.1979, BGBl. Nr. 140/1979 (Konsumentenschutzgesetz), slightly extended by Art. 1, Bundesgesetz vom 28.10.2003, BGBl. No. 91/2003 ("Zivilrechtsänderungsgesetz 2004")		'Grey list' of terms which may be considered unfair	Yes	Sec. 6 para. 2 KSchG	Please note, that the 'grey list' in Sec. 6 para. 2 KSchG is not identical to the "grey list" in European law.
			Extension of the application of Directive to individually negotiated terms	Yes	Sec. 6 para. 1 KSchG	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.

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			Extension of the application of Directive terms on the adequacy of the price and the main subject-matter	No		
			Application of certain unfair contract terms provisions to B2B relationships	Yes	Sec. 879 para. 3 ABGB	The Austrian Supreme Court affirmed the use of § 6 KSchG as an indicative list for BB contracts under certain circumstance (“Ungleichgewichtslage”). <sup>195</sup> Under general civil law all standard contract terms are scrutinised under Sec. 879 para. 3 ABGB.
<b>Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market</b>			Provisions regarding financial services going beyond minimum harmonisation requirements	No		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.
			Provisions regarding immovables going beyond minimum harmonisation requirements	No		
	Bundesgesetz vom 13.11.2007, BGBl. I, No. 79/2007 (“UWG-Novelle 2007”), further amended and harmonised with the UCPD by Bundesgesetz vom 22.04.2015, BGBl. I No. 49/2015 (“UWG-Novelle 2015”)		Application of UCPD to B2B transactions	Yes		Traditionally the UWG aimed at the protection of competitors. As the legislature did not transpose the UCPD so as to limit its application to consumers, but rather in the UWG, the UCPD’s provisions generally also apply to B2B transactions.

<sup>195</sup> Langer “§ 6 KSchG”, rec. 2 in: Kosesnik-Wehrle (2015).

<b>Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers</b>			Extension of the application to other sectors (e.g. for immovable property)	No		
	Bundesgesetz vom 11.07.2000, BGBl. I No. 55/2000 ("Preisauszeichnungsänderungsgesetz")		Use of specific regulatory choices/derogations	Yes	Sec. 10b para. 3 PrAG  Sec. 10c para. 3 PrAG	Derogation for small businesses  Derogation for common price indications in Member States.
<b>Directive 2006/114/EC concerning misleading and comparative advertising</b>	Bundesgesetz vom 13.11.2007, BGBl. I, No. 79/2007 ("UWG-Novelle 2007")		Misleading advertisement		Sec. 2 UWG	
	Bundesgesetz vom 13.11.2007, BGBl. I, No. 79/2007 ("UWG-Novelle 2007"), further harmonised with the MCAD by Bundesgesetz vom 22.04.2015, BGBl. I No. 49/2015 ("UWG-Novelle 2015")		Comparative advertisement		Sec. 2a UWG	
<b>Directive 2009/22/EC on injunctions for the protection of consumers' interests</b>						

**Table 2: Fact sheet on Injunctions Directive – AUSTRIA**

Issue	Answer	Comments
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)?	- Yes, separate procedures in separate legal acts	<i>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,<sup>196</sup> regulating aspects of Regulation (EU) 524/2013 and Directive 2013/11/EU.</i>
Who is entitled to bring an action seeking an injunction?	- Designated public bodies - Specified consumer associations - Competitors	<p><i>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.</i></p> <p><i>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".</i></p> <p><i>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.</i></p>
Is the injunction procedure a court or an administrative procedure?	- Court procedure	

<sup>196</sup> "Alternative-Streitbeilegung-Gesetz", Federal Law Gazette (BGBl.) I, No. 105/2015.

Who bears the costs of an injunction procedure?	- The costs are as a rule borne by the losing party	<i>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.</i>
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?	- Yes, scope of application extended to cover areas of consumer law that are not part of Annex I of the Directive	<i>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.</i>
Is protection of business' interests covered by the injunctions procedure?	- Yes	<i>This is shown by the right of action of the Commercial Chamber and regarding unfair commercial practices also by the right of action of competitors.</i>
Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations	- No	<i>There is the possibility under Sec. 187 ZPO whereby different procedures can be dealt with in the same proceedings if they are accelerated or their costs are minimized this way. However, this is in the discretion of the court. Insofar there is no possibility to "intentionally" bring an injunction toward one economic sector.</i>
Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID)	- Yes (but not obligatory)	<i>As Sec. 28 para. 2 KSchG suggests, there is the possibility of conducting an out-of-court preliminary process, in terms of demanding a cease-and-desist declaration ("konventionalstrafbesicherte Unterlassungserklärung"). However, this is not mandatory, but rather impacts the requirement of a risk of first infringement and the risk of recurrent infringement ("Erstbegehungs- und Wiederholungsgefahr"). Nor is the out-of-court-procedure in Austria de-facto mandatory since it has no effect on the cost bearing question in cases of an immediate acknowledgement ("sofortiges Anerkenntnis") under Sec. 45 ZPO.<sup>197</sup></i>
Has your Member State taken specific measures regarding the prior consultation (Article 5 of the Injunctions Directive)?	- No	
Does the national legislation provide for measures ensuring summary procedure?	- Yes	<i>Interim injunctions are possible (see below) Also Sec. 273 para. 2 cl. 2 ZPO allows for a simplified procedure in case of claims below the value of EUR 1000, but this is in the discretion of the court.</i>

<sup>197</sup> Cf. *Langer* "§§ 20-30 KSchG", rec. 42 in: *Kosesnick-Wehrle* (2015).



<p>Are there sanctions for non-compliance with the injunction order (Article 2(1) of the Injunctions Directive)?</p>	<p>- Yes, a penalty of a fine for each day of non-compliance</p>	<p><i>Regarding Art. 2 (1) b: Publication of decisions is possible in some cases. (see below)</i>  <i>Regarding Art. 2 (1) c: The EO foresees, for instance, fines as sanctions. (see below)</i>  <i>Under both the EO and Sec. 220 ZPO, the federal government is the beneficiary of the fines.</i></p>
<p>Has your Member State taken specific measures regarding the publication of the decision and/or the publication of a corrective statement?</p>	<p>- Yes</p>	<p><i>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.</i></p>
<p>Is it possible to claim within the injunction procedure for sanctions for the infringement?</p>	<p>- Yes</p>	<p><i>Pursuant to Sec. 355 EO it is possible after having obtained an executory title against the person obliged to desist; any subsequent contravention can be dealt with a fine. If the contravention continues, another fine or imprisonment can be imposed.</i></p>
<p>Can an action for the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to other beneficiary be brought within the injunction procedure?</p>	<p>- No</p>	<p><i>Neither the UWG nor the KSchG foresees such possibility.</i></p>
<p>Can an action for damages to be paid to the qualified entity or the public purse be brought within the injunction procedure?</p>	<p>- No</p>	<p><i>Qualified entities do not have a claim for damages.</i></p>
<p>Can an action for damages or redress to be paid to the consumers concerned be brought within the injunction procedure?</p>	<p>- Yes</p>	<p><i>As far as unfair commercial practices are concerned, there are generally no claims for damages. However, there is a claim for remedial action in Sec. 15 UWG. There is no claim for remedial action in the context of Secs. 28 and 28a KSchG.</i>   <i>The question whether individual consumers can claim for damages they suffered because of an unfair commercial practice is highly disputed.<sup>198</sup> Since they are also not entitled to seek an injunction under the ID, the question does not matter in this context. It might be possible to seek an injunction under general civil law (which is, however, barely possible as far as unfair contract terms or unfair commercial practices are concerned). However, in this event the claimant could combine both claims under Sec. 227 ZPO.</i></p>

<sup>198</sup> Enzinger (2012), p. 239.

<p>Can individual consumers base their individual claims for damages/remedies on the injunctions order?</p>	<p>- Yes</p>	<p><i>Under Sec. 17 ZPO intervening parties can join one of the main parties if it is in their legal interest. Hence if a qualified entity seeks an injunction, a consumer suing for damages could join the proceeding and therefore the injunction order would be binding. Apart from this, the injunction order only has effect among the parties. Particularly, there is no such provision such as Sec. 11 German Act on Injunction Claims.</i></p>
<p>Can the qualified entity claim other measures beyond the injunction, e.g. evidence of compliance with the judgment?</p>	<p>- Yes</p>	<p><i>Pursuant to Sec. 24 UWG, claims mentioned in this provision can be secured by issuing interim injunctions ("einstweilige Verfügungen"). Sec. 24 UWG is also applicable in the context of Secs. 28 and 28a KSchG (cf. Sec. 30 KSchG) Also Sec. 458 ZPO, referring to the EO (relevant provision: Sec. 378 seqq. and Sec. 355), mentions the possibility of interim injunctions.</i></p>
<p>Are the effects of individual injunctions orders extended to the future infringements and/or same or similar illegal practices (of other traders)?</p>	<p>- No</p>	<p><i>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.</i></p>

## B. Data tables

### *Number of B2C disputes*

Please indicate how many B2C disputes have been decided in your country on the basis of consumer law directives covered by this study (UCPD, UCTD, PID) as a proportion of the total number of B2C disputes decided on the basis of other national consumer legislation (based on statistics, or based on estimates by enforcement authorities and other stakeholders, where this is not the available).

**Table 3: B2C disputes decided on the basis of consumer law directives covered by this study in comparison with total B2C disputes decided on the basis of other legislation (most recent year for which data is available)**

Year	Type of data	Total number of B2C disputes (number of cases)	Share of B2C disputes decided on basis of ...					Comments
			UCPD	UCTD	PID	other EU consumer protection legislation (e.g. CRD, Sales Directive, sectoral legislation)	national consumer legislation not based on EU directives	

Note: Data is not available in this regard.

### *Costs of obtaining redress for a hypothetical case of invoking unfairness of a standard contract term*

- Please estimate the costs, including time, for consumers in obtaining redress when invoking the unfairness, and thereby the non-binding character of standard contract terms in a contract they concluded. Please provide the estimate for the hypothetical example below, focusing on costs (and needed time) of a lower court procedure and the use of ADR or other relevant procedure (if applicable).<sup>199</sup>

<sup>199</sup> For the hypothetical example it is assumed that both the provider and the consumer are located in your country.

**Table 4: Estimate of costs for consumers in obtaining redress when invoking the unfairness of standard contract terms in a contract they concluded (for the hypothetical example provided in the box below)**

Redress mechanism	Estimated court fees (national currency)	Estimated lawyer's fees (national currency)	Other costs, if any (national currency)	Estimated time involved for consumer (hours)	Comments
<b>Lower court procedure</b>	EUR 299*	EUR 628.42**	n.a.***	Information is not available.	According to Sec. 41 para. 1. ZPO, the loser has to reimburse the expenses of the winner (for legal assistance and court fees). Further it should be noted, that in Austria lawyers are paid for every action they undertook consistent with the Attorney' Tariff Act. <sup>200</sup> Insofar the fee indicated here covers only filling and preparing the lawsuit. It is possible that there will occur further relevant fees, such as for correspondence or waiting in court. However there are also reduced fees for simple claims.

<sup>200</sup> "Rechtsanwaltstarifgesetz (RATG)", Federal Law Gazette (BGBl.) I, No. 189/1969, amended by Ordinance of 27.11.2015, Federal Law Gazette (BGBl.) II, No. 393/2015.

<b>ADR or other relevant procedure</b>	EUR 0	No legal assistance required	n.a.	Information is not available.	Pursuant to Sec. 13 Act on Alternative Dispute Resolution, <sup>201</sup> the procedure does not trigger any costs. There is the possibility to foresee a “minor cost contribution” in the respective alternative dispute resolution procedure (Sec. 6 para. 5 AStG).
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Notes: \* In Austria this is fixed fee depending on the value in dispute; in this case the range EUR 3500-7000 is applicable pursuant to Sec. 3 paras. 1 and 3 No. 1 Court Fees Act<sup>202</sup> with Annex I.1.I.; \*\* this is the fee for filling a suit before the District Court with a value in dispute of EUR 5000 including taxes, EUR 295.30 according to TP4/BG RATG and EUR 333.12 for preparing the suit according to TP3/A RATG; please note that legal assistance before District Courts is not mandatory up to an amount in dispute of EUR 5000 under Sec. 27 para. 1 ZPO; \*\*\* in the event of a dismissal, the claimant has to bear the costs of the opposing party, including fees for legal assistance; therefore the opposing party has to file a breakdown of costs according to Sec. 54 para. 1 ZPO; the losing party has the chance to file an objection; however, the Court ultimately decides on the precise amount that has to be reimbursed by the losing party (Sec. 52 para. 1 ZPO), which makes it hard to even estimate this amount.

**Hypothetical example: Terms which inappropriately exclude/limit consumers' rights to compensation**

*A consumer went on a package holiday with a friend to Kenya for which they paid € 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 €5,000 (€4,000 for the cost of the package and €1,000 for lost time and enjoyment). The tour operator agreed to compensate them €1,000 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/unfair-contract-terms/index\\_en.htm](http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-contract-terms/index_en.htm)]*

- Please estimate how often court and ADR procedures are used in your country for invoking the unfairness, and thereby the non-binding character of standard contract terms (i.e. the number of cases per year)?

There is not sufficient data available.

<sup>201</sup> "Alternative-Streitbeilegungs-Gesetz (AStG)", Federal Law Gazette (BGBl.) I, 105/2015.

<sup>202</sup> "Gerichtsgebührengesetz (GGG)", Federal Law Gazette (BGBl.) I, No. 501/1984, amended by Federal Act of 28.12.2015, Federal Law Gazette (BGBl.) I, No. 160/2015.

## C. Interviews conducted and literature reviewed

**Table 5: Interviews conducted for this study**

Organisation	Stakeholder type	Date
<b>Bundesministerium für Wissenschaft, Forschung und Wirtschaft (Federal Ministry of Science, Research and Economy)</b>	Ministry	22.07.2016
<b>Rundfunk und Telekom Regulierungs-GmbH (Austrian Regulatory Authority for Broadcasting and Telecommunications)</b>	National Regulatory Authority	22.07.2016
<b>Finanzmarktaufsicht (Financial Market Authority)</b>	National Regulatory Authority	25.07.2016
<b>Schutzverband gegen unlauteren Wettbewerb</b>	Association against Unfair Competition	15.07.2016
<b>Bundesministerium für Justiz (Federal Ministry of Justice)</b>	Ministry	25.07.2016
<b>1. Bundesministerium für Arbeit, Soziales und Konsumentenschutz (Federal Ministry of Labour, Social Affairs and Consumer Protection)</b> <b>2. Verein für Konsumenteninformation (Association for Consumer Information)</b> <b>3. Europäisches Verbraucherzentrum Österreich (European Consumer Centre Austria)</b> <b>4. Bundesarbeiterkammer (Federal Labour Chamber)</b>	1. Ministry 2. Consumer Organisation 3. Consumer Organisation 4. National Authority	26.07.2016
<b>Wirtschaftskammer Österreich (Austrian Economic Chamber)</b>	Business Organisation	09.08.2016

**Table 6: Literature reviewed for country report**

Author/Source	Year	Title of publication
Alexander	2002	“Vertrag und unlauterer Wettbewerb“, Berlin.
Alexander	2012	“Vertragsrecht und Lauterkeitsrecht unter dem Einfluss der Richtlinie 2005/29/EG über unlautere Geschäftspraktiken. Zugleich Besprechung der Entscheidung EuGH, 15.03.2012 – C-453/10 Pereničová und Perenič/SOS“, WRP (Wettbewerb in Recht und Praxis), p. 515.
Appl/Homar	2012	“Zugabenverbot: Das letzte Kapitel einer unendlichen Geschichte“, MR (Multimedia und Recht), p. 349.
Augenhofer	2002	“Gewährleistung und Werbung“, Vienna.
Augenhofer	2003	“Pippig versus Hartlauer: EuGH klärt offene Frage hinsichtlich vergleichender Werbung“, RdW (Recht der Wirtschaft), p. 682.
Augenhofer	2005	“Individualrechtliche Ansprüche des Verbrauchers aus unlauterem Wettbewerbsverhalten des Unternehmers“, in: Krejci/Keßler/Augenhofer (eds.), Lauterkeitsrecht im Umbruch: Europa – Deutschland – Österreich, Vienna.
Augenhofer	2006	“Individualrechtliche Ansprüche des Verbrauchers bei unlauterem Wettbewerbsverhalten des Unternehmers“, WRP (Wettbewerb in Recht und Praxis), p. 169.
Augenhofer	2010	“State of play of the implementation of the provisions on advertising in the unfair commercial practices legislation“ (Study for the Policy Department A of the European Parliament), Brussels.
Augenhofer	2011	“Country Report Austria“ in: Civic Consulting (eds.): Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU.
Augenhofer	2012	“Aktuelle Entwicklungstendenzen im Europäischen Verbraucherrecht“ in Susanne Augenhofer (ed.), Verbraucherrecht im Umbruch, Tübingen, p. 19.
Augenhofer	2012	“Some questions on enforcement and individual redress – the example of Regulation (EC) No 261/2004“ in: Festschrift Simotta, Vienna, p. 39.
Augenhofer	2016	“Unfair Commercial Practices and Austrian Private Law“, EuCML (Journal of European Consumer and Contract Law), p. 92.
Bollenberger	2011	“Lauterkeitsrecht und Irrtumsanfechtung“ in: Schenk/Lovrek/Musger/Neumayr (eds.), Festschrift für Irmgard Griss, Festschrift für Irmgard Griss, Vienna, p. 65.
Bollenberger	2011	“Grundfragen des Irrtumsrechts“ in: Fischer-Czermak and others (eds.), Festschrift 200 Jahre ABGB, Vienna, p. 877.
Bundesministerium für Arbeit, Soziales und Konsumentenschutz	2015	“KonsumentInnen-Barometer“, Vienna.
Bydlinski	2010	“Die Irrtumsanfechtung von Spekulations- und Vermögensanlagegeschäften“, ÖBA (Österreichisches Bankarchiv), p. 646.
Bydlinski	2013	“System und Prinzipien des Privatrechts“, Vienna.
Dehn	2015	“‘Information overkill‘ – Hat das Informationsmodell ausgedient?“, VbR (Zeitschrift für Verbraucherrecht), p. 33.



Deixler-Hübner/Kolba	2015	“Handbuch Verbraucherrecht“, Vienna.
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.
Enzinger	2012	“Lauterkeitsrecht – Eine systematische Darstellung zum Gesetz gegen den unlauteren Wettbewerb“, Vienna.
Faber	2001	“Handbuch zum neuen Gewährleistungsrecht“, Vienna.
Fehringer/Freund	2007	“Die Umsetzung der Richtlinie über unlautere Geschäftspraktiken in das UWG“, MR (Medien und Recht), p. 115.
Fenyves/Kerschner/Vonkilch (eds.)	2006	“Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch“, 3 <sup>rd</sup> edition, Vienna.
Fezer	2003	“Das wettbewerbsrechtliche Vertragsauflösungsrecht in der UWG-Reform“, WRP (Wettbewerb in Recht und Praxis), p. 138.
Gamerith	2006	“Kommission plant Kodifizierung der RLVerglWerbung“, ÖBl. (Österreichische Blätter zum Gewerblichen Rechtsschutz und Urheberrecht), p. 204.
Gamerith	2011	“Die schwarze Liste und das nationale Zugabenverbot“ in: Festschrift für Irmgard Griss, Vienna.
Geroldinger	2013	“Ergänzende Auslegung von Verbraucherverträgen trotz Verbots der geltungserhaltenden Reduktion?“, ÖBA (Österreichisches Bankarchiv), p. 27.
Griss	2005	“Haftung für Dritte im Wettbewerbsrecht und im allgemeinen Zivilrecht“, JBl (Juristische Blätter), p. 69.
Heidinger	2013	“Neuregelung der Ausverkaufsbestimmungen durch die UWG-Novelle 2013“, MR (Medien und Recht), p. 135.
Hellwege	2015	“It is necessary to strictly distinguish two forms of fairness control“, EuCML (Journal of European Consumer and Market Law), p. 129.
Henning-Bodewig	1981	“Die wettbewerbsrechtliche Haftung von Werbeagenturen“, GRUR (Gewerblicher Rechtsschutz und Urheberrecht), p. 164.
Kaps/Bräunlich	2013	“Wie lange bleibt man ein Kind? Zum Begriff ‘Kinder’ der Z 28 Anh UWG“, wbl (Wirtschaftsrechtliche Blätter), p. 614.
Kath	2007	“Rechtsfragen bei der Verwendung allgemeiner Geschäftsbedingungen“, Vienna.
Kiendl	1997	“Unfaire Klauseln in Verbraucherverträgen“, Vienna.
Köhler	2003	“UWG-Reform und Verbraucherschutz“ GRUR (Gewerblicher Rechtsschutz und Urheberrecht), p. 271.
Kolba/Leupold	2014	“Das neue Verbraucherrecht“, Vienna.
Kolmasch	2016	“Verbandsklage und IPR“, Zak (Zivilrecht aktuell), p. 203.
Konwitscha	2014	“Pro ergänzende Vertragsauslegung bei missbräuchlichen Klauseln“, VbR (Zeitschrift für Verbraucherrecht) 2014, p. 106.
Koppensteiner	2015	“Markt, Wettbewerb und Vertrag“, JBl (Juristische Blätter), p. 137.
Kosesnik-Wehrle (ed.)	2015	“Manzschers Kurzkomentar zum Konsumentenschutzgesetz“, 4 <sup>th</sup> edition, Vienna.

Koziol	1984	“Österreichisches Haftpflichtrecht. Band 2”, 2 <sup>nd</sup> edition, Vienna.
Koziol/Bydlinski/Bollenberger (eds.)	2014	“Kurzkommentar zum ABGB”, 4 <sup>th</sup> edition, Vienna.
Koziol/Welser	1992	“Grundriß des bürgerlichen Rechts, Teil I”, 9 <sup>th</sup> edition, Vienna.
Kraft/Steinmair	2013	“Praxiskommentar zum UWG”, Vienna.
Krutzler	2015	“Schadenersatz im Lauterkeitsrecht”, Vienna.
Kühnberg	2005	“Die Verbandsklage nach §§ 28ff. KSchG”, Vienna.
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.
Leitner	2005	“Das Transparenzgebot”, Vienna.
Leitner	2008	“AGB: Ungleichgewicht, Definition und Modelle zur Verwirklichung von Vertragsgerechtigkeit” in: Knyrim/Leitner/Perner/Riss Aktuelles AGB-Recht, Vienna, p. 5.
Leitner	2014	“Verbietet die Banesto-Entscheidung die ergänzende Vertragsauslegung?“, VbR (Zeitschrift für Verbraucherrecht), p. 170.
Leitner	2015	“Keine geltungserhaltende Auslegung von AGB auch im Individualverfahren“, ecolex (Zeitschrift für Wirtschaftsrecht), p. 754.
Leupold	2010	“Schadenersatzansprüche der Marktgegenseite nach UWG“, ÖBl (Österreichische Blätter für gewerblichen Rechtsschutz), p. 164.
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.
Micklitz/Reich	2012	“Und es bewegt sich doch?“ – Neues zum Unionsrecht der missbräuchlichen Klauseln in Verbraucherverträgen“, EuZW (Europäische Zeitschrift für Wirtschaftsrecht), p. 126.
Nennen	2005	“Vertragspflichten und Störerhaftung der Werbeagenturen“, GRUR (Gewerblicher Rechtsschutz und Urheberrecht), p. 214.
Palma	2014	“Unzulässige ABG-Änderungen – Auswirkungen der E 1 Ob 210/12g“, VbR (Zeitschrift für Verbraucherrecht), p. 84.
Parapatis	2008	“Das Transparenzgebot im Unternehmergegeschäft“ in: Knyrim/Leitner/Perner/Riss, Aktuelles AGB-Recht, p. 35, Vienna.
Prunbauer-Glaser	2008	“Kinder, Kinder! – Zum ‘Kind’ in der Werbung nach der UWG-Nov 2007“ ÖBl. (Österreichische Blätter für Urheberrecht und Gewerblichen Rechtsschutz), p. 164.
Prunbauer-Glaser	2013	“ Was bleibt von den Ausverkaufsbestimmungen der §§ 33a ff UWG nach dem Köck-Urteil des EuGH? - UWG-Novelle 2013!“, RuW (Recht und Wirtschaft), p. 4.
Prunbauer-Glaser/Seidelberger	2015	“Die Wettbewerbsfibel“, 12 <sup>th</sup> edition, Vienna.
Rechberger	2014	„Kommentar zur ZPO“, 4 <sup>th</sup> edition, Vienna.

Rechberger/Simotta	2010	“Grundriss des österreichischen Zivilprozessrechts“, 8 <sup>th</sup> edition, Vienna.
Riss	2007	“Die Reichweite des Unterlassungsanspruch im Verbandsklageverfahren“, RdW (Recht der Wirtschaft), p. 395.
Robertson	2015	“‘Was kost' die Welt?’ Neues zur Preisauszeichnung von Pauschalreisen im Lauterkeitsrecht“, RdW (Recht der Wirtschaft), p. 379.
Roth	2012	“Litigating in Austria – Are Costs and Fees Worth it?” in: Reimann (ed.), Cost and Fee Allocation in Civil Procedure, p. 69, New York.
Rummel (ed.)	2002	“Kommentar zum ABGB“, 3 <sup>rd</sup> edition, Vienna.
Rungg/Walser	2011	“Was bleibt vom Zugabenverbot“, MR (Medien und Recht), p. 90.
Sack	2004	“Folgeverträge unlauteren Wettbewerbs“, GRUR (Gewerblicher Rechtsschutz und Urheberrecht), p. 637.
Schopper	2010	“Die Verwendung unzulässiger Allgemeiner Geschäftsbedingungen als Wettbewerbsverstoß“, ecolex (Zeitschrift für Wirtschaftsrecht), p. 684.
Schuhmacher	2007	“Die UWG Novelle 2007“, wbl (Wirtschaftsrechtliche Blätter), p. 557.
Schuhmacher	2010	“Das Ende der österreichischen per-se-Verbote von ‘Geschäftspraktiken’ gegenüber Verbrauchern“, wbl (Wirtschaftsrechtliche Blätter), p. 612.
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 verbraucher-schützenden Lauterkeitsrecht der Mitgliedstaaten“, Osnabrück.
Schwimann	2015	“Taschenkommentar ABGB“, 3 <sup>rd</sup> edition, Vienna.
Schwimann/Kodek (eds.)	2014	“Praxiskommentar zum ABGB. Band 4“, 4 <sup>th</sup> edition, Vienna.
Schwimann/Kodek (eds.)	2015	“Praxiskommentar zum ABGB. Band 5a“, 4 <sup>th</sup> edition, Vienna.
Seidelberger	2004	“Vergleichende Werbung im Überblick“ in: Schutzverband gegen den Unlauteren Wettbewerb (ed.): Aktuelle Herausforderungen des Lauterkeitsrechts, Vienna, p. 219.
Seidelberger	2010	“Täuschende Eintragungsgangebote nehmen massiv zu“, ÖBl (Österreichische Blätter für Urheberrecht und Gewerblichen Rechtsschutz), p. 244.
Seidelberger	2014	“Die ‘unfreiwilligen’ UWG-Novellen 2013 durch die Judikatur des EuGH“ in: Staudegger/Thiele (eds.): Geistiges Eigentum. Jahrbuch 2014, Vienna, p. 263.
Seidelberger	2016	“Überraschungen der UGP-Richtlinie für UWG-Verfahren in der Praxis“ in: Augenhöfer/Alexander (eds.): 10 Jahre UGP-Richtlinie, Tübingen, p. 109.
Thiele	2013	“Zero Intern – Rechtswidrige AGbs als Lauterkeitsverstoß“, RdW (Recht der Wirtschaft), p. 388.
Thiele	2013	“EuGH bestätigt Unlauterkeit durch gesetzwidrige AGB“ RdW (Recht der Wirtschaft), p. 186.
Thöni	2010	“Vertragsrechtliche Relevanz von Verstößen gegen § 2 Abs. 6 UWG?“, ÖJZ (Österreichische Juristen-Zeitung), p. 698.

Trenker	2015	“§ 273 Abs 2 Fall 2 ZPO – Ansätze eines Bagatellverfahrens” RZ (Österreichische Richterzeitung), p. 74.
Ummenberger-Zierler	2016	“Harmonisierung auf Kosten der Rechtstransparenz” in: Augenhöfer/Alexander (eds.): 10 Jahre UGP-Richtlinie, Tübingen, p. 25.
Wamprechtshamer	2000	“Die Neuordnung der vergleichenden Werbung, ÖBl. (Österreichische Blätter zum Gewerblichen Rechtsschutz und Urheberrecht), p. 147.
Welser	1973	“Das Verschulden bei Vertragsschluss im österreichischen bürgerlichen Recht”, ÖJZ (Österreichische Juristen-Zeitung), p. 282.
Welser/Jud	2001	“Die neue Gewährleistung”, Vienna.
Wiebe	2016	“Wettbewerbs- und Immaterialgüterrecht”, 2 <sup>nd</sup> edition, Vienna.
Wiebe/Kodeck (eds.)	2016	“Kommentar zum Gesetz gegen Unlauteren Wettbewerb”, 2nd edition, Vienna.
Wiltschek	2013	“Kommentar zum UWG”, Vienna.
Wiltschek/Majchrzak	2008	“Die Umsetzung der Richtlinie über unlautere Geschäftspraktiken in Österreich”, ÖBl. (Österreichische Blätter zum Gewerblichen Rechtsschutz und Urheberrecht), p. 4.
Zemann	2014	“Lauterkeitsrechtliche Dimension von Verstößen gegen gesetzliche Informationspflichten, ecolex (Zeitschrift für Wirtschaftsrecht), p. 928.

# 1. Study to support the Fitness Check of EU Consumer law – Country report BELGIUM

## 1.1. Unfair commercial practices and marketing

### 1.1.1. Effectiveness of the UCPD in establishing a high level of consumer protection

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

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

Among Member States, Belgium was a forerunner in the field of protection against unfair practices. This may explain that, in the beginning, there was some reluctance to apply the Directive: the old law seemed good enough. Nonetheless, the overall assessment is positive.

From the point of view of enforcers, the added value of UCPD lies in the fact that the general clauses enable authorities (the Ministry for the Economy) to intervene in cases where, prior to the directive, Belgian law would not have provided a legal basis. However, the general clause is considered a mixed blessing.

The Inspectorate (the section of the Ministry for the Economy in charge of enforcing consumer protection rules) is wary of relying on article 5 of the UCPD, because inspectors are never quite sure whether they will be able to prove unfairness to the requisite legal standard should the case be litigated. The semi-general clauses (art 6 to 8 of the UCPD) have rarely been used. It is only recently that the Inspectorate started relying on article 8 of the UCPD (aggressive practices) in the furniture sector. Enforcers consider the list in annex I of the directive as very helpful.

Judges see both advantages and drawbacks with the general principles. On the one hand, they do value the open-endedness of the general clause for the flexibility it gives in adapting enforcement to changing commercial practices. On the other hand, some wonder whether the EU legislator is always aware of the practical problems raised by open textured legislative provisions. The more general the provision, the harder it is for consumer to prove the unfair nature of a commercial practice. In this regard, black lists are much more convenient because they are more specific and lead to a lighter burden of proof for consumers and consumer associations. Moreover, precise provisions have a greater preventive effect on businesses, who know that a certain commercial practice is *per se* prohibited, and therefore will refrain from engaging in it.

One judge explains that lower courts tend to rely on general contract law to address unfair commercial practices. According to him, they thereby reach the same outcomes and level of consumer protection as if they had applied the specific rules transposing UCPD. An explanation for this practice of substituting general contract law rules for specific consumer law rules could be that lawyers are more familiar with contract law and prefer, where possible, to rely on contractual standards rather than on the equally open-ended but less familiar standards of UCPD. If this view is correct, it could mean that what creates a sense of difficulty is not so much the open-textured nature of the provisions in itself as the lack of genuine familiarity among legal actors, which develops only over time.

Government authorities state and case-law shows that it is not always easy to prove that both conditions of the general unfairness test are met. This is especially the case for the proof of the (potential) material distortion.<sup>1</sup> In this regard, additional guidance in the form of a typology of distortive practices based on insights from psychology

<sup>1</sup> J. GODDAER and E. TERRY, "Unfair B2C commercial practices" in G. STRAETMANS and J. STUYCK (eds.), *Commercial practices*, 2015, (47) 76.

could be helpful.<sup>2</sup> The limited Belgian case-law that is available shows that infringement of article 5 of the UCPD is often invoked in conjunction with an infringement of the prohibition of misleading actions and/or omissions.<sup>3</sup> Furthermore, some authors argue that because of the vagueness of some concepts ('commercial practice', 'professional diligence' and specifically 'special skill and care', 'reasonable expectations', 'honest market practices' or 'good faith'), there is ample room for subjective interpretation. This leaves a large margin of discretion to the courts and, it is argued, possibly runs against the objective of harmonisation and, therefore, of improving the functioning of the internal market.<sup>4</sup>

The leading consumer association's point of view is consistent with that of the enforcement authority. They underscore the practical value of the blacklist and also agree that broad provisions are necessary to catch practices that may be unfair but are not blacklisted. Comparing with the previous state of Belgian consumer law, the consumer association notes that the principle based approach creates some practical difficulties. They mention problem with door step selling in the energy sector: under Belgian law, door to door selling used to be prohibited for transactions above 250€. Because of maximum harmonisation, this prohibition was removed and the association has to make do with the general clause. They would clearly prefer that this were added the black list. Another area where protecting consumers has been made more difficult in practice is 'false sales', i.e. when traders claim that the price is reduced when in fact it is not. Under current legislation, the consumer association regrets that enforcement authorities cannot do anything in this regard.

The same consumer association indicates that, in practice, the UCPD is mostly used in injunction procedures. As these are expedited procedures, they do not lend themselves very well to the application of open-textured rules. The other context in which UCPD is relied on is class actions, where this issue is less acute.

A business association, for its part, stated that the principle-based approach is advantageous compared to very specific and detailed rules, since it leaves room for contractual freedom and freedom of trade. General clauses have the advantage that businesses still have a margin of appreciation in judging whether a commercial practice is unfair and can take specific circumstances into account.

The fact that the general clause has been rarely applied in Belgium, and that both consumers and enforcement authorities are uncertain about what evidence they need to provide in order to successfully bring a case under article 5 of the UCPD, should not lead to a departure from the principle-based approach. The function of a general clause, such as article 5, is to act as a 'safety net'.<sup>5</sup> In the absence of any general clause, the risk is that businesses will circumvent any black list by inventing practices that are not prohibited *per se* but are equivalent in their effect. A safety net need not be used frequently to fulfil its function. Detailed guidance, such as that published by the Commission in May 2016,<sup>6</sup> may help enforcers and consumer organisation gain confidence in using the general clause.

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

<sup>2</sup> A-L Sibony, Can EU Consumer Law Benefit From Behavioural Insights? An Analysis of the Unfair Practices Directive, *European Review of Private Law*, 2014, vol. 22, n° 6, pp. 903-942.

<sup>3</sup> See for example Brussels 4 May 2010, *NJW* 2011, issue 238, (182) 182-184; Pres. Comm. Brussels 8 June 2009, *Jb.Hand.Med.* 2009 (142) 142.

<sup>4</sup> J. GODDAER and E. TERRY, cited at footnote 1, 59-60.

<sup>5</sup> L. DE BROUWER and G. SORREAU, "La nouvelle loi sur les pratiques du commerce et la protection du consommateur : une occasion manquée", *TBH* 2008, issue 5, (371) 384, no. 48 ; J. GODDAER and E. TERRY, cited at footnote 1, 55.

<sup>6</sup> Guidance on the implementation/application of directive 2005/29/EC on unfair commercial practices, SWD(2016) 163 final, [http://ec.europa.eu/justice/consumer-marketing/files/ucp\\_guidance\\_en.pdf](http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf)

In principle, a black list has advantages for enforcement authorities, businesses and consumers. For businesses, it provides welcome legal certainty. For enforcers and for consumers, not having to apply the transactional decision test considerably lightens the burden of proof,<sup>7</sup> as was confirmed by a judge. However, in order to produce these benefits and to ensure uniform application throughout Europe, the blacklisted practices should be precisely defined, which is currently not the case.

As has been noted by a scholar, a number of provisions in the blacklist raise questions.<sup>8</sup> An example is the unfair commercial practice which creates an impression that the consumer cannot leave the premises until a contract is formed (blacklist, n° 24). It is not always clear to enforcers how broadly 'premises' should be defined, or how 'the impression' (of an average consumer) should be assessed. Another example is the aggressive advertisement toward children. A judge considers the notion of direct exhortations to children (blacklist, n° 28) almost impossible to apply in practice. Because the black list in the annex of UCPD calls for *in concreto* assessment by national courts,<sup>9</sup> it does not always lighten the burden of proof for consumers in practice.<sup>10</sup> It is noteworthy that a business association also reports that its members experience difficulties in applying the black list.

Presenting the list as a grey list may have been a better option than making its application mandatory in cases when it presents real difficulties for courts. That being said, some scholars argue that the black list has the virtue that it greatly helped raise awareness of certain unfair commercial practices among legal practitioners and judges.<sup>11</sup> There does not seem to be an agreement among stakeholders as to the optimal length of the blacklist. One author argues that the black list is too long and should only contain practices that are most common and harmful or which are unfair in all circumstances.<sup>12</sup> On the other hand, the Belgian Ministry for the Economy would like to be able to add items to the black list.

In Belgian case-law, there are few applications of the black list. This could be due to the fact that the black list is dissuasive and/or to the fact that enforcers and courts find it hard to apply. The few applications by courts concern especially those practices that were already forbidden under the old Belgian law.<sup>13</sup>

To conclude, stakeholders do not call into question the benefit of having a black list, in particular because it lightens the burden of proof for consumers. Most provisions in the current black list do not seem to raise problems. However, several provisions are considered too open-ended to be usefully included in a black list.

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

For financial services, Belgium does have national provisions that go beyond the level of protection provided under the UCPD. For example, joint selling is prohibited for financial services. However, the Belgian legislator provided that, in principle, financial services should not be excluded from the scope of book VI of the Code of Economic Law (hereinafter: 'CEL') on 'market practices and consumer protection' (where the UCPD is transposed). More precisely, the provisions stemming from the UCPD apply to financial services where 'a different treatment serves no purpose and only causes

<sup>7</sup> J. STUYCK, *Handels- en economisch recht. 2. Mededingingsrecht. A: Handelspraktijken in Beginselen van Belgisch Privaatrecht*, issue 13, 2013, 286, no. 308.

<sup>8</sup> J. STUYCK, cited at footnote 7, 307-308, no. 345 and 310-315, no. 349.

<sup>9</sup> J. STUYCK, cited at footnote 7, 285, no. 308.

<sup>10</sup> R. STEENNOT and P. GEERTS, "De implementatie van de Richtlijn Oneerlijke Handelspraktijken in België en Nederland", in *TPR* 2011, (677) 741, no. 89.

<sup>11</sup> R. STEENNOT and P. GEERTS, cited at footnote 10, no. 89.

<sup>12</sup> B. KEIRSBILCK, "Which way forward for the new European law of unfair commercial practices?", *REDC* 2013, issue 2, (233) 261, no. 34; J. STUYCK, cited at footnote 7, 286, nr. 308.

<sup>13</sup> B. KEIRSBILCK, *Art. 91 Wet betreffende marktpraktijken en consumentenbescherming in X, Handels- en economisch recht. Commentaar met overzicht van rechtspraak en rechtsleer*, 2013.



confusion'.<sup>14</sup> It seems that the executive and the legislative branch are not thinking along the exact same lines on the issue of maximum harmonisation. The Belgian legislator displays a preference for maximum harmonisation, while Belgian government authorities are in favour of minimum harmonisation for financial services.

According to a judge, the national provisions applying specifically to financial services are not better known and understood by consumers than the general provisions. On the contrary, even professionals, e.g. lawyers, often do not know these provisions. Furthermore, this judge pointed out that courts not always apply these provisions *ex officio*, because they would need to invite the parties to debate their application to the facts of the case and there is often no time for this. Another judge reports that provisions applying specifically to financial services bring real benefits for consumers and allow courts to cope with cultural differences. The same judge praised the maximum harmonisation of Directive 2002/65 on financial services provided at a distance. In short, there does not seem to be a consensus on the issue of minimum harmonisation with regard to unfair commercial practices in financial services.

- 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 what 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?*]

Regarding misleading practices in the energy market, a code of conduct applying specifically to the energy market has been adopted.<sup>15</sup> It serves the functions initially envisaged for codes of conduct in general in relation to the UCPD, namely to give guidance as to what constitutes a practice 'contrary to professional diligence'. It reiterates the prohibitions of the UCPD and goes further in some respects. The major energy suppliers, who, together, cover a very large part of the retail market, have adhered to this code, but two new entrants have not. As an observer notes, a strategy of consumer service and cooperation with consumer protection may constitute a means for incumbents to resist new competitors. Indeed, suppliers who have adhered to the code have agreed that Belgian enforcement authorities may prosecute any violation of the code of conduct as an unfair practice.

Officials from the Belgian Ministry for the Economy regret that two new entrants have not adhered to the code and wish it were possible to make the code binding on all operators in the sector. They fear that the current solution – a voluntary code of conduct – is both damaging in terms of fair competition (the playing field is not level) and less effective in terms of consumer protection than binding rules would be. In this regard, the maximum harmonisation approach of the UCPD causes some frustration. This is especially the case since consumer protection in the energy market is high on the agenda of the current minister. Given the choice in favour of maximum harmonisation, Belgian enforcement authorities feel that the best solution would be to extend the harmonised black list. The industry federation for its part has already shown it was reticent to the adoption of codes of conduct and would no doubt resist any attempt to extend the black list, let alone 'Europeanise' it. The code of conduct is being evaluated and the dialogue between stakeholders in the sector is ongoing within the framework of a multiparty working group (to whose recommendations the Commission referred in its 2016 UCPD guidance notice).

Concerning environmental claims, very few complaints regarding 'green washing' have been filed with the Economic Inspectorate (three in five years). There are however more complaints about the CO<sub>2</sub> emissions of cars, an area that is regulated by

<sup>14</sup> MvT, 24 september 2013, *Parl.St. Kamer*, DOC 53 3018/1, 19-20.

<sup>15</sup> Accord "Le consommateur dans le marché libéralisé de l'électricité et du gaz", October 2013, [http://economie.fgov.be/fr/binaries/accord\\_electricity\\_fr\\_tcm326-41209.pdf](http://economie.fgov.be/fr/binaries/accord_electricity_fr_tcm326-41209.pdf) (FR), [http://economie.fgov.be/nl/binaries/accord\\_electricity\\_nl\\_tcm325-41209.pdf](http://economie.fgov.be/nl/binaries/accord_electricity_nl_tcm325-41209.pdf) (NL).

another code of conduct.<sup>16</sup> It is apparent that some car manufacturers do not respect their own environmental codes of conduct, but the Economic Inspectorate feels it cannot intervene because the practices that violate the code of conduct do not meet the criteria of article 6 of the UCPD. Indeed, car manufacturers do not firmly commit to be bound by their own codes or indicate to consumers that they are bound by a code.<sup>17</sup> Officials from the Ministry of the Economy wish the violation of a firm's own code of conduct were *per se* prohibited.

As to court cases, a judge pointed to a precedent in the Netherlands.<sup>18</sup>

The leading consumer association for its part has started a class action based on national provisions transposing the UCPD in the 'Dieselgate' case. The case is about misleading information regarding CO2 emissions. At the time of writing this report, the Association was awaiting judgement on admissibility of the action, so that it is too early to assess success.

The most pressing problem with the application of UCPD is not specific to environmental claims, the consumer association explains. It is that judges who rule at first instance for small claims (*juges de paix*) are not familiar with consumer protection rules. The association identifies a clear need for training of judges.

- 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 your country rigidly?*]

Prior to the UCPD, art. 94 of the Trade Practices Act of 1991 (hereinafter: 'TPA') contained an unfairness test, which referred to the interests of 'consumers'. When the UCPD was initially transposed in 2007, the Belgian Parliament did not adopt the terminology of the 'average' consumer. A change was deemed unnecessary on the grounds that Belgian law, despite its different wording, already complied with the directive. Moreover, it was feared that altering the wording in the legal test would cause unnecessary confusion as to the continued relevance of the case law applying the initial test.<sup>19</sup> A scholarly discussion developed as to whether the Belgian standard was really equivalent to the average consumer standard. This was less than clear, since the Belgian Court of Cassation had ruled that the TPA aimed to protect the 'least informed consumer' (to the great satisfaction of consumer organisations).<sup>20</sup> However, several lower courts had relied on a different benchmark, that of a 'reasonably well-informed, observant, circumspect and critical consumer', endowed with a minimum of common sense. There was therefore some uncertainty as to what standard was applicable.

The Market Practices and Consumer Protection Act of 2010 (hereinafter, 'MPCPA'), which replaced the TPA, brought a welcome clarification. The new law adopted the language of the Directive and the general clause, as well as semi-general clauses and black list were replicated word for word. The 'average consumer' standard was therefore introduced in the legal provisions now found at art. VI.93 Book VI of the CEL. This legislative change was accompanied by a declaration from the government

<sup>16</sup> Code en matière de publicité pour les véhicules automobiles ainsi que leurs composants et accessoires (2014), [http://www.febiac.be/documents\\_febiac/2014/code2014/code%20Febiac%20FR%20-%202014.pdf](http://www.febiac.be/documents_febiac/2014/code2014/code%20Febiac%20FR%20-%202014.pdf) (FR); Code inzake reclame voor motorrijtuigen, hun onderdelen en toebehoren, [http://www.febiac.be/documents\\_febiac/Pubcode\\_NL.pdf](http://www.febiac.be/documents_febiac/Pubcode_NL.pdf) (NL).

<sup>17</sup> Article 6 paragraph 2 UCPD.

<sup>18</sup> Rechtbank Zeeland-West Brabant, 17 March 2014, Case C/02/275080/ KG ZA 13-837, Stichting Brandstofverlies / Louwman en Parqui BV.

<sup>19</sup> MvT, 9 maart 2007, *Parl.St.* Kamer, DOC 51 2983/001, 24-25; J. GODDAER and E. TERRY, "Unfair B2C commercial practices" in G. STRAETMANS and J. STUYCK (eds.), *Commercial practices*, 2015, (47) 66; R. STEENNOT, "Consumentenbescherming 2003-2007", *TPR* 2009, issue 1, (345) 375, nr. 185.

<sup>20</sup> R. STEENNOT and P. GEERTS, "De implementatie van de Richtlijn Oneerlijke Handelspraktijken in België en Nederland", in *TPR* 2011, (677) 737-738, no. 85.

that Belgian courts have been 'quasi-unanimous' in applying the average consumer standard for decades and that the new wording should not bring about any change in the judicial practice.<sup>21</sup>

Scholars have pointed out that the average consumer standard affords enforcement authorities and national courts a margin of appreciation, in particular when assessing how the average consumer behaves in a given situation<sup>22</sup> or how social, cultural and linguistic factors play out in relation to cross-border commercial practices.<sup>23</sup> National courts have to assess whether the commercial practice at stake could have an appreciable impact on the decision of the average consumer (*in abstracto*), but still have to investigate the facts and circumstances of a particular case (*in concreto*).<sup>24</sup>

Judges seem to display different sensitivities as to the average consumer standard. While one welcomes the flexibility of the standard, another underscores the drawbacks of its vagueness. However, both judges and scholars concur in thinking that standard is not entirely abstract and should be applied in connection with the specific facts of the case.

In case law, the average consumer standard does not seem to be applied in a way that is favourable to consumers.<sup>25</sup> For example, in a case about an advertisement for an eco-friendly washing product, the question arose 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.<sup>26</sup> 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. In other words, the court 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. This seems a rather formidable assumption, not only as to consumers' technical knowledge but also and more importantly as to their level of attention and immunity from predictable errors due to mental shortcuts.<sup>27</sup>

<sup>21</sup> Doc. Parl., Chambre, 2009-2010, DOC 52-2340/005, p. 53.

<sup>22</sup> B. KEIRSBILCK, *The New European Law of Unfair Commercial Practices and Competition Law*, Oxford, Hart Publishing, 2011, 284, no. 345.

<sup>23</sup> J. GODDAER and E. TERRY, "Unfair B2C commercial practices" in G. STRAETMANS and J. STUYCK (eds.), *Commercial practices*, 2015, (47) 67; B. KEIRSBILCK, *The New European Law of Unfair Commercial Practices and Competition Law*, Oxford, Hart Publishing, 2011, 286, no. 347.

<sup>24</sup> R. STEENNOT, "Consumentenbescherming 2003-2007", *TPR* 2009, issue 1, (345) 375, nr. 185

<sup>25</sup> Antwerp, Court of Appeal, 21 November 2012, *Jaarboek Marktpraktijken, Intellectuele eigendom en Mededinging* 2012, 458. Consumers should expect that financial services entail risks. For advertisement to qualify as misleading it should provide incorrect information or a risk in this sense should exist.

<sup>26</sup> 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.

<sup>27</sup> 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

Similarly, in the field of telecom and television contracts, Belgian Courts seem to consider that the average consumer is very diligent and attentive. An offer for a TV subscription was held not to be misleading if, next to the large font, an asterisk draws the attention of the consumer to the terms and condition in small font.<sup>28</sup> A footnote, however, is not a requirement. In a judgement about an offer for a phone subscription, the Court of Appeals of Mons ruled that an advertisement was not misleading, even if the mention in large font did not contain a direct reference to the details of the offer, as long as the details were available in the brochure, even if in small font.<sup>29</sup> Only where the advertising slogan in large font makes no reference at all to the specifics of the subscription contract, has an offer been considered misleading.<sup>30</sup> The decisive criterion therefore seems to be whether the consumer has been given access to the relevant information. Very little attention seems to be given to how consumers typically react to information or how reactions vary depending on how the information is given.

Where an inexact advertising slogan is followed by a comparison table which enables the consumers to compare competing offers, the advertisement is not considered misleading.<sup>31</sup> On the contrary, the average consumer interested in subscribing to a TV contract to be able to watch the national football competition can be misled by the lack of information regarding the precise content of a TV offer where the content differs significantly from alternative offers on the market.<sup>32</sup>

In the same vein the Brussels Court of appeals ruled in a case involving an advertisement focused on a comparison between a basket of goods sold in two competing supermarket chains that the burden of proof on consumers was quite heavy. The advertisement is misleading where, considering the factual circumstances of the advertisement, a significant number of consumers could be inclined to purchase products of the advertiser where the consumers are wrongfully led to believe that the product basket mentioned in the advertisement *is representative* for all the advertiser's products and consumers are led to believe that they can save a certain amount of money or that *all of advertiser's products* are cheaper than those of a competitor.<sup>33</sup> This would seem to require rather specific empirical studies.

The leading consumer association is of the view that courts apply the average consumer standard in a way that is not favourable to consumers, in that they assume too much about the average consumer. For instance, in a case where the buyer of a house complained that the seller had omitted some important information about the property and sued the seller for damages, the seller brought a counter claim against his estate broker, arguing that it was the broker's professional duty to bring his attention to the importance of the piece of information which was missing. The court held that the seller (a consumer) was jointly liable for the lack of pre-contractual information.<sup>34</sup>

Given this unfavourable information-only orientation of the case law, it is no surprise that a business association has no objection to the 'average consumer' standard and explains that it is viewed 'neither positively nor negatively' by Belgian businesses.

- The practical benefits for consumers of the specific protection of "vulnerable consumers" introduced by the directive; [*Key aspects to consider are: Have*

mind]. On the prevalence of mental shortcuts generally, see. D. Kahneman, *Thinking Fast, Thinking Slow*, NY: Farrar, Straus and Giroux, 2011.

<sup>28</sup> Bruxelles (9e chambre) 29 april 2015, J.L.M.B. 2015, n°28, 1324.

<sup>29</sup> Mons Court of appeals, Tecteo c. Favco, 16 sept. 2013.

<sup>30</sup> Brussels Court of Appeals, 2006

<sup>31</sup> Brussels Court of Appeals, 28 June 2013.

<sup>32</sup> Brussels Court of Appeals, 27 June 2013.

<sup>33</sup> Court of Appeal Brussels, ALDI v. Delhaize, 29 January 2013, *Jaarboek Marktpraktijken, Intellectuele eigendom en Mededinging* 2013, 431 (our emphasis).

<sup>34</sup> The stakeholder did not share the reference of this unpublished case.

*enforcement authorities/courts in your country recognised new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted)?]*

Belgium transposed the categories of vulnerable consumers mentioned in the UCPD literally. Enforcement authorities have not recognised any other categories. Lower courts however use a new category in practice, namely indebted consumers. They take the degree of indebtedness of the consumer into account to adapt payment schedules.

Overall, no real problems regarding the concept of vulnerable consumers have surfaced in Belgium. A judge explained that it is applied in a flexible manner. Higher courts consider that this pragmatic approach is appropriate to address unfair commercial practices towards particularly vulnerable consumers and that there is no need to recognise additional categories of vulnerable consumers. Indeed, some judges think the fewer categories the better.

Some scholars agree with this opinion and warn that categorisation creates the risk of different levels of protection in similar situations. For example, Duivenvoorde asks why a vulnerable consumer belonging to an identifiable group, such as young or old people with limited cognitive abilities, should enjoy special protection, while a vulnerable consumer with limited cognitive abilities for other reasons (genetic, cultural or educational reasons), who may therefore not be considered as belonging to a clearly identifiable group, should not be similarly protected.<sup>35</sup> Therefore, he doubts whether the requirement that 'vulnerable consumers' belong to a 'clearly identifiable group' is sound and suggests that a pragmatic approach is more suited when assessing whether a consumer is vulnerable in the specific case.

Other scholars too have criticized the concept of vulnerable consumers, because it lacks practical and logical foundations, is slightly arbitrary and causes uncertainty or unpredictability.<sup>36</sup> In practice, it seems sometimes difficult to identify a group of vulnerable consumers, since they are not always 'clearly identifiable' or because there is still a lot of uncertainties as to what 'clearly identifiable' means (identifiable – or identified – by traders? identifiable by courts?).<sup>37</sup> As Duivenboorde suggests,<sup>38</sup> the focus should be on whether a commercial practice is designed to exploit the vulnerabilities of consumers in a specific case, rather than on identifying groups of vulnerable consumers.

However, a judge suggests that consumers addicted to alcohol should be recognised as a category of vulnerable consumers.

A consumer association for its parts suggests that handicapped persons do not always get the special treatment they deserve in Belgian courts. For example, a handicapped person experiencing a problem with a wheelchair should in their view deserve special attention from courts when it comes to applying rules on warranty.<sup>39</sup>

<sup>35</sup> B. DUIVENVOORDE, "The Protection of Vulnerable Consumers under the Unfair Commercial Practices Directive", *EUVR* 2013, issue 2, (70) 79.

<sup>36</sup> J. GODDAER and E. TERRY, "Unfair B2C commercial practices" in G. STRAETMANS and J. STUYCK (eds.), *Commercial practices*, 2015, (47) 73; J. STUYCK, *Handels- en economisch recht. 2. Mededingingsrecht. A: Handelspraktijken in Beginselen van Belgisch Privaatrecht*, issue 13, 2013, 270, nr. 289;

<sup>37</sup> B. DUIVENVOORDE, *The Consumer Benchmarks in the Unfair Commercial Practices Directive*, Springer, 2015, 69-71.

<sup>38</sup> B. DUIVENVOORDE, "The Protection of Vulnerable Consumers under the Unfair Commercial Practices Directive", *EUVR* 2013, issue 2, (70) 79.

<sup>39</sup> Stakeholders were not very specific as to what was meant by 'special attention', nor did they share a specific reference to a court case.



- 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?*]

In Belgium, there are a number of sectoral codes of conduct: the energy market, the telecom market and sport clubs are cases in point.<sup>40</sup> There are also codes with a broader scope of application, such as a general clients charter adopted in 2010. The Belgian Ministry for the Economy is conducting an evaluation on codes at the moment.

Different stakeholders have diverging views about the virtues of codes of conduct. Overall, business organisations prefer self- and co-regulation over regulation and favour codes of conducts or guidelines after dialogue between all relevant stakeholders.<sup>41</sup>

According to the government authorities, codes of conduct are helpful, but not sufficient. They are helpful in appraising professional diligence under the general clause. The main shortcoming officials observe with existing codes is linked to their voluntary nature. When some key actors in a given sector do not adhere to the code, be it new entrants in the energy sector or a major chain of sports clubs, the best practices are not uniformly applied. This raises both issues of consumer protection and unfair competition. Government authorities therefore argue that the violation of a code of conduct should be *per se* prohibited (blacklisted). That would in effect amount to making codes of conduct binding and extend their scope of application to all undertakings in the sector concerned (or all undertakings trading in Belgium in the case of cross-sector codes).

A judge pointed out that these codes of conducts improve consumer protection in some respects, but because they are drafted by business actors, they also display a corporatist dimension. Another judge mentioned the Advertising Council (*Conseil de la publicité*) as a successful co-regulation venture. This Council has been in existence since 1967. Its members are professional associations representing advertisers, communication agencies and media. Together, they are responsible for 95% of the advertisements released in Belgium.<sup>42</sup> The Council runs an advertisement ethics body (*Jury d'Ethique Publicitaire*, JEP), which is a self-regulatory body.

According to a business association, self- and co-regulation function very well: consumer protection is kept at a high level, without hindering freedom of trade. The enforcement authority (Economic Inspectorate) has a long practice of implementing guidelines after extensive consultation, discussion and constructive dialogue with business associations, as well as with consumer associations. A specific example are the guidelines from the Economic Inspectorate regarding marketing at the annual car show in Brussels. Compliance is reportedly excellent and this is said to enhance both consumer trust in offers made at the car show and consumer protection.

For its part, the leading consumer associations would prefer less codes and more hard law. They see numerous violations of existing codes (especially the one on sun tan booths) and little enforcement.

<sup>40</sup> For a complete list of codes of conduct (and full text access), see [http://economie.fgov.be/fr/consommateurs/Pratiques\\_commerce/Codes\\_bonne\\_conduite/Coregulation/#.V7G\\_ypQLTKI](http://economie.fgov.be/fr/consommateurs/Pratiques_commerce/Codes_bonne_conduite/Coregulation/#.V7G_ypQLTKI). The list includes a code on green advertising, a code on advertising financial products targeted at young consumers, a code on advertising for savings accounts and life insurance.

<sup>41</sup> This opinion was repeatedly stated in the interview with a business association, and can also be found in documents concerning B2B unfair commercial practices. E.g. X, "Réponses de la Concertation de la chaîne agro-alimentaire aux questions dans le cadre de la de la concertation des stakeholders. Livre vert sur les pratiques commerciales déloyales dans la chaîne d'approvisionnement alimentaire et non-alimentaire interentreprises en Europe COM (2013) 37 final", [http://ec.europa.eu/internal\\_market/consultations/2013/unfair-trading-practices/docs/contributions/individuals-and-others/comeos-fevia-boerenbond\\_fr.pdf](http://ec.europa.eu/internal_market/consultations/2013/unfair-trading-practices/docs/contributions/individuals-and-others/comeos-fevia-boerenbond_fr.pdf).

<sup>42</sup> Council's own figure. <http://www.raadvoordereclame.be>

- 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?

Government officials think the black list should be extended and suggest adding the following practices:

- Violation of a code of conduct to which a professional has adhered (it is in itself contrary to professional diligence and officials feel 6, §2, b UCPD unduly restricts the possibility to sanction the violation of a code of conduct)
- Any comparative advertising which is illegal within the meaning of Directive 2006/114/EC
- Violation of the rules on guarantees contained in Directive 99/44/EC (this should be considered unfair in all circumstance rather than only in circumstances set out in article 6, §1, g of Directive 2005/29/EC).
- Forcing consumers to call a premium-rate telephone number should be considered unfair in all circumstances. Consumers should be able to reach the seller at no cost (other than ordinary costs) in order to report any problem with the contract goods or services.
- Advertising specifically the tied or bonus product or service in order to distract consumers' attention from the main contract product or service should be considered unfair in all circumstances (since the UCPD applies to combined offers and sale with bonuses, rules about these practices should be included in the directive)
- Refusing certain means of payment, e.g. cash or certain bank notes with high denominations (in line with the Commission's Recommendation of 22 March 2010 on the scope and effects of legal tender of Euro banknotes and coins<sup>43</sup>, such refusal should be added to the black list)

A leading consumer association mentions the following as desirable additions to the black list (most items would need to be framed with greater precisions):

- Announcing a price supplement after an initial quote has been accepted by the consumer
- 'Fake sales': giving the impression of a reduced price when in fact price has not been reduced from what it was [some weeks / months, to be determined] before
- Promoting a food product on the basis of an ingredient which is in fact barely present ('alibi ingredient), e.g. 'strawberry yogurt' with minute quantity of strawberries in it
- False environmental claims

Concerning the procedure to revise the black list in order to reflect future developments, Keirsblick has suggested that the Commission should be competent under the comitology procedure to quickly adapt the black list in view of new economic or technological developments, after consultation of the national enforcement authorities and business and consumer organisations.<sup>44</sup> Belgian authorities are not averse to this idea, but are pessimistic about the prospect since so many other Member States are reluctant. In addition, the suggestion to introduce a comitology procedure to revise the black list periodically is not welcomed by medium size enterprises.

<sup>43</sup> OJ L 83, 30.3.2010, p. 70-71

<sup>44</sup> B. KEIRSBILCK, "Which way forward for the new European law of unfair commercial practices?", *REDC* 2013, issue 2, (233) 261-262, no. 34 and B. KEIRSBILCK, *The New European Law of Unfair Commercial Practices and Competition Law*, Oxford, Hart Publishing, 2011, 391-392.

In conclusion on this point, there seems to be no agreement among stakeholders on whether or how to amend the black list: while some would trim down the annex on the ground that open textured concepts do not belong in a black list (see above), others would like to see the black list extended. There is no contradiction between the two opinions as open-ended provisions could be deleted from the blacklist while the above precisely defined practices could be added to it, but that does not make either position consensual among all stakeholders.

- Are there other measures that could improve the effectiveness of the UCPD in establishing a high level of consumer protection in your country? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

Officials at the Ministry for the Economy suggest that the following measures would improve the effectiveness of UCPD:

- Further clarifying the definition of consumer to tackle the issue of mixed activities
- Improve the definition of codes of conduct by including consumer participation in drafting the code among the relevant criteria
- Improve consistency between UCPD, Consumer Rights Directive and Directive 98/6/EC on price indications. All of them deal with pre-contractual information and offers and legal certainty as well as ease of application would be improved by consolidating all these rules and eliminating inconsistencies and redundancies

They also suggest that, in general, greater attention should be paid to the time dimension in assessing unfair commercial practices. While this dimension is mentioned in the general and semi general clauses, it may not be sufficiently reflected in the black list. Accurate information given in an untimely manner can very well distort consumer decisions, as is the case with bait-and-switch (already black listed). It is suggested that this element needs attention also in online transactions. Another general point which has been raised in the interviews is that better coordination between the UCPD and other directives (Consumer Rights, E-commerce, Price Indication) would be helpful.

A judge adds that a provision prohibiting misleading environmental claims should be added to UCPD.

The leading consumer association indicated that is in favour of training actions for judges.

### 1.1.2. Effectiveness of the PID in establishing 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;

A judge stated that, in his view, the protection afforded to consumers under the PID is effective. According to a business association, businesses (especially large ones) comply to a very large extent with legal requirements regarding unit selling prices. The leading consumer association agrees that this is the case. The Ministry for the Economy agrees that the national rules transposing the Directive are effectively applied. Officials regret that this Directive is not applied uniformly across Member States (thus causing problems for cross-border transactions), because of its unclear scope of application. In their opinion, the Directive should however not be modified at this point in time, since a change would only trigger more complications.



- 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?

Back in the early 2000s (after the repeal of the former Belgian legislation), Belgian producers of detergents had already asked the Belgian legislator to introduce a requirement of a per unit price expressed in washloads. At the time, the relevant code of conduct recommended this practice, which was widely but not universally used. Making it mandatory, it was argued, would level the playing field. In 2012, a per performance price indication was indeed made mandatory for detergents under Belgian law.<sup>45</sup> According to the Belgian enforcement authorities, using this price per performance not only makes more sense to consumers, but also to promotes concentrated products and thus contributes to reducing waste.

Public authorities consider that the price per performance measure functions very well and the requirement to display such prices should be extended beyond washing products.

The leading consumer association does not seem to have formed strong views on this issue. They think that it could be good to have both indications.

Businesses would not object to such an extension of unit price indication, but would want to be able to mention only one price rather than two. They cite high (administrative) compliance costs. Where possible, business would prefer the price per performance measure rather than the price per unit measure.

A judge explained that, in his view, making indication of price per performance mandatory would go too far.

- The effects of the regulatory choices/derogations allowed by the Directive and applied by Member States. *[Note: Only relevant if you write a report for one of the countries that use the derogation for small businesses from the requirement to indicate the unit price on the basis of Article 6 of the Directive (AT, BE, EL, DE, FR, NL, SI, UK). In this case key aspects to consider are: Is the derogation relevant? Do companies make use of it? Are there consumer complaints because of this? If so, approximately how many per year?]*

Under Belgian law, traders' obligations regarding price indication extend to services. Courts have ruled that transparent and clear price indications must be given for ancillary mandatory services (e.g. add-ons in a cable TV contracts).<sup>46</sup>

Under Belgian law, there is a derogation for small convenience shops of less than 150 sq meters. Businesses who can avail themselves of the derogation do so. This does not seem to raise particular problems and no complaints have been received.

### 1.1.3. Effectiveness of the MCAD in providing protection for businesses

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

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

<sup>45</sup> Ministerial Decree of 09/02/2012 on textile detergents, Moniteur Belge, 17/02/2012.

<sup>46</sup> Cass. (1e k.) AR C.12.0497.N, 5 December 2013 (Belgacom/ Telenet), DCCR 2015, afl. 106, 85; Jaarboek Marktpraktijken 2013, 60; Pas. 2013, afl. 12, 2451 (about ancillary services considered mandatory); Vred. Arendonk 10 juni 2014, T. Vred. 2015, afl. 9-10, 479 (where ancillary services were held not to be mandatory).

Under Belgian law, there are specific legal provisions prohibiting misleading commercial practices (including advertising) in B2B relationships. Regarding the definition of advertising, Belgian law tracks the very broad definition adopted under EU Law (e.g. the *BEST* case).<sup>47</sup> 'Advertising' is defined as 'any communication which is intended to directly or indirectly promote the sale of goods or services'. Belgian courts have developed a respectable body of case-law on the scope of 'advertising', in line with a broad interpretation of this notion.<sup>48</sup>

Regarding specific protection afforded to businesses, the economic code contains several specific provisions. For example, advertising including an invoice or a similar document is prohibited on the grounds that the true nature of the document is not clear and the addressee could be confused as to the consequence of not replying (art. VI.106 (1) CEL). Similarly, advertising for listing services in company guides are prohibited when they do not unequivocally state that a contractual offer is being made and that a payment will be required (art. VI.107 CEL).

A business association does not call into question the scope of protection. It expresses the view that the definition of advertising is appropriate to tackle misleading or comparative commercial practices. This is at odds with the opinion expressed by the Commission in its Communication 'Protecting businesses against misleading marketing practices and ensuring effective enforcement' of 2012, where the Commission pointed out the shortcomings of the current definition.<sup>49</sup>

Government authorities on the other hand think it would be a welcome simplification to align rules on misleading practices in B2B relationships with rules protecting consumers.

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

Generally, businesses prefer the principle-based approach because this allows more contractual freedom, and hence gives them the opportunity to interpret the legal provisions in light of specific circumstances.

Government authorities, for their part, think that more precise rules would be welcome. In particular, price comparisons are difficult to assess because prices change all the time. The magnitude of this problem is likely to increase in the future, as prices not only vary over time but are also increasingly personalised, at least in e-commerce. The main difficulty, whether online or offline, lies in deciding what the correct comparator is. For example, if a price is changed just before the advertising campaign (e.g. raised to artificially increase the discount offered subsequently), should it be the reference price? Or should the price before the last-minute raise be taken into account? Another issue arises when prices charged differ from list prices or from the recommended prices. Which price should be taken into account for the purposes of the comparison? Belgian authorities think it would be helpful to codify the case law and adopt guidelines on this point. For such guidelines to be robust, they should include the thorny issue of price comparisons in online environments where list prices are a thing of the past and prices fluctuate over time and across categories of consumers (and where the categories themselves fluctuate with data gathered on consumer profiles).

- The effects of the minimum harmonisation provisions on misleading advertising;  
*[Key aspects to consider are: Which of the national rules that go beyond the MCAD,*

<sup>47</sup> Case C-657/11, *Belgian Electronic Sorting Technology NV v Bert Peelaers en Visys NV*, EU:C:2013:516

<sup>48</sup> See for a general overview of the notion "advertising": G. STRAETMANS and S. BENNIS, *Art. 1.8.13° Code of Economic Law in X, Handels- en economisch recht. Commentaar met overzicht van rechtspraak en rechtsleer*, 2013, (17) 17-52.

<sup>49</sup> Communication "Protecting businesses against misleading marketing practices and ensuring effective enforcement", COM(2012) 702 final, 9.

*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)?]*

Belgium has adopted provisions on unfair commercial practices in B2B transactions, thus extending the scope of the UCPD rules. They are found in art. VI.104 – 109 CEL. Art. VI.104 CEL is a general provision, prohibiting undertakings from engaging in any act that is contrary to 'honest market practices' and that causes or may cause damage to the business interest of one or more undertakings. The two-pronged test contained in this provision differs somewhat from that of the general clause of the UCPD. The first prong of the test is similar: the requirement that the practice be contrary to 'honest practices', while framed differently, does not differ markedly from the requirement (under article 5 of the UCPD) that a commercial practice be 'contrary to professional diligence'. The second requirement however is different: it is not concerned with alteration of choice (influence) but with economic harm. The question asked is not whether the practice has the potential of distorting the average business's decision (which would be analogous to distorting the average consumer's decision), but rather whether the practice causes or is likely to cause potential harm.<sup>50</sup>

In addition to this general provision, the B2B section of book VI CEL also contains a general prohibition of misleading advertising (Art. VI.105 CEL) and several provisions prohibiting specific misleading practices. More precisely, the following provisions of UCPD are extended to B2B practices: prohibition of three types of misleading advertisement (Articles 6 1. B,<sup>51</sup> 6.1.d,<sup>52</sup> and 6.1.f)<sup>53, 54</sup> prohibition of one type of misleading omission (article 7.2)<sup>55</sup> and prohibition of three blacklisted practices: pyramid schemes (Annex, n° 14)<sup>56</sup>, inertia selling (Annex, n° 29),<sup>57</sup> and the use of invoices or similar documents seeking payment which gives the addressee the impression that they have already ordered the marketed product when they have not (Annex n° 21).<sup>58</sup> This last provision is reiterated with some 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. All of these rules go beyond the MCAD as is clear from the 2012 guidelines.<sup>59</sup>

Government authorities would welcome the possibility to apply all rules on unfair commercial practices to B2B relationships. The current minister has expressed concern that SMEs are not adequately protected. Extending the scope of existing B2C rules is one way to address this concern.

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

Belgian authorities are not enthusiastic about full harmonisation when it comes to comparative advertising. They value precise rules and think that interpretation of existing rules should not lose sight of the fact that the aim is not to *allow* comparative advertising (sic). They stress that damage is easily done. In terms of scope, they think it is important not to relax rules when it comes to online advertising or when consumers use a smartphone.

<sup>50</sup> This is where the provision differs from the general provision on civil liability (tort). Under art. 1382 Civil Code, actual harm is necessary. D. MERTENS, "Rules on Advertising and Commercial Practices in B2B" in G. STRAETMANS and J. STUYCK (eds.), *Commercial practices*, 2015, (197) 197.

<sup>51</sup> Art VI.105 a) CEL

<sup>52</sup> Art VI.105 b) CEL

<sup>53</sup> Art VI.105 f) CEL

<sup>54</sup> On these three provisions in the B2B context, see T. BAES, "Misleading Advertising Aimed at Non-Consumers" in G. STRAETMANS and J. STUYCK (eds.), *Commercial practices*, 2015, 204-220.

<sup>55</sup> Art VI.106 2) CEL

<sup>56</sup> Art VI.109 CEL

<sup>57</sup> Art. VI.108 CEL

<sup>58</sup> Art VI.106 1) CEL

<sup>59</sup> Communication "Protecting businesses against misleading marketing practices and ensuring effective enforcement", COM(2012) 702 final, 11-12.

- 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;

A business association stated that the current definition of 'advertising' is sufficiently broad to encompass modern types of marketing and that current rules are adequate.

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

A business association states that the current rules on enforcement are not sufficient in cross-border cases. They do however point out the positive cooperation of government authorities within the Benelux, but specify that more cooperation between Member State authorities is desirable, to step up cross-border enforcement. This view aligns with the Commission's desire to strengthen enforcement of the rules in cross-border cases by a cooperation procedure between enforcement authorities and the obligation to designate an enforcement authority in every Member State.<sup>60</sup> Belgium already has such an enforcement authority, namely the Economic Inspectorate (within the Ministry for the Economy), which plays a very active role, according to the businesses.

Government authorities further point out the important role of court decisions. The essential problem in advertising cases is establishing the comparative character of advertisement. Courts interpret the legal provisions and provide specific criteria on the comparative character of the advertisement (e.g. the Lidl v Colruyt-case<sup>61</sup>, followed by Belgian case-law).

- Are there measures that could improve the effectiveness of the MCAD in providing protection for businesses (see also 1.1.6 below)? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

None of the interviewed stakeholders had specific comments or suggestions on this issue.

#### 1.1.4. Effectiveness of current rules 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;
- The effects of the uniform black list of unfair commercial practices annexed to this directive on the free movement of goods and services;

Business associations made no specific reference to any disparities in the understanding of principles contained in the UCPD. Such differences, if they exist, do not call into question business associations' preference for a principle-based approach over a rule-based approach.

Regarding the effect of the uniform black list, a business association noted that it was not applied completely uniformly. They gave the example of the prohibition of the blackout periods and the prohibition of resale at a loss. A blackout period, in this context, is a period (a number of weeks) before the start of the seasonal sales, when

<sup>60</sup> Communication "Protecting businesses against misleading marketing practices and ensuring effective enforcement", COM(2012) 702 final, 11-13.

<sup>61</sup> Case C-356/04, Lidl v Colruyt, EU:C:2006:585.

it is prohibited to announce price reductions.<sup>62</sup> The black list does not contain a provision on blackout periods, but Belgium kept this *per se* prohibition, in violation of the maximum harmonization-character of the UCPD. The CJEU stated that this prohibition is precluded, in so far as it pursues objectives related to consumer protection.<sup>63</sup> The Belgian legislator avoided the application of EU law by expressly providing that the regulation of seasonal sales serves fair competition (B2B relations). This statement was also made explicitly in relation to the prohibition on resale at a loss.<sup>64</sup> In other words, Belgium is exploiting a loophole to escape the maximum harmonization of the UCPD. Business representatives stress that this causes both legal uncertainty (it is still debated whether the regulation of blackout periods is in compliance with the UCPD) 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<sup>65</sup>. 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.<sup>66</sup> Business associations in Belgium do not seem to have gathered empirical evidence which would go one way or another.

According to the business view, these examples demonstrate that the black list does not deliver the intended result of maximum harmonisation and argue this is an additional reason to prefer a principle-based approach.

- Whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade. [*Do the national differences play a role in a business perspective? Have they caused problems?*]

Business associations have not given any example of barriers to trade in these sectors attributable to minimum harmonisation. This is not evidence that such barriers do not exist, only that the representatives who were interviewed were not aware of them if they do exist.

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;

<sup>62</sup> See R. STEENNOT, G. STRAETMANS, E. TERRY, B. KEIRSBILCK en B. WYSEUR, "Overzicht van rechtspraak. Consumentenbescherming (2008-2014). Marktpraktijken (2011-2014)", TPR 2015, (1) 173-198, no. 130-140; J. STUYCK, "Seasonal sales" in G. STRAETMANS and J. STUYCK (eds.), *Commercial practices*, 2015, 107-109.

<sup>63</sup> Case C-288/11, Wamo, EU:C:2011:443; Case C-421/11, Inno v UNIZO, EU:C:2011:851 and regarding sale at a loss: Case C-343/12, Euronics Belgium CVBA v Kamera Express BV and Kamera Express Belgium BVBA, EU:C:2013:154.

<sup>64</sup> P. WYTINCK, "Sale at a loss" in G. STRAETMANS and J. STUYCK (eds.), *Commercial practices*, 2015, (121) 133-136.

<sup>65</sup> Joint cases C-267/91 and C-268/91, Keck and Mithouard, EU:C:1993:905.

<sup>66</sup> See on the Council Recommendation of July 9 2013 on the National Reform Programme 2013 of France and delivering a Council opinion on the Stability Programme of France, 2012-2017, 2013/C 217/08, OJ C 217 30 July 2013, p. 27, recommendation 4 (p. 31). Curiously, the same recommendation was not addressed to Belgium that same year (Council Recommendation of 9 July 2013 on the National Reform Programme 2013 of Belgium and delivering a Council opinion on the Stability Programme of Belgium, 2012-2016, 2013/C 217/02, OJ C 217 30 July 2013, p.5).

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

Business associations declined to comment specifically on MCAD. They reiterated a general statement that they prefer a clear and easily applicable legal framework, to reduce uncertainty and compliance costs when operating in different Member States. This seems contradictory with another general statement, in favour of a principle-based approach. It is not clear why businesses would prefer a principle-based approach on unfair practices and a rule-based approach on comparative advertising. What is clear is that business associations generally prefer maximum harmonisation, since minimum harmonisation leads to disparities and different applicable rules in different Member States, which cause legal uncertainty and therefore hinder cross-border trade.

As already pointed out, businesses see the lack of a cross-border enforcement mechanism as a barrier to cross-border trade. More cooperation between Member State authorities is desired in this regard.

#### 1.1.5. Interplay amongst UCPD information requirements according to Article 7(4) with the information requirements in the horizontal consumer law instruments

Regarding the information requirements according to Article 7(4) UCPD ("invitation to purchase") in the advertising stage, please analyse:

- The level of awareness of traders as regards information requirements at the advertising stage, as in particular demonstrated by their practical application; [*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?*]

According to a business association, traders are very much aware of the information requirements and implement them correctly. A judge agrees with that statement.

Sectoral business association give abundant guidance to their members on mandatory information requirements. They report no specific issue with existing information requirements.

Businesses regret that there is an overlap between the information requirements pursuant to art. 7(4) of the UCPD and the more comprehensive pre-contractual information requirements of the CRD. Furthermore, they point out that there is a crucial difference between the advertising stage and the pre-contractual stage. At the first stage, there is no direct dialogue with the consumer and only the essential information should be mandatory. Only in the pre-contractual phase, when a one-on-one dialogue with the consumer starts, should there be a more extensive obligation to inform consumers.

At a general level, this does not seem at odds with existing directives, as article 7 of the UCPD on the 'invitation to purchase', which applies at the advertising stage, does focus on the provision of information deemed essential, while CRD requires more extensive information at the pre-contractual stage. However, the business association clearly stated that, in general, information requirements are too numerous. According to the association, they cause large compliance costs for traders and may not help consumers effectively, since most consumers do not pay much attention to the information. This view is similar to that of legal scholars relying on economic



analysis.<sup>67</sup> From a behavioural perspective, there is evidence that, even when consumers do read the information, they do not always understand it or act upon it. However, businesses and scholars differ when it comes to practical conclusions. In the traders' view, no information requirements should be added to existing ones. Behavioural legal scholars for their part argue that information requirements should be reconsidered in light of behavioural studies with a view to streamlining them and making them smarter, i.e., possibly reducing their numbers but without ruling out introducing new ones.<sup>68</sup>

The interviewed consumer association is of the opinion that information requirements are complementary and any overlaps do not raise issues or generate compliance costs.

On a more juridical note, one author argues that art. 7(4) of the UCPD should be repealed.<sup>69</sup> Art. 7(4) of the UCPD is a maximum harmonisation provision, while the pre-contractual information requirements of the CRD are of a minimum harmonisation nature. Theoretically, this is not a problem since art. 3(2) of the UCPD states that the UCPD is without prejudice to contract law. In other words, this Directive does not seek to set an upper limit on information duties under national contract law. However, given the maximum harmonisation character of art. 7(4) of the UCPD, this article can constitute a *de facto* 'ceiling' for national pre-contractual information duties, because it limits indirectly Member States' competence regarding national contract law. Hence the author concludes, Art. 7(4) of the UCPD should never have been adopted in the first place and should be repealed.

A judge shares this view, i.e. that there should be only one instrument regulating information at both the advertising and pre-contractual stages.

- 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 business association interviewed was not aware of specific problems linked to such overlaps.

#### 1.1.6. Relevance for business-to-business transactions

Regarding the area of unfair commercial practices/marketing, please analyse:

- 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 cross-border trade;

The majority of stakeholders interviewed approve of an extension of protection to SMEs, but not so much because they think it is essential for cross-border trade. Rather, those who approve of such an evolution do so because they think there is a need to better protect small undertakings. Fair competition and/or fairness in business practices would seem to be the main goal in their view (rather than market integration).

Government authorities view an extension of the UCPD to B2B transactions favourably. They think it would be a good way to enhance the protection of SMEs. As a

<sup>67</sup> For a radical view along these lines, see O Bar-Gill and O Ben-Shahar, 'Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law' (2013) 50 CML Rev 109.

<sup>68</sup> A.-L. SIBONY and G. HELLERINGER, 'EU Consumer Protection and Behavioural Sciences: Revolution or Reform?' in A. ALEMANNI and A.-L. SIBONY, *Nudge and the Law: A European Perspective*, Oxford: Hart, 2015, pp. 209-233.

<sup>69</sup> B. KEIRSBILCK, "Which way forward for the new European law of unfair commercial practices?", *REDC* 2013, issue 2, (233) 266-267, no. 39.

rule, business associations on the other hand seem averse to extending B2C regulation to B2B transactions, since this leads to extra compliance costs (because of a lot of formalities and administrative hassle), which would not enhance trade in general and therefore also not cross-border trader. Generally, they prefer contractual freedom in B2B transactions.

One judge shared this view, but based on a different reason: unlike consumers, businesses have accepted the risk of being the victim of unfair commercial practices, since this is an inherent in doing business with other businesses. It is impossible to say that this is the view of the Bench in general. Indeed, another judge is of the opinion that SMEs are very similar to consumers when it comes to unfair commercial practices and should benefit from the same protection. He cites the Italian example in this regard. Referring to the Belgian situation, he stresses that there is a great need for protection of small businesses, e.g. small shops (in clothing) vs. big suppliers (brands) and refers to problem in case of termination of the contract. Great disparity in financial strength do not allow small firms to defend their rights adequately. This judge is of the opinion that all of the following measures should be considered:

- Extending the UCPD to B2B transactions or revising/extending the MCAD
  - Aligning the legal regimes for B2B and B2C transactions in the area of commercial practices
  - Extending the scope of the protection in B2B transactions to cover also unfair commercial practices during and after the transaction
  - Having a black-list of practices in the business-to-business marketing area
  - Having a cross-border enforcement cooperation mechanism in the business-to-business marketing area
  - Developing contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive, e.g. making a contractual clause inapplicable
  - Adapting the rules on comparative advertising of the current Misleading and Comparative Advertising Directive
- 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;

Reinforcing the above mentioned opinions of stakeholders, a legal author suggests that the scope of the UCPD should be amended to cover both B2C and B2B (marketing) practices directly connected with the promotion of products, in the pre-contractual stage.<sup>70</sup> This author suggests abandoning the dualistic approach, which distinguishes between the rules on B2C and B2B transactions, because the economic interests of consumers, competitors, other market participants and, eventually, the general interest in undistorted competition are closely intertwined and most often coincide. The same author quotes the European Parliament: 'consumer protection and the promotion of fair trading practices between competitors can often be two sides of the same judicial coin'.<sup>71</sup>

- 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 also cover unfair commercial practices during and after the transaction;

<sup>70</sup> B. KEIRSBILCK, "Harmonisation of Rules on Business-To-Business Marketing Practices: A Critical Analysis of the MCAD Report", in M.B.M. LOOS and I. SAMOY (eds.), *The Position of Small and Medium-Sized Enterprises in European Contract Law*, Cambridge, Intersentia, 2014, 137-159.

<sup>71</sup> B. KEIRSBILCK, cited at footnote 70, referring to: Resolution of the European Parliament of 13 March 2013 on prospects for legal protection of the consumer in the light of the Commission Green Paper on European Union Consumer Protection, P5\_TA(2003)0102, consideration L.



In Belgium, protection against misleading practices has been applied in cases involving two businesses, even where the practice was misleading because it could confuse consumers. A case in point involved watches packaged in Lego-like packaging. The Brussels Court of Appeals was convinced that the practice could confuse consumers as to the origin of the watched and took this into account in a B2B dispute.<sup>72</sup> Indirectly therefore, the UCPD can help protect the rights of businesses (here Lego).

In the interview, businesses stated that, should protection in B2B transaction be increased, they would prefer rules to concern the pre-contractual, contractual and post-contractual stages.

No further reference was made regarding this issue by other interviewees or stakeholders.

- Whether there is a need to have a black-list of practices in the business-to-business marketing area;

Enforcers believe that there is a need for a black list. A business association disagrees. Here again, it reiterated its preference for a principle-based approach, self- or co-regulation (e.g. codes of conduct). One judge was similarly hostile to a black list.

- What should be the enforcement cooperation mechanism in the business-to-business marketing area;

Stakeholders interviewed declined to comment on this point.

- Whether there is a need to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive;

Enforcers and a judge in the interviews stated that there is no need for developing the law on contractual consequences in this regard. General rules and principles of contract law seem to suffice (provisions on error and fraud, general principle of good faith). One judge also points to Art. 493 and 494 of the Belgian Criminal Code (on abuse of confidence) and to provisions on interests in the Civil code.

One judge points out that more precise rules on avoidance of a clause would be helpful. While avoidance can be a good and efficient remedy, he explains, it may at times be too broad and create legal uncertainty. More precise EU rules would be useful, but they should leave room for national courts to adapt the remedies to the case at hand.

E.g. even if the bargaining power of two business-parties is very unequal, the remedy of avoidance of the contract that has been closed is not always the best remedy.

- Whether there is a need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive.

As mentioned above, businesses advocate better enforcement mechanisms in cross-border trade, by setting up cooperation between government authorities, emulating what is now already in place in the Benelux.

#### 1.1.7. Relevance of contractual consequences of unfair commercial practices

Please analyse whether there are in your country:

<sup>72</sup> Brussels Court of Appeal, 11 December 2012 "misleading commercial practices, giving misleading information both on the point of the commercial origin of the product as in relation to the fact whether there was a direct or indirect sponsorship or approval of the product".

- 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;

Belgian law provides a civil law remedy in art. VI.38 CEL: if a contract was concluded following certain unfair commercial practices, the court *must* (practices listed in art. VI.38 (1) CEL) or *may* (practices listed in art. VI.38 (2) CEL) order the reimbursement to the consumer of the amounts they have paid, without any obligation for them to return the product delivered. If the matter concerns an unfair commercial practice listed in the second paragraph, 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.<sup>73</sup> For example, the judge could order a partial reimbursement of the sums paid. For practices listed in the first paragraph, the Court has no margin of appreciation and must order the complete reimbursement.

The leading consumer association explains that art VI.38 has never been applied in practice because consumers on their own do not usually have sufficient incentives to go to court. This legal provision may find its first application in a pending class action (Dieselgate case, started by Test Achats, pending at the time of writing). In this case, the leading consumer association based its claim on article IV. 38 CEL. Another reason, this association explains, why this provision is not applied so far is because both courts and lawyers are more familiar with general contract law and will usually rely on that and/or on specific sectoral legislation (e.g. on travel packages) rather than on horizontal consumer protection provisions. A separate point made by the same stakeholder about the shortcoming of article IV. 38 CEL is that it only applies to goods and not services.

There is an extensive scholarly discussion regarding the scope of application of contractual remedies. 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?<sup>74</sup> 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.<sup>75</sup>

In practice, the leading consumer association explains, consumers can be reimbursed while keeping the product, but this requires a court case.

- Any case law (enforcement decisions, court rulings) providing for such consequences;

There is no published case-law available applying the above-mentioned specific contractual remedies. As mentioned, the 'Dieselgate' Case, now pending, will be the first relevant case.

<sup>73</sup> J. GODDAER and E. TERRYN, "Unfair B2C commercial practices" in G. STRAETMANS and J. STUYCK (eds.), *Commercial practices*, 2015, (47) 83.

<sup>74</sup> See for a brief overview of the discussion: J. GODDAER and E. TERRYN, "Unfair B2C commercial practices" in G. STRAETMANS and J. STUYCK (eds.), *Commercial practices*, 2015, (47) 81-83.

<sup>75</sup> J. GODDAER and E. TERRYN, "Unfair B2C commercial practices" in G. STRAETMANS and J. STUYCK (eds.), *Commercial practices*, 2015, (47) 82.

- Whether there is, based on past experience in your country, a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

Judges interviewed did not see a need to develop the law on contractual consequences linked to the use of unfair practices. One of them explained that such provisions risk being very far-reaching and could possibly lead to abuses. Another pointed out that the general contract law provides sufficient ways to address unfair commercial practices.

Court practice to date is scarce but cases can be found, which show that courts do find means to grant contractual remedies. A case in point is a judgement by the court of Appeals of Antwerp of 2007.<sup>76</sup> After recalling that termination clauses, in issue in the case, are not normally reviewed under the UCPD, the Court of Appeal left open the possibility that even such a clause could be voided when it is contrary to public policy, for example because it has a speculative character. Moreover, such clauses are examined under Article 31 Trade Practices Act which prohibits creating a significant imbalance between the rights and obligations of the parties.

The leading consumer association points to distortions caused by the rule that limits the courts' full powers of review to penalty clauses: courts may reduce the amount stipulated in case of breach of contract but they may not review the amount due based on a contract clause other than a penalty clause. This leads to sellers trying and stretching the notion of withdrawal clauses beyond its natural borders in an attempt to make the revision of the clause unavailable for consumers as a remedy. This leads the consumer association to recommend that courts should be given the power of full review over withdrawal clauses. The same association would also like to see a new time limit of two years applicable to B2C contracts. This would for example prevent telecom operators from claiming payment of four-year old invoices which consumers have not kept.

More generally, the consumer association explained that the practice regarding remedies is only starting to develop as there was little relevant litigation before a class action was introduced (in 2014) in Belgian law. It mentioned a pending case it introduced about resale of 35 tickets. In Belgium, reselling tickets at a premium is per se prohibited. Operators established in the Netherlands, however, resell concert tickets online. The class action aims to obtain a court order to the effect that the surcharge is not due (and consumers should only pay the original price for the ticket). Such a remedy would be based on the specific legislation concerning resale of tickets, not on general contract law.

## 1.2. Contract conclusion and performance

### 1.2.1. Effectiveness of the current rules in establishing 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;

From the point of view of enforcers, the general unfairness-test contributes to consumer protection because the case-law of the ECJ is sufficiently developed.

Case-law shows that the general unfairness-test serves its purpose as a safety-net or back-up to catch the unfair contract terms that do not fall under the national black-list. An example is the case-law concerning (unilateral) termination clauses<sup>77</sup>,

<sup>76</sup> Ghent, Court of Appeal, 28 March 2007, NJW, 2008, 174, pp. 32.

<sup>77</sup> Gent 19 November 2014, NJW 2016, afl. 338, 225, note P. BRULEZ; Antwerpen 7 June 2010, RW 2011-12, issue 30, 1344; Rb. Antwerpen (14e k. B) 26 oktober 2007, RW 2009-10, afl. 36, 1529.

jurisdiction clauses<sup>78</sup>, clauses in insurance contracts<sup>79</sup>, etc. When these clauses do not fall under the black list, they still can be found unfair because they create a significant imbalance in the parties' rights and obligations.

From the point of view of the judges, the problem with the general principle is that it is too vague to always provide effective consumer protection and adequate legal certainty. While it does fulfil its function as a safety-net to catch those unfair contract terms that do not fall under the black list, it would be helpful to have more precise rules. As one judge points out, Courts are obliged to examine of their own motion the issue of unfairness in consumer contracts and this is not always easy. At present, in case of default (i.e. if one party is neither present nor represented), a judge may only consider violations of public policy (but this should change shortly, with the reform known as 'Potpourri V').

A consumer association thinks that, overall case law is satisfactory and reports that when they contact businesses pointing out that a practice is unfair, they often reach satisfactory outcomes without litigation.

Business associations' views concerning the UCTD are consistent with their position regarding the UCPD: here again, they express a preference for general principles over specific black lists, since they leave a margin of appreciation for traders to take specific circumstances into account.

Belgium extended the scope of the UCTD in its national law: the provisions transposing the directive (in Book VI of the CEL) apply to all terms and not only to non-negotiated terms. In addition, the third exception of mandatory, statutory or regulatory provisions in art. 1 (2) of the UCTD been transposed in Belgian law.<sup>80</sup> Furthermore, the place of provisions on unfair contract terms in CEL is, rightly, criticised. The general fairness test is situated in art.I.8, 22° CEL (outside of book VI) while the criteria guiding the appraisal of unfairness of contract terms (what circumstances should be taken into account, time dimension, etc.) are found in art. VI.82 CEL. Thus readability of the economic code could be much improved on this point.<sup>81</sup>

The Belgian general fairness test differs from the UCTD in two respects. Firstly, art. I.8, 22° CEL refers to 'a manifest imbalance', whereas the UCTD uses the wording 'a significant imbalance'. Most Belgian commentators do not think that this should be read as a more demanding standard under Belgian law than under EU Law. They view this as a mere terminological difference, without any practical bearing (a different view is expressed in the EC Consumer Law Compendium).<sup>82</sup> Secondly, Book VI of the CEL contains no reference to the criterion 'good faith'. This is considered to enhance legal certainty<sup>83</sup> and lower the burden of proof for consumers.<sup>84</sup> Moreover, according to scholars, the fairness of contractual terms should be assessed, taking into account

<sup>78</sup> Arrondrb. Brussel 12 december 2012, *T.Vred.* 2013, issue 11-12, 559, note F. DE PATOUL; Arrondrb. Brussel 6 June 2011, *T.Vred.* 2013, issue 11-12, 220; Vred. Sint-Pieters-Woluwe 24 juni 2011, *T.Vred.* 2013, issue 11-12, 556, note F. DE PATOUL; Vred. Sint-Pieters-Leeuw 28 maart 2011, *T.Vred.* 2013, 218; Gent (13e k.) 26 oktober 2012, *Jaarboek Marktpraktijken* 2012, 286; TGR-TWVR 2013, afl. 1, 46; Kh. Henegouwen (afd. Bergen) (1e k.) 9 februari 2016, *JLMB* 2016, afl. 19, 894.

<sup>79</sup> Bergen 11 January 2011, *T.Vred.* 2011, 330; Cass. 12 oktober 2007, *Arr.Cass.* 2007, afl. 10, 1931 en *DCCR* 2008, afl. 80, 61.

<sup>80</sup> P. CAMBIE, "Unfair Terms in Consumer Contracts" in G. STRAETMANS and J. STUYCK (eds.), *Commercial practices*, 2015, (136) 137.

<sup>81</sup> S. STIJNS and S. JANSEN, "De basisbeginselen van het contractenrecht: kroniek van de recentste evoluties", *TBBR/RGDC* 2013/1, (2) 14, no. 31.

<sup>82</sup> R. STEENNOT, *Onrechtmatige bedingen in de wet van 6 april 2010 betreffende marktpraktijken en consumentenbescherming*, Mechelen, Kluwer, 2012, 25.

<sup>83</sup> J. STUYCK, *Handels- en economisch recht. 2. Mededingingsrecht. A: Handelspraktijken in Beginselen van Belgisch Privaatrecht*, issue 13, 2013, 498, no. 573.

<sup>84</sup> H. SCHULTE-NOLKE (ed.) i.c.w. C. TWIGG-FLESNER and M. EBERS, *EC Consumer Law Compendium. Comparative Analysis*, 2007, 372-379, [http://ec.europa.eu/consumers/archive/cons\\_int/safe\\_shop/acquis/comp\\_analysis\\_en.pdf](http://ec.europa.eu/consumers/archive/cons_int/safe_shop/acquis/comp_analysis_en.pdf); J. STUYCK, *Handels- en economisch recht. 2. Mededingingsrecht. A: Handelspraktijken in Beginselen van Belgisch Privaatrecht*, issue 13, 2013, 498, no. 573.

not only the circumstances at the time of conclusion of the contract, but also the circumstances following the performance of the contract<sup>85</sup>, which confers courts a large margin of appreciation.<sup>86</sup>

These deviations from the UCTD contribute to a high level of consumer protection. However, practice shows that consumers or their lawyers are not always aware of the existence of these provisions.

- 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 your MS? Does this work in practice or are there problems?*]
- 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; [*Note: If a black/grey list exists in your country, key aspects to consider are: How does the list work in practice? Does it make a difference to have such a list?*]

There was already a list in the TPA of 1991, in anticipation of and inspired by the UCTD. Belgium has since transposed the Annex in a blacklist which can now be found in art. VI.83 CEL. Belgian law goes further than the UCTD in that its black list is more extensive than that contained in the Annex to the UCTD. Some prohibitions, however, were not transposed in the black list, e.g. the ban on clauses that oblige the consumer to turn to arbitration in case of a dispute (Annex, (q) UCTD). Therefore, according to Belgian scholars, these clauses would have to be appraised under the general fairness test.<sup>87</sup>

According to enforcement authorities, there are no problems regarding the application of the indicative list in Belgium. A consumer association concurs: in Belgium there is no problem because there is a blacklist.

Judges too think the black list works well in practice and that it represents a clear advantage for consumer protection compared to the purely indicative list of the Directive. The black list is very specific, which leads to more legal certainty, is easier to use in practice and consequently enhances consumer protection.

A business association, for its part, considers that the black list as such has little value in practice, because its interpretation is uncertain and neither case-law nor The Belgian Commission on Unfair Contract Terms (hereinafter: 'CUCT')'s opinions provide adequate guidance. Indeed, some of the provisions in the blacklist are formulated very broadly (using language such as 'unreasonable', 'equivalent', 'disproportionate', 'inappropriately'). Courts therefore have a margin of appreciation under the black list, which leads a scholar to the conclusion that the Belgian black list displays shades of grey.<sup>88</sup>

<sup>85</sup> P. CAMBIE, *Onrechtmatige bedingen*, Brussel, Larcier, 2009, 157; J. STUYCK, *Handels- en economisch recht. 2. Mededingingsrecht. A: Handelspraktijken in Beginselen van Belgisch Privaatrecht*, issue 13, 2013, 501, no. 575; P. WERY, "Les clauses abusives relatives à l'inexécution des obligations contractuelles dans les lois de protection des consommateurs du 14 juillet 1991 et du 2 août 2002", *JT* 2003, 801.

<sup>86</sup> P. CAMBIE, "Unfair Terms in Consumer Contracts" in G. STRAETMANS and J. STUYCK (eds.), *Commercial practices*, 2015, (136) 145.

<sup>87</sup> R. STEENNOT, G. STRAETMANS, E. TERRY, B. KEIRSBILCK en B. WYSEUR, "Overzicht van rechtspraak. Consumentenbescherming (2008-2014). Marktpraktijken (2011-2014)", *TPR* 2015, (1) 242, no. 190; R. STEENNOT, "Art. 74, 22° Wet betreffende marktpraktijken en consumentenbescherming" in X, *Handels- en economisch recht. Commentaar met overzicht van rechtspraak en rechtsleer*, 2012, losbl. OVERAL AANPASSEN

<sup>88</sup> P. CAMBIE, "Unfair Terms in Consumer Contracts" in G. STRAETMANS and J. STUYCK (eds.), *Commercial practices*, 2015, (136) 145; P. CAMBIE, *Onrechtmatige bedingen*, Brussel, Larcier, 2009, 214-215, no. 257.



The black list is also used as guidance for assessment of contract terms under the general unfairness test.<sup>89</sup> Scholars refer to this phenomenon as the 'reflective function' of the black list).<sup>90,91</sup> Business representatives agree that this is the main added value of the black list. On a related point, it should be noted that, as recommended by the ECJ,<sup>92</sup> Belgian courts also rely on the indicative list from the UCTD as a guidance to assess contract clauses that are not black listed, such as arbitration clauses.<sup>93</sup>

One area for improvement in relation with the indicative list of UCTD and the blacklist contained in domestic law may be the CUCT. It delivers guidance on how to apply the black list and can give an opinion as to the unfairness of a particular clause, either on its own motion or when seized by the Minister, typically after the Inspectorate has received numerous complaints. Courts, for their part, may not request an amicus brief from the CUCT. The CUCT also makes recommendations on how to extend the black list, but it does not have the power to directly update the list. Enforcers regret that the CUCT's opinions are not better known, in particular by courts. Apparently, these opinions are not widely circulated. The CUCT seems to be under-used and its work could contribute more to consumer protection if it were better known. Drafting a citizen-friendly summary of opinions, which are often very technical, would also be an improvement.

Another point worth noting regarding the protection afforded by the black list concerns the power of courts. If contract terms are caught under the black list, a court is bound to declare them null and void. By contrast, when applying the general fairness test, courts enjoy a margin of appreciation.

- 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: In your country, have the effects of court decisions establishing the unfairness of an unfair term been extended to all contracts of the trader concerned or to the contracts of any other trader containing such a term? If so, how does this work in practice? What are the impacts on businesses? If there are no such effects of court decisions on unfair terms: what are the effects of this situation?*]

Since the ECJ's judgment in *Invitel*<sup>94</sup>, the *res judicata* of a court decision in an injunction procedure should extend to all consumers in a contractual relationship with that specific trader.<sup>95</sup> This is undoubtedly the case under Belgian law.

Enforcers did not mention the *Invitel* case or its consequences in the interview, but pointed to a different element, within the Belgian legal order: the King may intervene by Royal Decree and prescribe or forbid the use of certain terms in contracts or impose the use of standard contracts (provided by art.VI.85 CEL).<sup>96</sup> In any event,

<sup>89</sup> P. CAMBIE, *Onrechtmatige bedingen*, Brussel, Larcier, 2009, 170, no. 199; I. DEMUYNCK, *De inhoudelijke controle van onrechtmatige bedingen: onderzoek van de wet van 14 juli 1991 op de handelspraktijken en de voorlichting en de bescherming van de consument*, Diss. PhD Law (not publicized), 371-401.

<sup>90</sup> P. CAMBIE, *Onrechtmatige bedingen*, Brussel, Larcier, 2009, 170, no. 199; I. DEMUYNCK, *De inhoudelijke controle van onrechtmatige bedingen: onderzoek van de wet van 14 juli 1991 op de handelspraktijken en de voorlichting en de bescherming van de consument*, Diss. PhD Law (not published), 371-401.

<sup>91</sup> See the above-mentioned case-law concerning the general fairness test.

<sup>92</sup> See for instance Case C-472/10, *Invitel*, EU:C:2012:242, paragraph 26.

<sup>93</sup> See the above-mentioned case-law concerning arbitration clauses.

<sup>94</sup> Case C-472/10, *Invitel*, EU:C:2012:242.

<sup>95</sup> R. STEENNOT, G. STRAETMANS, E. TERRYN, B. KEIRSBILCK en B. WYSEUR, "Overzicht van rechtspraak. Consumentenbescherming (2008-2014). Marktpraktijken (2011-2014)", *TPR* 2015, (1) 287, no. 242.

<sup>96</sup> The King has done this three times concerning the delivery order when purchasing a new car, contracts with marriage bureaus and mediation of real estate agents. See the following royal decree's: Royal Decree of 9 July 2000 concerning the mentioning of essential information and the general sales conditions on the delivery order for new cars, *BS* 9 August 2000; Royal Decree of 18 November 2005 concerning a

there is therefore a mechanism under Belgian law for extending the prohibition of certain unfair terms to all contracts (or all contracts of a certain category).

A consumer association added that, in addition to the extension of the effects of a ruling to all contracts of a trader party to the proceedings, there is *de facto* a snow ball effect reaching the whole sector. Once certain terms have been held unfair, other traders in the same sector hear about it and adapt their terms and conditions as needed to avoid litigation.

A judge interviewed also made no reference to *Invitel* and referred to the limited effect of the *res judicata*. Nonetheless, she shared the view of a business association that, in practice, a trader will adapt the terms in their contracts on a long-term basis, when it becomes clear that they would not stand up in court. The same business association stated that a broader effect on other traders in the same sector is likely after multiple court decisions, subject on effective dissemination of the court decision in that sector. The interviewee cites as an example a string of court decisions in which the contract terms of some energy suppliers were found unfair and were consequently declared null and void. This led to a change of these contract terms in the entire energy sector.

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

The transparency principle used to be part of the law on unfair terms. Since MPCPA, its scope has been broadened. Now, the general principle of 'plain and intelligible language' applies to all commercial practices (art. VI.37, §1 CEL).<sup>97</sup> Nonetheless, the regulation of unfair terms remains its field of choice and the requirement for transparency is explicitly mentioned among the criteria of assessment of unfairness in art. VI.82 (2) CEL.

Enforcers see the transparency principle as very positive. Among judges interviewed, one shared the view that the principle of 'plain and intelligible language' is too vague, and argued that these requirements should be further specified. Another explained that this principle is interpreted in a broad manner, leading to solutions which are favourable to consumers. There are no published cases in which the lack of transparency led to a contract term being held as unfair. There is however one published case in which the lack of coherence of contractual terms was held to violate art. VI.37 CEL.<sup>98</sup> In that specific case, the violation of the transparency principle of art.VI.37 is considered as a violation of the law which is distinct from the unfairness of other terms in the contract.

Scholars explain the under-use of art.VI.37 as based on one main reason: the lack of a specific civil sanction for breach of the principle of plain and intelligible language.<sup>99</sup>

In the view of a business association, businesses are very aware of the transparency requirement applying to contract terms.

A consumer association was of the opinion that transparency requirement work well in practice. In important sectors, such as utilities, contracts have evolved a great deal in the last years, representatives of the association explained. Negotiation between the consumer association and operators has been the means of choice for producing compliance with the transparency requirement.

standard contract for marriage mediation, *BS* 9 March 2006 and Royal Decree of 12 January 2007 concerning the use of certain terms in contracts of mediation of real estate agents, *BS* 19 January 2007.

<sup>97</sup> P. CAMBIE, "Unfair Terms in Consumer Contracts" in G. STRAETMANS and J. STUYCK (eds.), *Commercial practices*, 2015, (136) 139.

<sup>98</sup> Vred. Grâce-Hollogne 25 May 2012, *JLMB* 2012, issue 40, (1917) 1922-1923.

<sup>99</sup> P. CAMBIE, "Unfair Terms in Consumer Contracts" in G. STRAETMANS and J. STUYCK (eds.), *Commercial practices*, 2015, (136) 141; S. STIJNS and E. SWAENPOEL, "Evolutiepelen van de onrechtmatige bedingenleer", *DCCR* 2013, (141) 148.

- 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. [Note: Question only relevant for MS that have put in place extensions of application of UCTD]

Belgium has extended the scope of the UCTD to individually negotiated terms. A scholar explains that this extension was based on the view that the consumer is a weaker party in contract conclusions irrespective of whether a contract term is negotiated or not.<sup>100</sup> A judge, however, pointed out that this extension leads to legal uncertainty that is not outweighed by an additional benefit for the consumer. Even without this extension, the consumer could rely on general principles of contract law to address an unfair individually negotiated term. Indeed, there are no published cases where the relevant Belgian provisions have been applied to individually negotiated terms.

A consumer association thinks that price excesses should be controlled. They mention the example of plumber's overcharge for weekend interventions.

- 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?]

According to the enforcers, it is regrettable that the consumer needs to go to court obtain recognition that a contract term is unfair. This is the result of the terminological choice made by the Belgian legislator to provide that every unfair clause is 'prohibited and void' (*toute clause abusive est interdite et nulle*), rather than 'deemed unwritten' (*réputée non écrite*), as other Member States have provided to give effect to the Directive's requirement that the unfair term be made 'not binding'. This drafting of art. VI.84, para. 1 creates a civil law fiction of non-existence,<sup>101</sup> which only a court of law can trigger.<sup>102</sup> Enforcers also point out that Belgian courts have not referred any preliminary questions to the ECJ.

Belgian case-law confirms that national courts do invoke the unfairness of a clause *ex officio*,<sup>103</sup> even in cases where the consumer does not show up in court.<sup>104</sup> However, a judge remarked that Belgian courts sometimes fail to invoke the unfairness *ex officio* for reasons of time. The issue is that Courts must of course respect the *audi alteram partem*-principle. In other words, they must call the parties to debate on the issue of unfairness. This causes delays, in a context where delays are already problematically long and where courts are under pressure to speed up proceedings. Courts deal with this issue by silently performing a proportionality assessment of sorts. They will not invoke the unfairness of contract terms of their own motion in every case where it would be conceivable to do so, but they will do it in cases the imbalance is striking and

<sup>100</sup> P. CAMBIE, *Onrechtmatige bedingen*, Brussel, Larcier, 2009, 3-4, no. 3-4 and 71, no. 86.

<sup>101</sup> H. SCHULTE-NOLKE (ed.) i.c.w. C. TWIGG-FLESNER and M. EBERS, *EC Consumer Law Compendium. Comparative Analysis*, 2007, 388, [http://ec.europa.eu/consumers/archive/cons\\_int/safe\\_shop/acquis/comp\\_analysis\\_en.pdf](http://ec.europa.eu/consumers/archive/cons_int/safe_shop/acquis/comp_analysis_en.pdf).

<sup>102</sup> R. STEENNOT, G. STRAETMANS, E. TERRY, B. KEIRSBILCK en B. WYSEUR, "Overzicht van rechtspraak. Consumentenbescherming (2008-2014). Marktpraktijken (2011-2014)", *TPR* 2015, (1) 220, no. 169.

<sup>103</sup> See for example: Gent 4 January 2012, *NJW* 2012, 255, note R. STEENNOT; Gent 26 October 2012, *Jb.Markt*. 2012, 286, note P. CAMBIE, *TGR-TWVR* 2013, issue 1, 46; Arrondrb. Oost-Vlaanderen 17 november 2014, *T.Vred.* 2015, issue 1-2, 21; Vred. Thuin 7 January 2013, *DCCR* 2013, issue 99, 68, note J. LAFFINEUR, *T.Vred.* 2013, issue 11-12, 572, note R. STEENNOT.; Vred. Charleroi 4 July 2008, *JLMB* 2008, 1658. See for more case-law: R. STEENNOT, G. STRAETMANS, E. TERRY, B. KEIRSBILCK en B. WYSEUR, "Overzicht van rechtspraak. Consumentenbescherming (2008-2014). Marktpraktijken (2011-2014)", *TPR* 2015, (1) 220, no. 169, footnote 969.

<sup>104</sup> R. STEENNOT, G. STRAETMANS, E. TERRY, B. KEIRSBILCK en B. WYSEUR, "Overzicht van rechtspraak. Consumentenbescherming (2008-2014). Marktpraktijken (2011-2014)", *TPR* 2015, (1) 219, no. 169.



the consumers did not invoke the legal provisions that protect them. This is confirmed by scholars, who note that, even though raising the unfair character of contract terms of their own motion represents a substantial effort for judges, they do it in a way that contributes significantly to consumer protection.

A business association confirms that abusive character is invoked *ex officio* by courts. They think nullity is a good and practical sanction.

A consumer association explains however that most judges only have limited knowledge of the law on unfair contract terms. They typically know that conventional interest rates cannot exceed legal interest rates and will raise the unfairness of such a clause of their own motion, but may well not spot unfairness of other clauses.

Scholars have discussed extensively whether nullity under art. VI.84 CEL is absolute or relative.<sup>105</sup> Traditionally, it would have been considered as relative nullity: one which can be invoked only by the party which the legislator intends to protect, i.e. consumers. The rule that courts have to raise the unfair character of their own motion sits ill with the notion of relative nullity. Indeed such a duty is habitually associated with absolute nullity. The Belgian *Cour de Cassation* may have found a compromise by laying emphasis on the duty of courts to raise the *argument* of unfairness of their own motion and inviting *parties* to revise their positions in this light.<sup>106</sup> Following this logic, it could be said that courts facilitate the exercise of consumer rights but do not take the place of consumers. It remains for them to raise the claim which is only suggested to them. Nullity, therefore, can still be considered relative.

As mentioned, going to court is the only way to have a contract term recognised as unfair. In other words, no administrative remedy is available under Belgian law. However, as both representatives of the Ministry for the Economy and a business association explain, the Economic Inspectorate plays an active role in practice by intervening regularly in court proceedings. In addition, the CUCT (see above) is an advisory body created in 1993. It issues recommendations about contracts terms in B2C contracts, gives advice upon request and may submit proposals to the Minister of Economic Affairs.<sup>107</sup> The CUCT can act on its own initiative or at the request of the competent minister, a consumer organisation or an association of traders.

As far as court proceedings are concerned, a consumer association raises an additional issue and explains that the situation would be improved in terms of remedies if it were possible to obtain compensation in the framework of an injunction procedure, rather than having to sue separately for compensation.

- In a forward looking perspective: Are there other measures that could improve the effectiveness of the UCTD in establishing a high level of consumer protection in your country? Would a graphical presentation model improve the readability and comprehension by consumers of the T&Cs? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

Representatives of the Ministry for the Economy are not averse to the idea. However, they underscore that a graphical representation model with symbols requires a certain amount of education. At the moment, symbols are used all around, without the guarantee that the consumer knows the meaning all of them. A business association stated that such symbols could have an added value, but they should be implemented by sectoral auto-regulation. In other words, enforcers and businesses concur in

<sup>105</sup> See for a short overview of the arguments: R. STEENNOT, "Art. 75 Wet betreffende marktpraktijken en consumentenbescherming" in X, *Handels- en economisch recht. Commentaar met overzicht van rechtspraak en rechtsleer*, 2012, losbl.

<sup>106</sup> P. CAMBIE, "Unfair Terms in Consumer Contracts" in G. STRAETMANS and J. STUYCK (eds.), *Commercial practices*, 2015, (136) 152, footnote 481.

<sup>107</sup> The CUCT has already given repeatedly advice, e.g. concerning the use of certain terms in contracts of mediation of real estate agents. The recommendations can be consulted on the internet ([http://economie.fgov.be/nl/fod/structuur/Commissions\\_Raden/Commissie\\_onrechtm\\_bedingen/adviezen/#.V7Go\\_5iLShc](http://economie.fgov.be/nl/fod/structuur/Commissions_Raden/Commissie_onrechtm_bedingen/adviezen/#.V7Go_5iLShc)).

thinking that more graphic representation of information could be a way forward, provided there is sufficient standardisation. The idea however seemed relatively new to representatives of a consumer association. They expressed that it could be a good idea, provided that the overall level of protection would not diminish. The most important aspect to improve the effectiveness of UCTD, according to that consumer association, is to improve practical information on what concrete steps consumers should take when they face a problem (by analogy with passenger rights).

More generally, a judge stated that national UCTD provisions (whether it concerns the general provisions or the black list) contribute little to consumer protection because of the ignorance of consumers and also that of their lawyers. Generally, lawyers use well-known concepts of general contract law with which they are more familiar. These findings are identical with these of the EC Consumer Law Compendium of 2007.<sup>108</sup> However, according to the judge, the way forward would be to specify the prohibitions and to focus on black-lists. General principles and indicative lists are vague, which necessitates a complete research of all facts in a procedure and for which there is not enough time or resources. According to this stakeholder, the more specific the prohibition, the more useful it is in practice. Another judge concurs that short and clear provisions would be an improvement.

### 1.2.2. Effectiveness of the current rules 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 disparities have an impact on cross-border trade; [*Key aspects to consider are: Do national differences in the application/implementation of the Directive play a role for businesses? Have these differences led to changes in their business strategy? Have these differences caused problems?*]

A business association stated that because of the active role of the ECJ (in interpreting the general principle to ensure a uniform interpretation), the principle presently works fine in cross-border trade and has contributed positively to establishing the Internal Market.

- 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;

Business representatives did not mention any adverse effect of black lists on cross-border trade.

- 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.

Again, no specific obstacle was perceived in connection with extended scope of UCTD.

<sup>108</sup> H. SCHULTE-NOLKE (ed.) i.c.w. C. TWIGG-FLESNER and M. EBERS, *EC Consumer Law Compendium. Comparative Analysis*, 2007, 417, [http://ec.europa.eu/consumers/archive/cons\\_int/safe\\_shop/acquis/comp\\_analysis\\_en.pdf](http://ec.europa.eu/consumers/archive/cons_int/safe_shop/acquis/comp_analysis_en.pdf)

### 1.2.3. Relevance for business-to-business transactions

Regarding the area of contractual fairness and in relation to the Unfair Contract Terms Directive, please analyse:

- Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;

As already mentioned above, businesses, as a rule, are not favourable to transposing rules on consumer protection to B2B transactions.

Currently in Belgium, there are no general rules on unfair terms for B2B transactions. There is however a specific provision in the Act on Late Payment in Commercial Transactions,<sup>109</sup> 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. This for instance can be the case by stipulating a too low default interest rate. A judge has to consider all circumstances of the case, including good commercial practice, the nature of the product or service, and the fact if the unfair term creates a significant imbalance between the rights and obligations of the parties, to the detriment of the creditor. There is no requirement that the clause has not been individually negotiated, but one author suggests that this will in practice mostly be the case.<sup>110</sup>

Another author suggests that an extension of the unfairness test of contractual terms is justified in contracts where at least one party is an SME.<sup>111</sup> The general rationale of European contract law is the creation of a well-functioning internal market and the protection of weaker parties. Since SMEs, like consumers, are generally in a position to conclude a contract on their business partner terms or to not conclude it at all, the same rationale applies to them and to consumers. This would seem a valid reason to extend protection against unfair terms to SMEs.

- 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;

It is argued in literature that this would be appropriate for B2B transactions and that a more stringent fairness test, such as the one suggested in art. 86 of the proposal on a Common European Sales Law (hereinafter: 'CESL'),<sup>112</sup> would not be justified. A more stringent test would not create more confidence for SME's to engage in cross-border trade, nor would it seem justified on fairness grounds, as SMEs do not need to be more protected than consumers.<sup>113</sup> Another author strongly suggests that the scope of the UCPD should be amended to cover both B2C and B2B (marketing) practices at the pre-contractual stage. Thus, scholars agree that the same test should apply to SMEs and consumers.

<sup>109</sup> Act on Late Payment in Commercial Transactions of 2 August 2002, *BS* 7 August 2002.

<sup>110</sup> S. VAN LOOCK, "Unfair Terms in Contracts Between Businesses. A Comparative Overview in Light of the Common European Sales Law" in M.B.M. LOOS and I. SAMOY (eds.), *The Position of Small and Medium-Sized Enterprises in European Contract Law*, Cambridge, Intersentia, 2014, (83) 125-126.

<sup>111</sup> J. KLIJNSMA, "The CESL and its Unfair Terms Protection for SMEs" in M.B.M. LOOS and I. SAMOY (eds.), *The Position of Small and Medium-Sized Enterprises in European Contract Law*, Cambridge, Intersentia, 2014, (73) 73-74.

<sup>112</sup> Commission Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law of 11 October 2011, COM(2011) 653 final. Art. 86 states that, in B2B relations, a term is unfair if a) it is not individually negotiated and b) its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.

<sup>113</sup> J. KLIJNSMA, "The CESL and its Unfair Terms Protection for SMEs" in M.B.M. LOOS and I. SAMOY (eds.), *The Position of Small and Medium-Sized Enterprises in European Contract Law*, Cambridge, Intersentia, 2014, (73) 79.

- 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;

There was no extensive information found regarding these extensions or exclusions. Scholars however argued that, contrary to the CESL, a difference in the scope of the unfairness test between consumers and small business would not seem justified.<sup>114</sup> Consequently, if individually negotiated terms are excluded from the unfairness test for consumers, this should also be the case for small businesses, since the same rationale (the weaker party and the internal market argument) equally apply. Under Belgian law individually negotiated terms are within the scope of the prohibition of unfair terms. Therefore, it would be better if they could also fall within the scope of protection for SMEs.

- 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;

No specific information was found nor given regarding this question.

- Whether there is a need for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive;

No specific information was found nor given regarding this question.

- Whether an extension of the Unfair Contract Terms Directive to B2B transactions can bring benefits for cross-border trade;

No specific information was found nor given regarding this question.

- Whether the consequences of such an extension would have an effect on innovation by or market opportunities for SME providers/suppliers;

No specific information was found nor given regarding this question.

- Whether the benefits of extending the scope to business-to-business transactions would exceed the negative consequences of such an extension.

No specific information was found nor given regarding this question.

<sup>114</sup> J. KLIJNSMA, "The CESL and its Unfair Terms Protection for SMEs" in M.B.M. LOOS and I. SAMOY (eds.), *The Position of Small and Medium-Sized Enterprises in European Contract Law*, Cambridge, Intersentia, 2014, (73) 80.

### 1.3. Injunctions

#### 1.3.1. Effectiveness of the current rules in establishing a high level of consumer protection

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

- To what extent is the use of the injunction procedure in your country contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment?<sup>115</sup>

Two specialised judges were of the opinion that the injunction procedure is very effective and useful. One commented that it is mostly used by business and not by consumers. Indirectly however, consumers benefit from these orders to cease, since they lead firstly to fairer competition and secondly to consumer protection.

A consumer association explained that, in network services sectors (telecom, energy), the injunction procedure helped obtain real changes in consumer contracts.

- What measures in your national legislation on injunction procedure are considered to be particularly effective, if any: measures regarding the cost of the procedure, the 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?

Article 1022 of the Belgian Judicial Code (rules on civil procedure) together with article 3 of the Royal decree of October 26th 2007 provide that the value of an injunction cannot be evaluated in money. This has a bearing on the general rule according to which costs are born by the losing party. The amount the winning party can recover from the losing party in an injunction procedure is capped at 1440 Euro. However, the judge may increase this amount up to 12.000 Euro.<sup>116</sup> In the interviews, judges underscored the importance of this compensation, explaining further that, where necessary, the amount can be adjusted downwards for e.g. vulnerable consumers. However, the rule does not address the *ex ante* obstacle of litigation costs: most consumers, irrespective of the merit of their case, will be reluctant to make an advance for the litigation costs.

The representatives of the leading consumer association explained that, in practice, the sums awarded to the winning party never cover real costs of the cap. They said that, as a result, the consumer association had to choose its cases and could not file for an injunction in every case that would merit attention. They indicated that the consumer association is doing an enforcement job that should be financed by the government and suggested it should be able to recover the true costs of private enforcement from the government.

There is a summary procedure, but, according to a judge, it is seldom used, if at all, since the ordinary injunction procedure (before the president of the court) is already an accelerated procedure.

Concerning the prior consultation, in Belgium there is a procedure of reconciliation, where parties try to reach an agreement together with the judge. According to a judge, this procedure is quick, without any costs for the parties, implies a low threshold for the consumer, and is therefore very consumer friendly.

The publication of a decision or a corrective statement is very effective according to a judge, but should not be used lightly, since it could harm the reputation of the business over time. In other words, the publication is very effective because of its

<sup>115</sup> 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.

<sup>116</sup> Both caps are indexed. These are the current values at the time of writing.

deterrent nature. Another judge concurs and explains that the combination of various measure at the courts disposal is sufficient to discipline businesses.

- Has your country extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunction Directive? If yes, what are the additional consumer rights covered?

Injunction procedures are available under Belgian law for a variety of matters, ranging (among others) from remuneration of public notaries to gender discrimination and data protection, from appointing experts to granting exequatur and trademark infringement.<sup>117</sup> The scope of application of injunction procedures under Belgian law is therefore far wider than consumer law.

In the realm of regulation of marketing practices, the Economic Code provides for injunction procedures for violations of the rules contained in Book VI of the same code (which contains consumer protection rules)<sup>118</sup> but also in matters of advertisement 'including those not covered by book VI'<sup>119</sup>, and matters regarding the protection of consumers of mobile telecommunication services.<sup>120</sup> This may be seen as an 'extension' beyond the scope of application of the Injunction Directive (with the caveat that Belgian lawyers may not perceive this directive as the root of injunction procedures in these matters and therefore the wider scope of application of the injunction procedure not as an 'extension' from that base). The scope of injunction procedures in consumer matters is therefore broader under Belgian law than the rights conferred by the pieces of EU legislation listed in the Annex I to the Injunction Directive.

- Analysis of the obstacles to the effective use of the injunction procedure, in particular by analysing which progress in removing obstacles has been made and/or new difficulties that have emerged in your country since 2012.

Under Belgian law, injunction procedures are fast-track procedures. Urgency is presumed and many procedural delays are abridged (in comparison to ordinary procedures). Yet, in practice these procedures too are quite slow. A judge expresses the opinion that delays are indeed the main obstacle to effectiveness. He thinks that, beyond a much-needed general upgrade of the Belgian judicial system, it would be helpful to have specialised courts dealing with consumer protection.

The interviewed consumer association clearly stated that costs are the main obstacle. It did not consider that there has been significant change since 2012.

- In a forward looking perspective: Should the coverage of the Injunctions Directive be extended (by including additional legislation into Annex I to the Directive)? If so, which EU legislation should be included? Are there other measures that could improve the effectiveness of the ID in establishing a high level of consumer protection? Should the scope of the Injunctions Directive be extended to the protection of collective business' interests? Are there best practices in your country that could be relevant for other countries and considered as model for the injunction procedure at EU level?

From an EU law perspective, the list should at least be updated to include recent directives, in particular the Consumer Rights Directive. This is purely a matter of consistency.

<sup>117</sup> Listed in the Code of Procedure at art. 585 and 587 (civil matters) and art. 588 and 589 (commercial matters).

<sup>118</sup> Article XVII.2. 15°

<sup>119</sup> Article XVII.2. 7°

<sup>120</sup> Article XVII.2. 14°

From a Belgian perspective, scholars are sceptical about extending the scope of injunction procedures (whether in consumer matters or more generally). The reason is that courts are not well resourced and stretching the limited available resources over an even greater number of injunction procedures is likely to make matters worse in terms of delays. It would also detract resources from the seriously urgent matters.<sup>121</sup> In the past, it has been observed that many of legislative provisions adopted to broaden the scope of injunction proceedings have not produced the desired results and appear retroactively as demagogical.<sup>122</sup>

Another drawback of these procedures is that the judge can only give an injunction. If the parties want to claim compensation, they have to start a distinct procedure (for which there is no fast-track). The reason for this is that it would be unworkable to keep the fast-track character of the injunction procedure if the court had to deal with calculation of damages. Nonetheless, this is a serious inconvenience to victims of unfair practices or unfair clauses. In the field of gender discrimination, where the same injunction procedure also applies, a very innovative measure was adopted to alleviate this difficulty: the claimant may opt for a flat-rate compensation (fixed in the legislation).<sup>123</sup> The compensation may not be exact, but it will be relatively speedy. This seems to work well.<sup>124</sup> Another more recent initiative to improve the efficacy of injunction procedures was introduced in article 186 of the Judicial Code: the King (i.e. the government) may give the president of certain courts specialized jurisdiction over injunction procedures.

An issue a revised Injunctions Directive should deal with is the interplay between injunctions and collective redress. As a matter of principle, if one takes collective redress seriously, it would seem that injunctions should be available not only to public bodies in charge of consumer interests and consumer associations (current article 3 of the Injunction directive). They should also be available to groups of consumers formed in accordance with national law (and relevant EU law if ever adopted) for the purpose of group litigation.

It is true that, in practice, this may not be necessary in all cases. For example, where a consumer association or public body applies for an injunction in parallel with the class action (or before), the effect of the injunction will extend to all consumers.<sup>125</sup> Yet there may be cases in which it could make a difference that the class has standing to apply for an injunction. This issue should at least be considered when revising the Injunctions Directive.

Regarding measures that could improve the effectiveness of the ID in establishing a high level of consumer protection, the leading consumer association stresses the need for a better coordination between the injunction procedure and sanctions. According to consumer representatives, it should be possible to apply for a sanction in the same set of proceedings (even if in a separate second step), and sanctions collected should go to a fund which could finance other applications for injunctions as well as class actions.<sup>126</sup>

<sup>121</sup> Interim measure proceedings governed by art. 583 Judicial Code.

<sup>122</sup> J-F VAN DROEGENBROECK «Le juge des référés, hors la loi ? », in J. ENGLEBERT (ed.) *Questions de droit judiciaire inspirées de 'l'affaire Fortis'*, Brussels, Larcier, 2011, p. 154 and reference cited.

<sup>123</sup> Law of 10 May 2007 on fighting discriminations, MB 30 May 2007, p. 29016, section 18.

<sup>124</sup> S. VAN DROEGENBROECK and J-F VAN DROOGHENBROECK, *L'action en cessation de discriminations in J-F VAN DROOGHENBROECK, Les actions en cessation*, Brussels, Larcier, 2006, 324-397 ; G. CLOSSETS-MARCHAL and J-F VAN DROOGHENBROECK,, *La protection judiciaire contre la discrimination : l'action en cessation in J. RINGELHEIM (ed.) Le droit et le diversité culturelle*, Brussels, Bruylant, 2011, 394-453.

<sup>125</sup> Case C-472/10, *Invitel*, EU:C:2012:242.

<sup>126</sup> For a similar proposition, See A-L SIBONY, *A Behavioural Perspective on Collective Redress in Eva Lein, Duncan Fairgrieve, Marta Otero Crespo and Vincent Smith (eds), Collective Redress in Europe: Why and How?*, British Institute of International and Comparative Law, 2015, pp. 47-57 at 56.



### 1.3.2. 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:

- How effective is the injunction procedure in addressing infringements originating in another EU country?

A judge pointed out that, from the point of view of consumers, there are few problems since the consumer will try to address the infringement before a Belgian court, so there are no real procedural problems as such. The main problem however will be the implementation and enforcement of the Belgian court decision in other countries, which remains difficult. Another judge interviewed concurs on this point.

- How effective is it to address infringements originating in another EU country that qualified entities in your country are enabled to seek injunctions in the other Member State (Article 4 of the Injunctions Directive)?

The persons interviewed who work for qualified entities did not have experience with injunction procedures before a Belgian court for infringement of consumer rights originating in other Member States.

The leading consumer association pointed to the difficulty of dealing with practices originating in another Member State, where the practice is not prohibited (such as reselling concert tickets at a premium price).<sup>127</sup>

- In a forward looking perspective: Are there non-legislative or/and legislative measures that could improve the effectiveness of the injunction procedure in addressing infringements originating in another EU country? Are there best practices in your country that could be relevant for other EU countries and could be considered as a model for the injunction procedure at EU level?

The main difficulty evoked by several stakeholders concerns the execution of Belgian judgments in other Member States. The solution would then seem to consist in broadening the scope of instruments facilitating cross-border execution of judgements so as to include injunctions within the scope of ID. This would require legislative action in the framework of judicial cooperation in civil and commercial matters.

In addition, the leading consumer association notes that cooperation among national enforcement authorities could be improved.

### 1.3.3. Interplay between the Injunctions Directive and other enforcement instruments of consumer law

#### Please analyse:

- Is the injunction procedure as designed by the Injunctions Directive regulated separately in your country (in a separate legal act or as a separate procedure regulated within the same legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (UCPD, UCTD and by the Consumer Rights Directive)?

The injunction procedure is regulated by articles of the Judicial Code, which is a distinct piece of legislation from the Economic Code, where the directives are transposed.

- If these procedures are regulated separately: What are the main differences between them? How is the coherence between these procedures ensured? If these

<sup>127</sup> See example described above.



procedures are regulated in a single legal act (possibly as a single procedure): In what way do these procedures (or this procedure) go beyond measures foreseen by the Injunctions Directive?

Belgian rules on injunction are in conformity with the Injunction directive. They do beyond the measures foreseen by the Injunctions Directive on one particular issue: urgency is irrebutably presumed, thus relieving the claimant of the heavy burden of proof under article 584 of the Judicial Code. It should also be mentioned that, in practice, periodic penalty payments (under art. 1385 bis of Judicial Code) are almost systematically ordered.

## 1.4. Cross-cutting issues

### 1.4.1. Cost and benefits of the directives covered by the study

- To what extent is there evidence for benefits for consumers stemming from the protection provided by both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of benefits for consumers from the protection against unfair commercial practices and unfair standard terms in contracts; [*Note: a relevant aspect in this context is whether the costs for consumers in exercising their rights under these directives are limiting these benefits or not.*]

According to a judge, the single biggest hindrance that holds consumers back from exercise of their rights under these directives is the cost of litigation. In many cases, consumers will not litigate for fear that either upfront costs will be too high or that costs may outweigh benefits (if they lose, as mentioned, the losing party must pay a standard compensation for the litigation costs to the winning party).

One author states that according to the European legislator, the harmonisation within the internal market increases consumer confidence.<sup>128</sup> However one author criticises this argument with regard to the UCPD for a number of reasons.<sup>129</sup> For instance, even if there is a minimum safety net of consumer protection in the internal market, most consumers are not aware of the content of their own law. This makes it unlikely that the reason why consumers are reluctant to buy across borders is the fear that other Members States law may be different from their own law. Another compelling counter argument is that the UCPD increases consumer confidence by eliminating obstacles stemming from different national regulation of commercial practices, but not by addressing other, more important kind of obstacles, e.g. obstacles related to cross-border dispute resolution (access to justice obstacles), practical obstacles (shipping costs, difficulties in exchanging the product and getting it repaired) and natural obstacles (the language barrier, geographical distance and unfamiliar consumer culture and journey time).

The leading consumer association stresses that cost of going to court is a serious obstacle to the enforcement of consumer rights.

- To what extent is there evidence for benefits for traders stemming from both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of creating a level playing field for honest traders by providing a legal basis to eliminate or at least constrain dishonest market practices, such as the use of unfair standard terms in contracts or unfair commercial practices, including through the application of the Injunctions Directive;

<sup>128</sup> B. KEIRSBILCK, *The New European Law of Unfair Commercial Practices and Competition Law*, Oxford, Hart Publishing, 2011, 186, no. 203-204.

<sup>129</sup> B. KEIRSBILCK, *The New European Law of Unfair Commercial Practices and Competition Law*, Oxford, Hart Publishing, 2011, 186-187, no. 204.

In the view of a judge, the regulation on market practices is very beneficial for businesses, since it prevents and reduces unfair competition, and therefore levels the playing field. Because of this legislation, consumers benefit indirectly from fairer competition. A business association agreed with this view and argued that especially full harmonisation levels the playing field in cross-border trade, contrary to minimum harmonisation, which leads to diversity in national legislation. However, as already mentioned, because of some open-textured concepts, for instance in the UCPD, there is a large margin of appreciation for the judges, which possibly detracts from the effectiveness of harmonisation and thus the functioning of the internal market. A legal author agrees with this view and wrote that regulatory diversity would not disappear after the implementation of the UCPD.<sup>130</sup> The law in action would probably continue to differ widely, because of the numerous open-textured concepts, rules and principles in the UCPD. In the interview, a business association confirmed this point of criticism and gave the example of the regulation of blackout periods in Belgium,<sup>131</sup> which illustrates ongoing regulatory diversity across Member States.

As already stated, one business association maintains that only maximum harmonisation eliminates those compliance and transaction costs for businesses, but it does so only if the harmonised rules are precise enough. Otherwise, harmonised rules create legal uncertainty and therefore higher compliance and transaction costs, with the effect of possibly hindering cross-border trade.

According to Keirsbilck, such compliance costs do not constitute the main obstacle to cross border trade. Empirical evidence suggests rather that the main obstacle, on the traders side, is the divergent consumer cultures throughout Europe. Cross-border traders are forced to adapt to these varying contexts, keeping the principle 'think global, act local' in mind.<sup>132</sup>

- What are costs for traders due to the need to respect the requirements under the directives covered by the study? *[Note: Such as costs of research, legal advice and compliance as well as the amount of time necessary to comply with the directives]*

In the interview, the business association gave no specific numbers, but stated that the compliance and transaction costs mainly consist of the costs of research and legal advice, to comply with the national regulation of another Member State.

On a more general note, a judge pointed out the difference between large companies and SMEs: for SMEs, it is much more difficult to comply with the requirements because the compliance costs are a heavier burden compared to larger businesses.

- What are the costs involved in the public enforcement of these rules?

Enforcers do not have a precise notion of such enforcement costs because government personnel involved in enforcement tasks also enforce national provisions which do not originate in directives.

- Are there indications that the directives covered by the study are not implemented in your country in a cost-effective manner?

No specific trait of Belgian enforcement system seems to be wasteful. A judge confirmed that, at the moment, there is no margin for significant improvements.

A consumer association stresses that out-of-court procedures are also expensive

<sup>130</sup> B. KEIRSBILCK, *The New European Law of Unfair Commercial Practices and Competition Law*, Oxford, Hart Publishing, 2011, 185-186, no. 201-202.

<sup>131</sup> On which see above section 1.1.3. page 24.

<sup>132</sup> B. KEIRSBILCK, *The New European Law of Unfair Commercial Practices and Competition Law*, Oxford, Hart Publishing, 2011, 186, no. 202.

- Could the costs for implementing and enforcing the rules of the directives covered by the study be reduced without lowering the level of protection for consumers? If so, how?

In the view of a judge, the litigation costs (private enforcement costs) could be reduced, but this would increase the risk of abusive litigation. What courts do is that they exercise discretion as to how private costs are shared between the parties: they may for instance lower litigation costs for the losing party by reducing the compensation which it has to pay to the successful party at the end of proceedings. This does not change the total amount of enforcement costs but may change incentives to litigate. To truly lower costs, the legislator would need to lower court fees.

A consumer association stresses that prevention is less costly than litigation. It also puts forward that sanctions should be increased to improve dissuasion.

#### 1.4.2. Interplay with EU sector-specific consumer protection legislation

Regarding the interplay of the horizontal EU consumer legislation [mainly UCPD and UCTD] with EU sector-specific consumer protection legislation in the areas of electronic communications, passenger transport, energy and consumer financial services, please:

- Analyse the levels of awareness of the requirements of the horizontal EU consumer legislation (mainly UCPD and UCTD) of businesses and consumers and the specific public enforcement bodies in the relevant sectors, as in particular demonstrated by their practical application; [*Key question here is: Are UCPD and UCTD applied in practice by national authorities and courts as a legal basis to combat unfair commercial practices and unfair standard terms in contracts in the regulated sectors?*]

A judge stated that consumers are not aware of their consumer rights in general. However, for certain sectors like e-communications, young consumers display a higher level of awareness. Furthermore, as mentioned above, judges stated that, courts rarely apply provisions stemming from the UCPD or UCTD, since general contract law often suffices and is more familiar to legal practitioners, who are mostly not aware of specific consumer legislation.

From the point of view of one business association, businesses - especially large ones - are well aware of the requirements in these specific sectors and comply with them. The business association added that businesses generally follow the opinions of the CUCT, and they also well informed on the requirements by the sectoral business associations.

- Specify whether in your country the same authority is responsible for the enforcement of the horizontal EU consumer law 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 UCPD/UCTD in the regulated sectors, as specified in the previous bullet?*]

The Economic Inspectorate is in charge of enforcing consumer protection rules generally, also in the e-communications and transport sectors. Only in the financial sector and in the energy sectors are sectoral regulators in charge of consumer protection.

In the Financial sector, the 'Financial Services and Market Authority' (hereinafter, FSMA) is in charge (since its creation in 2010). FSMA is responsible for the supervision of financial products generally and oversees in particular the provision of mandatory pre-contractual information requirements. It also enforces sector-specific provisions on

advertisement.<sup>133</sup> Both pre-contractual information and advertisements are subject to prior approval by FSMA.<sup>134</sup> The general perception of the leading consumer association is that FSMA prioritises the interest of the sector rather than the interests of consumers, however no specific examples were given.

In the energy sector, the regulatory structure is more complex as the oversight of the energy markets is divided between specialised authorities on the federal and regional level (the 'CREG' and 'VREG'). These authorities are competent to oversee the compliance of the energy suppliers with the specific energy legislation. The Belgian Court of Accounts (*'Rekenhof'/'Cours des comptes'*) reviewed the functioning of the CREG (the federal regulator) in 2015 and concluded that, because of a deficient legal framework, insufficient budget and inadequacy between needs and personnel, the CREG was not suitably equipped to exercise its inspection powers effectively or adopt effective sanctions.<sup>135</sup> This suggests an enforcement deficit for the UCPD and the UCTD in the energy sector.

The leading consumer association considers that, in general, sectoral regulators rely on sector-specific provisions more than they do on horizontal rules. This is a reason to keep in sectoral rules provisions that overlap with general directives (i.e. repeat general provisions and/or go further), as the telecom regulation does.

- Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning contractual fairness, 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.?*]

Book VI of the CEL, containing the provisions on contractual fairness, unfair commercial practices and information obligations regarding advertising is applied to all sectors unless sector-specific rules depart from this general framework.<sup>136</sup>

According to a business association and a judge, there are some overlaps between horizontal consumer provisions and sector-specific rules, but no conflicts and the existing overlaps do not cause any problems.

Examples of such overlaps are found in financial services sector, where sectoral regulation imposes numerous information requirements upon financial services providers.<sup>137</sup> For instance, information requirements applicable to credit advertising mandate that every advertisement that does not contain numerical information regarding the cost of credit should state: 'please note, borrowing money also costs money' (art. VII.64 (2) CEL).<sup>138</sup> In addition, Belgian national provisions on the standard information requirements (Book VII of the CEL on Financial Services transposing art. 4 of the Consumer Credit Directive 2008/48/EC), regulates advertisements for credit in a more general way, outside the scope of harmonisation of the Directive and in addition to the provisions on unfair market practices of Book VI CEL. This is without prejudice to the above-mentioned Royal Decree of 25 April 2014

<sup>133</sup> Royal Decree of 25 April 2014 Concerning Information Requirements with the Commercialisation of Financial Products with non-professional Clients, *BS* 25 April 2014.

<sup>134</sup> Art. 8 and art. 26 of the above mentioned Royal Decree

<sup>135</sup> X, *Rekenhof. Commissie voor de Regulering van de Elektriciteit en het Gas (CREG)*, 66, Nov 2015, available in Dutch and in French: [https://www.ccrek.be/docs/2015\\_48\\_CREG\\_NL.pdf](https://www.ccrek.be/docs/2015_48_CREG_NL.pdf) (NL) [https://www.ccrek.be/docs/2015\\_48\\_CREG\\_FR.pdf](https://www.ccrek.be/docs/2015_48_CREG_FR.pdf) (FR)

<sup>136</sup> For instance for financial law aimed at consumer protection: Explanatory Memorandum 24 September 2013, *Parl.St. Kamer*, COD 53 3018/001, p. 21; V. COLAERT en A. VAN IMPE, "Financial Services" in G. STRAETMANS and J. STUYCK (eds.), *Commercial practices*, 2015, (305) 306.

<sup>137</sup> V. COLAERT en A. VAN IMPE, "Financial Services" in G. STRAETMANS and J. STUYCK (eds.), *Commercial practices*, 2015, (305) 306.

<sup>138</sup> V. COLAERT en A. VAN IMPE, "Financial Services" in G. STRAETMANS and J. STUYCK (eds.), *Commercial practices*, 2015, (305) 314.

Concerning Information Requirements with the Commercialisation of Financial Products with Non-Professional Clients.<sup>139</sup>

To conclude, there are overlaps, but the sector-specific rules on financial services go further than horizontal rules and there is no particular difficulty in applying the sector-specific rules.

- What are the benefits of the complementary application of the UCPD and UCTD in the regulated sectors? What are the costs due to the complementary application with the sectoral EU consumer protection legislation?

A consumer association stated that there were benefits in terms of coherence. In the association's view, complementary application of general and sector-specific rules does not create extra costs. No further reference was found concerning specifically the benefits of the application of the UCPD and UCTD in the regulated sectors.

- Assess any need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law.

Stakeholders do not seem to think that overlaps or contradictions between the EU sector-specific rules and horizontal EU consumer law are in practice a big problem. There does not seem to be an acute need for clarification of the interplay between them.

#### 1.4.3. Relevance of consumer law directives for consumer-to-business transactions

- Please analyse the need and potential for the application of the consumer law directives (mainly UCPD and UCTD) to 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).

A judge stated that, even in a C2B relationship, the consumer does not provide goods or services on a regular basis, which implies that the consumer should still enjoy the benefit of consumer protection. Another judge thinks that it is necessary to prevent or sanction abuse on the part of consumers.

Business associations for their part are in favour of 'reciprocity': they think these directives should apply (to protect businesses) in C2B transactions. Nonetheless, they raise doubts about whether these directives are easily transposable to C2B transactions.

A consumer association thinks that consumers should enjoy equal protection in any relation with businesses, whether B2C (where the consumer is the buyer) or C2B (where the consumer is the seller) or C2C via B, where the consumer sells to another consumer via a platform which qualifies as a business.

<sup>139</sup> Royal Decree of 25 April 2014 Concerning Information Requirements with the Commercialisation of Financial Products with non-professional Clients, *BS* 25 April 2014.

#### 1.4.4. Specific protection for vulnerable consumers

Please analyse:

- Whether the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined in the consumer law directives and relevant jurisprudence, and as applied by national authorities and courts in your country, continue to be valid and fit for purpose.

Representatives from the Ministry of the Economy as well as the leading consumer association consider that these concepts are still fit for purpose.

A judge pointed out that one concept of a 'consumer' would suffice. The reason is that (especially lower) courts are almost never asked to apply consumer protection rules and are able to adjudicate cases brought to them under general contract law. The simpler consumer protection rules are, the better chance they stand to be used by non-specialist legal practitioners. Another judge disagrees and thinks that these concepts are useful and that a consistent body of case law has now developed about them. In the view of a business association, there is no indication that these concepts are not valid or fit for purpose. Furthermore, businesses are now well aware of these concepts and there is some value in not changing the approach and requiring yet another learning process. The association estimates that it took about ten years for businesses to really switch their mentality and adapt to these standards.

- To what extent the existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers and whether, based on the experiences in your country, specific provisions should be introduced in other directives concerned, in particular the Unfair Contract Terms Directive.

The point of view of enforcement officials is that specific rules concerning vulnerable consumers are not a very good idea. The category of vulnerable consumers adds to the complexity without creating a clearly identifiable benefit in terms of specific rights. They would be very reticent to extend a specific protection of vulnerable consumers to UCTD as this would generate a lot of legal uncertainty for contracts.

Business association and judges did not have specific comments on this point.

A consumer association says that it is more difficult for handicapped consumers to enforce their rights and thinks that special sanctions should be contemplated against traders who take advantage of handicapped consumers. This opinion seems to be based on direct experience in one case about a wheelchair guarantee.

#### 1.4.5. EU added value

- Overall, would you consider that protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in your country since the implementation of the UCPD and the UCTD in national legislation?

Representatives from the Ministry for the Economy, who have followed closely the legislative changes brought about by the transposition of these directives, say that the UCPD has improved the level of consumer protection. However, on one point, the Directive has lowered consumer protection. Belgium had to abolish rules on reference prices which applied to advertising of discounts. As a result, it has become a lot easier for businesses to advertise inflated discounts that do not correspond to reality. As criteria are now much broader, it has become more difficult for the Economic Inspectorate to take action. Traders in the distribution sector have unfortunately not adhered to the relevant code of conduct. Regarding the UCTD, the view of the Ministry is that this directive has not benefited Belgian consumers as Belgium was a forerunner at the European level on the issues covered in this directive.

While recognising that, on paper, the directives have improved the level of consumer protection, a judge explains that many practitioners (lawyers, judges) are under the



impression that consumer law is complex and that there are constant changes. Therefore, it seems that theoretically there is more consumer protection, but in practice the level of consumer protection only rises gradually over time, as consumers and practitioners become more aware of specific consumer protection regulations and apply them more regularly.

Another judge stresses that the protection remains ineffective in many cases, for economic reasons. A single consumer will generally not initiate court proceedings even if she/he has a good case. In his view, only collective actions can insure effective protection of consumer rights. In practice, he says, consumer rules are applied only in the context of court cases initiated against consumers on a contractual basis (e.g., for failure to pay) and are used as part of a defence strategy (e.g., consumer has not paid but terms were unfair and therefore not binding). The same judge notes that, in some cases, lawyers of consumers try to abuse the well-intentioned protection provided by these rules. On the whole, in his opinion, the main merit of the rules is independent from actual enforcement: their mere existence and the threat of enforcement is enough to discipline trader's behaviour.

A business association agrees that consumer protection has increased significantly with the development of EU law. Its view is that, on the whole, Belgian businesses are well aware of the consumer protection rules. For instance, their general terms and conditions mostly comply with the legislation, although there are some exceptions.

A consumer association thinks that EU law has brought significant progress in Belgium mainly in the field of unfair contract terms.

- Overall, would you consider that the information of consumers regarding unit prices has improved since the implementation of the PID in national legislation?

Both representatives of the Ministry for the Economy and a business association agree that this Directive has increased level of protection and made it easier for consumers to compare offers. The representative from the Ministry notes that rules on price indications are applied by distributors more broadly than is mandatory.

- Overall, would you consider that the protection of businesses against unfair marketing in your country has improved since the implementation of the MCAD in national legislation?

A business association stated that businesses made a huge effort to comply with the provisions of the MCAD. Especially the Economic Inspectorate and enforcement authorities (on a national level and on the level of the Benelux) ensured the compliance of businesses with the MCAD. Representatives from the Ministry stress that the change has been much more radical for comparative advertising than for misleading advertising. Before the Directive, comparative advertising was prohibited. It was the law which transposed the Directive which authorised such advertising. A number of issues with the interpretation of rules regarding comparative advertising have been identified. As explained in detail in a report of 2011, the Ministry thinks the rules on comparative advertising should be clarified, especially on the issue of whether the price used as a comparator in the advertisement is truly offered by a competitor. The case law of the CJEU on this point is not perfectly clear so that the clarification of existing rules would need to go beyond a mere codification of the case law.

- Overall, would you consider that it has become easier for businesses in your country to directly trade cross-border to final consumers located in other EU countries in recent years? Has it become easier for consumers in your country to directly purchase cross-border from traders located in other EU countries?

One judge thinks the opposite is true. Because of the multitude of rules and frequent changes, complexity and legal uncertainty have increased and compliance costs for



cross-border trade have gone up. Furthermore, the implementation of the directives differs among Member States, which does not facilitate cross-border trader in practice.

To what extent are these improvements, if any, due to the mentioned directives?

According to a business association, improvements over the last years are largely due to the mentioned directives. In its view, further improvements in consumer protection would be achieved if the European legislator would systematise maximum harmonisation.

## Annex

## A. Transposition fact sheet

**Table 1: Fact sheet on transposition of directives in Member States' law – Belgium<sup>140</sup>**

Directive	Transposition legislation (National law, Article)	Comments	Specific provisions going beyond minimum harmonisation requirements/use of exemptions	Included in national legislation	Comments	
<b>Directive 93/13/EEC on unfair terms in consumer contracts<sup>141</sup></b>	Code of Economic Law (CEL) (Law of 23 February 2013)		'Black list' of terms considered unfair in all circumstances	Yes	Art. VI.83 and XIV.50 CEL	
			'Grey list' of terms which may be considered unfair	No	Art. VI.83 CEL blacklists most items contained in the grey list (among others: the Belgian blacklist contains 33 items in total)	<i>CEL blacklists unfair terms that are not contained in the annex of the directive (Art. VI.83. 3°, 5°, 7°, 8°, 10°, 12°-18°, 28°, 32°, 33°)</i>
			Extensions of the application of Directive to individually negotiated terms	Yes	Art. I.8, 22° CEL	
	Code of Economic Law (CEL) (Law of 23 February 2013)		Extensions of the application of Directive terms on the adequacy of the price and the main subject-matter	No	Art. VI.82 §3 CEL	<i>Main subject-matter and adequacy of price explicitly excluded</i>

<sup>140</sup> The table indicates provisions transposing the directives as they have been codified in the Code of Economic Law. The codification took place in 2013 and took effect in 2014. References to statutes initially transposing directives are indicated in footnotes. These pre-codification references are not used in practice.

<sup>141</sup> First transposed by Law of 3 April 1997, modified by Act of 2 August 2002 on misleading advertising, comparative advertising, unfair terms and distance contracts pertaining to professions.

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<b>Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market</b> <sup>142</sup>	Code of Economic Law – Book VI (Law of 21 December 2013)		Provisions regarding financial services going beyond minimum harmonisation requirements	No		<i>BE has not made explicit use of Article 3(9) UCPD</i>
			Provisions regarding immovable going beyond minimum harmonisation requirements	No		<i>BE has not made explicit use of Article 3(9) UCPD</i>
			Application of UCPD to B2B transactions	Yes (in part)	Art. VI. 104-109	<i>However some provisions regarding unfair practices apply to B2B only (see below)</i>

<sup>142</sup> First transposed by Laws of 5 June 2007 as modified by Law of 6 April 2010 on Market practices and Consumer protection (LPMC).

<b>Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers</b>	Code of Economic Law – Art. VI.3 - 6 CEL (Law of 21 December 2013)		Extension of the application to other sectors (e.g. for immovable property)	No	Art. VI.3 à 6 CEL	
	Code of Economic Law – Book VI (Royal Decree of 30 June 1996, implemented by an amendment decree of 21 September 2004)		Use of specific regulatory choices/derogations	Yes	Art. VI. 7	<i>Price per unit indication not mandatory for sellers whose commercial premises are smaller than 150m<sup>2</sup>. Price per unit indication not mandatory for the following 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</i>

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<b>Directive 2006/114/EC concerning misleading and comparative advertising</b>	Code of Economic Law - Book VI		Unfair market practices in relation to persons other than consumers		Chapter 2, Art. VI.104-109	
<b>Directive 2009/22/EC on injunctions for the protection of consumers' interests</b>	Law of 6 April 2010 on Market practices and Consumer protection					
	Law of 26 December 2013 Belgian Code of Economic Law – Book XVII					

**Table 2: Fact sheet on Injunctions Directive – BELGIUM**

Issue	Answer	Comments
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)?	- Yes, separate procedures in separate legal acts	<i>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.</i>
Who is entitled to bring an action seeking an injunction?	- Designated public bodies - Specified consumer associations - Individual consumers	<i>Persons who can apply for an injunction are listed in XVII.7 CEL.</i>
Is the injunction procedure a court or an administrative procedure? If your country legislation foresees both forms of the procedure, please explain in the comments column for which infringements the court or administrative procedure is foreseen	- Court procedure	<i>The President of the Commercial Court is competent in procedures against a trader (Art. XIII.1. CEL). The President of the Court of First instance is competent if an injunction is requested against a member of liberal professions (Art. XIII.1. CEL, as amended by Law of 15 May 2014).</i>
Who bears the costs of an injunction procedure? If qualified entities (or some of their categories e.g. consumer organisations are entitled to an exemption of some/all cost related to the procedure please explain the characteristic of such exemption in the comments column.	- Costs are borne by the losing party	<i>The Judge may however take circumstances into account and exempt the losing party from paying part of the costs.</i>
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?	- Yes, scope of application extended to cover areas of consumer law that are not part of Annex I of the Directive	<i>Belgian injunction procedure applies well beyond the scope 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.</i>
Is protection of business' interests covered by the injunctions procedure? If scope of application extended to the protection of business' interests, please provide details in the comments column regarding type of business' interests covered by the injunctions procedure	- Yes	<i>Art. XVII. 7 CEL: a professional authority, professional or inter-professional organizations can bring proceedings provided they are legal entities, defending their members' interests. There is no restriction as to types of business interests covered.</i>

Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations	- Yes	<i>Art. XVII. 12 of CEL provides that the proceeding can be brought, jointly or separately, against companies from the same economic sector or against a business association that recommended the practice at stake.</i>
Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID)	- Yes	<i>A preliminary reconciliation procedure is available (art. 731 §1 Judicial Code) but not mandatory. It is never used in practice.</i>
Has your Member State taken specific measures regarding the prior consultation (Article 5 of the Injunctions Directive)?	- No such requirement	
Does the national legislation provide for measures ensuring summary procedure? Please specify main characteristics of the procedure (subject matter/time limits) in the comments column.	- Yes	<i>Injunctions are granted under a summary procedure (Art. XVII.6 CEL). Judgement granting an injunction is enforceable notwithstanding appeal (Art. XVII.6, Art. XVII. 18 CEL). The defendant trader must bring the evidence requested by the president of the commercial court within one month maximum (Art. XVII.13)</i>
Are there sanctions for non-compliance with the injunction order (Article 2(1) of the Injunctions Directive)? If sanctions in form of penalty or fine is foreseen, please specify in the comments column to whom exactly should they be paid	- Yes, other sanction (please specify)	<i>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.</i>
Has your Member State taken specific measures regarding the publication of the decision and/or the publication of a corrective statement?	- Yes	<i>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)</i>
Is it possible to claim within the injunction procedure for sanctions for the infringement?	- No	
Can an action for the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to other beneficiary be brought within the injunction procedure?	- No	
Can an action for damages to be paid to the qualified entity or the public purse be brought within the injunction procedure?	- No	<i>The President of the Court granting an injunction cannot award damages.</i>
Can an action for damages or redress to be paid to the consumers concerned be brought within the injunction procedure?	- No	<i>The injunction procedure (fast-track procedure) is distinct from other enforcement proceedings such as collective redress or class actions</i>



Can individual consumers base their individual claims for damages/remedies on the injunctions order?	- Yes	<i>Actions for damages may follow up on an injunction.</i>
Can the qualified entity claim other measures beyond the injunction, e.g. evidence of compliance with the judgment?	- No	<i>Except asking for private penalties (as indicated above)</i>
Are the effects of individual injunctions orders extended to the future infringements and/or same or similar illegal practices (of other traders)?	- Yes	<i>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'.<sup>143</sup></i>

<sup>143</sup> Case 1986-87, Court of cassation, 14 November 1986; Court of cassation, 29 May 2009.

## B. Data tables

*Number of B2C disputes*

Please indicate how many B2C disputes have been decided in your country on the basis of consumer law directives covered by this study (UCPD, UCTD, PID) as a proportion of the total number of B2C disputes decided on the basis of other national consumer legislation (based on statistics, or based on estimates by enforcement authorities and other stakeholders, where this is not the available).

**Table 3: B2C disputes decided on the basis of consumer law directives covered by this study in comparison with total B2C disputes decided on the basis of other legislation (most recent year for which data is available)**

Year	Type of data	Total number of B2C disputes (number of cases)	Share of B2C disputes decided on basis of ...					Comments
			UCPD	UCTD	PID	other EU consumer protection legislation (e.g. CRD, Sales Directive, sectoral legislation)	national consumer legislation not based on EU directives	
2015	Court statistics	681 cases	0%	2%	0%	0%	98%	Total of percentages should add up to 100%

*Costs of obtaining redress for a hypothetical case of invoking unfairness of a standard contract term*

- Please estimate the costs, including time, for consumers in obtaining redress when invoking the unfairness, and thereby the non-binding character of standard contract terms in a contract they concluded. Please provide the estimate for the hypothetical example below, focusing on costs (and needed time) of a lower court procedure and the use of ADR or other relevant procedure (if applicable).<sup>144</sup>

**Table 4: Estimate of costs for consumers in obtaining redress when invoking the unfairness of standard contract terms in a contract they concluded (for the hypothetical example provided in the box below)**

Redress mechanism	Estimated court fees (national currency)	Estimated lawyer's fees (national currency)	Other costs, if any (national currency)	Estimated time involved for consumer (hours)	Comments
<b>Lower court procedure</b>	EUR 200	EUR 2000	EUR 1080 (compensation to pay when losing)	8 hours	
<b>ADR or other relevant procedure</b>	EUR 5000	EUR 2000		8 hours	

**Hypothetical example: Terms which inappropriately exclude/limit consumers' rights to compensation**

*A consumer went on a package holiday with a friend to Kenya for which they paid € 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 €5,000 (€4,000 for the cost of the package and €1,000 for lost time and enjoyment). The tour operator agreed to compensate them €1,000 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/unfair-contract-terms/index\\_en.htm](http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-contract-terms/index_en.htm)]*

- Please estimate how often court and ADR procedures are used in your country for invoking the unfairness, and thereby the non-binding character of standard contract terms (i.e. the number of cases per year)?

No information is available.

<sup>144</sup> For the hypothetical example it is assumed that both the provider and the consumer are located in your country.

## C. Interviews conducted and literature reviewed

**Table 5: Interviews conducted for this study**

Organisation	Stakeholder type	Date
VBO/FEB	Business association	29 July 2016
Judiciary	Judge	11 August 2016
Judiciary	Judge	17 August 2016
Judiciary	Judge	9 November 2016
SPF Economie, P.M.E., Classes moyennes et Energie	Enforcement authority	4 August 2016
Test Achats	Consumer organisation	17 January 2017

**Table 6: Literature reviewed for country report**

Author/Source	Year	Title of publication
Ministry for the Economy	Updated regularly	Codes of conduct <a href="http://economie.fgov.be/fr/consommateurs/Pratiques_commerce/Codes_bonne_conduite/Coregulation/#.V7G_ypOLTKI">http://economie.fgov.be/fr/consommateurs/Pratiques_commerce/Codes_bonne_conduite/Coregulation/#.V7G_ypOLTKI</a>
Jules Stuyck	2013	Handels- en economisch recht. 2. Mededingingsrecht. A: Handelspraktijken in Beginselen van Belgisch Privaatrecht
Gert Straetmans and Jules Stuyck	2015	Commercial practices
Bert Keirsbilck	2013	Which way forward for the new European law of unfair commercial practices?
Veerle Colaert	2012	Financiële diensten en de Wet Markpraktijken: enkele knelpunten
Bram Duivenvoorde	2013	The Protection of Vulnerable Consumers under the Unfair Commercial Practices Directive
Reinhard Steennot and Paul Geerts	2011	De implementatie van de Richtlijn Oneerlijke Handelspraktijken in België en Nederland
Reinhard Steennot	2012	Onrechtmatige bedingen in de wet van 6 april 2010 betreffende marktpraktijken en consumentenbescherming
Paul Cambie	2009	Onrechtmatige bedingen
Sophie Stijns and Sanne Jansen	2013	De basisbeginselen van het contractenrecht: kroniek van de recentste evoluties.
Sophie Stijns and Elke Swaenepoel	2013	Evolutiepolen van de onrechtmatige bedingenleer
Ine Demuyne	2000	De inhoudelijke controle van de onrechtmatige bedingen
Marco Loos and Ilse Samoy	2014	The Position of Small and Medium-Sized Enterprises in European Contract Law

# 1. Study to support the Fitness Check of EU Consumer law – Country report BULGARIA

## 1.1. Unfair commercial practices and marketing

### 1.1.1. Effectiveness of the UCPD in establishing a high level of consumer protection

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

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

The Bulgarian legislator transposed the UCPD with an amendment of the Consumer Protection Act (in a new Section III of the Chapter IV) enacted in 2007. Prior to this amendment the national legislation had not had any special provisions on unfair practices in B2C transactions. The rules of general contract law on pre-contractual obligations and liability were applied to consumer contracts, which application however had not been accepted without critics in the legal literature.<sup>1</sup>

The set of rules on unfair practices between traders and consumers, enacted in 2007 with the transposition of the UCPD, provided a legal framework more suitable for tackling the specific issues in B2C transactions. This conclusion has been drawn based on the various data collected for the purposes of this country report. The legal authors and the interviewed stakeholders share the opinion that the principle-based approach of the UCPD proves to be effective in achieving the goals set as it ensures flexible and broad interpretation of the concept 'unfair commercial practice', which facilitates legal enforcement and combating unfair practices not enumerated in the list annexed to the Directive.<sup>2</sup> On the other hand, some of the interviewed stakeholders raise concerns about the language of the Directive (and the national laws transposing it) used for describing behaviour that can be labelled as an 'unfair practice'. It is reported that some provisions seem to be too general in their formulation, with conditions requiring too much subjective assessment, which apparently causes problems in interpreting of legal provisions and their enforcement, for instance, in the provision on misleading commercial practice the part '... to take a transactional decision that he would not have taken otherwise'.

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

Based on the opinions of the interviewed stakeholders it can be concluded that the black list of unfair commercial practices annexed to the UCPD facilitates the legal enforcement by serving as guidance for consumers, businesses and enforcement authorities.

For instance, consumers can easily check the list and find out whether certain behaviour of a trader may be suspected as unfair, before they decide whether to file a complaint or not.

Furthermore, the list looks to be beneficial also for traders. The relevant enforcement authority reports that some Bulgarian traders, before undertaking certain marketing

<sup>1</sup> More specifically, the general requirement to parties of pre-contractual relations to act in good faith – Article 12 the Obligations and Contracts Act. Some authors expressed in the legal literature hesitation if this rule could be applied to consumers contracts due to the specifics of the latter – Стойчев, Красен Преговори за сключване на договор и преддоговорна отговорност, 2005, с. 54 [Stoychev, Krasen Negotiations for Formation of the Contract and Pre-contractual Liability, 2005, p.54]

<sup>2</sup> Варадинов, Огнян Луканов Нелоялни търговски практики в отношенията търговец - потребител : анализ на глава четвърта, раздел IV от Закона за защита на потребителите, 2014, с.86 [Varadinov, Ognyan Lukanov, Unfair Commercial Practices in transactions between trader and consumer: Analysis of Chapter IV, Section IV consumer Protection Act, 2014, p.86]

actions (for example, discount campaigns<sup>3</sup>), are proactively checking the list to determine if the planned actions can be treated as being one of the unfair practices included into the black list, and are in addition searching for advice from the competent authorities regarding this matter.

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

The minimum harmonisation clauses for financial services and immovable property have so far brought no practical benefits for Bulgarian consumers, because the national legislation does not generally provide consumers in these two areas with protection at levels higher than the level provided by the UCPD.

Of course, this is with the exception of those areas of consumer financial services where the European legislator has intervened with special and more stringent regulation in the form of sector-specific directives and regulations.<sup>4</sup>

As far as the area of immovable property is concerned, the level of protection is similar to the one of the UCPD.<sup>5</sup> The question about the necessity of higher protection in this area is not a straightforward one, bearing in mind the very complex and formal legal regime of transactions involving immovable property (i.e. involving a notary proceeding as well as adding a record into the public register of immovable property). Therefore any measure for increasing the level of consumer protection needs to ensure a good balance between the interests of consumers and legal certainty, as suggested by one of the interviewed stakeholders. The latter also recommends that before any legislative intervention is taken, the scale of the issue must be thoroughly analysed and discussed, since the majority of transactions for transfer of titles on the Bulgarian real estate market, are between natural persons, hence would fall outside the scope of application of consumer protection rules. On the other hand, there have already been some reported cases of unfair commercial practices related to immovable property.<sup>6</sup>

- 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 what 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 application of the UCPD to environmental claims in Bulgaria does not seem to be very extensive, as only a few cases of unfair practices related to false or misleading environmental claims have been reported by the stakeholders and found in the practice of the enforcement authorities, namely: an offer for rental apartments in

<sup>3</sup> See e.g. Decision No 6336 30.05. 2016 of the Supreme Administrative Court, Adm. case No 1635/2016, VII department (it is an unfair commercial practice when the message for price reduction includes the starting prices of the goods and not, as required by the law, the previous (already reduced) prices that the trader applied for a period not less than one month before the start date of the current discount campaign; as a result the discount percentage looks higher than the actual reduction, which may influence consumers economic behaviour and can lead to consumers making a decision to purchase, which decision the average consumer would not have taken without such misleading practice)

<sup>4</sup> Civic Consulting, 2011, Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU part, Country report (Bulgaria), p.58 [http://ec.europa.eu/justice/consumer-marketing/files/ucpd\\_study\\_country\\_reports.pdf](http://ec.europa.eu/justice/consumer-marketing/files/ucpd_study_country_reports.pdf)

<sup>5</sup> Civic Consulting, 2011, Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU part, Country report (Bulgaria), p.63 [http://ec.europa.eu/justice/consumer-marketing/files/ucpd\\_study\\_country\\_reports.pdf](http://ec.europa.eu/justice/consumer-marketing/files/ucpd_study_country_reports.pdf)

<sup>6</sup> For instance one large real estate agency operating on Bulgarian market binds their customers with an obligation to pay a commission fee of 3% of the (potential) transaction value, but not less than 1,000 EUR excluding VAT, even when they decide to buy the viewed property from another person – See an interview with the Chairman of the Commission for Consumer Protection for the Bulgarian National Television on 14.07.2016 - <https://kzp.bg/novini/dimitar-margaritov-golyama-agenciya-za-nedvizhimi-imoti-obvarzva-klientite-si-s-komisionna-i-bez-da-sklyuchi-sdelka-s-tyah> [last visited on 17.07.2016]

Plovdiv, misleadingly claimed to be built with ecological materials;<sup>7</sup> few cases of misleading information about bio-products;<sup>8</sup> a case of misleading information about capacity of a device ('Electricity-saving Box') to save electricity (trader claims the device saves from 10% up to 30% electricity, whereas the technical tests proved only 0.05% saving).<sup>9</sup>

The relevant public authorities regularly conduct checks on the market on the requirements for labeling white household goods with energy-efficiency rating, and no major infringements have been observed so far.<sup>10</sup>

- 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 your country rigidly?*]

No particular problems regarding the concept 'average consumer' have been reported by the stakeholders, and the case law does not reveal any particular disputes in its practical application. Bulgarian courts define the average consumer as 'reasonably well informed, observant enough and cautious',<sup>11</sup> which seems to be in line with the European standard, as defined in the case law of the ECJ and in the Preamble of Directive 2005/29.<sup>12</sup> When the commercial practice is targeted at a specific group of consumers (for instance, children, elderly people and disabled persons), the relevant benchmark is the average consumer within this certain group – Article 68g (2) CPA.<sup>13</sup>

- 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 in your country recognised new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted)?*]

In Bulgarian practice 'vulnerable consumers' are mainly considered to include elderly people,<sup>14</sup> children<sup>15</sup> and disabled persons (the latter mainly in passenger transport). This interpretation may be stemming from Article 68g (2) CPA, which lists in this category only people due to their mental or physical disability, age or credulity.<sup>16</sup>

<sup>7</sup> See Order #554/14.06.2015 of the Commission for Consumer Protection for prohibiting of unfair commercial practice, namely providing false and misleading information on the website [www.milchevi.com](http://www.milchevi.com) on the type of rental apartments claiming that the apartments are ECO (built with ecological materials), without providing evidence to support the claim / missing documents certifying building as ECO / - <https://kzp.bg/aktove> [last visited 17.07.2016]

<sup>8</sup> See publications in the press - [http://dariknews.bg/view\\_article.php?article\\_id=1367540](http://dariknews.bg/view_article.php?article_id=1367540) [last visited on 17.07.2016]

<sup>9</sup> See Order #430/07.07.2014 of the Commission for Consumer Protection - [old.kzp.bg/download.php?mode=fileDownload&p\\_attached\\_file\\_id=15053](http://old.kzp.bg/download.php?mode=fileDownload&p_attached_file_id=15053) [last visited on 17.07.2016]

<sup>10</sup> The Annual Reports of the Commission for Consumer Protection for 2013, 2014 and 2015 - <https://kzp.bg/godishni-dokladi> [last visited on 20.07.2016]

<sup>11</sup> Decision № 2313/16.12.2013, Com. Case № 897/2013 the Court of Appeal - Sofia; Decision № 11954/27.09.2011, Adm. Case № 4275/2011 the Supreme Administrative Court; Decision № 10298/23.07.2014, Adm. Case № 15845/2013 the Supreme Administrative Court; Decision № 43/07.01.2016 Com. Case № 2443/2014 Sofia City Court.

<sup>12</sup> In this sense see also Civic Consulting, 2011, Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU, Country report (Bulgaria), p.57 [http://ec.europa.eu/justice/consumer-marketing/files/ucpd\\_study\\_country\\_reports.pdf](http://ec.europa.eu/justice/consumer-marketing/files/ucpd_study_country_reports.pdf); See Varadinov, op.cit., p.66.

<sup>13</sup> Decision No 7746 5.06.2013 the Supreme Administrative Court, Adm. Case No 14873/2012, VII department.

<sup>14</sup> Decision No 7746 5.06.2013 the Supreme Administrative Court, Adm. Case No 14873/2012, VII department.

<sup>15</sup> Decision № 8485/13.06.2012 Adm. Case 7915/2011 The Supreme Administrative Court, VII Division.

<sup>16</sup> Article 68g (2) CPA states that "fairness of a commercial practice, which is likely to materially distort the economic behaviour of a clearly identifiable group of consumers, particularly vulnerable to the commercial practice or to the goods or services covered by commercial practice due to their mental or physical



Apart from the categories mentioned above, no other categories of 'vulnerable consumers', such as poor/indebted persons, have currently been recognised in Bulgarian legal literature<sup>17</sup> and case law. This, however, may change any time soon, given the amendment from 2012 of the Energy Act (EA), which introduces a definition of 'vulnerable customers' in the energy sector (Para. 1, item 66v of the Additional Provisions).<sup>18</sup> Taking into account these provisions as well as the fact that a significant part of Bulgarian population is below the threshold of 'energy poverty' (meaning facing difficulties such as keeping their homes warm in the winter and cool in the summer)<sup>19</sup>, it may be expected that a new category of vulnerable consumers in the energy sector gets recognized in Bulgarian case law and legal literature in the coming years ('energy poor').

- 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?*]

Self/co-regulation does not seem to have extensive application on the Bulgarian market. The interviewed stakeholders point out only two publicly known examples of self-regulation, namely those of advertising agencies and breweries. None of the stakeholders though is able to comment what their impact has been on combating unfair commercial practices.

The leading role in the self-regulation of advertising in Bulgaria is played by the National Council for Self-Regulation (NSS), which is a non-profit organisation.<sup>20</sup> The members of the NSS are representatives from the advertising industry, advertising agencies, media, advertising professionals and any other natural or legal persons who voluntarily accept the goals and statutes of the NSS. Its main goal is to unite the advertising industry and ensure compliance with the Code of Ethics in favour of fair competition and above all, consumer protection. The NSS activities consist of providing preventive and follow-up control on advertising, securing respect for professional diligence in advertising and commercial communications, as well as prohibition of misleading and unlawful comparative advertising. The review of application of the Code of Ethics reveals its effectiveness – in 2014 the Ethical Commission issued 32 decisions, namely 29 in 2015 and 12 in 2016 (until June).<sup>21</sup> In a few cases the Commission found that the commercial communications addressed to consumers were unclear or untrue.<sup>22</sup> The practical importance of self-regulation in

disability, age or credulity and if the trader could predict that distortion, is to be assessed from the perspective of the average member of this certain group targeted by the practice".

<sup>17</sup> See Varadinov, op.cit., p.72

<sup>18</sup> Pursuant to this norm, vulnerable customers are households that receive allowances for electricity, heating or natural gas under the Social Assistance Act (SAA) and regulations for its implementation. According to the SAA, through the Ordinance # RD-07-5/16 May 2008 on purposive benefits for heating, such allowance is given once a year to persons or families whose average monthly income in the last six months is lower or equal to differentiated minimum income. These citizens are eligible for heating benefits according to Articles 10 and 11 of the Regulation for Application of the SAA.

<sup>19</sup> See the data provided in "Energy poverty and vulnerable consumers in the energy sector across the EU: analysis of policies and measures", May 2015, [https://ec.europa.eu/energy/sites/ener/files/documents/INSIGHT\\_E\\_Energy%20Poverty%20-%20Main%20Report\\_FINAL.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/INSIGHT_E_Energy%20Poverty%20-%20Main%20Report_FINAL.pdf) [last visited on 17.07.2015]

<sup>20</sup> See <http://www.nss-bg.org/read.php?id=208> [last visited on July 10, 2016]

<sup>21</sup> See list of decisions [http://www.nss-bg.org/view\\_concl.php](http://www.nss-bg.org/view_concl.php) [last visited on July 10, 2016]

<sup>22</sup> Decision № 166 of the EC of 16.01.2014 (Complaint about Christmas promotion of Bulgaria Mall); Decision № 167 of the EC of 02.04.2014 (Complaint about commercial communication of the company "Novomes" Ltd.); Decision № 168 of the EC of 13.02.2014 (Complaint about television advertising of "Karnobatska grape") Decision № 169 of the EC by 13.02.2014 (Complaint about advertising on the TV show "Frontline" broadcast on television TV7); Decision № 172 of the EC of 03.04.2014 (Complaint about headsets advertised on the site WWW. MIKROSLUSHALKA.BG); Decision № 175 EC of 24.04.2014 (Complaint about radio advertising plasterboard advertiser: "Gigi 1" LTD); Decision № 176 of the EC of 15.05.2014 (Complaint about television advertising of product for weight lost "Shot for Slim" with advertiser "TELESHOP" Ltd. ) Decision № 197 of the EC of 30.01.2015 (Complaint about media campaign "Bulgartabac Holding" JSC in partnership with the Ministry of Finance, the Agency "Customs", "National

advertising appears to be positively appraised by the Commission for Protection of Competition, which in some of their decisions refers to the practice of the Ethical Commission of the NSS.<sup>23</sup>

Additionally, self-regulation has been initiated by the Union of Brewers in Bulgaria (the UBB) as it is a representative organisation of the brewing industry in the country. In accordance with the principles and rules of the prestigious organisation 'The Brewers of Europe', the Union has adopted a Code of Responsible Commercial Communication and Ethical Standards, applicable for its members, beer producers. The Code excludes the promotion of excessive or irresponsible consumption of beer as well as aggressive or antisocial behaviour; advertising of beer cannot be directed at persons of age under 18 years nor at tolerant attitude towards driving after consumption; it states that commercial communications to consumers may not claim that beer cures or increases mental or physical abilities, etc. Among the main goals of the Code are also providing better information to consumers about products and principles of the industry as well as securing the protection of their interests.<sup>24</sup> A Council for Self-Regulation of the UBB is also established, having the following main tasks: monitoring compliance, updating and developing of self-regulatory system of the national brewery industry.

Some attempts of business associations to draft a model Code of Conduct for their members, are reported by the stakeholders.<sup>25</sup> The model Code contains a requirement for businesses to provide their clients with clear, truthful, complete and readable information about the goods and services (Article 4.12.2. of the Code). However, there is no survey/analysis on whether this model Code has ever been applied in practice and how effective it is in addressing unfair commercial practices.

- 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?

Some interviewees have suggested adding to the list practices related to the digital contracts. Currently they are only popular among certain groups of consumers (mainly young people) and for certain goods (mainly clothes, books, event tickets, etc.), however the importance of online purchasing increases gradually and is expected to play a more significant role in the coming years.<sup>26</sup> Because of this trend, greater protection against unfair commercial practices will be needed for consumers purchasing online.

When it comes to the mechanism for subsequent inclusion of new practices into the UCPD black list, the interviewed stakeholders are almost unanimous that there is a need for regular reviews and updates of the list, however they appear to have various opinions on how this can be done – some of them support having a special mechanism included in the Directive and applied only for updating the black list; the others tend to see the generic legislative procedures for amendment of the EU/national legislation as effective enough, and being sufficient for handling this matter (thus, no special mechanism is needed).

Association of Tobacco Growers 2010" and "Association of oriental tobaccos" under the slogan "Do not buy contraband! It is harmful to all. ") - [http://www.nss-bg.org/view\\_concl.php](http://www.nss-bg.org/view_concl.php) [last visited on July 10, 2016]

<sup>23</sup> Decision N° 1195 /18.09.2013 the Commission for Protection of Competition.

<sup>24</sup> See <http://www.library.pivovari.com/main/codeadvertise-2.html> [last visited on July 10, 2016]

<sup>25</sup> See <http://www.vsa.bcci.bg/files/custom/2013/BusinessEthicsCode.pdf> [last visited 01.07.2016]

<sup>26</sup> See <http://www.investor.bg/web/456/a/vse-poveche-bylgari-pazaruvat-onlain-199450/> [last visited in 16.07.2016]; [http://www.capital.bg/biznes/kompanii/2016/04/17/2742612\\_onlain\\_pazaruvaneto\\_raste\\_no\\_fizicheskite\\_magazini\\_ne/](http://www.capital.bg/biznes/kompanii/2016/04/17/2742612_onlain_pazaruvaneto_raste_no_fizicheskite_magazini_ne/) [last visited on 16.07.2016]

- Are there other measures that could improve the effectiveness of the UCPD in establishing a high level of consumer protection in your country? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

No best practices or lessons learnt seem to exist in Bulgaria that can be considered relevant for other EU countries.

#### 1.1.2. Effectiveness of the PID in establishing 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;

The majority of interviewed stakeholders agree on the fact that in the last few years there has been a significant improvement in informing Bulgarian consumers about the unit selling price, especially in relation to packaged goods. The enforcement authority points out that during the early years after entry into force of 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<sup>27</sup>. The trend of decreasing number of complaints related to price indication has been observed by the other interviewees, and that the credit for these positive results should be attributed to the strict control performed by the enforcement authority.

As far as the unit selling price of services is concerned, some of the interviewees express concerns about traders' adherence to the price indication requirements.

Some minor infringements seem to still exist for non-packaged goods.<sup>28</sup>

- 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?

The interviewed stakeholders are not unanimous about this matter. The majority of them thinks the unit price per performance could at times be misleading for consumers, who seem to be used to the kilogram/litre measurement. Furthermore, it was pointed out that the measurement 'unit price per performance' could be very relative, as it depends on how the product is used by individual consumers, namely, in the example with the detergents, various consumers may use a different quantity for washloads, hence the number of washloads may differ (it will be higher for consumers using less quantity per washload and lower for the ones using a larger amount).

One of the respondents is in favour of the price indication approach, referring to a survey on prices of detergents conducted on the Bulgarian market. It revealed quite a big price fluctuation between the unit price per kilogram and the unit price per

<sup>27</sup> Recent examples can be found in the case law - Decision No 164 13.06. 2012 of the Vratsa Administrative Court (packaged goods offered to consumers must contain labels with information about a total selling price/a price per unit or such information must be placed in close proximity to goods; such price indication cannot be replaced by "price checker" devices available in the shop) and Decision No 45 dated 30.01.2015 of the Pleven Administrative Court (it is an infringement of price indication rules when prices of goods (of mobile devices without services) are not separately announced, but consumers receive information only about their prices when purchasing is combined with contracts for communication services).

<sup>28</sup> For instance, for gold jewelry, for which the price for gram gold is indicated, but not the total price of the each piece of jewelry - Annual report for 2014 of the Commission for Consumer Protection - <http://www.cpc.bg/General/Publications.aspx> [last visited on July 10 2016]; for misleading unit price of non-packaged food in supermarket - Decision № 2906 /16.12.2013 Adm. Penal. Case № 2653/2013 the Administrative court - Plovdiv; different prices for same good as well as unit price not matching the selling price - Decision № 891 / 12.06.2014 Com. Case № 4023/2013 Sofia City Court.

performance of some of the products. Noteworthy, was the conclusion of the survey based on the conducted tests, that the most objective way of presenting the prices of detergents is the price per performance (per single washload).<sup>29</sup>

- The effects of the regulatory choices/derogations allowed by the Directive and applied by Member States. [*Key aspects to consider are: Is the derogation relevant? Do companies make use of it? Are there consumer complaints because of this? If so, approximately how many per year?*]

Not applicable for Bulgaria.

### 1.1.3. Effectiveness of the MCAD in providing protection for businesses

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

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

The Directive 2006/114 was transposed in the Bulgarian Protection of Competition Act 2008 (PCA), which contains a legal definition of advertising very similar to the one in the Directive.<sup>30</sup> Nevertheless there are no indications that the limited scope of the MCAD (and the national legislation) has a negative impact on how effectively the rules are achieving the goals they are aimed at, namely protection for businesses, and indirectly, for consumers interests as well.

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

It is proven by the rich case law<sup>31</sup> that the approach to misleading advertising under the MCAD works well in practice and ensures a good legal framework for protection of both business and consumers.

- The effects of the minimum harmonisation provisions on misleading advertising; [*Key aspects to consider are: 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 Bulgarian legislator does not seem to use the advantages of the minimum harmonisation on misleading advertising – PCA does not provide a level of protection that goes beyond the one of the Directive.

Some specific acts from the national legislation however introduce a full ban of advertising of certain products (tobacco,<sup>32</sup> direct advertising of distillates,<sup>33</sup> some medicines)<sup>34</sup> and of some activities (advocate services)<sup>35</sup>.

<sup>29</sup> More details about the tests and the survey please find on - <http://aktivnipotrebiteli.bg/> [last visited on 17.07.2016]

<sup>30</sup> Pursuant para.11 of the Additional provisions of the Consumer Protection Act advertising is "means any form of communication in connection with a trade, business, craft or profession, which aims to promote the supply of goods or services, including immovable property, rights and obligations".

<sup>31</sup> For the last five years the cases of misleading and comparative advertising are among the most frequently handled by the Commission for Protection of Competition - See the annual reports of the Commission <http://www.cpc.bg/General/Publications.aspx> [last visited on July 10 2016]

<sup>32</sup> Tobacco and Tobacco Products Act - Article 35; Radio and Television Act - Article 75 (6)

<sup>33</sup> Health Act – Article 55 (1)

<sup>34</sup> Medicinal Products in Human Medicine Act, Chapter XI "Advertising of medicinal products"

<sup>35</sup> Bar Association Act – Article 42 (1)

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

The national legislation transposing the provisions of comparative advertising seems to work well in practice and no particular problems in its application have been reported.<sup>36</sup>

- 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;

This seems to be the case. In the practice of the Commission for the Protection of Competition, there are a significant number of cases related to online misleading/comparative advertising,<sup>37</sup> including social media marketing.<sup>38</sup>

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

Although misleading advertising appears to be among the most frequent infringements investigated by the Commission for Protection of Competition,<sup>39</sup> in the practice of the Commission there have only been few cases with a cross-border dimension, namely:

- Misleading advertising on the [www.emag.bg](http://www.emag.bg) online shop (for big sales campaign 'Black Friday') operated on the Bulgarian market by a company registered in Romania (Dante International S.A.);<sup>40</sup>
- Misleading advertising (via electronic messages) of a business directory ('EU Business Register') misleadingly appearing as if it was connected with the European Union (the name contains the abbreviation "EU" and the logo – on a blue background 12 stars positioned in a circle)<sup>41</sup> distributed by a company registered in Nevis, West Indies, with contact address in Utrecht, the Netherlands;<sup>42</sup>
- Advertising of tapes with special use (barrier, warning, etc.), which were distributed by some Bulgarian companies on the local market and appeared very similar to the tapes produced by a company registered in Germany (Kemaplast G. Kellermann GmbH);<sup>43</sup>
- Misleading advertising case between Renault, France, and a Bulgarian company 'Nemex Service'. The latter was using Renault's advertising materials and

<sup>36</sup> See in this regard the opinion of the Commission for Protection of Competition expressed in its Decision N° 58404.05.2011.

<sup>37</sup> Decision N° 501/20.04.2011 the Commission for Protection of Competition; Decision N° 273 / 05.03.2014 the Commission for Protection of Competition; Decision N° 329 / 18.05.2016 the Commission for Protection of Competition; Decision N° 1478 / 26.11.2014 the Commission for Protection of Competition; Decision 06.01.2012 `Civil Case. N° 58/2011 Sofia City Court.

<sup>38</sup> Decision N° 1137 / 18.09.2013 the Commission for Protection of Competition; Decision N° 791 / 29.09.2015 the Commission for Protection of Competition; Decision N° 250 / 18.03.2015 the Commission for Protection of Competition; Decision N° 291 / 11.05.2016 the Commission for Protection of Competition; Decision N° 331 / 16.04.2015 the Commission for Protection of Competition; Decision N° 860 / 04.11.2015 the Commission for Protection of Competition

<sup>39</sup> See the annual reports of the Commission for Protection of Competition - <http://www.cpc.bg/General/Publications.aspx> [last visited on July 10 2016]

<sup>40</sup> Decision N° 1478 / 26.11.2014 the Commission for Protection of Competition; Decision N° 329 OT 18.05.2016 the Commission for Protection of Competition;

<sup>41</sup> See <http://www.eubusinessregister.com/about.php> [last visited on July 10, 2016]

<sup>42</sup> Decision N° 500 / 03.05.2012 the Commission for Protection of Competition

<sup>43</sup> Decision N° 882 /22.07.2010 the Commission for Protection of Competition (the complaint for misleading advertising is overruled)



misleadingly looked like an authorized Renault service station, which in reality was not true.<sup>44</sup>

It has been reported that the current rules of enforcement in the MCAD do not seem to be effective in tackling misleading online advertising on websites registered outside the EU.<sup>45</sup>

- Are there measures that could improve the effectiveness of the MCAD in providing protection for businesses (see also 1.1.6 below)? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

No best practices or lessons learnt seem to exist in Bulgaria in terms of combating misleading/unlawful comparative advertising, and that can be deemed relevant for the other EU countries.

#### 1.1.4. Effectiveness of current rules 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;

The interviewed stakeholders are not reporting any obstacles faced by Bulgarian traders in cross-border transactions, and that are caused by differences in the application/implementation of the UCPD in the different Member States. This does not necessarily mean that such difficulties do not exist; they may simply not be recorded or raised as an issue by the businesses. No relevant evidences have been found in this regard in the course of preparing the country report.

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

Based on the opinions of interviewed stakeholders, it is hard to assess the extent to which Bulgarian businesses are informed about the existence of the uniform black list of unfair commercial practices, or what is the impact of the list on their cross-border transactions.

On one hand, some of the interviewed stakeholders report that the businesses do not seem to be aware of any such provisions, hence the impact of the black list on their strategies appears to be insignificant. On the other hand, it has been pointed out by the relevant enforcement authority, that there have been cases in which traders, before undertaking any marketing actions, consult with the authority as to the compliance of each planned action with the requirements for fairness, which is essentially a sign of awareness of existence of the prohibition of unfair commercial practices (and perhaps, of the black list as well) and a sign of their willingness to adhere to it.

- Whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade. [*Do the national differences play a role in a business perspective? Have they caused problems?*]

<sup>44</sup> Decision № 601 / 29.05.2012 the Commission for Protection of Competition (the complaint for misleading advertising is overruled)

<sup>45</sup> See the Annual Report of The National Council for Self-regulation (in advertising industry) for 2014, p.8 - [http://www.nss-bg.org/files/NSS\\_Booklet\\_2014.pdf](http://www.nss-bg.org/files/NSS_Booklet_2014.pdf) [last visited on July 10 2016]; same problem has been reported by some of the interviewed stakeholders.

No such problems have been reported; however this may simply be because of a lack of statistical data available, and does not necessarily mean that such problems do not exist.

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;

The interviewed stakeholders are not reporting any obstacles faced by Bulgarian traders in cross-border transactions and caused by differences in the application/implementation of the MCAD in the Member States.

No other relevant data has been found either in the literature or in the press.

- Whether the minimum harmonisation character of provisions on misleading advertising represents a barrier to cross-border trade;

No information has been found in support of the hypothesis that minimum harmonisation represents a barrier to cross-border trade.

- 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;

There is a lack of data about the impact on cross-border trade of full harmonisation of provisions on comparative advertising. As mentioned above, so far the Commission for Protection of Competition has only dealt with a few advertising cases with a cross-border dimension, and they are all regarding misleading, not unlawful comparative advertising.

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

The interviewed stakeholders do not mention any difficulties in cross-border trade caused/influenced by the lack of the public cross-border enforcement mechanism in the field of advertising.

Moreover, self-regulation offers such a mechanism via The European Advertising Standards Alliance (EASA).<sup>46</sup> According to the rules of procedure of the NSS,<sup>47</sup> if the complaint relates to advertising originating outside Bulgaria, it will be treated as a cross-border complaint. This means that it will be directed by the EASA to a self-regulatory body in the country of origin and the local ethical rules will be applicable. The procedure is free of charge. The country of origin is considered to be the country where the headquarters of the broadcasting platform is located; in the case of Internet/digital advertising – the country where the headquarters of the advertiser is. The following countries are included in the system of the EASA cross-border complaints: Austria, Romania, Belgium, Slovakia, Bulgaria, Slovenia, United Kingdom, Turkey, Germany, Greece, Hungary, Finland, Ireland, Spain, Lithuania, France, Netherlands, Czech Republic, Luxembourg, Poland, Portugal, Sweden, Switzerland. EASA maintains contacts with some countries outside Europe. These are: Australia, India, Brazil, Canada, New Zealand, Chile, and South Africa. Whenever needed, a complaint can be routed for resolution by the local authority for self-regulation in

<sup>46</sup> See <http://www.easa-alliance.org/Home/page.aspx/81> [last visited on 17.07.2016]

<sup>47</sup> See [http://www.nss-bg.org/trials\\_howto.php](http://www.nss-bg.org/trials_howto.php) [last visited on 17.07.2016]



these countries. The EASA cross-border reports and statistics give the impression that the self-regulated cross-border enforcement mechanism works well in practice.<sup>48</sup>

#### 1.1.5. Interplay amongst UCPD information requirements according to Article 7(4) with the information requirements in the horizontal consumer law instruments

Regarding the information requirements according to Article 7(4) UCPD ("invitation to purchase") in the advertising stage, please analyse:

- The level of awareness of traders as regards information requirements at the advertising stage, as in particular demonstrated by their practical application; [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?]

The majority of interviewed stakeholders state that businesses in Bulgaria are aware of this information requirement in pre-contractual relationships with consumers and to a significant extent adhere to it. Disagreement with this statement was expressed by only one of the interviewed stakeholders.

According to the competent regulator until recently this rule was not applicable to the energy sector as 'invitations to purchase' were not used in this sector,<sup>49</sup> whereas the traders in the passenger transport sector are reported to be very compliant with the requirement to provide information to consumers at this early stage of their relationships. However, as mentioned by the relevant regulator, this appears to be mainly due to the sector specific legislation, not as a result of adherence to the provision of Article 7(4) UCPD (and this seems to be the case both in passenger road and air transport).

The interviewed stakeholders share the opinion that the provision is useful as it regulates a specific aspect of the B2C relationship and is not redundant even in the light of the more comprehensive pre-contractual information requirements of the CRD. The enforcement authority expresses more general concern about the way the provisions of the sectoral directives are transposed into Bulgarian legislation, for instance the directives in energy sector and electronic communications. Apparently, it is difficult to tell general provisions from specific ones, which creates obstacles for interpretation and application of the provisions (it is hard to apply the doctrine *Lex specialis derogat legi generali*).

- 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 national provisions transposing Article 7(4) UCPD and the Services Directive have some similarities, however their scopes do not seem to overlap. Article 7(4) UCPD is transposed to Article 68e (4) CPA and is applicable to invitations for purchasing both of goods and services (pre-contractual stage) of only B2C transactions. It appears similar to some of the pre-contractual information requirements for service providers under Article 22 of the Services Directive (transposed in Article 24 of the Service Activities Act (SAA)), however these provisions have different scope and goals, namely:

<sup>48</sup> See <http://www.easa-alliance.org/page.aspx/249> [last visited on 17.07.2016]

<sup>49</sup> This might change as, in connection with opening of the electricity market, the SEWRC adopted in 2013 rules for trade with electricity. These rules are providing a procedure for changing electricity supplier, hence invitations to purchase can be applied in the supply of electricity sector.

- The requirement under Article 7(4) UCPD is applicable only to B2C transactions and aims at protecting consumer interests, whereas the requirements under Article 22 of the Services Directive applies to all types of transactions (B2B and B2C) and its focus is not on the consumer protection;
- According to the Services Directive some of the pieces of information are to be supplied only at the recipient's request (for instance, the method for calculating the price when the price is not pre-determined), whereas the information enumerated in Article 7(4) UCPD has to be conveyed to consumers even without explicit request from their side.

Furthermore, some resemblance can be found between the requirement of Article 7(4) UCPD and the information requirements of Article 5, 6 and 10 Directive on electronic commerce (transposed to Articles 4, 5 and 8 the Electronic Commerce Act (ECA)), however these two sets of norms are not overlapping, again due to characteristic scope and goals of the provisions.

The interviewed stakeholders also find no overlapping between the provisions in question.

No extra costs are reported to be incurred either by businesses or by public authorities as a result of these multiple information obligations.

#### 1.1.6. Relevance for business-to-business transactions

Regarding the area of unfair commercial practices/marketing, please analyse:

- 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 cross-border trade;

Theoretically, it looks like such an extension could facilitate cross-border trade, however to what extent this will happen in practice is hard to predict. The extension to B2B transactions may repeat the scenario of application of these sets of rules to B2C ones – the provisions on unfair commercial practices and misleading/comparative advertising prove to be effective in tackling with domestic transactions, however in the domain of cross-border trade, despite some positive trends from the last few years,<sup>50</sup> the current status is far from being very successful.

- 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;

It would be better to keep the legal regimes for B2C and B2B separate, as these two types of transactions each have their specific characteristics, and a uniform legal regime for both, if achievable at all, may impede application of the law. This is also the opinion shared by some of the interviewed stakeholders. The latter additionally suggest avoiding administrative procedures for controlling and rectifying unfair commercial practices in B2B relationships (if so, the state intervention into trade and commercial transactions will be drastic, which may have negative impact on the market) and entrusting the control to courts.

- 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 also cover unfair commercial practices during and after the transaction;

<sup>50</sup> See annual reports of ECC - Bulgaria for 2013 and 2014 - <http://www.ecc.bg/> [last visited on 17.07.2016] as well as cross-border cases of the Commission for Protection of Competition for misleading advertising mentioned earlier in the report.

The appropriate scope of protection would cover the whole life-cycle of the transaction as the practice reveals a need for it.<sup>51</sup> Bulgarian legislation and case law already tend to secure such protection against unfair practices in B2B transactions, as the following examples are showing.

Firstly, 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 favorable mainly for the retailer, this new provision has been enforced. According to it, any act or omission of a company with a strong bargaining position, which is contrary to fair trade practice and harms or may harm the interests of the weaker party in the negotiation and consumers, is prohibited. Unfair are those actions or omissions that have no objective economic justification, such as unjustified refusal to supply or purchase goods or services, imposing unreasonably onerous or discriminatory conditions or unjustified termination of trade relations. The presence of a strong bargaining position is determined by the characteristics of the structure of the market, as well as the specific relationship between the undertakings concerned, taking into account the degree of correlation between them, the nature of their work and the difference in its scale, the probability of finding alternative trading partners, including the existence of alternative sources of supply, distribution channels and/or customers.

Secondly, some courts in their decisions 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, for instance concluding a contract with a bank for a bank loan.<sup>52</sup> The legal literature accepts even broader application – where the unfair commercial practice is targeted at both consumers and other traders, it falls within the scope of application of the UCPD (the national legislation transposing it).<sup>53</sup>

- Whether there is a need to have a black-list of practices in the business-to-business marketing area;

The stakeholders seem to be divided regarding this matter. Notably, the public authorities warn about potential risks from state intervention in B2B transactions (for example by introducing in B2B transactions protection against unfair commercial practices, using the model for B2C transactions), whereas some of the other respondents believe that such protection would bring some benefits to small and middle-size enterprises. In support of this position, one of the interviewed associations gives the recent example of problematic negotiations between small delivery companies and a big supermarket chain.

- What should be the enforcement cooperation mechanism in the business-to-business marketing area;

Enforcement should be entrusted to courts and performed in litigation procedures, as per the opinion of some of the interviewed stakeholders.

- Whether there is a need to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive;

<sup>51</sup> Pre-contractual phase (unjustified refusal to prepare an offer)– see Decision № 365 / 26.05.2016 the Commission for Protection of Competition; during the transaction (supermarket chain unjustified remove from the racks the products of a supplier as a means of pressure for decrease of selling price) – Decision1 № 194 /23.03.2016 the Commission for Protection of Competition

<sup>52</sup> Decision № 159 /11.12.2013 Com. case № 99/2012 District court- Pazardzhik.

<sup>53</sup> See Varadinov, op.cit., p.31

That would be beneficial, however those consequences have to be under court control in the litigation procedure – no state administrative body should be able to intervene into B2B relationships as this may affect negatively the freedom of trade. This is also the opinion of some of the interviewed stakeholders.

- Whether there is a need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive.

No evidences justifying the need for such adaptation have been found in the course of preparing this country report.

#### 1.1.7. Relevance of contractual consequences of unfair commercial practices

Please analyse whether there are in your country:

- 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;

There is such a provision – Article 68m the Consumer Protection Act, which states that the consumer has the right to terminate a contract with the trader, concluded as a result of using an unfair commercial practices, and to claim damages under the general procedure, when an order prohibiting the application of the unfair commercial practice of the Commission for Consumer Protection has been enacted and entered in force. The right of termination can be exercised by an out-of-court unilateral notice from the consumer to the trader.<sup>54</sup> The decision of the Supreme Administrative Court, confirming an order prohibiting the unfair commercial practice of the Commission for Consumer Protection under this provision, shall be binding for the civil court when deciding on whether the order is valid and lawful. A prohibition order of unfair trade practice, which has not been appealed or the appeal against which was withdrawn, has a binding power, as valid and lawful, for the civil court.

- Any case law (enforcement decisions, court rulings) providing for such consequences;

According the interviewed stakeholders, this provision does not have any practical impact as it is not applied very often, even though it has a potential to be very beneficial for consumers. No relevant case law has been found.

- Whether there is, based on past experience in your country, a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

Such consequences are provided for in Article 68m the Consumer Protection Act, however currently this redress does not have any use in practice.

### 1.2. Contract conclusion and performance

#### 1.2.1. Effectiveness of the current rules in establishing 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;

<sup>54</sup> Сукарева, Златка Потребителско право, 2015, с. 58 [Sukareva, Zlatka Consumer Law, 2015, p.58]

The stakeholders that have any experience with the practical application of Bulgarian law transposing the UCTD, express very positive assessment of the Directive and its principle-based approach.

The national enforcement authority expresses the opinion that the provisions of the UCTD are correctly transposed in the Bulgarian legislation, however their broad scope of application (to all contracts in all economic sectors) is not commensurate to the capacity of the authority to perform effective control for their application. Furthermore, it has been pointed out that the provisions exclude from control for unfairness contractual terms based on the legal acts, an exception which creates some impediments in the practice. For example, currently there are discussions regarding terms in contracts used by 'Central Heating Company' Sofia (Toplofikacia Sofia) and based on the legal act provisions.

- 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 your MS? Does this work in practice or are there problems?*]

The Bulgarian legislator introduced a 'black list' of unfair terms, and the stakeholders with practical experience with the list give a positive assessment of this legislative approach. They share the opinion that the list very much facilitates the application of the law, as with its clear language, it provides guidance to enforcement authorities, consumers and businesses regarding the (un)fairness of certain contract terms. As reported by the interviewed stakeholders, it has had significant practical importance, especially in the first couple of years after the transposition of the UCTD, when there was a lack of case law, as well as insufficient expertise in the field.

Of course, the black list does not prevent the enforcement authority or courts from checking any term in consumer contracts for compliance with the general principle of good faith and the requirement for balance in the parties' rights and obligations (and on finding unfairness declaring the term as null and void), i.e. the term in question need not fall under any of hypotheses enumerated in the list in order to be controlled.<sup>55</sup>

- 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; [*Note: If a black/grey list exists in your country, key aspects to consider are: How does the list work in practice? Does it make a difference to have such a list?*]

See above.

Furthermore the national enforcement authority has explicitly stated that the list of unfair terms is clearer and easier to apply in practice than the list of unfair commercial practices (which sometimes suffers from vagueness). It serves as a clear guidance in law enforcement, but also is useful for business and consumers when they would like to check if a certain term can be considered unfair.

<sup>55</sup> See Decision № 212 / 17.12.2015 Civil case № 381/2015 the Court of Appeal - Varna – terms for amending the credit contract by including the obligation for consumer to pay compound interest and introducing a new scheme for debt calculation and payments which increase the final amount due by the consumer.

- 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: In your country, have the effects of court decisions establishing the unfairness of an unfair term been extended to all contracts of the trader concerned or to the contracts of any other trader containing such a term? If so, how does this work in practice? What are the impacts on businesses? If there are no such effects of court decisions on unfair terms: what are the effects of this situation?*]

In Bulgarian law the court decision has legal effect only for the parties participating in the court proceeding, with a few exceptions.

One exception relates to court decisions on claims for protection of collective interests of consumers, which have legal effect for the parties as well as for all consumers damaged by the same infringement who did not exercise their right to opt-out – Article 386 (1) Code of Civil Procedure.

Consumers who opt-out and go for an individual litigation can still refer to the court decision granting the collective action<sup>56</sup> in support of their claim, when the subject-matter of both proceedings are the same contractual terms – Article 386 (1) of Code of Civil Procedure. Without such a decision on collective action, each consumer who brings an individual lawsuit against a trader, asking for certain terms to be proclaimed unfair, has to provide enough evidences in support of the lawsuit.

A court decision on one individual case for proclaiming certain terms unfair, can be used as a reference in another individual case only regarding the same contractual terms. The court that is hearing the second case is not obliged to take this decision into consideration; it has been reported though that it usually does.

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

The interviewed stakeholders assess this requirement very positively and consider it useful. No particular problems in its application are reported and the overall assessment is that businesses adhere to it. Noteworthy is the fact that there is case law on unfairness of contract terms due to lack of transparency – contractual terms allowing for a unilateral change of the interest rate in a contract for bank credit,<sup>57</sup> and a contractual clause dealing with correction of bills for electricity, but with unclearly stated conditions.<sup>58</sup>

- 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. [*Note: Question only relevant for MS that have put in place extensions of application of UCTD*]

No such extension is provided in Bulgarian legislation.

<sup>56</sup> The court decision for rejection of lawsuit is not considered binding for consumers who opted-out – article 386 (1) Code of Civil Procedure, see also Markov, Metodi “Collective actions for consumer protection”, in “Society and Law”, 2007/9, p.21

<sup>57</sup> Decision № 424 /02.12.2015 Civil case № 1899/2015 IV Division, the Supreme Court of Cassation; Decision № 2939 / 10.07.2014 Civil case № 12334/2011 Regional court – Plovdiv; Decision № 5229 / 13.07.2015 Civil case № 4881/2015 Sofia City Court; Decision № 266 / 17.10.2014 Com. case № 414/2014 the Court of Appeal – Varna.

<sup>58</sup> Decision № 344 / 16.07.2013 Civil case № 725/2013 the District court – Veliko Tarnovo.



- 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?]

The sanction is good, however it does not seem to work very effectively in practice. Although consumers can claim that the unfair term is not binding for them, the stakeholders share the opinion that they are hesitant to do so (either in court proceedings or in out-of-court contacts with businesses) fearing the unsuccessfulness of such a claim and its legal consequences (such as penalties for non-performance of contract, etc.)

There is no statistical data on how many consumers are refusing to adhere to a contract term, after it has been proclaimed unfair, and hence void, in a collective action proceeding.

According to the opinion of some stakeholders the Bulgarian legislation have no law provision explicitly obliging the court to exercise *ex-officio* control over terms in consumer contracts. Nevertheless, the enforcement authority and some other respondents report that such *ex-officio* control is happening in some court proceedings.<sup>59</sup> The interviews leave the impression that the guidance of CJEU in this regard is not very well known.

There is no administrative remedy in this area. Unfairness of contract term can be invoked in court proceeding – either by the national enforcement authority with a collective action, or proactively by consumers with a claim for unfairness or as an objection to business's claim (like a defence action).

- In a forward looking perspective: Are there other measures that could improve the effectiveness of the UCTD in establishing a high level of consumer protection in your country? Would a graphical presentation model improve the readability and comprehension by consumers of the T&Cs? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

The interviewed stakeholders recommend the following measures:

- Introducing a provision clearly stating the obligation of courts to perform *ex-officio* control over unfair terms in consumer contracts;
- The unfairness control to be extended to contract terms amended with the approval of the state authority as well as on those coming from the legislation.<sup>60</sup> The application of the provision for amendment of standard T&Cs (Article 147b

<sup>59</sup> See Decision № 102 / 06.07.2010 Com. case № 283/2010 the Court of Appeal - Varna – from the motives of this court decision appears the court invoked *ex-officio* control for unfairness.

Same with Decision № 266 / 17.10.2014 Com. case № 414/2014 the Court of Appeal - Varna; Decision № 159 / 11.12.2013 Com. case № 99/2012 District court - Pazardzhik (with good justification).

<sup>60</sup> In this regard see also Колева, Рая „Основните права на потребителите – теоретични и практически въпроси“, сп. „Търговско право“, 2009/2, с. 83 [Koleva, Raya “Rights of consumers – theoretical and practical aspects”, in “Commercial Law”, 2009/2, p.83]; in this regard – see also Decision No 86 17.08. 2015 of the Supreme Court of Cassations, Com. case No 616/2015, 2nd panel of the Commerce Chamber.



(2)(3) CPA)<sup>61</sup> is reported to be not very successful and to create problems in practice (legal uncertainty) – it causes situations in which various standard T&Cs (old version and amended version) are applied to the contracts between a trader and consumers, (depending only whether some consumers have been more proactive in exercising their right under Article 147b (2) CPA to object to the amendment of the T&Cs or the standard terms and conditions have been amended as a result of an order or instruction of the competent public authority);

- In some cases (for example, the payment schedule in financial services) a graphical presentation model could improve the readability and comprehension of the T&Cs by consumers.

### 1.2.2. Effectiveness of the current rules 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 disparities have an impact on cross-border trade; [*Key aspects to consider are: Do national differences in the application/implementation of the Directive play a role for businesses? Have these differences led to changes in their business strategy? Have these differences caused problems?*]

The interviewed stakeholders are not reporting any such problems and no other relevant evidence has been found.

- 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;

The interviewed stakeholders are not reporting any such barrier for cross-border transactions and no other relevant evidence has been found.

- 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.

The interviewed stakeholders are not reporting any such barrier for cross-border transactions and no other relevant evidence has been found

<sup>61</sup> Art. 147b. CPA (1) The trader must inform the consumer of any change in the standard terms and conditions of the contract within 7 days from the occurrence of this circumstance of indicated by the phone, email or mailing address.

- (2) When disagrees with changes in the standard terms and conditions, the consumer can cancel the contract without giving any reason and without obligation for paying compensation or penalty, or to continue to perform it according to the standard terms and conditions before the amendment.
- (3) The consumer exercising its right under par. 2 sends to the trader written notice within one month of receipt of the notification under par. 1. Paragraph 2 shall not apply in cases where the amendment of the standard terms and conditions is a result of an order or instruction of the competent public authority.
- (4) Changes in the standard terms and conditions is binding on the consumer under the contract, where the consumer is notified of them under par. 1 and has not exercised its right under par. 2 and 3.
- (5) The trader must establish the fact of notifying the consumer about the change of the standard terms and conditions.

### 1.2.3. Relevance for business-to-business transactions

Regarding the area of contractual fairness and in relation to the Unfair Contract Terms Directive, please analyse:

- Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;

The interviewed stakeholders express contradicting opinions on this matter. The state authorities think that if such protection was introduced this would have to be done very carefully and without any restriction of autonomy and freedom of contract. Other respondents express the need for such protection, given already existing problems on the market (between big store chains and small delivery companies).

As mentioned earlier, some steps for protection of businesses with weaker bargain power have already been undertaken by the Bulgarian legislator, i.e. the enforcement of Article 37a of the Protection of Competition Act, which prohibits the abuse of a stronger position in negotiations. Although it is a relatively new rule (in force since 2015) it already finds application in the practice of the Commission for Protection of Competition,<sup>62</sup> nevertheless there is still not enough case law to allow for a deeper analysis as to how effective the rule is.

- 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;

The requirements of good faith and fairness are fundamental for Bulgarian contract law and must be respected in all contracts, including B2B transactions.<sup>63</sup> Therefore a system of protection based on the concept of good faith and the significant imbalance in the parties' rights (unfairness), is very suitable for control for unfair terms in business-to-business transactions.

This conclusion is also supported by decisions of some Bulgarian courts and in the legal literature.<sup>64</sup> 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.<sup>65</sup>

<sup>62</sup> See Decision № 365 / 26.05.2016 the Commission for Protection of Competition and Decision № 194 / 23.03.2016 the Commission for Protection of Competition

<sup>63</sup> In this sense is Article 9 Obligations and Contracts Act ("The parties are free to determine the contents of the contract insofar as it is not contrary to mandatory rules of law and good morals") and Article 12 Obligations and Contracts Act ("In negotiating and contracting parties must act in good faith. Otherwise they owe compensation."), applicable also to B2B transactions in accordance with the 288 Commercial Act referring to general provision of the Private Law.

<sup>64</sup> Марков, Методи Развитие на уредбата на договора при общи условия, "Съвременно право", 2000/3 [Markov, Metodi Development of the legal framework of contract under general terms]

<sup>65</sup> See in this sense - Decision № T-372 / 13.07.2010 Com. case № 111/2010 III Division the Court of Appeal - Sofia; also Decision № 102 / 06.07.2010 Com. case № 283/2010 the Court of Appeal - Varna and Decision № 216 / 16.07.2012 Com. case № 255/2012 the Court of Appeal -Varna. On the opposite position - Decision № 283 / 17.07.2015 Com. case № 155/2015 the Court of Appeal - Plovdiv (unfairness under CPA only for B2C contracts), also Decision № 332 / 25.11.2014 Com. case № 469/2014 the Court of Appeal – Varna.

- 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;

The interviewed stakeholders do not express any particular opinion on this matter, but they are warning that any such intervention could harm freedom of contract. Extending protection to individually negotiated terms, the main subject-matter of the contract and the adequacy of the price of B2B contracts can also be considered as restriction of freedom of contract, therefore would not be very welcome among interviewed stakeholders.

- 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;

The following practices in B2B relationships on Bulgarian market can be considered as unfair in all circumstances:<sup>66</sup>

- Restriction in the use of trademarks and parking places;
- Restriction or sanction for offering third parties the same or better commercial terms (i.e. 'most favored nation' clause);
- Limiting the possibility of supply or sale to third parties as a whole;
- Unilateral amendment of the contract;
- Introduction of payments without any real consideration (often cited as a fee 'Birthday');
- Transfer of unjustified or disproportionate commercial risk to one party (e.g. stipulating reimbursement of expenses related to the withdrawal and the destruction of goods with expired date);
- Payment within a period longer than 30 days from the delivery or the receipt of the invoice for the sale of any kind of food regardless of the length of the cycle of their realization;
- Limiting the right on transferring the claims to a third party under a contract for delivery of goods;
- Unjustified refusal to prepare an offer for purchase.<sup>67</sup>

- Whether there is a need for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive;

Such transparency requirement would be very beneficial, especially for some B2B contracts that, due to industry characteristics, are rich in *terminus technicus* and unreadable for the laity. For instance, in B2B contracts for financial services, energy or heating supply, even when the recipients of financial services or of energy service are traders themselves, one cannot expect them to have such a level of professional expertise in these fields so that they can understand the jargon used in standard T&Cs of banks or energy suppliers.

The interviewed stakeholders do not express any particular opinion on this matter.

<sup>66</sup> As reported by the interviewed stakeholders; see also - [http://www.capital.bg/biznes/vunshni\\_analizi/2015/07/12/2571094\\_regulaciia\\_na\\_turgoviiata\\_ne\\_samo\\_na\\_turgovskite\\_verigi/](http://www.capital.bg/biznes/vunshni_analizi/2015/07/12/2571094_regulaciia_na_turgoviiata_ne_samo_na_turgovskite_verigi/) [last visited 17.07.2016]; [http://www.regal.bg/tema\\_na\\_broia/2014/07/18/2345934\\_globi\\_za\\_zloupotreba\\_s\\_po-silna\\_poziciia\\_pri/](http://www.regal.bg/tema_na_broia/2014/07/18/2345934_globi_za_zloupotreba_s_po-silna_poziciia_pri/) [last visited on 17.07.2016]

<sup>67</sup> Decision № 365 / 26.05.2016 the Commission for Protection of Competition.

- Whether an extension of the Unfair Contract Terms Directive to B2B transactions can bring benefits for cross-border trade;

It seems hard to predict what the effect would be of such an extension for cross-border trade. According to one of the interviewed stakeholders it will probably bring benefits.

- Whether the consequences of such an extension would have an effect on innovation by or market opportunities for SME providers/suppliers;

Such an extension may help innovation by micro<sup>68</sup> and small<sup>69</sup> enterprises. Some studies reveal that for 57% of the Bulgarian SME the big companies with dominant market position represent a barrier for innovations.<sup>70</sup> Admittedly, this is not the most significant obstacle to innovations by SME, yet it looks as a hindrance that should not be neglected. Should the control for unfair terms in contracts between SME and bigger enterprises contribute to balancing of bargaining power of parties then that measure may have a positive effect on innovations by and market positions of SME.

For the interviewed stakeholders it is hard to assess what such effect would be.

- Whether the benefits of extending the scope to business-to-business transactions would exceed the negative consequences of such an extension.

As per the opinion of some of the respondents the answer to this question requires deep and very detailed analysis of all potential benefits and disadvantages of the extension before drawing the conclusion as to which one will prevail – positive impact or negative consequences of such extension. As long as the fairness is respected and the balance between parties' rights and obligations is observed, the gain of such intervention in B2B transactions would exceed its potential negative impact.

### 1.3. Injunctions

#### 1.3.1. Effectiveness of the current rules in establishing a high level of consumer protection

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

- To what extent is the use of the injunction procedure in your country contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment?<sup>71</sup>

The assessment of effectiveness provided by the interviewed stakeholders varies. The common opinion is that the ID measures work relatively well on the national market, but not for the cross-border infringements.

Some measures are more effective in practice when applied by public authorities than by consumer organisations (for instance, collective actions) – the information collected for the purpose of this country report reveals that since 2010 the national enforcement authority has filed around 90 collective actions, whereas consumer organisations around 8.

<sup>68</sup> Micro enterprise is the one with personnel less than 10 people and annual turnover and/or assets less than 3,900,000 BGN – Article 3 (3) Small and Medium Enterprise Act

<sup>69</sup> Small enterprise is the one with personnel less than 50 people and annual turnover and/or assets less than 19,500,000 BGN – Article 3 (2) Small and Medium Enterprise Act

<sup>70</sup> See the Study on Innovations of SME in Bulgaria (p.356) conducted by the Applied Research and Communications Fund - [www.arcfund.net/fileSrc.php?id=2529](http://www.arcfund.net/fileSrc.php?id=2529) [last visited on 20.07.2016]

<sup>71</sup> 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.

Collective actions are more effective for ending, hence reducing, infringements, however they do not work well in practice when it comes to reduction in consumers' detriment, as per a stakeholder experience shared during the interview.<sup>72</sup> This is caused by amendments of some provisions of national law, namely Article 188 (3) CPA. Before 2008 this provision required the court to award damages based on the concept of fairness (without proofs for the exact amount of the loss); in 2008, with the new Code of Civil Procedure the provision was abrogated and nowadays the exact amount of loss incurred by each consumer has to be substantiated in the court proceeding. This creates procedural obstacles in the collective action proceedings.<sup>73</sup>

- What measures in your national legislation on injunction procedure are considered to be particularly effective, if any: measures regarding the cost of the procedure, the 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?

The prior consultation (Article 5 of the Injunctions Directive) is reportedly used very often by the national enforcement authority prior undertaking any other measures and is deemed effective.

Mixed assessment also applies in relation to the summary procedure – although the latter is used very often in practice (especially by the national enforcement authority) it does not appear to be that fast for making a real difference when compared with the normal proceeding.

The interviewed stakeholders (both consumer organisations and public authorities) point out that the publication of the decision and/or the publication of a corrective statement represents a measure that could be very useful and effective after some adjustment of its application in practice, namely – the language of publication needs to be more understandable for consumers (legal terms to be avoided as much as possible) and the notification to be published in more popular newspapers with better circulation. This may face some obstacles though if between such a newspaper and the business infringed the law exists advertising contract or other business relationship, making the editors reluctant to publish such notifications. Existence of these obstacles is reported by one of the interviewed stakeholders.

- Has your country extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunction Directive? If yes, what are the additional consumer rights covered?

The scope of application of the injunction procedure is extended beyond the legislation from Annex I to any 'other legislation that protect the interests of consumers' – Article 186 (2) p. 9 the Consumer Protection Act.

Additionally according to Article 186 (2) p. 10, 'g' and 'p' (in Bulgarian: 'r' 'n') the Consumer Protection Act in the scope has also been included national legislation of any EU member-state transposing the following two directives:

- Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive);
- Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending

<sup>72</sup> See also Decision № 10 / 06.08.2013 Com. case № 998/2012 I commercial division, the Supreme Court of Cassation.

<sup>73</sup> See for instance Ruling № 63 / 04.02.2016 Civil case № 3/2016 the Court of Appeal - Plovdiv and Ruling № 4284 / 03.11.2015 Civil case № 2295/2015 the District court – Plovdiv.

Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

- Analysis of the obstacles to the effective use of the injunction procedure, in particular by analysing which progress in removing obstacles has been made and/or new difficulties that have emerged in your country since 2012.

The interviewed stakeholders enumerate the following obstacles for the effective use of the injunction procedure:

- The amount of court expenses, namely state fees, which for non-tangible claims may vary between 80 BGN [approx. EUR 40] and 1600 BGN [approx. EUR 820] and for tangible claims – 4% from the claim; lawyers fee as well – in average, 500-600 BGN [approx. EUR 255-307];<sup>74</sup>
- The length of court proceeding – in general, the length is sufficient to affect the effectiveness of the court decision (it is reported that in a few cases the unfair practice or the unfair term ceased long before the final court decision was announced).<sup>75</sup> Even the summary procedure is not securing any faster remedy, as reported by the interviewees;
- Lack of judges sufficiently well trained and experienced in the specifics of legislation for consumer protection. Reportedly some progress has been made in this regards in the last couple of years (consumer protection law is now included in the training curriculum for judges), but it is not sufficient yet;
- The amendment of the CPA in the sense that in collective actions damages are awarded to consumers by the court only when the exact amount of the loss is substantiated (in the past the amount of compensation was determined by the court in accordance with the principle of fairness and no proofs for the exact amount were needed);
- The Bulgarian Administrative Infringements and Penalties Act (AIPA) was enforced approximately 60 years ago, and some of its provisions are not compatible with the provisions of the consumer protection legislation, which makes application of the latter cumbersome. The national enforcement authority explains that some of their orders for ceasing of infringements were overruled by the court only based on formal procedural grounds rooting in the incompatibility mentioned above. For instance, according AIPA the order for ceasing of infringement needs to state the place where the infringement was committed, which in some cases is challenging to specify i.e. in distant selling transactions, as per the relevant authority opinion;
- In addition, the legal authors suggest improvements/removal of inconsistencies between proceedings for appeals against various acts of the Commission for Consumer Protection. Nowadays appeal against orders for cessation of unfair commercial practice and orders for imposing on traders administrative sanctions for unfair practice are governed by two separate legal acts, the Code for Administrative Procedure and the Administrative Infringements and Penalties Act, respectively, which is not an optimal solution for law enforcement and may lead to contracting court decision regarding one and the same law infringement.<sup>76</sup>

<sup>74</sup> The Commission for Consumer Protection dues court fees – see Ruling № 937 / 25.11.2011 Com. case № 825/2011 II commercial division, the Supreme Court of Cassation.

<sup>75</sup> See for example Decision № 69 / 19.03.2015 Com. case № 28/2015 the Court of Appeal - Varna (the Commission for Consumer Protection recommended removing of an unfair term in August 2013, as it was not done, collective action was filed and the claim was upheld with a court decision in November 2014; meanwhile new T&Cs of the defendant company were drafted and approved by the respective regulator and as they didn't contain the term in question, the court procedure was terminated in March 2015, almost two years after the recommendations).

<sup>76</sup> See Varadinov, op.cit., p.218



- In a forward looking perspective: Should the coverage of the Injunctions Directive be extended (by including additional legislation into Annex I to the Directive)? If so, which EU legislation should be included? Are there other measures that could improve the effectiveness of the ID in establishing a high level of consumer protection? Should the scope of the Injunctions Directive be extended to the protection of collective business' interests? Are there best practices in your country that could be relevant for other countries and considered as model for the injunction procedure at EU level?

The interviewed stakeholders are not happy about an extension of the coverage of the Injunctions Directive and do not see a need for such.

One of the interviewed stakeholders would welcome collective actions for protection of interests of small enterprises.

The national enforcement authority recommends any measures that can encourage and facilitate consumer organisation to file more collective actions.

One of the interviewed stakeholders suggests introducing a mechanism for better coordination and information exchange between consumer organisations within various EU Member States in the cases when one infringement affects consumers from multiple Member States or the same business commits the same type of infringement in multiple Member States. This mechanism would aim at defining which court in which country would have jurisdiction to hear the collective action, measures for informing affected consumers and allowing them to be represented in the court proceeding as well as for assessment of damages.

### 1.3.2. 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:

- How effective is the injunction procedure in addressing infringements originating in another EU country?

Theoretically, such procedures are possible, but they are not applied in practice as they raise complicated legal questions and require significant resources. The interviewed stakeholders almost unanimously state that the injunction procedure is not very effective in addressing infringements originating in another EU country.

- How effective is it to address infringements originating in another EU country that qualified entities in your country are enabled to seek injunctions in the other Member State (Article 4 of the Injunctions Directive)?

As per the interviewees, it is not effective (not working well) and it only seems to exist as a theoretical option. No cross-country injunction proceedings have been reported and none appear to be completed or pending – neither initiated by qualified Bulgarian entities against traders from another EU member state and brought in Bulgarian or foreign jurisdiction, nor of foreign qualified entities seeking an injunction before Bulgarian courts or enforcement bodies.

- In a forward looking perspective: Are there non-legislative or/and legislative measures that could improve the effectiveness of the injunction procedure in addressing infringements originating in another EU country? Are there best practices in your country that could be relevant for other EU countries and could be considered as a model for the injunction procedure at EU level?

One of the respondents introducing a mechanism for better coordination and information exchange between consumer organisations within various EU Member States in the cases when one infringement affects consumers from multiple countries



or the same business commits the same type of infringement in multiple Member States – see above 1.3.1.

### 1.3.3. Interplay between the Injunctions Directive and other enforcement instruments of consumer law

Please analyse:

- Is the injunction procedure as designed by the Injunctions Directive regulated separately in your country (in a separate legal act or as a separate procedure regulated within the same legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (UCPD, UCTD and by the Consumer Rights Directive)?

All enforcement procedures are regulated in one legal act – the Consumer Protection Act, Chapter 9. There are also provisions on collective actions in the Code of Civil Procedure, chapter 33.

- If these procedures are regulated separately: What are the main differences between them? How is the coherence between these procedures ensured? If these procedures are regulated in a single legal act (possibly as a single procedure): In what way do these procedures (or this procedure) go beyond measures foreseen by the Injunctions Directive?

Apart from the extended scope of application of the injunction procedure (for 'any other legislation that protects the interests of consumers') the procedures in the national legislation do not go beyond measures foreseen in the Injunctions Directive.

## 1.4. Cross-cutting issues

### 1.4.1. Cost and benefits of the directives covered by the study

- To what extent is there evidence for benefits for consumers stemming from the protection provided by both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of benefits for consumers from the protection against unfair commercial practices and unfair standard terms in contracts; [*Note: a relevant aspect in this context is whether the costs for consumers in exercising their rights under these directives are limiting these benefits or not.*]

There is clear statistical evidence (from the annual reports of the Commission for Consumer Protection<sup>77</sup> and information provided by the relevant public authorities) that the number of consumer complaints have significantly increased over the last few years – from approximately 2000 per year a few years ago to more than 20,000 in 2015. This trend is a result of increased consumer awareness of their rights, and their confidence to seek protection. A certain benefit is a free-of-charge procedure for filing a complaint as well as the fact those can be sent via email without a requirement to use a digital signature.

The situation with court procedures looks different. There is no relevant statistical data about consumer court disputes (those seem to be included under the statistical category 'civil law cases')<sup>78</sup> and it is onerous to find out how many civil law proceedings for damages are following the procedures for ceasing the unfair practices or terms. However as per stakeholders' opinion, such proceedings are unlikely to be

<sup>77</sup> Annual reports for 2013, 2014 and 2015 can be found here <https://kzp.bg/godishni-dokladi> [last visited on 08.07.2016].

<sup>78</sup> Statistical data can be found here - <http://www.vss.justice.bg/page/view/1082> [last visited on 08.07.2016].

many. Court proceedings require more resources (time, efforts and financial means) than administrative procedures and this factor can make consumers reluctant to file civil claims. Consumers must pay state fees and, if they use the services of an attorney, they have to pay the lawyer's fee as well. The analysis of the case law reveals that consumers are seeking damages for both material and non-material loss resulting from unfair practices.<sup>79</sup>

- To what extent is there evidence for benefits for traders stemming from both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of creating a level playing field for honest traders by providing a legal basis to eliminate or at least constrain dishonest market practices, such as the use of unfair standard terms in contracts or unfair commercial practices, including through the application of the Injunctions Directive;

There is not such evidence. On the contrary, one of the stakeholders gives an example of unfair practices of mobile operators. All three mobile operators have in their T&Cs a term stipulating that if consumers want to terminate, before the agreed upon end date, contracts concluded for a defined period of time they are obliged to pay all fees for the complete duration of the contract. The Commission for Consumer Protection recommended removing this term from the T&Cs. Following the recommendation, one of the mobile operators complied immediately with it; the second one – after a certain period, the third one did not react and the Commission started a court proceeding. The latter operator, which seems to be the most non-compliant one out of three, is actually benefiting the most from its infringement as it will continue collecting fees based on the unfair term while the court proceeding is running.

- What are costs for traders due to the need to respect the requirements under the directives covered by the study? [*Note: Such as costs of research, legal advice and compliance as well as the amount of time necessary to comply with the directives*]

The relevant stakeholders report that no information about such costs is available.

- What are the costs involved in the public enforcement of these rules?

No relevant information has been found about the public costs related to the enforcement of these rules.

- Are there indications that the directives covered by the study are not implemented in your country in a cost-effective manner?

Probably this is the case as the court fees seem to be an obstacle for consumer organisation (in some cases even for public authorities) for filing collective actions.

- Could the costs for implementing and enforcing the rules of the directives covered by the study be reduced without lowering the level of protection for consumers? If so, how?

Decreasing the amount of court fees due for consumer litigations would have twofold effect – reducing the cost and encouraging consumer organisations for using more actively this redress mechanisms for protection of consumers' interests.

<sup>79</sup> Damages caused by unfair practice - Decision № 4914 / 07.07.2015 Civil Case № 20213/2014 the Sofia City Court; Decision № 895 / 09.02.2015 Civil case № 10538/2014 the Sofia City Court („СМС за милиони“ “SMS for millions”).

#### 1.4.2. Interplay with EU sector-specific consumer protection legislation

Regarding the interplay of the horizontal EU consumer legislation [mainly UCPD and UCTD] with EU sector-specific consumer protection legislation in the areas of electronic communications, passenger transport, energy and consumer financial services, please:

- Analyse the levels of awareness of the requirements of the horizontal EU consumer legislation (mainly UCPD and UCTD) of businesses and consumers and the specific public enforcement bodies in the relevant sectors, as in particular demonstrated by their practical application; [*Note: Key question here is: Are UCPD and UCTD applied in practice by national authorities and courts as a legal basis to combat unfair commercial practices and unfair standard terms in contracts in the regulated sectors?*]

This is the case, especially in financial services, electronic communications and energy, not that much in passenger transport.

For instance in 2013, 2014 and 2015 the Commission for Consumer Protection reviewed thousands of T&Cs for unfairness in the sectors mentioned above and among them have found unfair terms, as follows:<sup>80</sup>

Sector	2013	2014	2015
<b>Financial Services (banks)</b>	n/a	5 out of 890	196 out of 3300
<b>Financial Services (other than banks)</b>	56	31 out of 1066	351 out of 4253
<b>Energy (central heating)</b>	37	n/a	4 out of 228
<b>Energy (electricity)</b>	8	n/a	1 out of 10
<b>Energy (gas)</b>	n/a	1 out of 230	n/a
<b>Electronic Communications</b>	24	115 out of 2653	89 out of 1808
<b>Transport</b>	4	n/a	n/a

The most common unfair terms found are:

- Inappropriately excluding or limiting the legal rights of consumers;
- Performance of obligations of the trader is subject to conditions whose realization depends on trader's own will alone;
- Authorising the supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer;
- Requiring the consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;
- Bundling multiple contracts with the same consumer in a way that non-performance of the consumer of one of the contracts entitles the trader to refuse to perform all contracts;
- Excluding the supplier's responsibility even in case of failure in a network under their control;

<sup>80</sup> See the Annual Reports of the Commission for Consumer Protection for 2013, 2014 and 2015 - <https://kzp.bg/godishni-dokladi> [last visited on 08.07.2016].

- Consumers are obliged to pay the sum even when there is a pending proceeding based on their complaint against the sum.

In quite a few cases the courts have reviewed the terms in contracts between consumers and providers of electronic communication services,<sup>81</sup> central heating delivery companies,<sup>82</sup> electricity delivery companies,<sup>83</sup> financial services<sup>84</sup> and have declared some of them unfair.

Unfair commercial practices in the same sectors (electronic communications,<sup>85</sup> passenger transport,<sup>86</sup> energy<sup>87</sup> and consumer financial services)<sup>88</sup> have also been a subject to court proceeding.

- Specify whether in your country the same authority is responsible for the enforcement of the horizontal EU consumer law 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 UCPD/UCTD in the regulated sectors, as specified in the previous bullet?*]

According to Bulgarian legislation different authorities are competent for enforcement of the horizontal EU consumer law and the sector specific rules, namely:

- The Commission for Consumer Protection – the UCPD and UCTD (transposed in the Consumer Protection Act);

<sup>81</sup> Decision № 2396 / 22.12.2014 Com. case № 3502/2014 the Court of Appeal – Sofia.

<sup>82</sup> Decision № 312 / 11.12.2015 Civil case № 412/2015 the Court of Appeal – Veliko Tarnovo; Decision № 26 / 23.02.2015 Civil Case № 1479/2014 the Court of Appeal – Plovdiv; Decision № 312 / 11.12.2015 Civil case № 412/2015 the Court of Appeal – Veliko Tarnovo.

<sup>83</sup> Decision № 103 / 10.08.2015 Com. case № 1112/2015 II commercial division, the Supreme Court of Cassation; Decision № 86 / 17.08.2015 Com. case № 616/2015 II commercial division, the Supreme Court of Cassation; Decision № 79 / 11.05.2011 Com. case № 582/2010 II commercial division, the Supreme Court of Cassation; Decision № 115 / 20.05.2015 Civil case № 4907/2014 IV commercial division, the Supreme Court of Cassation; Decision № T-397 / 21.07.2010 Civil case № 138/2010 VI division, the Court of Appeal – Sofia; Decision No 86 17.08. 2015 of the Supreme Court of Cassations, Com. case No 616/2015, 2nd panel of the Commerce Chamber; Decision No 38 15.05.2014 of the Supreme Court of Cassations, Com. case No 5/2013, 1st panel of the Commerce Chamber (unfair is a contract term enabling the electricity supplier unilaterally to amend the bill for already delivered and paid electricity without a valid reason, for instance non-excused non-performance from consumer's side).

<sup>84</sup> Decision № 77 / 22.04.2015 Civil case № 4452/2014 III commercial division, the Supreme Court of Cassation - unfair is a contractual term granting a bank the right to unilaterally alter annual fee for administering of loan without specifying any valid reasons, beyond bank's control, that could justify a change in the fee amount.

<sup>85</sup> Decision № 4914 / 07.07.2015 Civil case № 20213/2014 the Sofia City Court; Decision from 06.01.2012 Civil case № 58/2011 the Sofia City Court; Decision No 9525 18.08.2016 of the Supreme Administrative Court, Adm. case No 11791/2015, VII department - unfair commercial practice (aggressive practice) is considering, without any legal grounds, three separate contracts concluded with a certain consumer as a single framework agreement only for justifying the refusal to provide services on all these contracts, even for those on which the consumer is a perfect payer, and by this means to force the consumer to pay their obligations under one of the contracts for which there is a dispute; Decision No 534 18.01. 2016 of the Supreme Administrative Court, Adm. case No 4078/2015, VII department (it is a misleading commercial practice when a trader fails to disclose to a certain consumer information about technical characteristics of a product, even when such information is available on the trader's website), on the contrary – if all relevant details on tariffs are available on the trader's website and they are comprehensible for the average consumer, the way the information is presented cannot be considered as a misleading practice (for instance the fact that a part of the information is provided in pop-up boxes, which open by clicking on the sign "?") – see Decision No 4570 2.04. 2013 of the Supreme Administrative Court, Adm. case No 642/2013, VII department.

<sup>86</sup> Comparative advertng as unfair practice in providing taxi services - Decision № 6951 / 20.10.2013 Civil case № 63/2011 the Sofia City Court.

<sup>87</sup> Decision from 04.02.2014 Civil case № 3912/2008 Regional court - Sofia (Collective Action against Toploficacia Sofia).

<sup>88</sup> Decision from 11.04.2011 Civil case № 3407/2007the Sofia City Court.

- The Energy and Water Regulatory Commission – energy, gas and water sector specific rules;<sup>89</sup>
- The Commission for the Regulation of Communications – electronic communications specific rules;<sup>90</sup>
- The Ministry of Transport, Information Technology and Communication, The Directorate General "Civil Aviation Administration" – passengers' air transport specific rules;<sup>91</sup>
- The Ministry of Transport, Information Technology and Communication, Executive Agency "Car Administration" – passengers' auto transport specific rules.<sup>92</sup>

The cooperation between all these authorities is regulated by legal provisions in multiple legal acts, namely:

- Ministry of economy has a general responsibility for coordinating activities of all other public authorities with competence in the field of consumer protection (Article 164 (1) p.5 the Consumer Protection Act);
  - The Energy and Water Regulatory Commission before approving T&Cs for delivery of central heating and electricity, is obliged to send to the Commission for Consumer Protection drafts of T&Cs for review for unfair terms (Article 148 (2) the Consumer Protection Act);
  - The interviewed regulators report that the Commission for Consumer Protection forward to them consumers' complaints for infringements in the sectors with specific rules, for instance delivery of central heating and electricity, air and road passengers transport (legal basis is Article 178 (6) the Consumer Protection Act), except for complaints for unfair terms and unfair commercial practices, which are deemed to belong to the domain of the Commission for Consumer Protection. On the other hand, the regulators forward to the Commission for Consumer Protection those of consumers complaints sent to them, but falling within the scope of competence of the Commission for Consumer Protection (for instance, in road passengers transport when non-authorized company, acting as if it is a representative of a bus company, sold an invalid ticket to a consumer).
- Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning contractual fairness, 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.?*]

The interviewed stakeholders assess overall positively the legal framework concerning contractual fairness and unfair commercial practices provided by the combination of horizontal consumer provisions and sector-specific rules.

<sup>89</sup> DIRECTIVE 2009/73 / EC, DIRECTIVE 2009/72 / EC, DIRECTIVE 2004/67 / EC, REGULATION (EU) N° 994/2010, Regulation (EC, Euratom) N° 833/2010, REGULATION (EC) N° 715/2009, REGULATION (EC) N° 714/2009

<sup>90</sup> DIRECTIVE 2009/73 / EC, DIRECTIVE 2009/72 / EC, DIRECTIVE 2004/67 / EC, REGULATION (EU) N° 994/2010, Regulation (EC, Euratom) N° 833/2010, REGULATION (EC) N° 715/2009, REGULATION (EC) N° 714/2009, DIRECTIVE 2009/140 / EC, DIRECTIVE 2009/136 / EC, DIRECTIVE 2009/114 / EC, DIRECTIVE 2006/24 / EC, DIRECTIVE 2002/77 / EC, DIRECTIVE 2002/58 / EC, DIRECTIVE 2002/22 / EC, DIRECTIVE 2002/21 / EC, DIRECTIVE 2002/20 / EC, DIRECTIVE 2002/19 / EC.

<sup>91</sup> REGULATION (EC) No 261/2004 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91; REGULATION (EC) No 1107/2006 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air

<sup>92</sup> Regulation (EC) N° 181/2011.

There is one particular issue reported by the interviewed stakeholders, namely disputes about application of para.1 of the Additional Provisions of the Consumer Protection Act, stating that in case of contradicting legal provisions the one which guarantees the highest degree of consumer protection is to be applied. In practice this requirement clashes with another legal doctrine *Lex specialis derogat legi generali* and creates difficulties for law interpretation and application. This has been reported as a significant problem in the energy sector. One of the interviewed stakeholders claims that when it comes to consumer protection, the Energy Act is *lex specialis* and has priority over the provisions of the Consumer Protection Act as a general law. Other interviewees as well as case law<sup>93</sup> on the contrary state that the provisions of the Energy Act can have priority only where they provide a higher degree of protection for consumers' interests than the provisions of the Consumer Protection Act.

Another example is the rules on payments services.<sup>94</sup> They cannot derogate the provisions of the Consumer Protection Act if the latter provides a higher level of consumer protection.<sup>95</sup>

- What are the benefits of the complementary application of the UCPD and UCTD in the regulated sectors? What are the costs due to the complementary application with the sectoral EU consumer protection legislation?

No information available on this matter has been found in the course of preparing the country report.

- Assess any need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law.

There is such need and this opinion is also shared by some of the interviewed stakeholders. Especially given the issue about application of para.1 of the Additional Provisions of the Consumer Protection Act, as described above, as well as the fact that one of the interviewed regulators admitted that they heard about existence of the UCPD and the UCTD only after having been contacted for opinion on the current study. Better knowledge on rules about unfair commercial practices and unfair contract terms in consumer contracts would be beneficial for the regulators in sectors with specific rules for consumer protection, in spite of the lack of competence to handle such issues.

#### 1.4.3. Relevance of consumer law directives for consumer-to-business transactions

- Please analyse the need and potential for the application of the consumer law directives (mainly UCPD and UCTD) to 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 stakeholders either do not have opinion on this matter or express negative attitude to such application. They think this will create confusion and raise unnecessary questions about the need of such protection.

<sup>93</sup> Decision № T-372 / 13.07.2010 Com. case № 111/2010 III division, the Court of Appeal – Sofia: “EA and CPA regulate a diverse range of public relations and ... cannot be seen as special and general legislative act”.

<sup>94</sup> Payment Services and Payments Systems Act 2009, transposing the Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market.

<sup>95</sup> In this sense see - Decision from 23.02.2015 Civil Case № 69055/2014 Regional court – Sofia.



#### 1.4.4. Specific protection for vulnerable consumers

Please analyse:

- Whether the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined in the consumer law directives and relevant jurisprudence, and as applied by national authorities and courts in your country, continue to be valid and fit for purpose.

Yes, and this is almost anonymously confirmed by the interviewed stakeholders.

The legal definition of the term 'consumer' is provided in § 13, item 1 Additional Provisions of CPA, namely: 'Consumer means any natural person who acquires goods or uses services that are not intended for commercial or professional activity, and any person who, under a contract under this Act acting outside his trade or profession'. This definition is general for the whole Consumer Protection Act (transposing various EU directives, including the UCP one) and is criticized in the legal literature as contradicting the definition from Article 2 'a' of the UCPD<sup>96</sup> due to introduction of an additional characteristic, which does not exist in the Directive i.e. goods and services should not be 'intended for commercial or professional activity'. Legal authors see this as not being compliant with the requirements of the Directive, because outside the protection against unfair practices would remain cases in which natural persons are acquiring professional goods for their personal activity (i.e. hobby), for instance professional photographic technic and materials acquired by amateur photograph and used only for his hobby. Therefore legal authors suggest either correction of the current definition of 'consumer' or introducing a new one, applicable only for unfair commercial practices.<sup>97</sup>

The concept of 'consumer' is interpreted broadly in the case law – not only for transactions and practices regulated in the Consumer Protection Act, but also all other recipients of services that are not intended for commercial or professional activity, such as supply of electricity for households.<sup>98</sup>

- To what extent the existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers and whether, based on the experiences in your country, specific provisions should be introduced in other directives concerned, in particular the Unfair Contract Terms Directive.

The summarized opinions of interviewed stakeholders reveal uncertainty about the fitness of existing rules for providing adequate protection of vulnerable consumers. Only one respondent evaluates the rules as adequate, at the same time pointing out one significant exception, namely for transactions performed online. Other stakeholders also express the need of more suitable rules for protection of vulnerable consumers, especially children, in Internet purchasing.

#### 1.4.5. EU added value

- Overall, would you consider that protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in your country since the implementation of the UCPD and the UCTD in national legislation?

Based on the interviews conducted for this country report, it is concluded that the protection of consumers has improved. Prior to the transposition of the UCPD (in

<sup>96</sup> "Consumer' means any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession".

<sup>97</sup> See Varadinov, op.cit., p.35.

<sup>98</sup> See Sukareva, op.cit., p. 227 and Ruling № 710/30.10.2012 Г., Civil case № 613/2012, III Civil Division, the Supreme Court of Cassation.



2007) and the UCTD (in 1999)<sup>99</sup> in Bulgarian legislation no special rules tackling with such infringements existed. Although the provisions of general contract law provided consumers with, to a certain extent, suitable remedies in such cases, the transposition of these two directives played a key role for improving the protection of consumer rights and interests. As reported by the interviewed stakeholders, the lists of unfair terms and unfair practices served as a clear and useful guidance for the enforcement authority and courts when deciding on consumer cases, especially in the early years of law enforcement, when there was a lack of knowledge and sufficient case law on these topics. Furthermore, the application of the rules on unfair practices and unfair terms into practice and the information campaigns in these areas, seem to increase consumers' awareness of their rights and encourage them proactively to seek for remedy for infringements – as reported by the relevant enforcement authority currently approximately 20000 consumers' complaints per year are addressed to them, whereas only a few years ago this number was around 2000. Nevertheless, the respondents point out that there is still room for improvements, especially in increasing the level of control on how the law provisions are applied in the practice as well as for protection of consumers purchasing online.

- Overall, would you consider that the information of consumers regarding unit prices has improved since the implementation of the PID in national legislation?

It has improved for packaged goods. This is the prevailing opinion of the interviewees, including the enforcement authority and consumer organisations, which have observed a significant decrease of number of complaints and cases of violations of the unit price indication requirements since the national legislation transposing the PID entered into force.

As far as non-packaged goods and services are concerned, the application of the information requirements regarding unit prices still needs improvement, as reported by the respondents.

- Overall, would you consider that the protection of businesses against unfair marketing in your country has improved since the implementation of the MCAD in national legislation?

Some of the respondents express such an opinion, emphasizing the key role the Commission for Protection of Competition plays in tackling with unfair marketing in Bulgaria. Bulgarian legislation has however had provisions on misleading advertising since 1999,<sup>100</sup> therefore it is difficult to assess what has been the impact of the transposition of the MCAD in this regard.

The reviewed case law reveals that mainly cases of misleading advertising have been invoked before the relevant enforcement authority and courts. Cases related to comparative advertising can rarely be found in the legal practice. No other evidence has been found on the impact of the transposition of the MCAD on the protection of businesses against comparative advertising.

- Overall, would you consider that it has become easier for businesses in your country to directly trade cross-border to final consumers located in other EU countries in recent years? Has it become easier for consumers in your country to directly purchase cross-border from traders located in other EU countries?

<sup>99</sup> First rules on unfair terms in consumer contracts were part of the Consumer Protection and Business Practices Act (enacted in 1999 and abrogated in 2006 with the Consumer Protection Act) and were quite similar to some provisions of the UCTD.

<sup>100</sup> Articles 29-33 of the Consumer Protection and Business Practices Act (enacted in 1999 and abrogated in 2006 with the Consumer Protection Act) similar to some of the provisions of Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising.

No explicit evidence has been found for substantiating a response in one direction or in another. According to one of the interviewed stakeholders, there is increased confidence of Bulgarian traders to offer goods and services cross-border, which can mainly be attributed to the advantages provided by the internal market (namely, due to absence of custom duties). Harmonized law of consumer protection to a certain extent contributes to this result, even though it does not seem to be considered by the respondents as a primary factor.

As far as consumers' confidence to purchase cross-border is concerned, based on the summarized opinions of the interviewees it can be concluded that it has slightly increased for the last years. Only one exception to this trend seems to exist, namely online purchasing, due to some negative examples of goods purchased online from countries outside EU, which cases have reportedly made consumers in Bulgaria more reluctant to enter into cross-border online transactions.

- To what extent are these improvements, if any, due to the mentioned directives?

The directives certainly have very positive impact in this regards, but they are not considered by the interviewed stakeholders as the most influential factor for these improvements.

## Annex

## A. Transposition fact sheet

**Table 1: Fact sheet on transposition of directives in Member States' law – BULGARIA**

Directive	Transposition legislation (National law, Article)	Comments	Specific provisions going beyond minimum harmonisation requirements/use of exemptions	Included in national legislation		Comments
<b>Directive 93/13/EEC on unfair terms in consumer contracts</b>	The Consumer Protection Act (2005), Chapter 6 “Unfair Terms in Consumer Contracts”, Articles 143 – 148a		'Black list' of terms considered unfair in all circumstances	Yes	Article 143 The Consumer Protection Act (2005)	
			'Grey list' of terms which may be considered unfair	No		
			Extensions of the application of Directive to individually negotiated terms	No		
			Extensions of the application of Directive terms on the adequacy of the price and the main subject-matter	No		
<b>Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market</b>	The Consumer Protection Act (2005), Chapter 4 “Commercial Practices and Methods of Trade”, Section III “Unfair Commercial Practices”, Articles 68b-68m		Provisions regarding financial services going beyond minimum harmonisation requirements	No		
			Provisions regarding immovable going beyond minimum harmonisation requirements	No		
			Application of UCPD to B2B transactions	No		

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<b>Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers</b>	The Consumer Protection Act (2005), Chapter 2 “Information for Consumers”, Section IV “Indication of prices of goods and service”, Articles 15 – 31		Extension of the application to other sectors (e.g. for immovable property)	No		
			Use of specific regulatory choices/derogations	No		
<b>Directive 2006/114/EC concerning misleading and comparative advertising</b>	The Competition Act of 2008, Chapter 7 “Prohibition of Unfair Competition”, Articles 32-34					
<b>Directive 2009/22/EC on injunctions for the protection of consumers' interests</b>	The Consumer Protection Act (2005), Chapter 9 “Consumer Disputes”, Section IV “Collective Actions. Injunctions. Damages”, Articles 186 - 190					

**Table 2: Fact sheet on Injunctions Directive – BULGARIA**

Issue	Answer	Comments
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)?	- No, single procedure	<i>Extended list of provisions to which injunction procedure is applicable – to “any other legislation that protects the interests of consumers”</i>
Who is entitled to bring an action seeking an injunction?	- Designated public bodies - Specified consumer associations	
Is the injunction procedure a court or an administrative procedure?	- Court procedure	
Who bears the costs of an injunction procedure?	- The costs are as a rule borne by the losing party	
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?	- Yes, scope of application extended to cover consumer law in general	<p><i>Any “other legislation that protect the interests of consumers” – Article 186 (2) p. 9 the Consumer Protection Act;</i></p> <p><i>National legislation of any EU member-state transposing the following two directives (Article 186 (2) p. 10, “g” and “p” (Bulgarian “з” “п”) the Consumer Protection Act): Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)</i></p> <p><i>Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)</i></p>
Is protection of business' interests covered by the injunctions procedure?	- No	

Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations	- Yes	<i>Only in accordance with the rules for joined cases – Chapter 16, Section I, Articles 215-217 the Civil Procedure Code 2008 – there must be a connection between actions (common rights and/or obligation or rights and/or obligations with one the same ground) against the traders, otherwise the request for joining them will be denied.</i>
Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID)	- No	
Has your Member State taken specific measures regarding the prior consultation (Article 5 of the Injunctions Directive)?	- No such requirement	
Does the national legislation provide for measures ensuring summary procedure? Please specify main characteristics of the procedure (subject matter/time limits) in the comments column.	- Yes	<i>Chapter 25 „Summary Procedure“, Article 310 (1) p.4 the Code of Civil Procedure – claims for infringements of rights under the Consumer Protection Act: Time limits: 1. The court must review for admissibility the claim by the end of the day it has been filed and send a copy of it to the defendant for reply; 2. The public hearing must be scheduled within three weeks period after the reply has been filed to the court; 3. The court decision must be announce no later than two weeks after the final public hearing.</i>
Are there sanctions for non-compliance with the injunction order (Article 2(1) of the Injunctions Directive)? If sanctions in form of penalty or fine foreseen please specify in the comments column to who exactly should they be paid	- Yes, penalty of a fine for each day of non-compliance	<i>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.</i>
Has your Member State taken specific measures regarding the publication of the decision and/or the publication of a corrective statement?	- Yes	<i>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.</i>
Is it possible to claim within the injunction procedure for sanctions for the infringement?	- No	
Can an action for the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to other beneficiary be brought within the injunction procedure?	- No	

Can an action for damages to be paid to the qualified entity or the public purse be brought within the injunction procedure?	- Yes	<i>It is possible to join for examination in the same proceedings the action for injunction and the action for compensation of collective interests of consumers, or the representative action under Article 189 CPA. Quite often courts divide both actions in separate proceedings.<sup>101</sup></i>
Can an action for damages or redress to be paid to the consumers concerned be brought within the injunction procedure?	- Yes	<i>It is possible to join for examination in the same proceedings the action for injunction and the representative action under Article 189 CPA. Quite often courts divide both actions in separate proceedings.<sup>102</sup></i>
Can individual consumers base their individual claims for damages/remedies on the injunctions order?	- Yes	<i>The court decision on the collective action for injunction has legal effect for consumers who did not opt-out; those who opt-out still can base their individual claims for damages on the decision for granting the collective action (Article 386 (1) CPC)</i>
Can the qualified entity claim other measures beyond the injunction, e.g. evidence of compliance with the judgment?	- Yes	<i>Article 187 p.3 the Consumer Protection Act – the qualified entities may claim any other measure suitable to cease and desist the infringement</i>
Are the effects of individual injunctions orders extended to the future infringements and/or same or similar illegal practices (of other traders)?	- No	

<sup>101</sup> International Consulting / European Commission, 2011, Study on the application of Directive 2009/22/EC on injunctions for the protection of consumers' interests, p.61  
[http://ec.europa.eu/consumers/enforcement/documents/study\\_on\\_injunctions\\_directive\\_final\\_report-18\\_12\\_2011\\_en.pdf](http://ec.europa.eu/consumers/enforcement/documents/study_on_injunctions_directive_final_report-18_12_2011_en.pdf); see Ruling 31.10.2007 Civil Case №4275/2006 Г. Sofia City Court.

<sup>102</sup> International Consulting / European Commission, 2011, Study on the application of Directive 2009/22/EC on injunctions for the protection of consumers' interests, p.61  
[http://ec.europa.eu/consumers/enforcement/documents/study\\_on\\_injunctions\\_directive\\_final\\_report-18\\_12\\_2011\\_en.pdf](http://ec.europa.eu/consumers/enforcement/documents/study_on_injunctions_directive_final_report-18_12_2011_en.pdf)



## B. Data tables

### *Number of B2C disputes*

Please indicate how many B2C disputes have been decided in your country on the basis of consumer law directives covered by this study (UCPD, UCTD, PID) as a proportion of the total number of B2C disputes decided on the basis of other national consumer legislation (based on statistics, or based on estimates by enforcement authorities and other stakeholders, where this is not the available).

**Table 3: B2C disputes decided on the basis of consumer law directives covered by this study in comparison with total B2C disputes decided on the basis of other legislation (most recent year for which data is available)**

Year	Type of data	Total number of B2C disputes (number of cases)	Share of B2C disputes decided on basis of ...					Comments
			UCPD	UCTD	PID	other EU consumer protection legislation (e.g. CRD, Sales Directive, sectoral legislation)	national consumer legislation not based on EU directives	
<b>2013</b>	Various sources <sup>103</sup>	25 cases <sup>104</sup>	8%	92%	0%	0%	0%	
<b>2014</b>	Various sources	29 cases	0%	100%	0%	0%	0%	
<b>2015</b>	Various sources	20 cases	15%	85%	0%	0%	0%	

### *Costs of obtaining redress for a hypothetical case of invoking unfairness of a standard contract term*

- Please estimate the costs, including time, for consumers in obtaining redress when invoking the unfairness, and thereby the non-binding character of standard contract terms in a contract they concluded. Please provide the estimate for the hypothetical example below, focusing on costs (and needed time) of a lower court procedure and the use of ADR or other relevant procedure (if applicable).<sup>105</sup>

<sup>103</sup> The Annual Reports of the Commission for Consumer Protection for 2013, 2014 and 2015 - <https://kzp.bg/godishni-dokladi> [last visited on July 8 2016] and information provided by interviewed consumer organisation.

<sup>104</sup> Only collective actions as no court statistic data available for individual B2C disputes.

<sup>105</sup> For the hypothetical example it is assumed that both the provider and the consumer are located in your country.

**Table 4: Estimate of costs for consumers in obtaining redress when invoking the unfairness of standard contract terms in a contract they concluded (for the hypothetical example provided in the box below)**

Redress mechanism	Estimated court fees (national currency)	Estimated lawyer's fees (national currency)	Other costs, if any (national currency)	Estimated time involved for consumer (hours)	Comments
<b>Lower court procedure</b>	400 BGN [approx. EUR 205]	830-900 BGN [approx. EUR 425-460]	200-250 BGN <sup>106</sup> [approx. EUR 102-128]	Up to 10 hours	
<b>ADR or other relevant procedure</b>	Free of charge	n/a	n/a	Up to 3-4 hours	

**Hypothetical example: Terms which inappropriately exclude/limit consumers' rights to compensation**

A consumer went on a package holiday with a friend to Kenya for which they paid € 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 €5,000 (€4,000 for the cost of the package and €1,000 for lost time and enjoyment). The tour operator agreed to compensate them €1,000 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/unfair-contract-terms/index\\_en.htm](http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-contract-terms/index_en.htm)]

- Please estimate how often court and ADR procedures are used in your country for invoking the unfairness, and thereby the non-binding character of standard contract terms (i.e. the number of cases per year)?

Such statistical data is not available. Court statistics do not have a separate category 'consumer disputes', but they are included under the broader category 'civil law disputes'.

<sup>106</sup> For court expert.

## C. Interviews conducted and literature reviewed

**Table 5: Interviews conducted for this study**

Organisation	Stakeholder type	Date
<b>Bulgarian Chamber of Commerce and Industry</b>	Business association	13.06.2016
<b>The Commission for Consumer Protection</b>	National consumer enforcement authority	20.06.2016/21.06.2016
<b>State Energy and Water Regulatory Commission</b>	National regulatory authority	16.06.2016
<b>The Ministry of Transport, Information Technology and Communication, The Directorate General "Civil Aviation Administration"</b>	National regulatory authority	21.06.2016
<b>Executive Agency "Car Administration"</b>	National regulatory authority	29.06.2015
<b>Ministry of Economy</b>	Ministry	10.06.2016
<b>ECC Bulgaria</b>	European Consumer Centre	14.06.2016
<b>Federation of Consumers in Bulgaria (FCB)</b>	Consumer organisation	14.06.2016
<b>Bulgarian National Association Active Consumers – BNAAC</b>	Consumer organisation	13.06.2016
<b>Commission for the Regulation of Communications</b>	National regulatory authority	Interview invitation declined – topics of the study are outside the competence of the commission; official statement sent (attached to the report)
<b>Commission for the Protection of Competition</b>	National enforcement authority	Interview invitation declined – topics of the study are outside the competence of the commission;
<b>Bulgarian Industrial Association-Union of the Bulgarian Business</b>	Business association	interview invitation declined due to lack of enough knowledge/information about the consumer protection legislation in Bulgaria and its enforcement in practice
<b>Bulgarian Industrial Capital Association</b>	Business association	interview invitation declined due to lack of enough information about the consumer protection legislation in Bulgaria and its enforcement in practice

**Table 6: Literature reviewed for country report**

Author/Source	Year	Title of publication
Варадинов, Огнян Луканов [Varadinov, Ognyan Lukanov]	2014	Нелоялни търговски практики в отношенията търговец – потребител : анализ на глава четвърта, раздел IV от Закона за защита на потребителите [Unfair Commercial Practices in transactions between trader and consumer: Analysis of Chapter IV, Section IV consumer Protection Act]
Златка Сукарева[Sukareva, Zlatka]	2015	Потребителско право[Consumer Law]
Марков, Методи [Markov, Metodi]	2000	Развитие на уредбата на договора при общи условия [Development of the legal framework of contract under general terms]
Марков, Методи [Markov, Metodi]	2007	Колективни искиове за защита на потребителите, сп. „Общество и право“, 2007/9 [Collective actions for consumer protection”, in “Society and Law”, 2007/9]
Колева, Рая [Koleva, Raya]	2009	„Основните права на потребителите – теоретични и практически въпроси“, сп. „Търговско право“, 2009/2 и 3 [“Rights of consumers – theoretical and practical aspects”, in “Commercial Law”, 2009/2,3]
Стойчев, Красен [Stoychev, Krasen].	2005	Преговори за сключване на договор и преддоговорна отговорност [Negotiations for Formation of the Contract and Pre-contractual Liability]
Комисия за защита на потребителите [Commission for Consumer Protection]	2013 2014 2015	Годишни доклади [Annual Reports]
Комисия за защита на конкуренцията [Commission for Protection of Competition]	2011 2012 2013 2014 2015	Годишни доклади [Annual Reports]
Национален Съвет За Саморегулация [The National Council for Self-regulation]	2013 2014	Годишни доклади [Annual Reports]
Фондация приложни изследвания и комуникации [Conducted by the Applied Research and Communications Fund]		Иновациите в малките и средните предприятия в България [The Study on Innovations of SME in Bulgaria]
Pye, Steve and Audrey Dobbins, et. al.	2015	Energy poverty and vulnerable consumers in the energy sector across the EU: analysis of policies and measures
Десислава Фесенко [Dessislava Fessenko]	2015	Регулация на търговията, не само на търговските вериги [Regulation of commerce, not only of retail chains] (Press release)
Маргаритов, Димитър [Margaritov, Dimitar], the Chairman of the Commission for Consumer Protection	2016	Голяма агенция за недвижими имоти обвързва клиентите си с комисионна и без да сключи сделка с тях [Large real estate agency bind customers with commission even without a deal with them] (Interview)

Владимиров, Влади [Vladimirov, Vladi]	2014	Спират от продажба фалшиви еко и био продукти и мамещи ни хранителни добавки [Cessation of selling fake green and organic products and deceiving supplements] (Press release)
Кирилова, Елена [Kirilova, Elena]	2015	Все повече българи пазаруват онлайн [More and more Bulgarians are shopping online]
Georgieva, Mара [Георгиева, Мара]	2016	Онлайн пазаруването расте, но физическите магазини не изчезват [Online shopping is growing, but physical stores do not disappear]

## 1. Study to support the Fitness Check of EU Consumer law – Country report CROATIA

### 1.1. Unfair commercial practices and marketing

#### 1.1.1. Effectiveness of the UCPD in establishing a high level of consumer protection

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

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

According to the consumer associations and the ECC the principle-based approach under the UCPD has proven to be effective.

In the opinion of the relevant ministry overall, the UCPD has been efficient in regulating unfair commercial practices of traders towards consumers. Nevertheless, the relevant ministry has pointed out that the somewhat general approach of the UCPD is not successful in covering all cases of unfair commercial practice (see *infra*).

Also, in the legal literature it was emphasized that although the introduction of a general clause provided in Art 5 (2) of the UCPD was aimed at ensuring a high level of harmonization of the national clauses on unfair commercial practices, it cannot be considered to be effective. Namely, the application of the UCPD has shown that the use of the general clause which is open to different interpretations, may be problematic. Its application is very limited due to the fact that in an overwhelming number of cases the unfair commercial practice is recognized and determined under the black list of unfair commercial practices or the special clauses regarding misleading or aggressive commercial practice under Art 5 (4) of the UCPD.<sup>1</sup>

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

Consumer Associations and the ECC consider the black list of the unfair commercial practices as the most significant benefit of the UCPD.

As the practical experience of the consumer association shows, if Croatian judges are involved in resolution of B2C disputes, they are often reluctant to decide on the unfairness of the commercial practice if the practice at hand is not included in the black list.

As emphasized by the consumer associations and the ECC, the list covers a wide range of most common situations which are treated as unfair commercial practices. Since the situations are defined as unfair, there is no need for the consumer (or the consumer's representative at court) to demonstrate the consequences, but only the existence of the situations listed in the Annex I (and transposed in the Croatian Consumer Act (Official Gazette 41/14, 110/15)), in order for the practice of the trader to be considered unfair.

The black list also enables traders to be more aware of the practices which are unfair. In practice, this has resulted in a decreasing number of unfair practices in Croatia.

Due to the unambiguous wording of the black list the consumers are able to detect unfair commercial practice and therefore, they are more likely to report them. Overall, the black list contributes to the better functioning of the market.

<sup>1</sup> Zlatović, Dragan, Nepoštene poslovne prakse u hrvatskom, bosansko-hercegovačkom i slovenskom pravu, Glasnik prava, 5(2014)2, p. 12-29, pp.17) (hereinafter: Zlatović (2014)).

At the same time, there are views expressed in the legal literature that, the fact that in keeping with the UCPD, the Croatian legislator has implemented Annex I of the UCPD and provided for two black lists of unfair commercial practices - the black list of aggressive commercial practices (Art 38 of the Consumer protection Act) and the black list of misleading commercial practices (Art 35 of the Consumer Protection Act), does not provide practical benefits for consumers. According to some legal theorists, the black list contains too many practices which do not necessarily influence consumer choices, the terms of the black list are not defined in a clear and understandable manner and the black list is static and cannot be considered as exhaustive of all unfair commercial practices which occur at the Market.<sup>2</sup>

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

One important example suggests that there have been limited practical benefits. In Croatia, cases have been reported to the Croatian State Prosecutor's Office for the Suppression of Organized Crime and Corruption (USKOK). These involve property developers engaged in misleading advertising by making various misrepresentations about the characteristics of a property and in particular omitting to disclose that properties sold would continue to be subject to prior mortgages for present and future bank loans contracted for by the developers. After the bankruptcy of the developers, this led to attempts to evict homeowners who bought their property from the developers (and paid for it) (the attempted evictions were by the banks with which the developers had obtained the loans from). For now, individual civil proceedings are pending. At the same time, there was no reaction from the Croatian State Prosecutor's Office for the Suppression of Organized Crime and Corruption or other authorities. This is the only example reported in relation to practices at the immovable property market in Croatia. The stakeholders are not familiar with any other Croatian examples of situations where national rules beyond the minimum harmonisation clause for immovable property have or would have made a difference.<sup>3</sup>

- 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 what 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?*]

In Croatia, there have been practical benefits for consumers in the application of the UCPD's rules in tackling misleading environmental claims.

For example, prior to its transposition in the Consumer Protection Act, food producers/traders used the terms 'healthy', 'natural', 'homemade' and 'eco' in order to mislead consumers and justify higher prices for the products. There were cases of 'natural' fruit juices which did not contain fruit and 'homemade' or 'eco' products which were misrepresented as ecologically grown products, although they were grown in accordance with conventional farming practices which also include the use of pesticides. These cases of misleading practices have been addressed under the Consumer Protection Act which gives consumers the right to submit written complaints (Art 10 of the Consumer Protection Act) and instigate procedures before the Market Inspectorate at the Ministry of Economy.

Also, in the Croatian energy market recently there has been an initiative to install heating cost dividers in households which are users of the district heating system. The installation of heating cost dividers to all radiators in house should ensure that every

<sup>2</sup> Zlatović (2014), p. 16.

<sup>3</sup> This can be supported also by the responsible ministry's comparison of the market performance indicator (MPI) for 2013, according to which MPI for immovable property market at EU level was 70.6 (a rise of 1.2), the MPI for immovable property market in Croatia was 61.1 (9.6 under the EU average -28)



household pays for heat energy consumption based on individual counting system. First steps have been made, but as reported by consumer associations, there were misleading environmental claims on the side of the traders. Namely, traders have made claims that installation of heating cost dividers is obligatory, that they are energy efficient and that in saving energy, they also save money. Firstly, their claims were not supported by scientific evidence. Secondly, consumers were not given sufficient information in an accurate and unambiguous manner, on how the heating cost dividers actually work and what their costs and benefits are. In fact it turned out that households which installed heating cost dividers had higher bills at the end of the month than the ones which did not install them. Thus, a question was referred to the Commission regarding the claim as to the obligatory nature of the installation of the heating cost dividers. The initiative was suspended and before additional steps could be taken, a Working group at the Ministry of Economy should provide a detailed analysis of all of the aspects of installation of heating cost dividers in households in Croatia.

- 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 your country rigidly?*]

The consumer association explained their understanding of the concept of an 'average consumer' as an indicator of the level of understanding of:

- Fundamental consumer rights in national law and EU documents (regulations, directives);
- Fundamental principles of EU consumer policy;
- Knowledge of the reclamation procedure as a reflection of the financial literacy, legal literacy, literacy in the sector of electronic communications, and literacy in the sector of energy and other sectors.

According to the consumer associations and the ECC, in cases of national extra-judicial resolution of consumer disputes, the issue of the concept of an 'average consumer' has been invoked rarely.

The only situation where it was necessary to assess whether certain consumers should be considered as 'average consumers' was during a dispute which originated from a cross-border internet purchase of the products, where the price was wrongly indicated due to a system error on the webpage. Due to the system error, the indicated prices were much lower than the actual ones. Before the error was removed, a large number of consumers ordered the products at the lower prices indicated on the webpage. The trader, however, refused to fulfil the contract claiming that the 'average consumer' of the products placed on that particular webpage was aware/should have been aware, that the lower prices were the result of a system error because he/she should have known that these particular products could not be sold at such low prices. A key debate here was whether the concept of 'average consumer' should be assessed generally or in relation to a particular situation (e.g. should the concept of the 'average consumer' be understood in terms of a consumer who buys products online or a consumer who purchases that particular brand of products). This shows that the concept of an 'average consumer' may be confusing and difficult to define in practice and may vary depending of the legislation in the Member State of the trader's residence.

According to the legal literature, since the concept of an 'average consumer' is not legally defined, it provides for the possibility of different understandings and interpretations in legal systems of Member States. In Croatia it is for the courts to

establish how the concept of an 'average consumer' should be applied.<sup>4</sup> For now, there are no available court decisions regarding the matter.

- 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 in your country recognised new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted)?]

According to a consumer association, the concept of a 'vulnerable consumer' is an indicator of real level and efficiency of consumer protection at the Market. The fact that 'vulnerable consumers' are recognised as a separate category which needs special protection points to both strengths and weaknesses of EU consumer law. The weakness is reflected in the acknowledgment that consumer law does not afford sufficient protection to all categories of consumers. At the same time, the strength is visible in providing additional level of protection to those categories of consumers which cannot be adequately protected under 'basic' provisions of consumer law by ensuring a special treatment for vulnerable consumers.

In Croatia, there are still a large number of consumer complaints and at the same time, a lack of court legislation in the field of consumer protection.

The concept of 'vulnerable consumers' has been introduced in Art 32(2) of the Consumer Protection Act. In Croatia, enforcement authorities have recognised that the concept of 'vulnerable consumers' relates also to elderly consumers who are also very often both poor and indebted (due to the economic crisis).

The relevant ministry underlines that in Croatia a (free) legal aid system was established (Legal Aid Act (Official Gazette 1143/13) in order to provide legal advice, assistance and representation before court to socially and economically endangered categories of citizens (including 'vulnerable' consumers). In granting legal aid to citizens, the administrative bodies take into account the means test in order to check if citizens are financially eligible. Also, special regard is given to the inquiry as to whether the citizens are owners of immovable property and therefore whether the court proceedings would threaten their livelihoods. In this sense, it can be argued that the authorities have recognised the need to protect new categories of consumers (poor, indebted).

- 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?]

As was pointed out both by the stakeholders and the legal literature,<sup>5</sup> incentives for the self-regulation actions provided for by the UCPD, have had only limited effect both at the national and EU level. Codes of conduct are still the most widely introduced self-regulation mechanisms. In this context, they may be considered as the most effective mechanisms for addressing unfair commercial practice.

In Croatia, rules of customary practice for traders ('uzance') were first introduced by the Croatian Chamber of Economy in 1995. They may be considered as predecessors of the Code of conduct, and they were the basis for the promotion of contractual fairness and good practice of traders in Croatia. In this sense, it may be argued that Croatian traders have experience with self-regulation mechanisms. However, this does not mean that their practice and behaviour is always in accordance with the promoted fairness and good practice. Nevertheless, there is awareness that adhering to rules of Code of conduct contributes to high standards in their business activity.

<sup>4</sup> Zlatović (2014), p. 28.

<sup>5</sup> Pavillon, C.M.D.S., The interplay between the unfair commercial practices directive and codes of conduct, Erasmus Law Review, 5(2012)4, p. 267-288. (hereinafter: Pavillon (2012))

The rules of Code of conduct of the Croatian Chamber of Economy were introduced in 2005 (*Kodeks etike u poslovanju* (Official Gazette 71/05)). There are currently 1015 traders who are signatories to the Code of conduct of the Croatian Chamber of Economy.<sup>6</sup> Although this may not seem a particularly large number of signatories in comparison to the total number of traders in Croatia, still it should not be disregarded that there are also traders who adhere to these rules in practice even though they are not signatories of the Code.

According to a business association, the use of the Code of conduct in practice has proven to be effective in addressing unfair commercial practices. Namely, in case of breaches of the rules of the Code of conduct, alternative dispute resolution is practised at the Court of Honour of the Croatian Chamber of Economy. Until now, most of these disputes were initiated by consumers and concerned breaches of provisions of the Consumer Protection Act, including provisions regarding unfair commercial practice, as well as practices contrary to the principle of conscientiousness and honesty (*načelo savjesnosti i poštenja*).

An initiative for the introduction of the similar Code of conduct of the Croatian Chamber of Trade and Crafts, dates back to 2002. For now, there is only a draft of the Code of conduct. From the experience of the Chamber of Trade and Crafts, introduction of a self-regulation mechanism, such as a Code of conduct, would be especially beneficial for traders and craftsmen who are members of the Chamber, for example dry cleaning services, hair-dressers, manufacturers of furniture etc. In their business they could benefit from the detailed regulation of their general T&Cs, complemented by a certificate of trade and craft quality and a guide for consumers, which would all be available for the traders and craftsmen who would adhere to the Code of conduct.

However, according to the regulatory authority, self-regulation (and to an extent, co-regulation) have not been effective enough in certain sectors. In its opinion, the pressure of obtaining good business results, often overcomes the traders wish to "play by the book". Nevertheless, the best results are obtained if the detected problem is regulated based on the previous discussion and agreement among traders and the regulator of the specific sector. This conclusion confirms that introduction of the rules which are usually provided in the Codes of conduct are still considered as the most acceptable self-regulation action in Croatia.

Also, in 2014 the Ministry of Economy has initiated the introduction of 'trustmarks' for Croatian online stores as a measure for ensuring transparency in their transactions and enhancing the level of consumers' trust. The online traders would be subjected to certain requirements in order to obtain the 'trustmark'.

- 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?

According to the consumer associations and the ECC, the current list is extensive enough to encompass situations which most often occur in practice.

As for the mechanism for subsequent inclusion of new practices into the UCPD black list, consumer associations and the ECC would be in favour of this, due to the fast development of online purchasing, where new problems (which cannot be predicted at this stage) might occur.

The relevant ministry is also of the opinion that the black list should be extended. Namely, the availability of new products and services should be taken into account, especially in terms of the developments of the digital market.

<sup>6</sup> Information available at the official website of the Ministry of Economy, <http://www.mingo.hr/>, 30 July 2016.

- Are there other measures that could improve the effectiveness of the UCPD in establishing a high level of consumer protection in your country? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

One of the measures suggested by the consumer associations and the ECC that would be adequate for improving the effectiveness of the UCPD, would be the organization of educational campaigns and raising awareness of consumers as well as traders about unfair commercial practices. Such a campaign has already been initiated in Croatia in 2009 during the process of transposition of EU Directives in Croatian legislation. A mini guide was published for the business community (the traders) in the framework of the 'BIZ impact project' (EU CARDS project) in order to raise awareness in regard to the changes in the national legislation concerning consumer protection, including unfair commercial practices.

The experience of the consumer associations shows that although there is a legislative framework provided through the transposition of the UCPD in the Croatian Consumer Protection Act, compliance of traders with the requirements of the Act regarding unfair commercial practice cannot be adequately ensured in practice, until the enforcement mechanisms become effective in sanctioning traders. Enforcement mechanisms put in place by the Ministry of Economy include supervision of compliance with the Act through the competent inspectors of the Ministry of Economy. However, the situation in which lodging of a complaint to the trader constitutes a first step and only after the trader's (negative) response the consumer is entitled to initiate a procedure through the Market Inspectorate, the traders are left with sufficient time to remove the evidence of their unfair commercial practice in the meantime. Also, consumer associations consider that the procedure before the Market Inspectorate at the Ministry of Economy, is long, overly expensive and complicated, and creates a general impression that the Market Inspectorate protects traders more than it protects consumers. Until now, consumer associations have recorded only a single situation in which the Inspectorate published the results of analysis of fuel sold by a trader (Crodux) at Croatian market. The analysis showed that the fuel was not of the quality which was indicated

In Croatia, alternative dispute resolution mechanisms in consumer disputes also cannot be deemed as effective. As these are voluntary procedures, the authority conducting the procedure is not entitled to request the traders to stop their practice or impose sanctions on them for not complying with the request. For example in its decision the Court of Honour of the Croatian Chamber of Economy is only entitled to determine the responsibility of the trader for the unfair commercial practice and issue a warning (Art 36 of the Ordinance on the Court of Honour at the Croatian Chamber of Economy (Official Gazette 66/06, 114/06, 129/07, 8/08-consolidated text, 74/15).

Consequently, consumer associations would be in favour of introducing lists ("black lists") of those traders whose commercial practices constitute unfair commercial practice as a mechanism of warning for consumers.

#### 1.1.2. Effectiveness of the PID in establishing 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;

Consumer associations and the ECC are of the opinion that consumers are effectively informed of the unit selling price. However, there are still a large number of complaints from consumers to competent bodies regarding the issue, which is a clear indicator that there is still a lot of work to be done in order to make even more traders act in compliance with the national law transposing the PID.

Most of the problems are detected in regard to *in-store* shopping where the traders use small letters to indicate the unit selling price, which is therefore not easily readable. As a consequence, there are misunderstandings on the side of the consumers, which result in disputes with the traders (and sometimes even altercations).

According to the relevant ministry, some of the traders have indicated unit selling prices in 100 g instead of 1 kg. The question is whether this can be regarded as a misleading practice, since the consumers could be under a false impression that the price might be lower than it actually is.

On the other hand, a business association considers that consumers are effectively informed about the unit selling price since in Croatia there is an Ordinance on indication of wholesale price and the unit selling price (*Pravilnik o načinu isticanju maloprodajne cijene i cijene za jedinicu mjere proizvoda i usluga* (Official Gazette 66/14)) which prescribes the conditions of price indication in a clear and understandable manner. But, since the Ordinance has been introduced in May 2014 it should be noted that for now it is not possible to conclude on its effect in informing consumers of the unit selling price.

- 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?

From the perspective of the consumer associations and the ECC indicating the 'unit price' per 'performance' measurement units rather than per 1 kg or 1 litre for certain types of products might be a more accurate indicator when it comes to consumption recommended by the manufacturers of such products. However, indicating the exact weight or quantity of the product is still more transparent, because it is easily comparable with other similar products. Namely, different manufacturers might charge differently for the same quantity, or some might even charge more money for less quantity (putting less quantity of product within a unit price in order to increase the number of units per product).

At the same time, according to a business association, traders as members of the business association at hand have suggested that the price should be indicated both per 1 kg or 1 litre and per 'performance' measurement units. The relevant ministry is of the opinion that the price on detergents should be indicated per 1 kg or 1 litre but that indication of the price per 'performance' measurement units would be welcome as additional information for consumers.

- The effects of the regulatory choices/derogations allowed by the Directive and applied by Member States. [Key aspects to consider are: Is the derogation relevant? Do companies make use of it? Are there consumer complaints because of this? If so, approximately how many per year?]

In Croatia, if the trader's sales area is less than 50 square meters, the trader is not obligated to indicate the unit selling price. Since the introduction of this measure in 2010, there were no consumer complaints regarding the issue.

### 1.1.3. Effectiveness of the MCAD in providing protection for businesses

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

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

With the introduction of the Unpermitted Advertising Act (*Zakon o nedopuštenom oglašavanju*) (Official Gazette 43/09) in 2009, Croatia has successfully transposed the MCAD into Croatian legislation. The aim of the Act was to protect businesses from misleading advertising and the negative consequences of misleading advertising as well as to provide the conditions for the use of comparative advertising.

According to the business association the MCAD provides effective protection for businesses.

However, a problem revealed in a recent case of a dispute between RWE Energy and HEP regarding distribution of electrical energy in Croatia should not be disregarded. This problem illustrates the limitations of the scope of the MCAD to the notion of 'advertising' in regard to effective protection for businesses.

Namely, according to RWE Energy advertisements in media by HEP warned citizens of unfair and misleading practices of certain traders (without indicating who these traders are) in the distribution of electrical energy. This constitutes abuse of a dominant market position (Art 13 of the Competition Act) as well as an unfair commercial practice (Art 64 of the Trade Act and Art 30 of the Consumer Protection Act) and misleading advertising (Art 4 of the Unpermitted Advertising Act). It is problematic to delineate the scope of practices in this case, or similar cases which harm trader's interests from the ones which harm consumers' interests. Namely, it should be taken into account that in some cases misleading advertising also harms consumers' interests, even if only indirectly. However, while it is necessary to seek protection of trader's interests against unfair practice under several acts, since the MCAD is limited only to misleading advertising, the UCPD provides for protection of consumers against all unfair commercial practices that harm the consumers' economic interests. At the same time, the rules on misleading advertising in the MCAD mix up the protection of B2C and B2B relations, which makes it more difficult to limit the protection which is sought under the MCAD only to traders' interests. This dispute has revealed overlaps and inadequacies which do not help in protecting consumers. So, it seems that instead of protecting traders and indirectly also consumers, the limited scope of the MCAD decreases the legal certainty and protection provided to both consumers and traders.

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

According to the relevant ministry, in Croatia so far there were no (national) court proceedings initiated at the commercial court regarding misleading advertising. Also, there is no additional national horizontal legislation which regulates advertising as a special category in Croatia.

Still, it has to be mentioned 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. The weakness of the principle-based approach is mainly connected to the general criteria for assessment if practice is misleading. Different interpretation of the practice under the criteria provided in Art 3 of the MCAD might lead to different court practice which could result in legal uncertainty for businesses.



- The effects of the minimum harmonisation provisions on misleading advertising; [Key aspects to consider are: Which national rules that go beyond the MCDA, 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 Croatian Unpermitted Advertising Act introduced a wide definition of the concept of 'trader', similar to the definition incorporated in the Consumer Protection Act, in order to include persons and entities from the so-called 'grey areas of the economy' and advertising agencies acting in the name and on behalf of a trader.<sup>7</sup>

Additionally, in accordance with the provision of Art 5(2) of the MCAD, a system of collective protection of traders was introduced in the Unpermitted Advertising Act, meaning that certain organizations (such as the Croatian Chamber of Economy, the Croatian Chamber of Trades and Crafts, the Croatian Banking Association, the Croatian Employers' Association and the Croatian Insurance Bureau) are *ex officio* entitled to initiate proceedings before the Commercial court against any suspicious advertising. An important feature of this system is the fact that persons or organisations regarded under national law as having a legitimate interest in combating misleading advertising or regulating comparative advertising, may initiate legal proceedings against misleading advertising; and that a judgment rendered in these proceedings has an *erga omnes* effect, due to which the advertiser is obligated to refrain from such a practice in regard to all businesses (traders). This system constitutes an effective mechanism which provides protection of all businesses against misleading advertising of the advertiser.

In Croatia, there are no rules that go beyond the MCAD. Still, the following recent example from February 2016 shows that there is a greater level of awareness in determining if advertising is misleading and may be considered as unfair commercial practice in Croatia.

HAK (Croatian Autoclub) has informed the public about advertising of the product Magnufuel, as a product recommended by Croatian Autoclub for use to drivers as a product which lowers fuel consumption. According to the Croatian Autoclub, such advertising is regarded as misleading advertising and it violates both provisions of the Unpermitted Advertising Act as well as the provisions on unfair commercial practices of the Consumer Protection Act.

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

Assuming that full harmonization ensures a more unified and at the same time a more restrictive approach of national legislators in Member States towards regulating comparative advertising, it can be presumed that it also contributes to more credibility of such advertising. Namely, only if there are strict rules on comparative advertising, there is also a higher probability that claims made by traders convey useful information. Only such comparative advertising is capable of increasing competition among traders and at the same time protecting consumers, which was the aim of the EU legislation in the field.

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;

The comparative advertising rules should be further clarified in order to provide an effective legal framework for modern types of marketing.

<sup>7</sup> Zlatović, Dragan, Grupna tužba zbog nedopuštenog oglašavanja kao modalitet kolektivne zaštite trgovaca, Hrvatska pravna revija, (2009), p. 42-46, pp. 44). (hereinafter: Zlatović (2009))



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

In a dispute between Kraft Foods and Kraš the High Commercial Court in Zagreb in its judgment from 2013 found that due to the use of the colour lilac which is characteristic for the Kraft brand Milka by Kraš for their brand of sugar-free candy for diabetics, there was misleading advertising as well as unpermitted use of a trademark by Kraš. In this sense, both consumers and traders were protected from unpermitted advertising in national and cross-border transactions. However, this is the only available case on misleading practice in Croatia.

Generally, in Croatia there is a lack of practice in regard to collective proceedings, including collective protection of traders against misleading advertising, so the enforcement framework cannot be considered as particularly effective.

Especially in the context of cross-border transactions the existing enforcement mechanisms cannot be considered as providing an effective enforcement framework. This can be attributed to the fact that collective redress mechanisms are still not adequately developed in Member States.

- Are there measures that could improve the effectiveness of the MCAD in providing protection for businesses (see also 1.1.6 below)? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

One of the measures which could provide effectiveness would be a black list of misleading marketing practices. Even at the moment some of the practices included in the Annex I of the UCPD (point 13 and 17) can be considered as examples of prohibitions which protect traders.

Also, measures should be taken to improve effectiveness of cross-border enforcement by strengthening cooperation among competent authorities of Member States.

#### 1.1.4. Effectiveness of current rules 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;

According to a business association, the only problem which Croatian consumers face in cross-border trade concerns non-delivery of goods to Croatia. Also, in cases in which goods are delivered to Croatia, the prices for delivery are much higher in comparison to delivery to other Member States.

Due to the fact that the principle-based approach under the UCPD allows different interpretation of its principles in Member States, different understanding and the application of the principles should be expected. But, as Croatian legal literature has emphasized, most of the cases of unfair commercial practice are detected under the black list, which provides for uniform application of the UCPD in practice. In this sense, the disparities should not have a great impact on cross-border trade.

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

Although the inconsistencies in the transposition, interpretation and application of prohibitions of unfair commercial practices prescribed in Annex I of the UCPD in Member States cannot be disregarded, still based on the information provided by the stakeholders, it is possible to conclude that the black list has had a positive effect on the free movement of goods and services.

- Whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade. [*Do the national differences play a role in a business perspective? Have they caused problems?*]

Relevant stakeholders in Croatia are not aware whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade.

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;

Based on the available evidence and the interviews conducted for this report it is concluded that the principle-based approach under the MCAD shows disparities in the understanding of what misleading advertising is in different Member States, and it has a negative impact on cross-border trade.

- Whether the minimum harmonisation character of provisions on misleading advertising represents a barrier to cross-border trade;

According to the opinion of the stakeholders the minimum harmonisation character of provisions does not represent a barrier to cross-border trade.

- 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;

The relevant stakeholders did not respond to the question.

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

Business association assesses that the lack of enforcement mechanisms regarding disputes in B2B relations constitutes a barrier to cross-border trade. Mechanisms should be introduced in a form of institutionalized cooperation of public authorities in the interpretation of the legislation transposing the MCAD, detecting and informing of new practices under MCAD, and assisting in disputes in B2B relations regarding the MCAD.

#### 1.1.5. Interplay amongst UCPD information requirements according to Article 7(4) with the information requirements in the horizontal consumer law instruments

Regarding the information requirements according to Article 7(4) UCPD ("invitation to purchase") in the advertising stage, please analyse:

- The level of awareness of traders as regards information requirements at the advertising stage, as in particular demonstrated by their practical application; [*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?*]

The consumer associations and the ECC consider the level of awareness of traders to be high, as regards information requirements at the advertising stage, especially if

larger traders (companies) are taken into account. However, in their experience, SMEs have also made substantial progress with their level of awareness in this field.

In practice, when advertising a certain product, traders usually indicate all the relevant information required in Art 7(4), if that is possible taking into consideration the nature of the product and the advertising itself. However, most problems occur with the indication of (all) expenses that the consumer might have, since consumer associations and the ECC have often encountered with the practice of some traders to leave out some of the expenses that are subsequently charged to consumers.

Taking into consideration the difference in means used for providing information from the Art 7(4) to consumers, the information is useful. The information should not be too comprehensive because the consumers might be overwhelmed with too much information thereby missing the most important ones. Naturally, it can hardly be compared to the extensive information requirements provided in the CRD, due to the different medium through which the contract is concluded in the first place.

The only provision mentioned by consumer associations and the ECC which might be added to the Art 7(4) could be the existence of the legal guarantee as well as manufacturer's warranty (if the latter exists).

According to a business association, although there is no separate regulation on advertising in Croatia, there are self-regulation mechanisms in the field (Codes of conduct) as well as activities conducted by the sector-specific advertising associations which provide for high ethical standards in advertising. Also, there are special courts of honour which contribute to maintaining high standards.

The relevant ministry assesses that transactions of most of the traders comply with the legislative framework, but that difficulties in meeting the standards still exist in certain sectors, such as electronic communications (price indication) and distance selling over the internet.

In practice, when invitation to purchase is made to consumers (depending on the means and manner of communication) the traders inform consumers in accordance with the relevant provisions of the law.

According to the relevant ministry, since pre-contractual information requirements are regulated in detail in the CRD, information requirements under Art 7 (4) of the UCPD cannot be considered as useful. It would be more meaningful to apply the provisions of the CRD.

- 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?

According to the relevant ministry, there is overlap of the provision of Art 7 of the UCPD with the provision of Art 6 of the Electronic Commerce Act (which transposed provisions of the E-commerce Directive (EU/2000/31)). However, this overlap cannot be considered as potentially problematic and there are no additional costs arising for public authority and/or business.

#### 1.1.6. Relevance for business-to-business transactions

Regarding the area of unfair commercial practices/marketing, please analyse:

- 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 cross-border trade;

The relevant ministry is of the opinion that since in Croatia there is no legislative framework which regulates unfair commercial practices in B2B transactions an extension of the UCPD would be beneficial. At the same time, there should be no

extension of the MCAD. Instead, the UCPD should cover B2B and B2C transactions. Also, members of the business community in Croatia (especially manufacturers) consider the introduction of legislation which would regulate unfair commercial practice in B2B transactions as crucial. In their opinion there is no system of surveillance or regulation of competition at the market. Such a system would mean that it would not be possible for the trader to impose its own costs or risks on the other trader nor would it be permitted to unilaterally cancel the contract or threaten to cancel the contract, which is the case at the moment in Croatia.

- 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;

According to a business association it is not appropriate to keep separate legal regimes for B2B and B2C transactions. Namely, in their experience SMEs and micro enterprises often find themselves in situations in which their position is equal to the position of consumer in B2C transactions and therefore they expect the same level of protection.

According to the relevant ministry legal regimes for B2B and B2C transactions in the area of commercial practices could and should be aligned.

- 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 also cover unfair commercial practices during and after the transaction;

The relevant ministry assesses that it would be appropriate to extend the scope of the protection in B2B transactions to cover also unfair commercial practices during and after the transaction.

As to whether there is a need to have a black-list of practices in the business-to-business marketing area, in the opinion of the relevant ministry there is indeed such a need.

- What should be the enforcement cooperation mechanism in the business-to-business marketing area;

Although the relevant ministry supports the idea of an enforcement cooperation mechanism in the business-to-business marketing area, there are no suggestions on what that mechanism should be.

- Whether there is a need to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive;

According to the relevant ministry, there is no need to develop contractual consequences linked to the breaches of the MCAD. Namely, the Obligations Act provides for a possibility of including provisions on the contractual consequences (i.e. compensation) in the contract.

- Whether there is a need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive.

The relevant ministry assesses that there is a need to adapt the rules on comparative advertising of the current MCAD.

### 1.1.7. Relevance of contractual consequences of unfair commercial practices

Please analyse whether there are in your country:

- 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;

Consumer associations and the ECC are not aware of any corresponding national provisions providing contractual consequences in case of breaches to the UCPD or national provisions on the avoidance of the contract.

In Croatia, if breaches to the UCPD have caused damage, the damaged party is entitled to initiate court proceedings and request compensation under the general provisions on liability for damages prescribed in the Obligations Act.

- Any case law (enforcement decisions, court rulings) providing for such consequences;

To the best of the knowledge of the consumer associations and the ECC, there are not any enforcement decisions or court rulings which provide for contractual consequences for above mentioned breaches of the UCPD.

- Whether there is, based on past experience in your country, a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

The opinion of the stakeholders in Croatia regarding this matter differs. From the perspective of consumer associations and the ECC, contractual consequences against unfair commercial practices should be introduced in regard to certain cases of unfair commercial practice (e.g. existence of the product, nature of the product, obligation of the trader, price), due to the fact that the conduct of the trader (the unfair commercial practices) led to the conclusion of the consumer contract.

However, the experience of the regulatory authority in the telecommunications sector shows that there is no need to develop contractual consequences linked to the use of unfair commercial practices since at the moment, in cases where the provisions based on the UCPD were applied, the regulatory authority rendered a decision in favour of the consumer. Also, the contract can be terminated on the basis of the UCPD without any penalties for the consumer.

A business association agrees with the view of the regulatory authority and emphasizes that there is no need to develop contractual consequences linked to the use of unfair commercial practices.

The relevant ministry also support the view that there is no need to develop contractual consequences linked to the use of unfair commercial practices.

## 1.2. Contract conclusion and performance

### 1.2.1. Effectiveness of the current rules in establishing 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;

In Croatia, due to the transposition of the UCTD there are two parallel systems of control of unfair contract terms. Along with the transposition of the UCTD in Art 46-56 of the Consumer Protection Act, during the implementation of the UCTD some of the provisions of the Croatian Obligations Act (*Zakon o obveznim odnosima*) (Official Gazette 35/05, 41/08, 125/11, 78/15) were also changed and harmonized with the

approach of the UCTD regarding unfair contract terms. Accordingly, although general rules on obligations prescribed by the Obligations Act differ from the specific provisions of consumer law, the existing Obligations Act provisions on general contract conditions (Art 295-296) were aligned with the UCTD. In this sense, Croatian law of obligations and contracts provides for a set of rules and principles which are influenced by principles of consumer law which derive from EU Directives (including the UCTD).<sup>8</sup>

Consumer associations and the ECC are of the opinion that the UCTD would be more effective if an obligation of the Member States was introduced to sanction the incorporation of unfair commercial terms. Namely, in Croatian Consumer Protection Act Article 55(1) prescribes that 'an unfair contract term is null and void'. However, due to the fact that Consumer Protection Act as *lex specialis* does not contain detailed rules on nullity the relevant provisions of the Obligations Act (Art 322 and seq) apply which put the consumer in the same position as every other party to the contract in invoking nullity of the term of the contract at hand.

At the same time, a business association assesses that since the implementation of the UCTD in Croatian legislation there were no cases of significant breach of national laws transposing it. Hence, the principle-based approach may be considered to be effective.

- 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 your MS? Does this work in practice or are there problems?*]

According to the consumer associations and the ECC the 'grey' list (in Art 50 of the Consumer Protection Act, which contains nineteen contract terms enlisted in lit. a-q in Annex No. 1 of the UCTD) presents a strong basis for detecting potential unfair contract terms by the court or other dispute resolving entity in each individual case, on the basis of conditions prescribed in Art 50 of the Consumer Protection Act. Nevertheless there is no sanction for the trader who incorporated unfair term/s in the contract. The appropriate sanction could be a fine, a penalty or other means of correction which have a deterrent effect and could serve as a 'repressive' mechanism to pressure the trader into refraining from incorporating unfair terms in consumer contracts.

- 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; [*Note: If a black/grey list exists in your country, key aspects to consider are: How does the list work in practice? Does it make a difference to have such a list?*]

In Croatia a 'grey' list was adopted in Art 50 of the Consumer Protection Act which represents an advantage for consumer protection compared to the purely indicative list of the UCTD. In one case collective redress proceedings were initiated against unfair contract terms concerning bank loans in Swiss francs ('Franak' case) in regard to which application of the 'grey' list was relevant. The proceedings were initiated against banks which concluded loan agreements with consumers in the period from 2004 onwards. At the time, Consumer Protection Act from 2003 was in force and it was followed by Consumer Protection Act from 2007. The provision of Art 97 Consumer Protection Act from 2007 which corresponds to the provision of Art 50

<sup>8</sup>Josipović, Tatjana, Enforcement Activity in Consumer Protection Regulation in Croatia, *Journal of Consumer Policy* (2013)36, p. 287-314 (hereinafter: Josipović (2013)); Mišćenić, Emilia, Usklađivanje prava zaštite potrošača u Republici Hrvatskoj, *Godišnjak Akademije pravnih znanosti Hrvatske* 4 (1), p. 145-176 pp. 10 (hereinafter: Mišćenić (2013)), Mišćenić, Emilia, Consumer Protection Law, in: Josipović, Tatjana, Introduction to the Law of Croatia, Kluwer Law International, 2014, p. 279-290, pp. 282-283. (hereinafter: Mišćenić (2014)).



Consumer Protection Act (from 2014) stipulated that 'terms which could be considered as unfair, for example, are'. In his first instance judgment the court ruled on the unfairness of contract terms on currency clause in Swiss francs and interest rate based on the provision of Art 96 and 97 Consumer Protection Act from 2007, without stating the specific subparagraph under Art 97 Consumer Protection Act which covers the object or effect of the term which can be considered as unfair. They were declared null and void on the basis of the fact that consumers were not given full, timely and adequate information on the terms of the contract prior to its conclusion and that the banks unilaterally changed the height of the interest rate during the period of the bank loan repayment.

- 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: In your country, have the effects of court decisions establishing the unfairness of an unfair term been extended to all contracts of the trader concerned or to the contracts of any other trader containing such a term? If so, how does this work in practice? What are the impacts on businesses? If there are no such effects of court decisions on unfair terms: what are the effects of this situation?]

According to the relevant ministry the effects of the court decision establishing the unfairness of a contract term have been extended *erga omnes* under Art 117 of the Consumer Protection Act. However, this extension has been introduced in regard to injunctions under Art 7(2) of the UCTD and it does not affect the *inter partes* effect of the court decisions establishing unfairness of a contract term rendered in an individual civil proceedings. The judgment in "Franak" case which has an *erga omnes* effect has made an impact on the practice of banks in drawing up terms of the contracts, which are now more fair and transparent.

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

According to consumer associations and the ECC the contractual transparency requirements under the UCTD are effective.

In Croatia, the Obligations Act does not contain a specific provision on contractual transparency. At the same time, the Obligations Act provides for a general provision under which the terms whose content has been determined by one party shall be interpreted *contra proferentem*. However, contractual transparency requirements from the UCTD have been transposed into Consumer Protection Act (Art 53, 54 (1)). In regard to B2C relations Croatian legislator has additionally raised the level of protection of consumers by extending the contractual transparency requirements in Art 53 of the Consumer Protection Act also to 'terms which are easily noticeable'.

Regarding the effectiveness of the contractual transparency requirements, the legal literature warns of the fact that is for the court to establish if consumers have been informed appropriately. Since the assessment of the court will depend of its understanding of the concept of a consumer as a 'vulnerable consumer' or 'average consumer' and the balance between the interests of a trader and a consumer, this may cause disparities in the court practice.

Also, in practice, different interpretations and application of Art 5 of the UCTD, may be caused by the unresolved matter as to whether contractual non-transparency should result in declaration of the term as unfair or non-existent.<sup>9</sup>

<sup>9</sup> Petrić, Silvija, Koncept nepoštenih ugovornih odredbi s posebnim osvrtom na potrošačke ugovore, in: Tomljenović, Vesna, Petrić, Silvija, Mišćenić, Emilia, Nepoštene ugovorne odredbe, Europski standard i



- 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. [Note: Question only relevant for MS that have put in place extensions of application of UCTD]

In Croatia, the extension of the application of this Directive (to individually negotiated terms or to terms on the adequacy of the price and the main subject-matter) was not put in place but the possibility of the introduction of the extension has been analysed and it is favoured by the legal literature. (See *infra*)

- 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?]

According to the consumer associations and the ECC, the sanction foreseen by the UCTD is not proven to be especially effective in practice. Although it does help a consumer in a specific case, it does not have a deterrent effect against the practice of the trader of incorporating unfair contract terms. The experience of the consumer associations and the ECC shows that the guidance from the CJEU is not sufficient. In their opinion the issue requires a different approach (a detailed regulation in the UCTD).

The national courts do not take the active role required by the CJEU in invoking unfairness *ex officio* and taking measures of instruction. Namely, the court practice regarding the UCTD is scarce in Croatia. One of the main obstacles to a more significant development of court practice is the lack of knowledge and understanding of the consumer law and requirements of EU consumer legislation, which results in a considerable lack of court decisions based on the Consumer Protection Act and consumer protection provisions of other legal acts. The courts provide the same level of legal protection to consumers as every other natural person. There are a number of cases concerning unfair terms in standard contracts under Obligations Act while there is a lack of decisions based on the provisions of the Consumer Protection Act.<sup>10</sup> However, circumstances are changing due to the fact that a number of judges participate in alternative dispute resolution before the Courts of Honour of the Croatian Chamber of Economy and the Chamber of Trades and Crafts. According to a business association this offers judges an opportunity to gather knowledge and experience in consumer dispute resolution and the use of the broad range of instruments for consumer protection.

As for the guidance from the CJEU it should be emphasized that due to the recent succession of Croatia to the EU Croatian judges are not familiar with the jurisprudence of the CJEU in regard to consumer legislation and they rarely turn to it for guidance. Also, Croatian judges are not inclined to submitting requests for preliminary ruling to the CJEU. This is evident from the recent procedure on protection of collective interests of consumers against banks regarding the bank loans in Swiss Francs. The Croatian Constitutional court did not find it appropriate to request a preliminary ruling from the CJEU concerning the application of EU consumer law. At the same time, due to the inability of the Constitutional court to reach a decision, the procedure is still pending and in the meantime Croatia has been warned by the EC of the possibility of initiating a procedure before the CJEU for the breach of EU legislation.

In Croatia there is no administrative remedy in this area for consumers.

hrvatska provedba, Pravni fakultet u Rijeci, Rijeka, 2013, p. 15-60, pp. 58-59). (hereinafter: Petrić (2013))

<sup>10</sup> Mišćenić (2014), p. 289.

- In a forward looking perspective: Are there other measures that could improve the effectiveness of the UCTD in establishing a high level of consumer protection in your country? Would a graphical presentation model improve the readability and comprehension by consumers of the T&Cs? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

Consumer associations and the ECC are of the opinion that in order to reach a high level of consumer protection in Croatia, it is necessary to impose certain sanctions for incorporating unfair contract terms in the contract. Additionally, due to the fact that the information provided in T&Cs is usually excessive, they are not confident that any kind of graphical model would improve the readability and comprehension of the T&Cs, however, they would welcome any attempt to make T&Cs more comprehensible.

According to a regulatory authority, there are measures that could improve the effectiveness of the UCPD in establishing a high level of consumer protection in Croatia. An example of such measures which were taken by the regulatory authority, concerns contracting outside the business premises of the operator (something which is generally regulated within the provisions of the Consumer Protection Act). The regulatory authority additionally regulated the process and took into account the specific services offered by the operators. The operators are obligated to define and include all the fixed expenses in the contract and provide all other information which could be considered important for transparency of the terms of the contract. This provides for protection against any additional (hidden) expenses for the consumers. In case of a dispute between an operator and the consumer the expenses indicated in the contract are relevant even if the pricelist contains higher expenses.

According to the legal literature, extensions of the application of the UCTD (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 (Belgium, Czech Republic, Latvia, Luxembourg, Malta, Slovenia and France).

In practice, the exclusion of the application of the UCTD to individually negotiated terms is abused and contracts are concluded with consumers which contain a clause that all or some of the terms are individually negotiated, although this was not the case.

In this sense, it was suggested that since UCTD is a Directive of minimum harmonisation, extension of the application of the UCTD (to individually negotiated terms or to terms on the adequacy of the price and the main subject-matter) should be introduced in Croatian consumer protection legislation.<sup>11</sup>

<sup>11</sup> Petrić (2013), p. 38.

### 1.2.2. Effectiveness of the current rules 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 disparities have an impact on cross-border trade; [*Key aspects to consider are: Do national differences in the application/implementation of the Directive play a role for businesses? Have these differences led to changes in their business strategy? Have these differences caused problems?*]

There is no available information from the stakeholders regarding these issues. Nevertheless, several aspects need to be considered. First of all, the problem of the insufficient level of cross-border trade involving Croatian businesses (especially e-trade which in 2013 was 8% of the total cross-border trade of Croatian traders)<sup>12</sup> could be addressed by further removing of the obstacles to cross-border trade at EU level. However, for now it does not seem as if the awareness of traders in regard to disparities of the application of the general fairness clause in different Member States have influenced their business strategy. It seems that traders are more concerned if their additional cost of delivery will put consumers off, or if payment methods and security of internet transactions or privacy are adequately ensured in e-trade.

- 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;

There is no available information from the stakeholders regarding this issue. One of the main goals of the solutions provided for under UCTD was to help increase consumer confidence in cross-border trade. As emphasized in the UCTD, consumers do not know the rules of law which, in Member States other than their own, govern contracts for the sale of goods or services; whereas this lack of awareness may deter them from direct transactions for the purchase of goods or services in another Member State. Having that in mind, indicative list has been introduced in the UCTD as a valuable guide to courts and administrative authorities in their application of the UCTD and national implementing legislation. So, it may be the case that disparities in the terms under an extended indicative list, 'black' and/or 'grey' lists in Member States could represent barriers to cross-border trade.

However, this research revealed that Croatian consumers are not adequately informed of the national consumer law or the transposition of EU consumer law in the national legislation and still this does not affect their decision to acquire goods or services. So, it does not seem justified to presume that disparities in the terms under an extended indicative list, 'black' and/or 'grey' lists in Member States could affect consumer confidence and represent barriers to cross-border trade.

Then there is the question 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. Having in mind the arguments provided in the two previous answers, it does not seem that from the perspective of Croatian consumers and traders, 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.

<sup>12</sup> See [http://www.mingo.hr/public/trgovina/Stanje\\_internetske\\_trgovine\\_RH.pdf](http://www.mingo.hr/public/trgovina/Stanje_internetske_trgovine_RH.pdf)

### 1.2.3. Relevance for business-to-business transactions

Regarding the area of contractual fairness and in relation to the Unfair Contract Terms Directive, please analyse:

- Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;

Although the business associations remained silent on the matter, experience of consumer associations shows that there is a need to strengthen protection of businesses, especially SMEs and in particular micro enterprises. Namely, there were situations in which micro enterprises have turned to consumer associations in search of help and guidance. They have even requested that national law transposing the UCTD should be applied to their contracts with other businesses in Croatia. This has occurred mainly when micro enterprises bought electronic equipment (1 or 2 pieces) or other similar goods.

According to the legal literature, although these problems occur in a lower intensity when it comes to the B2B contracts between traders and SMEs and/or micro enterprises, they should be resolved. Since they concern situations in which SMEs and micro enterprises conclude contracts of adhesion (standard form contracts) with traders and due to the particular manner in which such contracts are concluded, SMEs and micro enterprises are put in an almost identical situations to that of consumers, solutions provided for protection of consumers against unfair contract terms could prove to be efficient.<sup>13</sup>

- 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;

An unequal position of the contracting parties and the possibility of exploiting a position of power in relation to the weaker party which is typical for B2C transactions can also occur in B2B transactions. In most of these situations in which there is an unequal position of power between the parties to the contract, also unfair commercial practice in B2B transactions occurs. This is especially noticeable in situations in which one of the traders is a monopolist at the Market. In this sense, Croatian legal literature considers the system of protection established by the UCTD to be appropriate for B2B transactions and the approach taken by Croatian legislator in this regard as adequate.<sup>14</sup>

Therefore, the Croatian legislator has assessed it to be appropriate to extend the protection guaranteed against unfair contract terms under the UCTD also to traders in B2B transactions. 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.<sup>15</sup>

The Trade Act (Official Gazette 87/08, 96/08, 11/08, 114/11, 68/13, 30/14) has introduced prerequisites for all traders to do their business free and under the same conditions at the market in a manner which does not prevent, limit or impair the competition. Each party to a contract is obligated to respect the principle of good faith.

<sup>13</sup> Petrić (2013), p. 34.

<sup>14</sup> Tepeš, Nina, Petrović, Siniša, Kontrola nepoštenih ugovornih odredaba s posebnim osvrtom na trgovačke ugovore, in: Tomljenović, Vesna, Petrić, Silvija, Miščenić, Emilia, Nepoštene ugovorne odredbe, Europski standard i hrvatska provedba, Pravni fakultet u Rijeci, Rijeka, 2013, p. 61-80, pp. 69-80) (hereinafter: Tepeš, Petrović (2013)).

<sup>15</sup> Petrić (2013), p. 46-47.

Above all other Market participants, the traders are obligated to respect the principle of fair competition and the rules of trade.

Also, the Competition Act (Official Gazette 79/09, 90/13) prescribes the rules and a system of measures for protection of competition as well as powers, tasks and organization of the authority for the protection of competition and the application of Competition Law. It is applied to all forms of preventing, limiting or impairing competition in Croatia and abroad, if such conduct has effect at Croatian territory. The competent body for the application of the Act is the Competition Agency.

Having in mind the presence of unfair commercial practice at the European Single Market and the market in Croatia, especially in the food supply chain, in 2016 the Ministry of Agriculture in cooperation with the Competition Agency and the relevant stakeholders has initiated intensive activity in the delivering of an 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. The stakeholders are currently working on the Proposal of the Act.

- 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;

According to the legal literature, the protection against unfair contract terms should not be extended to individually negotiated terms, the main subject-matter of the contract and the adequacy of the price.<sup>16</sup>

- 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;

According to a business association there is no specific contractual terms often used in B2B transaction which could be regarded as unfair in all circumstances or presumed to be unfair.

- Whether there is a need for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive;

From the perspective of a business association there is no need for contractual transparency requirements in B2B transaction since contracts are concluded between businesses on the basis of their business policy.

- Whether an extension of the Unfair Contract Terms Directive to B2B transactions can bring benefits for cross-border trade;

According to a business association, the extension of the UCTD 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;

Since there have been problems between traders and SMEs and/or micro enterprises, such an extension would have an effect on market opportunities for SME providers/suppliers.

<sup>16</sup> Petrić (2013), p. 38.

- Whether the benefits of extending the scope to business-to-business transactions would exceed the negative consequences of such an extension.

Based on the information provided by the stakeholders it is possible to conclude that there should be regard to the issues whether the extension could influence the basic principles of the contract law, such as the freedom to regulate obligations relationships, freedom of contract and the equality of the parties to the obligations relationship but the benefits for traders, especially SMEs could exceed negative consequences of such an extension.

### 1.3. Injunctions

#### 1.3.1. Effectiveness of the current rules in establishing a high level of consumer protection

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

- To what extent is the use of the injunction procedure in your country contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment?<sup>17</sup>

In Croatia, the injunction procedure is regulated in Art 106-122 of the Consumer Protection Act. However, qualified entities for initiating injunctions procedure (consumer organisations and public authorities) are regulated by a separate Decision of the Government of the Republic of Croatia (Official Gazette 105/14). These entities are entitled to initiate both national injunction actions regarding national infringements as well as injunction actions regarding infringements originating in another EU country.

Qualified entities are: Ministry of Economy, Ministry of Finance, Ministry of Maritime, Ministry of Health and Agency for Electronic Media, HAKOM, Croatian Union of Consumer Protection Organisations-Potrošač and Union of Organizations for Protection of Croatian's Consumers.

In Croatia so far, there was very limited use and success of the injunction procedure. There are several factors which need to be taken in account here:

Although Croatia had implemented the ID in the Consumer Protection Act, the application of the legislation on injunction procedure was suspended (according to Art 155 of the Consumer Protection Act from 2007 and Art 81 of the revised Consumer Protection Act from 2009) until Croatia became a Member State (it occurred on 1 July 2013).

Also, among qualified entities there are 4 Ministries entitled to initiate procedures and only two consumer protection organizations (these are in fact Unions of consumer protection associations, so none of the consumer protection associations are entitled to initiate injunction procedure by themselves, only as unions). However, Ministries are not interested in initiating injunction procedures.

Until now, only an injunction procedure initiated by the Croatian Union of Consumer Protection Organisations-Potrošač and Association Franak (against banks because of the unfair terms in bank loan agreements (in Swiss francs)) was partially successful. At the moment there is an injunction procedure against HT- Croatian Telekom.

<sup>17</sup> 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.



- What measures in your national legislation on injunction procedure are considered to be particularly effective, if any: measures regarding the cost of the procedure, the 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?

Based on the information provided by the stakeholders, it is possible to conclude that measures regarding the cost of the procedure could not be considered particularly effective, especially if we take into account the duration of the procedure. Namely, procedures in Franak case as well as HT-Croatian Telekom case cannot be considered as summary procedures due to their length. In Franak case there was also an appeal procedure (2nd instance) and a revision procedure (3rd instance).

Publication of the decision/of a corrective statement was not ordered by the court in Franak case (26.P -1401/2012). As there are no other injunction procedures - there is no relevant information at the moment.

The most effective measure was in fact the effect of the injunction order which forced the banks to change their practice and remove an unfair standard contract term.

According to the relevant ministry, also in certain cases, the formal (written) prior warning according to Art 108(1) of the Consumer Protection Act has proven to be effective.

- Has your country extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunction Directive? If yes, what are the additional consumer rights covered?

According to Art 106 (1) of the Consumer Protection Act 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 additionally rights of consumers as bus or coach passengers (as weaker parties to the transport contract) are covered.

- Analysis of the obstacles to the effective use of the injunction procedure, in particular by analysing which progress in removing obstacles has been made and/or new difficulties that have emerged in your country since 2012.

Since the introduction of the injunction procedure in the Consumer Protection Act 2003, there has been no application of the procedure until 1 July 2013. Given that there was no application of the procedure, the only obstacles and difficulties to the (potential) effective use of the injunction procedure which could be detected concern legislative solutions provided in the Consumer Protection Act:

According to Consumer Protection Act from 2003 only condemnatory actions for injunctions were available, but at the same time no declaratory actions. Without a declaratory relief which establishes responsibility of the trader for the contested infringement there was no possibility to seek damages in a follow-on (individual) procedure which is available under the current provisions of Consumer Protection Act.

Under the Consumer Protection Act from 2007 it was not clear whether the qualified entities are entitled to initiate the procedure or only suggest it to the State inspectorate which should initiate the procedure (which would be contrary to the ID). These obstacles were removed with the introduction of Art 55 of the revised Consumer Protection Act from 2009 when detailed provisions regarding qualified entities, court jurisdiction and the prior consultation procedure were prescribed.



- In a forward looking perspective: Should the coverage of the Injunctions Directive be extended (by including additional legislation into Annex I to the Directive)? If so, which EU legislation should be included? Are there other measures that could improve the effectiveness of the ID in establishing a high level of consumer protection? Should the scope of the Injunctions Directive be extended to the protection of collective business' interests? Are there best practices in your country that could be relevant for other countries and considered as model for the injunction procedure at EU level?

Experience with the protection of collective consumers' interest has not been significant in Croatia. In order to improve effectiveness of the ID, additional measures at EU level should include a more unified approach to the regulation of collective redress mechanisms which would contribute to their operation in Member States. This would also enhance consumers' trust at the Market.

### 1.3.2. 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:

- How effective is the injunction procedure in addressing infringements originating in another EU country?

According to the stakeholders, so far, there was no experience with the injunction procedure in addressing infringements originating in another EU country.

- How effective is it to address infringements originating in another EU country that qualified entities in your country are enabled to seek injunctions in the other Member State(Article 4 of the Injunctions Directive)?

For now, the stakeholders confirm that Croatian qualified entities made no attempts to seek injunctions in another Member State, so it is not possible to make assessments on the effectiveness of the possibility.

- In a forward looking perspective: Are there non-legislative or/and legislative measures that could improve the effectiveness of the injunction procedure in addressing infringements originating in another EU country? Are there best practices in your country that could be relevant for other EU countries and could be considered as a model for the injunction procedure at EU level?

Since there is a lack of experience of Croatian stakeholders with the injunction procedure in addressing infringements originating in another EU country, there are no best practices which could be relevant for other EU countries.

### 1.3.3. Interplay between the Injunctions Directive and other enforcement instruments of consumer law

Please analyse:

- Is the injunction procedure as designed by the Injunctions Directive regulated separately in your country (in a separate legal act or as a separate procedure regulated within the same legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (UCPD, UCTD and by the Consumer Rights Directive)?

The injunction procedure is regulated within the provisions of the Consumer Protection Act from 2014 as a separate procedure which may also be used against infringements of the UCPD, UCTD and Consumer Rights Directive. Commercial court has jurisdiction in injunction procedures. The Market Inspection at the Ministry of Economy is the

authority authorized for market surveillance as well as the application of the Consumer Protection Act.

- If these procedures are regulated separately: What are the main differences between them? How is the coherence between these procedures ensured? If these procedures are regulated in a single legal act (possibly as a single procedure): In what way do these procedures (or this procedure) go beyond measures foreseen by the Injunctions Directive?

Injunction procedures as designated by Consumer Protection Act do not go beyond measures foreseen in the ID.

## 1.4. Cross-cutting issues

### 1.4.1. Cost and benefits of the directives covered by the study

- To what extent is there evidence for benefits for consumers stemming from the protection provided by both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of benefits for consumers from the protection against unfair commercial practices and unfair standard terms in contracts; [Note: a relevant aspect in this context is whether the costs for consumers in exercising their rights under these directives are limiting these benefits or not.]

According to the relevant ministry the transposition of the Directives at hand has provided a higher level of consumer protection in comparison to the period prior to their transposition. Mechanisms of enforcement put in place in Croatia do not impose costs which limit benefits for consumers stemming from minimum harmonised and fully harmonised rules.

- To what extent is there evidence for benefits for traders stemming from both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of creating a level playing field for honest traders by providing a legal basis to eliminate or at least constrain dishonest market practices, such as the use of unfair standard terms in contracts or unfair commercial practices, including through the application of the Injunctions Directive;

In the opinion of the relevant ministry, the traders which apply consumer protection legislation have been recognized by the consumers in Croatia. It seems that, through combating unfair B2C commercial practices, the market position of honest traders is automatically strengthened.

In practice, it seems that enforcement mechanisms under the Directives have come to rely not only on consumers' willingness to initiate proceedings against traders who apply dishonest market practices, but also on other traders at the market and their interest in ensuring that insufficient interest on the part of consumers would not result in the failure to eliminate or constrain the dishonest practice at the Market. Mechanisms which are put in place under the UCPD do not exclude the possibility of a Member State to grant protection to a trader by enabling him to take legal action against unfair B2C commercial practices. If jurisprudence of the CJEU regarding preliminary ruling on the application of the UCPD in the Member States is examined closely, it can be shown that in half of the cases in which a request was referred to CJEU, the dispute before the national court was initiated by traders.

- What are costs for traders due to the need to respect the requirements under the directives covered by the study? [Note: Such as costs of research, legal advice and compliance as well as the amount of time necessary to comply with the directives]
- What are the costs involved in the public enforcement of these rules?

The relevant stakeholders did not respond to the question or provide information.

- Are there indications that the directives covered by the study are not implemented in your country in a cost-effective manner?

The relevant stakeholders did not respond to the question or provide information.

- Could the costs for implementing and enforcing the rules of the directives covered by the study be reduced without lowering the level of protection for consumers? If so, how?

The relevant stakeholders did not provide information.

#### 1.4.2. Interplay with EU sector-specific consumer protection legislation

Regarding the interplay of the horizontal EU consumer legislation [mainly UCPD and UCTD] with EU sector-specific consumer protection legislation in the areas of electronic communications, passenger transport, energy and consumer financial services, please:

- Analyse the levels of awareness of the requirements of the horizontal EU consumer legislation (mainly UCPD and UCTD) of businesses and consumers and the specific public enforcement bodies in the relevant sectors, as in particular demonstrated by their practical application; [*Key question here is: Are UCPD and UCTD applied in practice by national authorities and courts as a legal basis to combat unfair commercial practices and unfair standard terms in contracts in the regulated sectors?*]

According to a business association, traders are regularly informed of the changes in national laws transposing the UCPD and UCTD and they are obligated to align their practices with the new requirements.

According to a regulatory authority responsible for electronic communications, postal services and railway transport which evaluates standard contract terms, price lists and terms of usage in order to make sure that they meet requirements of the UCPD and UCTD, businesses and specific public enforcement bodies are generally aware of the requirements of the horizontal EU consumer legislation.

At the same time, consumers show lack of knowledge of their rights as well as obligations of traders.

According to the relevant ministry all traders, consumers and the specific enforcement bodies in the relevant sectors (regulatory authorities) are aware of the provisions of the UCTD and the UCPD. However, further activities which strengthen the awareness of the consumers regarding their rights are advisable.

The regulatory authority responsible for electronic communications, postal services and railway transport is also responsible for dispute resolution between users (consumers and businesses) and traders offering the service. However, this type of dispute resolution is available to users of electronic communications only after the procedure with the operator was completed. In case of an unfavourable answer from the Consumer Complaints Commission with the operator, a written request for the resolution of the dispute may be submitted to the regulatory authority, within 30 days from the date of the receipt of the Commission's answer. The decision of the regulatory authority is obligatory for the operator. The user (consumer) is also entitled to initiate court proceedings.

Although the decisions of the regulatory authorities and courts are undoubtedly based on Croatian legislation which implemented the UCPD and UCTD, there is no systematic monitoring and therefore there are no statistics available of the application of the UCPD and UCTD in Croatia. This has been confirmed by the Ministry of Economy, Ministry of Justice and the regulatory authorities (HAKOM and HERA), as provided in the Annex.

However, some illustrative examples of the court proceedings can be provided.

1. In the judgement delivered at the Municipal court in Zagreb in 2013 the court found that the standard terms of a contract between a consumer and an operator (HT telekom) were unfair due to the fact that the consumer was charged with additional instalments of the contract although the contract was terminated before its expiry. The judgment was delivered on the basis of the Croatian Consumer Protection Act. In the explanation of the judgment it was emphasized that the consumer should not be charged for a service that was not provided to him. (Ferdinand Major v HT telekom, 2013)

2. On 13 November 2014 Administrative court in Rijeka found that the operator (HT telekom) was responsible for imposing a non-contractual barrier to switching to another operator (VIP net) and unduly delay of the migration of the consumer to the other operator. Also, the court found that the regulatory authority (HAKOM) was not authorized to dismiss the written request of the consumer for dispute resolution. (3 UsI-1723/13-14 Zlatko Petranović v HAKOM and HT telekom, 2014)

Also, some of the judgments of the Administrative courts regarding proceedings initiated by consumers against both - the regulatory authority (HAKOM) and the operators can be provided. They mainly concern situations in which there was unfair commercial practice of the operator and/or unfair standard terms in contracts, but the regulatory authority dismissed the request of the consumer for dispute resolution based on the procedural formalities or found the request to be unfounded, so proceedings were initiated at the Administrative courts. In most cases the court recognized that consumer rights were infringed by the unfair commercial practice or standard terms in contracts and instead of a dismissal of the request of the consumers, adequate protection of consumer rights should have been provided in a procedure conducted by HAKOM. For example:

- Judgment of the Administrative Court in Rijeka, Ref. No. 3UsI-1180/14-26 concerning a user's complaint against HAKOM's decision – From the judgment it is obvious that misleading information have been provided to the consumer regarding the monthly cost of the service. Although the phone calls were free of charge the operator failed to mention that consumer will be charged for making every single call.

Other similar judgments:

- Judgment of the Administrative Court in Split, Ref. No. 1 UsI-47/14-10 concerning a user's complaint against HAKOM's decision;
- Judgment of the Administrative Court in Split, Ref. No. 1 UsI-2442/13-12 concerning a user's complaint against HAKOM's decision;
- Judgment of the Administrative Court in Zagreb, Ref. No. UsI-1425/14-15 concerning a user's complaint against HAKOM's decision;
- Judgment of the Misdemeanour court in Zagreb, Ref. No. 29 PpG-8010/12 concerning a misdemeanour referred to in Article 119.1 (59) and Article 119.2 of the ECA;
- Judgment of the High Administrative Court in Zagreb, Ref. No. Usž-1764/15-2 concerning a user's complaint against HAKOM's decision;
- Judgment of the Administrative Court in Zagreb, Ref. No. UsI-4384/13-9 concerning a user's complaint against HAKOM's decision;

- Judgment of the High Administrative Court of the Republic of Croatia, Ref. No. UsII-46/14-8 concerning a complaint submitted by the plaintiff Hrvatski Telekom d.d. against HAKOM's decision on the determination of fees in the reference offer for the service of the unbundled access to the local loop;
  - Judgment of the High Administrative Court of the Republic of Croatia, Ref. No. UsII-56/14-9 concerning a complaint submitted by the plaintiff OT-Optima Telekom d.d. against HAKOM's decision on resolution of a dispute concerning the establishment of the right to charge for additional services;
  - Judgment of the High Administrative Court of the Republic of Croatia Ref. No. UsII-81/13-10 concerning a complaint submitted by the plaintiff Hrvatski Telekom d.d. against HAKOM's decision concerning the imposition of regulatory obligations;
  - Judgment of the Administrative Court in Rijeka, Ref. No. 3UsI-1180/14-26 concerning a user's complaint against HAKOM's decision;
  - Ruling of the High Administrative Court of the Republic of Croatia Ref. No. UsII-14/13-10 in an administrative dispute initiated by the plaintiff Hrvatski Telekom d.d. against the defendant HAKOM concerning the resolution of a dispute between operators;
  - Judgment of the High Administrative Court of the Republic of Croatia, Ref. No. UsII-147/15- in an administrative dispute initiated by the plaintiff K3 Keter Telekom d.o.o. from Zagreb against the defendant, HAKOM, concerning the revocation of the license for use of the RF spectrum;
  - Judgment of the Administrative Court in Rijeka, Ref. No. 4UsII-1613/13-14 in an administrative dispute initiated by a user against HAKOM's decision in a case concerning the resolution of a dispute between a user and an operator;
  - Judgment of the High Administrative Court of the Republic of Croatia Ref. No. UsII-8/12-10 in an administrative dispute initiated by the plaintiff Hrvatski Telekom d.d. against HAKOM's decision concerning the resolution of a dispute between a user and an operator.
- Specify whether in your country the same authority is responsible for the enforcement of the horizontal EU consumer law 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 UCPD/UCTD in the regulated sectors, as specified in the previous bullet?*]

In Croatia different authorities are responsible for the enforcement of the horizontal EU consumer law and the sector specific rules. Ministry of Economy is responsible for enforcement of the rules provided by the Consumer Protection Act as a general consumer protection act and HAKOM and HERA are responsible for the enforcement of the sector specific legislation in their sectors. There is an institutionalised cooperation between them and in case of consumer complaints they cooperate on case by case basis.

In Croatia, the Market Inspection at the Ministry of Economy is authorized for surveillance of the application of the Consumer Protection Act. The application of the legislation in specific regulated sectors is under surveillance of authorized entities:

- In the field of electronic communication - the regulatory authority (HAKOM);
- In the field of financial services - the Market Inspection at the Ministry of Economy, Ministry of Finance, Croatian National Bank (HNB), Croatian Financial Services Supervisory Agency (HANFA);

- In the field of passenger traffic – Ministry of the Maritime Affairs, Transport and Infrastructure, Croatian Civil Aviation Agency and Croatian Regulatory Authority for Network Industries (HAKOM);
- In the field of energy - Croatian Energy Regulatory Agency (HERA).

According to the relevant ministry, the competent authorities have an institutionalised cooperation in regard to unfair commercial practices.

- Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning contractual fairness, 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.?*]

According to the regulatory authorities, sector specific rules clarify and set additional detailed rules concerning specific rules set by the Consumer Protection Act. Also, they set the legal framework for sector specific challenges not covered by horizontal provisions. In this sense, the combination of horizontal consumer provisions and sector-specific rules provides for a clear and coherent legal framework and although there may be some overlaps (regarding sector-specific rules for natural gas) there are no conflicts.

- What are the benefits of the complementary application of the UCPD and UCTD in the regulated sectors? What are the costs due to the complementary application with the sectoral EU consumer protection legislation?

Since relevant stakeholders cannot make an assessment regarding the issue, it is not possible to provide an answer or quantitative information.

- Assess any need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law.

According to the regulatory authority clarification of the interplay between the EU sector-specific rules on natural gas and horizontal EU consumer law would be needed.

#### 1.4.3. Relevance of consumer law directives for consumer-to-business transactions

- Please analyse the need and potential for the application of the consumer law directives (mainly UCPD and UCTD) to 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).

A detailed analysis provided in the legal literature of the provisions of the Consumer Protection Act from 2009 (which remains relevant for the Consumer Protection Act from 2014) shows that unlike the UCTD which applies exclusively to B2C relations, the Consumer Protection Act does not impose any restrictions of the application of the relevant provisions to C2B relations. Namely, restriction of the UCTD to B2C relations derives from Art 1 of the UCTD according to which the purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.<sup>18</sup> Based on the difference in the regulation it is possible to conclude that

<sup>18</sup> Baretić, Marko, Markovinović, Hrvoje, Nepoštene ugovorne odredbe – opća i posebna uređenja, in: Barbić, Jakša, Giunio, Miljenko (eds.), Zbornik 50. susret pravnika, Opatija 2012.; Zagreb, Hrvatski savez udruga pravnika u gospodarstvu, 2012, p. 57-132. (hereinafter: Baretić, Markovinović (2012)).

the Croatian legislator enabled the application of the standards of the UCTD also to C2B relations.

However, according to a business association these situations occur seldom in Croatia. So, from the perspective of consumer associations and the ECC as well as a business association there is currently no need to apply the UCPD and the UCTD to consumer-to-business (C2B) relations. Also, according to the relevant ministry, there is no need for the application of the consumer law directives (mainly UCPD and UCTD) to C2B relations since in practice there were not many cases to which consumer law directives could be applied in Croatia.

It is unclear if the lack of practice regarding these situations is indicative of whether there is a genuine lack of these situations. It might be that it was not significantly recognised in practice that according to Consumer Protection Act protection against unfair contract terms could also be provided to consumers who sell or supply to businesses in Croatia.

#### 1.4.4. Specific protection for vulnerable consumers

Please analyse:

- Whether the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined in the consumer law directives and relevant jurisprudence, and as applied by national authorities and courts in your country, continue to be valid and fit for purpose.

The concept of 'consumer' as currently defined in the consumer law directives and relevant jurisprudence (of the CJEU) and as applied by national authorities and courts in Croatia is not regarded to be valid and fit for purpose.

In the legal literature it is emphasized that the UCTD as well as Consumer Protection Act contain a narrow definition of the term consumer (Art 2 p. b, Art 5 p. 15) which is also common to many other EU Directives and it is accepted in the jurisprudence of the CJEU. However, situations in which a protection of a 'weaker party' in a contract should be provided, concern both natural and legal persons. Namely, these are situations in which a contract is concluded between a trader and a legal person (SMEs, trade and crafts) but the economical and legal substance of the contract points to the fact that in its nature it is a consumer contract. So, the concept of consumer should be widened in order to encompass situations in which legal persons conclude contracts but their position is equal to that of a consumer.<sup>19</sup>As suggested in the legal literature, the approach of Directive 2011/83/EU (Recital 13 and 17) should be used in order for the definition of consumer to cover NGOs, SMEs and micro enterprises and natural persons concluding dual purpose contracts.<sup>20</sup>

Consumer associations and the ECC consider the abovementioned concepts to be inadequately defined and therefore often disregarded in practice. Namely, according to their experience, in most sectors (apart from e.g. energy sector or finance), the difference between the concepts of 'consumer', 'vulnerable consumer' and 'average consumer' is vague or non-existent.

Having that in mind, a consumer association has made additional efforts in order to clarify the concept of a consumer to the citizens in Croatia:

<sup>19</sup> Petrić (2013), p. 34-35.

<sup>20</sup> Mišćenić (2013), p. 153.





The picture above presents a citizen/a consumer as a human being whose human rights protection should include= a guarantee of human dignity + the right to fair trial (adequate legal protection) + protection of the economic interests

Translation Croatian to English language:

*'GraĐanin potrošač nije broj, već prije svega, ljudsko biće apsolutne vrijednosti'* – 'A citizen who is a consumer is not a number, he/she is before all else a human being of absolute value with its own universal rights and obligations"

*'Ljudsko dostojanstvo, pravo na pravičnu pravnu zaštitu I zaštitu gospodarskih interesa'* – 'Human dignity, right to a fair trial and protection of economic interests'

From the position of the regulatory authority in the telecommunication sector the concept of 'consumer' is still valid and fit for the purpose.

At the same time, the concepts of 'vulnerable consumer' and 'average consumer' are harder to implement since it is difficult to provide for their uniform application which would meet the purpose of the terms.

According to the regulatory authority, the concept of the 'vulnerable consumer' is defined in Art 39 of the Energy Act (Official Gazette 120/12, 14/14, 102/15). At a proposal of the Ministry of Economy and the Ministry of Social Policy and Youth the Croatian Government sets the criteria for achieving the status of a vulnerable consumer and determines protection measures in order to provide for their adequate supply. The competent authority in charge for social welfare determinates the status of vulnerable consumer and the level of social support to vulnerable consumer in the administrative procedure.

Generally, it may be said that neither of the concepts seem to still be valid and fit for purpose in Croatia. However, the main problems are clear in regard to the concept of 'vulnerable consumers' and 'average consumers', since their adequate protection depends on the understanding of the concepts by the legislator which provides for statutory or sectoral protection, as well as authorities which need to apply them on a case-to-case basis. Additionally, the meaning and the understanding of the concept may vary depending on the situation in which the consumer finds himself, that is, the sector in which there was a B2C transaction at issue.

In some sectors there is a higher level of protection guaranteed (such in the case of Art 39 of the Energy Act). According to the consumer association 'Croatian Association for Consumer Protection' (*Hrvatska udruga za zaštitu potrošača*, HUZP) there are several categories which can be detected at the financial sector. Namely, due to the economic crisis in Croatia many people have lost their jobs at the age of 40-50. This population may be considered 'vulnerable', since they are excluded from the job market and consequently also from access to credit. Other category of 'vulnerable consumers' are people at the age 25-55 who work, but their income has decreased during the years of economic crisis or they do not receive a monthly income from their employers at all, although they work. This category of consumers is over indebted or facing bankruptcy due to which their access to financial services is limited (*'blokirani'*). The third category is young unemployed people between the ages of 18-25 who are usually supported by their parents, have no income and access to financial services. A

fourth category is retired people, aged 60- with insufficient understanding of the 'new' financial services, very low pension and often indebted. So, the problem of invalidity of the concepts should be addressed at EU level and comprehensive legislation should be introduced which takes into account different characteristics, needs and circumstances of consumers, but also situations in which specific categories of consumers can find themselves.

- To what extent the existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers and whether, based on the experiences in your country, specific provisions should be introduced in other directives concerned, in particular the Unfair Contract Terms Directive.

From the position of the consumer associations and the ECC, certain provisions regarding the older population as well as young people should be introduced; however, such introduction would require a very systematic and detailed analysis of the existing state of play in each Member State.

According to the relevant ministry, the existing rules of the UCPD are not adequate to protect vulnerable consumers, especially the older population. In their opinion, the provisions of the UCPD are general and do not cover specific situations such as distance selling, telephone selling as well as off the premises selling. Therefore, specific provisions which would enhance protection of the older population of consumers should be introduced.

In addition to introducing specific provisions in other directives concerned, in particular the UCTD, also adequate mechanisms for sanctioning the practice which harms interests of vulnerable consumers should be provided.

Namely, vulnerable consumers are entitled to initiate civil proceedings in which it is not necessarily ensured that the vulnerability would be taken into account and that the consumer will be adequately protected. If such proceedings are initiated, the only sanction available is nullity of the contract, according to the Obligations Act. So it does not seem that there is too much incentive for the vulnerable consumer to initiate court proceedings. On the other hand, although consumer associations should be able to effectively protect the interests of vulnerable consumers by initiating collective redress proceedings and requesting the end of unlawful practice and obtaining damages, due to the insufficiencies in the regulation of collective redress in Croatia which were already discussed in detail (see *supra*), it is obvious that the application of the existing rules of the UCPD in protection of vulnerable consumers has not been satisfactory in Croatia.

#### 1.4.5. EU added value

- Overall, would you consider that protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in your country since the implementation of the UCPD and the UCTD in national legislation?

According to the consumer associations, the ECC and the relevant ministry, the protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in Croatia since the implementation of the UCPD and the UCTD in Consumer Protection Act.

The experience of the regulatory authority in the telecommunications sector shows that implementation of the UCPD and the UCTD has improved protection of consumers against unfair commercial practices and unfair standard terms in contracts in Croatia even in the period prior to the country's accession to the EU. Namely, as an acceding country, Croatia made efforts to harmonize its consumer legislation with consumer and marketing law directives.

- Overall, would you consider that the information of consumers regarding unit prices has improved since the implementation of the PID in national legislation?

Consumer associations, the ECC and the relevant ministry confirm that since the implementation of the PID in the national legislation, the information to consumers regarding unit prices has improved in Croatia.

Also, a business association considers that information to consumers has improved since the implementation of the PID in the national legislation. In this regard, introduction of Ordinance on indication of wholesale price and the unit selling price has contributed to the transparency of price indication in Croatia.

- Overall, would you consider that the protection of businesses against unfair marketing in your country has improved since the implementation of the MCAD in national legislation?

According to the relevant ministry, the protection of businesses against unfair marketing has improved since the implementation of the MCAD in Croatia.

- Overall, would you consider that it has become easier for businesses in your country to directly trade cross-border to final consumers located in other EU countries in recent years? Has it become easier for consumers in your country to directly purchase cross-border from traders located in other EU countries?

According to a business association, although in the recent years it has become easier for businesses in Croatia to directly trade cross-border to final consumers located in other EU countries, still additional improvements can be made.

According to the consumer associations, the ECC and the relevant ministry from the date of accession to the EU (1 July 2013), it has become easier for consumers in Croatia to directly purchase cross-border from traders located in other EU countries. However, the consumer confidence in cross-border purchase in Croatia is still very low, especially taking into consideration the fact that there are still many cases of geoblocking against Croatian residents. Namely, many Croatian consumers often encounter difficulties while shopping online due to the fact that certain number of traders residing in other EU countries still do not deliver their products to Croatia, and even if such delivery is enabled, there are significant unjustified price differentials. Such practices have a very negative impact on consumer confidence in Croatia and present one of the reasons due to which the percentage of cross-border purchase is fairly low in Croatia.

- To what extent are these improvements, if any, due to the mentioned directives?

For consumer associations and the ECC it is very difficult to assess what are the exact reasons for the improvements; however the introduction of the Directives has surely favoured the awareness raising trend in the respective field.

Business associations consider the improvements to be partly the result of the mentioned directives.

## Annex

## A. Transposition fact sheet

**Table 1: Fact sheet on transposition of directives in Member States' law–Croatia**

Directive	Transposition legislation (National law, Article)	Comments	Specific provisions going beyond minimum harmonisation requirements/use of exemptions	Included in national legislation	Comments
<b>Directive 93/13/EEC on unfair terms in consumer contracts</b>	Zakon o zaštiti potrošača (NN 41/14, 110/15)  (Consumer Protection Act) (hereinafter: CpA) : Article 49-56		'Black list' of terms considered unfair in all circumstances	No	
			'Grey list' of terms which may be considered unfair	Yes	Article 50 of the Consumer Protection Act (hereinafter: CpA)
			Extensions of the application of Directive to individually negotiated terms	No	Article 296 (3) of the Obligations Act (hereinafter: OA)
			Extensions of the application of Directive terms on the adequacy of the price and the main subject-matter	No	Article 52 of the CpA
<b>Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in</b>	Zakon o zaštiti potrošača (NN 41/14, 110/15) (Consumer Protection Act) (hereinafter: CpA): Article 30-38		Provisions regarding financial services going beyond minimum harmonisation requirements	No	

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the internal market			Provisions regarding immovable going beyond minimum harmonisation requirements	No		
			Application of UCPD to B2B transactions	No		
Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers	Zakon o zaštiti potrošača (NN 41/14, 110/15) (Consumer Protection Act) (hereinafter: CpA): Article 7		Extension of the application to other sectors (e.g. for immovable property)	No		
			Use of specific regulatory choices/derogations	No		
Directive 2006/114/EC concerning misleading and comparative advertising	Zakon o nedopuštenom oglašavanju (NN 43/2009) (Unpermitted Advertising Act) (hereinafter: UaA)					
			a wide definition of the concept of "trader"		Article 3 of the Unpermitted Advertising Act (hereinafter: UaA)	<i>The definition includes persons and entities from the so-called "grey areas of the economy" and advertising agencies acting in the name and on behalf of a trader</i>
Directive 2009/22/EC on injunctions for the protection of consumers' interests	Zakon o zaštiti potrošača (NN 41/14, 110/15)(Consumer Protection Act) (hereinafter: CpA): Article 106-122					

**Table 2: Fact sheet on Injunctions Directive – Croatia**

Issue	Answer	Comments
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)?	- Yes, separate procedures in a single legal act	<p><i>The injunction procedure is regulated in Art 106 CpA et seq. as procedure for the collective protection of consumers.</i></p> <p><i>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)</i></p>
Who is entitled to bring an action seeking an injunction?	<ul style="list-style-type: none"> <li>- Designated public bodies</li> <li>- Specified consumer associations</li> <li>- Other</li> </ul>	<ol style="list-style-type: none"> <li><i>1. Designated public bodies: Ministry of Economy, Ministry of Finance, Ministry of Maritime, Ministry of Health and Agency for Electronic Media</i></li> <li><i>2. Croatian Union of Consumer Protection Organisations-Potrošač</i> <i>Union of Organizations for Protection of Croatian's Consumers</i></li> <li><i>3. HAKOM as a regulatory authority is entitled to initiate proceedings</i></li> </ol>
Is the injunction procedure a court or an administrative procedure? If your country legislation foresees both forms of the procedure, please explain in the comments column for which infringements the court or administrative procedure is foreseen	- Court procedure	
Who bears the costs of an injunction procedure? If qualified entities (or some of their categories e.g. consumer organisations are entitled to an exemption of some/all cost related to the procedure please explain the characteristic of such exemption in the comments column.	- The costs are as a rule borne by the losing party	
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?	- Yes, scope of application extended to cover areas of consumer law that are not part of Annex I of the Directive	<p><i>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.</i></p>

<p>Is protection of business' interests covered by the injunctions procedure?</p> <p>If scope of application extended to the protection of business' interests, please provide details in the comments column regarding type of business' interests covered by the injunctions procedure</p>	- No	
<p>Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations</p>	- Yes	<i>Under Art 106(2) CpA the procedure can be initiated against an individual trader or a group of traders coming from the same economic sector, who violate the provisions prescribed in Art 106(1) CpA, against chambers and trader interest associations promoting unlawful conduct, or against a drafter of trader's code of conduct which promotes unfair business practices</i>
<p>Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID)</p>	- Yes	<i>Under Art 109(1) CpA before initiating the procedure designated public bodies, regulatory authority or the specified consumer associations as the plaintiff and the defendant are entitled to initiate mediation procedure at the Mediation Centre</i>
<p>Has your Member State taken specific measures regarding the prior consultation (Article 5 of the Injunctions Directive)?</p>	- Yes, requirement for party seeking injunction to consult with the defendant	
<p>Does the national legislation provide for measures ensuring summary procedure?</p> <p>Please specify main characteristics of the procedure (subject matter/time limits) in the comments column.</p>	- No	
<p>Are there sanctions for non-compliance with the injunction order (Article 2(1) of the Injunctions Directive)?</p> <p>If sanctions in form of penalty or fine foreseen please specify in the comments column to who exactly should they be paid</p>	- Yes, penalty of a fine for each day of non-compliance	<i>According to Art 116 (4) CpA a fine (money penalty) will be paid to the state treasury (the public purse)</i>
<p>Has your Member State taken specific measures regarding the publication of the decision and/or the publication of a corrective statement?</p>	- Yes	<i>According to Art 115 the court may order the defendant to publish the decision at its own expense</i>
<p>Is it possible to claim within the injunction procedure for sanctions for the infringement?</p>	- No	<i>Only sanction in terms of a fine can be requested for non-compliance with the court decision under Art 116(2) CpA</i>
<p>Can an action for the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to other beneficiary be brought within the injunction procedure?</p>	- No	



Can an action for damages to be paid to the qualified entity or the public purse be brought within the injunction procedure?	- No	
Can an action for damages or redress to be paid to the consumers concerned be brought within the injunction procedure?	- No	
Can individual consumers base their individual claims for damages/remedies on the injunctions order?	- Yes	<i>According to Art 118 CpA consumers can base their individual claims for damages on the injunctions order</i>
Can the qualified entity claim other measures beyond the injunction, e.g. evidence of compliance with the judgment?	- No	
Are the effects of individual injunctions orders extended to the future infringements and/or same or similar illegal practices(of other traders)?	- No	<i>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</i>

## B. Data tables

*Number of B2C disputes*

Please indicate how many B2C disputes have been decided in your country on the basis of consumer law directives covered by this study (UCPD, UCTD, PID) as a proportion of the total number of B2C disputes decided on the basis of other national consumer legislation (based on statistics, or based on estimates by enforcement authorities and other stakeholders, where this is not the available).

**Table 3: B2C disputes decided on the basis of consumer law directives covered by this study in comparison with total B2C disputes decided on the basis of other legislation (most recent year for which data is available)**

Year	Type of data	Total number of B2C disputes (number of cases)	Share of B2C disputes decided on basis of ...					Comment
			UCPD	UCTD	PID	other EU consumer protection legislation (e.g. CRD, Sales Directive, sectoral legislation)	national consumer legislation not based on EU directives	
2014	Statistics provided by the Market Inspectorate at the Ministry of Economy	5	20%		20%	40%	20%	100
2013	Statistics provided by the (former) State Inspectorate /now Market Inspectorate	7	28.6%		14.9%	28.6%	28.6%	100
2012	Statistics provided by the (former) State Inspectorate /now Market Inspectorate	12	8.3%			91.7%		100

*Costs of obtaining redress for a hypothetical case of invoking unfairness of a standard contract term*

- Please estimate the costs, including time, for consumers in obtaining redress when invoking the unfairness, and thereby the non-binding character of standard contract terms in a contract they concluded. Please provide the estimate for the hypothetical example below, focusing on costs (and needed time) of a lower court procedure and the use of ADR or other relevant procedure (if applicable).<sup>21</sup>

<sup>21</sup> For the hypothetical example it is assumed that both the provider and the consumer are located in your country.

**Table 4: Estimate of costs for consumers in obtaining redress when invoking the unfairness of standard contract terms in a contract they concluded (for the hypothetical example provided in the box below)**

Redress mechanism	Estimated court fees (national currency)	Estimated lawyer's fees (national currency)	Other costs, if any (national currency)	Estimated time involved for consumer (hours)	Comments
Lower court procedure	<p><u>For submitting a claim:</u> 500kn [approx. EUR 67] + 1% for disputes over 15 000 kn [approx. EUR 2000] = 750 kn [approx. EUR 100]</p> <p><u>For rendering of a judgment:</u> 750kn [approx. EUR 100]</p>	1000kn [approx. EUR 133] for each procedural action	0	<p>If the proceedings are initiated before a court in Zagreb it should take up to 6 months for a first instance court to deliver a judgment: 6x30x24= 4 320 hours</p> <p>(if the proceedings are initiated before a smaller court the duration may increase) However, hours spent on filling paperwork, appearing at court, consulting a lawyer cannot be assessed due to the different level of knowledge, available funds and preparation of consumers for conducting the procedure before court.</p>	When submitting a claim the plaintiff is only requested to pay for submitting a claim and only upon delivering of a judgment is the plaintiff requested to pay for rendering of a judgment

ADR or other relevant procedure	<p>Costs of delivering of a decision /payment to the judge of first/second instance 100kn [approx. EUR 13] for conducting a procedure + 200kn [approx. EUR 27] for delivering a decision</p> <p>Cost of gathering of documentation 500kn [EUR 67]</p> <p>Travel costs and accommodation of judge/s funded from the state budgets</p>	<p>Only cost which occurs for the consumer is the cost of attorney representation (if the consumer has an attorney)</p> <p>-</p> <p>1000kn [approx. EUR 133] for each procedural action</p>	0	<p>It should take up to 90 days for the Court of Honour to deliver a decision:  <math>3 \times 300 \times 24 = 2160</math> hours                  However, hours spent on filling paperwork, appearing at Court of Honour, consulting a lawyer cannot be assessed due to the different level of knowledge, available funds and preparation of consumers for conducting the procedure before the Court of Honour.</p>	<p>This is estimate cost for ADR before the Court of Honour of the Croatian Chamber of Economy</p>
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**Hypothetical example: Terms which inappropriately exclude/limit consumers' rights to compensation**

A consumer went on a package holiday with a friend to Kenya for which they paid € 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 €5,000 (€4,000 for the cost of the package and €1,000 for lost time and enjoyment). The tour operator agreed to compensate them €1,000 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/unfair-contract-terms/index\\_en.htm](http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-contract-terms/index_en.htm)]

- Please estimate how often court and ADR procedures are used in your country for invoking the unfairness, and thereby the non-binding character of standard contract terms (i.e. the number of cases per year)?

In Croatia, due to the lack of the surveillance of the court and ADR procedures it is very difficult to estimate how often court and ADR procedures are used for invoking the unfairness, and thereby the non-binding character of standard contract terms. However, it can be concluded that the procedures are not used often, perhaps couple of time per year, and mainly as ADR procedures.

## C. Interviews conducted and literature reviewed

**Table 5: Interviews conducted for this study**

Organisation	Stakeholder type	Date
Hrvatska gospodarska komora (HGK)/Croatian Chamber of Economy	Business association	13 July 2016
Uprava za inspekcijske poslove u gospodarstvu/Directorate for Economic Inspection (Market Inspectorate)	National consumer enforcement authority	22 July 2016
Hrvatska regulatorna agencija za mrežne djelatnosti (HAKOM)/Croatian Regulatory Authority for Network Industries  (Telecommunications regulatory authority)	National regulatory authority	8 July 2016
Ministry of Economy	Ministry	22 July 2016
European Consumer Centre ECC – Croatia	European Consumer Centre	30 June 2016
Društvo za zaštitu potrošača Hrvatske – Potrošač/Croatian Union of Consumer Protection Organisations	Consumer organisation	4 July 2016
Hrvatska obrtnička komora (HOK)/Croatian Chamber of Trade and Crafts	Business association	18 July 2016
Hrvatska energetska regulatorna agencija (HERA)/Croatian Energy Regulatory Agency	National regulatory authority	6 July 2016
Ministry of Finance	Ministry	Not available
Hrvatska udruga za zaštitu potrošača/Croatian Association for Consumer Protection	Consumer organisation	19 July 2016
Ministry of Justice	Ministry	1 July 2016

**Table 6: Literature reviewed for country report**

Author/Source	Year	Title of publication
Mišćenić, Emilia	2013	The Harmonization of Consumer Protection Law with European Law in The Republic of Croatia
Mišćenić, Emilia	2013	Usklađivanje prava zaštite potrošača u Republici Hrvatskoj
Mišćenić, Emilia	2014	Consumer Protection Law
Josipović, Tatjana	2013	Enforcement Activity in Consumer Protection Regulation in Croatia
Government of the Republic of Croatia	2013	A Report on Application of a National Programme of Consumer Protection in the Period 2009-2012
Government of the Republic of Croatia	2013	A guide for the National Programme of Consumer Protection in the Period 2013-2016
Government of the Republic of Croatia	2013	The National Programme of Consumer Protection in the Period 2013-2016
Zlatović, Dragan	2009	Grupna tužba zbog nedopuštenog oglašavanja kao modalitet kolektivne zaštite trgovaca
Zlatović, Dragan	2014	Nepoštene poslovne prakse u hrvatskom, bosansko-hercegovačkom i slovenskom pravu
Pavillon, C.M.D.S.	2012	The interplay between the unfair commercial practices directive and codes of conduct



## 1. Study to support the Fitness Check of EU Consumer law – Country report CYPRUS

### 1.1. Unfair commercial practices and marketing

#### 1.1.1. Effectiveness of the UCPD in establishing a high level of consumer protection

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

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

The Regulator of the Competition and Consumer Protection Service, the body entrusted with monitoring compliance with and enforcing consumer protection legislation in Cyprus (hereinafter called 'the Regulator') considers the UCPD to be the most powerful legislation for the protection of the interests of the consumers. The Regulator also considers the principle-based approach to be effective. The Regulator issued a total of forty four (44) Decisions on the UCPD (or more accurately, the Cypriot law transposing it, namely Law 103(I)/2007). Thirty-eight (38) of those decisions involved an application of the principle-based approach of the Directive, something that shows that the Regulator does not hesitate to reach a finding of an unfair commercial practice, when the latter is not included in the black list. Six of those decisions involved use of a paragraph of the black list in addition to an application of the principle-based approach. Given that the total number of decisions involving a use of the black list is eleven (11), it seems that the Regulator often combines the black-list with the principle-based approach, thereby ensuring that even if the relevance or applicability of the black-list in a given case is disputed, the practice could still be justified as an unfair commercial practice. Moreover, there are cases in which the Regulator found an unfair commercial practice under both the general clause and the provisions dealing specifically with misleading actions and omissions (eg. 2016/16(ΑΠ), 24/10/2016, Alpha Bank Ltd). During the interview, the Regulator called for guidance on the application of the 'professional diligence' requirement in the general clause, which the Regulator described as abstract and/or vague. None of the forty one (41) Decisions of the Regulator involved a specific or detailed application of this particular requirement. A self-regulatory body interviewed also raised an issue with the 'transactional decision' requirement stating that it reduces the effectiveness of the law. Of course, according to relevant European Commission guidance, the concept of 'transactional decision' is quite broad and not limited to a purchase or payment. So, the issue raised by the self-regulatory body may be taken as an indication of the fact that the relevant concept is perceived to be much narrower than it really is.

Case law on the UCPD in Cyprus is very limited. More specifically, there is:

- One decision in the context of an interlocutory application that led to the issuance of a court order sought by a business against another which imported products bearing its trademark without authorisation. Law 103(I)/2007 has just been one of the laws comprising the legal basis of the application and is not in any way discussed or analysed in the relevant decision (C. A. PAPAELLINAS CO LTD v. YAKUMO ENTERPRISES LTD, Case no. 1962/2014);
- One very important decision by the Cyprus Supreme Court in the context of a criminal appeal. That case discusses in depth the maximum harmonisation nature of the UCPD and opines that a Cypriot law prohibiting sales and discounts except from during certain specified periods of the year goes beyond the UCPD and could not thus be applied against the defendants. The Supreme Court thus quashed the criminal conviction of the defendants based on that law and its ruling meant the liberalisation of sales in Cyprus (Ermes Department

Stores Plc and others v. Attorney General of the Republic, (2012) 2 C.L.R. 655);

- Two decisions of the Cyprus Supreme Court involving judicial review applications against the decisions of the Regulator. In the first, the Regulator refused to examine a complaint against practices employed by non-profit associations of doctors on the ground that such associations do not comprise 'traders'. The Supreme Court approved the judicial review application and citing CJEU case law (in particular, C-59/12), it opined that such associations do comprise 'traders' and any commercial practices they employ should be examined under the law transposing the UCPD (*Akis Ioannou v. The Republic of Cyprus*, through the Ministry of Commerce, Industry and Tourism, Case No. 136/2011). The second concerned an application for a preliminary ruling to the CJEU filed in the context of a judicial review against the decision of the Regulator to fine a trader for operating a multi-level marketing sales system contrary to point 14 of the black list. The decision relating to the judicial review application has not yet been issued but the application for a preliminary ruling has been rejected for reasons pertaining to the law governing such applications. (*AF MPOWER COMMUNICATIONS LTD and others v. the Republic of Cyprus*, through the Ministry of Commerce, Industry and Tourism, Competition and Consumer Protection Service, Case no. 88/2011).

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

The black-list is considered a very useful tool of application of the law by the Regulator but they think it should be reviewed or a mechanism of adding practices to the list should be introduced. This is because the Regulator faced many cases that were not falling within any of the paragraphs of the black list and the Regulator had to resort to the principle-based approach. Indeed, out of the total of forty four (44) decisions of the Regulator, only eleven (11) involved a use of the black list. Additionally, out of those eleven (11) decisions, only five (5) decisions involved a finding of unfairness *solely* on the basis of a paragraph of the black list. The view that there should be a mechanism of adding practices to the list is shared by other stakeholders such as the ECC and consumer protection associations. The latter as well as the Regulator pointed out that most consumer complaints refer to a refusal by traders to repair or replace a product in compliance with the two-year guarantee period of Directive 99/44/EC. It should perhaps be examined whether a relevant commercial practice could be added in the black list. A business association interviewed stated that it has been observed that certain traders do not state the dual price of products (the initial price and the discounted price) in sales periods. This is considered a common problem in Cyprus, hence a different law prohibits the omission of the dual price. This could be another practice that could be placed in the black list. As the black-list of the UCPD now stands (which does not include the relevant practice) it creates issues with regards to the compatibility of the Cypriot law which prohibits the omission of the dual price and thus goes beyond the provisions of the UCPD, which does not black list the relevant practice.

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

There are no rules concerning immovable property that go beyond the UCPD in Cyprus. As for financial services, some rules on advertising do exist in other statutes but those are not extensive (for more details see below Section 1.1.4 in this report). Some practical benefits however do arise particularly from the fact that those duties are specific to financial services and address specific commercial practices that are employed in the particular domain. Additionally, other supervisory authorities such as the Central Bank of Cyprus and the Cyprus Securities and Exchange Commission are entrusted with their application, something that may be translated into more effective

and/or rigorous enforcement. The law transposing the UCPD in Cyprus does not contain any additional rules for financial services or immovable property.

- 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 what 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?*]

There has not been an application of the UCPD in relation to environmental claims in Cyprus. There have been complaints however relating to advertised fuel-saving properties of fuel. The advertising was not sufficiently disclosing the conditions to which those fuel-saving properties were subject. The Regulator sent the fuel companies warning letters and instructions as to how to adjust that advertising derived from the UCPD. The fuel companies amended their advertising accordingly and as a result, no case has officially been opened against them.

- 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 your country rigidly?*]

This is answered in section 1.4.4 of this report.

- 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 in your country recognised new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted)?*]

This is answered in section 1.4.4 of this report.

- 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?*]

There is one active self-regulatory body, the Cyprus Advertising Regulation Organisation but it works totally independently from the Regulator and there is very little (non-institutionalised) co-operation between them. For more on this issue as well as for specific proposals as to how such actions can be improved, see below Sections 1.1.3 and 1.4.1 of this report. There are no well-developed co-regulation actions. The aforementioned self-regulatory body took an issue with the fact that Cyprus did not transpose Article 10, UCPD into Cyprus law something that harms the development of self-regulation and co-regulation in Cyprus. Indeed, in the relevant law, there is no provision corresponding to Article 10 of the UCPD.

The Regulator does not consider this particular self-regulatory body to be powerful enough because not all TV stations or other relevant advertising media are members of that organisation. Furthermore, its decisions are not binding on the parties and it cannot impose any penalties. The said body is not a qualified entity either so it cannot seek injunctions. Still the Regulator said that it co-operates with the said body when appropriate. On the other hand, the said self-regulatory body stated that businesses that are not its members often co-operate with it and that it will explore whether it can become a 'qualified entity' given that its decisions relating to advertising benefit the collective interests of consumers. Moreover, it often opens cases against businesses following complaints by consumers.

- 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?

Please refer to answer to second question of 1.1.1.

- Are there other measures that could improve the effectiveness of the UCPD in establishing a high level of consumer protection in your country? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

No best practices or lessons from Cyprus; the application of the UCPD is not particularly widespread, though the Regulator started increasingly to apply the particular measure. However, there are issues relating to the practical effectiveness of the law which mainly relate to the way it works in Cyprus rather than to the UCPD or even the transposition law as such. More specifically, the Cyprus Advertising Regulation Organisation referred to the Regulator's Decision 55/2015 against Camelot International Health Organisation (Cyprus) Ltd which led to an administrative fine against that trader in 2015. It highlighted the fact that despite the fine, the trader continued openly to employ the relevant commercial practice. It should be stated that this has to do with the fact that the Regulator has never utilised the injunctions procedure, which is discussed later in the report concerning the Injunctions Directive. Another complaint by stakeholders, namely the Cyprus Advertising Regulation Organisation and consumer protection associations, is that the administrative fines imposed are later reduced by the Minister; however from the list of all Decisions of the Regulator, only two are stated to have undergone a reduction of the initially-imposed fine following resource by the trader to the Minister in accordance with Section 12 of Law 103(I)/2007 which empowers the Minister to review the decision of the Regulator. The relevant list of the Decisions can be found on the website of the Regulator.<sup>1</sup> There is another Decision of the Regulator in which the initially imposed fine of EUR 200 000 was reduced to EUR 100 000 by the Minister. An application for judicial review of the decision of the Minister is currently pending (WIN AE v. Service of Competition and Consumer Protection and others, Case no.1827/2012, 26/3/2015).

It should also be stated that several of the imposed fines are not paid on time or there is delay in their payment due to the fact that traders file judicial review applications against the decision of the Regulator to the Cyprus Administrative Court in accordance with Section 146 of the Cyprus Constitution. While these judicial review applications are pending, the fine is often not paid by the trader, according to the Regulator. It should be stated however that the Regulator is entitled to immediate payment of the fine and could seek its recovery right away. Indeed, it is settled law in Cyprus that the filing of a judicial review application does not automatically stay the enforcement of the administrative decisions. Moreover, interim applications seeking a court order putting enforcement of the administrative decision on hold, only succeed in very special and rather rare circumstances as Cyprus case law (Praxoula Antoniadou Kyriacou v. Cyprus Broadcasting Corporation through the Attorney General Case No. 128/2013) clearly indicates. The Regulator does not however take any measures for the recovery of the unpaid fines if a judicial review application is pending. Understandably, this situation limits the deterring properties of the administrative sanctions and adversely affects the overall effectiveness of the law.

Finally, it should be added that in one very recent case, the Regulator has for the first time issued an order for the cessation of the unfair commercial practices in addition to the administrative fine it imposed (2016/16(ΑΠ), 24/10/2016, Alpha Bank Ltd).

<sup>1</sup> [http://www.mcit.gov.cy/mcit/cyco/cyconsumer.nsf/page51\\_gr/page51\\_gr?opendocument?OpenDocument](http://www.mcit.gov.cy/mcit/cyco/cyconsumer.nsf/page51_gr/page51_gr?opendocument?OpenDocument)

### 1.1.2. Effectiveness of the PID in establishing 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;

There is consensus amongst the stakeholders interviewed that consumers lack sufficient understanding of the function of the unit price. The Regulator has pointed out that various stakeholders have organised relevant seminars and information campaigns, yet at least one business association has emphasised the need for more effective consumer education on the meaning and function of the unit price. Consumer associations state that a few traders totally omit the unit price and in quite a few other cases, the unit price is stated but in very small print so that it can easily be missed. They have also pointed to examples of a misleading use of the unit price and specifically to the case where only the unit price (unaccompanied by the selling price) is stated so that consumers perceive it to be the (total) selling price.

One business association has said that inspections concerning the sufficient indication of prices by the Regulator have revealed certain issues, mainly with the obligation of a dual display of prices when products are on sale, a requirement that does not arise from PID but from a different Cypriot statute. According to the same business association, businesses tend to comply with their obligation to state the unit price and where omissions are observed, these are mostly accidental and are remedied in response to relevant observations of the Regulator without further official action against the trader being necessary. The Regulator stated that big businesses, especially supermarkets tend to comply with their obligations under the PID or co-operate towards compliance and indeed, neither a court decision (except one to a relevant judicial review application) nor a decision by the Regulator exists on the PID.

- 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?

All stakeholders agree that the unit price should be indicated per such 'performance' measurement especially where the weight or volume of a product is not relevant to its performance. This holds true for example in relation to detergents: concentrated detergents are of much smaller volume than non-concentrated ones, yet they may have the same or even higher performance in terms of number of washloads. The Regulator believes that this approach is appropriate especially in the light of the fact that consumers tend not to pay attention to the price per litre or understand the function of traditional unit price (as mentioned above). The Regulator observes however that if that approach is to be followed, it must be made a legal obligation so that it is used by all relevant traders. In a different case, the comparison function of such a unit price will significantly be weakened. Alternatively, both unit prices should be stated (traditional and 'performance') as one consumer association has suggested.

- The effects of the regulatory choices/derogations allowed by the Directive and applied by Member States. [*Note: Key aspects to consider are: Is the derogation relevant? Do companies make use of it? Are there consumer complaints because of this? If so, approximately how many per year?*]

Cyprus initially made use of this derogation but this has long ago been abolished, specifically by Article 2 of Law 136(I)/2005 amending the PID transposition law. Yet, the Regulator has disclosed that they are more lenient towards small businesses and inspections are mostly conducted in large stores such as supermarkets. There have been no consumer complaints. Yet, this could be expected given the existing consensus that consumers in Cyprus tend not to fully understand and thus, use the unit price.



### 1.1.3. Effectiveness of the MCAD in providing protection for businesses

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

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

There is absolutely no case law on the particular measure in Cyprus and no decision by the Regulator either. This is revealing of the limited role and thus effectiveness of the said measure. The Regulator explicitly stated that they have never made use of the particular measure and expressed the view that businesses are in much less need for protection, all focus having to be on consumer protection, which needs to be improved in Cyprus. They have received no relevant complaints either. This seems to be consistent with what a business association has stated, namely that businesses tend to settle any disputes between them (including disputes concerning comparative advertising) out of court and through their lawyers.

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

Please refer to answer in the previous question.

- The effects of the minimum harmonisation provisions on misleading advertising; [*Key aspects to consider are: Which national rules that go beyond the MCDA, 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)?*]

Cyprus has not extended the UCPD to B2B transactions and the view of the Regulator is that businesses do not require the same level of protection as consumers. 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. On the one hand, except those of its provisions that refer to misleading descriptions of the price (the term 'price' being defined in Section 2(1) as the amount that has to be paid by the *consumer*) the provisions of Law 5/87 do not seem expressly to be confined to B2C transactions. In the literature however, the said law is said to have been enacted to protect consumers.<sup>2</sup> Moreover, the limited case law existing on Law 5/87 consists of applications for preliminary injunctions by a trader against another (HABANOS SA κ.α. v. Vahe Zadoian, action no.7685/06, 16.5.07) and criminal prosecutions concerning trade descriptions used in the context of commerce (Stavros Mavrosavvas v. Cyprus Popular Public Co Ltd κ.α., Case no. 18567/12, 11/7/2014; Leontios Kostrikis v. 4MOTION AUTOMOTIVES LTD κ.α., Case no. 226/2014, 10/7/2015) without a clear distinction being drawn between B2C and B2B.

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

Given that Cyprus did not have in place any specific rules on comparative advertising prior to the law transposing the MCAD, the relevant full harmonisation provisions have only increased the level of consumer protection and have at least in theory provided the Regulator with a tool specifically designed to examine the fairness of comparative advertisements. Yet, it has not been used in practice as yet and the Regulator has stated that in their opinion, comparative advertising can be examined under the UCPD alone. However, the permissibility of comparative advertising is subject to Article 4 of

<sup>2</sup> Glykis and Anastasiou, Torts, in Andreas Neocleous & Co LLC (ed.), Introduction to Cyprus Law, 2010, pp.803-840 at p.833.

the MCAD, which lays down conditions of permissibility that are additional to the fairness of the advertising under the UCPD. The Regulator suggested that the comparative advertising rules of the MCAD should be brought within the UCPD so that this fragmentation of the relevant law ceases to exist. It is true that such an approach could significantly increase the effectiveness of the relevant provisions as by bringing them within a legislative measure that is frequently applied by the Regulator, the relevant move will render the said provisions more accessible to the enforcement body.

- 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;

In theory, the relevant rules do provide a comprehensive and potentially effective legal framework, yet in the absence of case law on the matter and given that the relevant rules have not been applied by the Regulator either, their practical effectiveness is difficult to assess or comment upon. Comparative advertising is not a particularly widespread mode of advertising in Cyprus and this may be a reason behind the limited use of the relevant rules. Another reason is that there is active self-regulation in the domain of advertising which deals with several relevant disputes. More specifically, the Cyprus Advertising Regulation Organisation examines disputes with regards to advertising and has issued some decisions involving comparative advertising. The relevant Organisation has provided six decisions that it has issued referring to comparative advertising. Three of them involved an application of Regulations 11 and 12 of the Cyprus Advertising Ethics Code and not the provisions of the MCAD. Importantly however, those rules of the Code seem to adopt the provisions of the MCAD verbatim. In two of these decisions, the Organisation found a violation of Regulation 11(ii) which corresponds to Article 4(c), MCAD. In another case, a violation has been found of Regulation 11 in general, yet a closer look at the decision reveals that it was mainly Regulation 11(ii) that was considered to have been violated. The Organisation has not raised any issues with regards to the effectiveness of the legal framework governing comparative advertising.

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

As already stated, the MCAD has not been utilised by the courts or enforcement authorities in Cyprus.

- Are there measures that could improve the effectiveness of the MCAD in providing protection for businesses (see also 1.1.6 below)? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

A good practice that is followed by the Cyprus Advertising Regulation Organisation in the context of self-regulation involves the use of so-called 'helppnotes' issued by the Organisation and distributed to all of its members. These are in the form of short notes that simplify the rules of the Ethics Code and aim at assisting their members in understanding and thus complying with the rules. One such 'helppnote' has been issued also for the Code rules on comparative advertising. Another good practice employed by the same Organisation is the offer of free 'copy advice', that is, a prior assessment of advertising material and the provision of an opinion as to what changes, if any, should be made to ensure compliance with the Code. Similar practices could be adopted by public authorities in relation to the MCAD (and also the UCPD).



#### 1.1.4. Effectiveness of current rules 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;

Business associations appeared to not have specific or detailed knowledge on the provisions of the UCPD and none raised any issues with cross-border trade. At a theoretical level, it appears natural that any disparities in the application of the principle-based approach will tend to have an adverse impact on cross-border trade.

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

Please see answer to previous question. This list, however, to the extent that it leaves too little to interpretation, is less likely to have an adverse impact on free movement. As it is amenable to a truly uniform application, it is more likely to facilitate free movement of goods and services.

- Whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade. [*Do the national differences play a role in a business perspective? Have they caused problems?*]

Cyprus law does not impose requirements with specific regard to the promotion and/or advertising of immovable property and therefore, the relevant minimum harmonisation derogation under the UCPD has no practical effect in Cyprus law. In relation to financial services, other laws specific to financial products do impose certain requirements relating to advertising but do not appear to be so extensive as to be able to have any (substantial) effect on cross-border trade. More specifically, Section 44 of Law on Consumer Credit (Housing loan agreements and Hire-purchase agreements), Law 39(I)/2001 requires that advertisements contain information on the APR and on any restriction to the availability of the credit facility. Section 40, Law 39(I)/2001 requires that certain basic information regarding the credit agreement are communicated on the first page of a credit agreement and Section 39, Law 39(I)/2001 requires that any document informing about or approving a housing loan application contain certain warnings such as that of the possible loss of mortgaged immovable property in case the loan installments are not paid in accordance with the agreement. Furthermore, Section 6(1) of the Business of Credit Institutions, Law 66(I)/1997 prohibits any advertising or promotion aiming at convincing people to make deposits in institutions that are not 'authorised credit institutions' under the relevant law, yet Section 6(3) of the same law specifically clarifies that this prohibition does not affect the movement in Cyprus of newspapers or magazines that contain advertisements of financial institutions operating abroad. Additionally, Chapter C of Investment Services and Activities and Regulated Markets Law, Law 144(I)/2007 contains provisions for the protection of investors. Article 36(1) imposes general duties of professional diligence and non-misleading advertising that do not go beyond the UCPD (Article 36(1)(a)). It however also imposes more specific information duties (Articles 36(1)(b) that mostly adjust the UCPD to the particularities of the financial domain rather than extending the said measure. Additionally however, it lays down obligations to receive information from potential investors, amongst others, as to their knowledge and experience in relation to investment so that the investment firm can recommend the appropriate investment product (Articles 36(1)(c)).

The interviews of business associations led to no information regarding the existence of barriers to cross-border trade.

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;

As already stated, there is no experience on the application of the MCAD in Cyprus.

- Whether the minimum harmonisation character of provisions on misleading advertising represents a barrier to cross-border trade;

In theory yes, given that minimum harmonisation effectively means greater disparities in the laws of the various member states, but again, there is no experience on the application of the MCAD in Cyprus.

- 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;

This is correct, as the fully harmonised provisions effectively mean that a comparative advertisement that complies with the law in Cyprus can freely move within the EU as it is more likely to comply with the laws of the rest of the Member States. Though as said, the Regulator has not made use of the comparative advertising rules of the MCAD, the Cyprus Advertising Regulation Organisation is making use of identical provisions existing in the Code of conduct it applies. The existing full harmonisation in this area renders the role of the relevant Organisation, especially its free copy advice service described in Section 1.1.3 of this Report, which is particularly important as businesses can benefit from it in relation to advertisements that they intend to address to consumers in more than one Member States.

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

Theoretically yes. However, with B2B relations comprising an area that is rather 'neglected' by stakeholders in Cyprus, the lack of cross-border enforcement mechanism could not be regarded as one of the most important barriers to cross-border trade. In other words, disputes between businesses with regards to advertising (especially cross-border ones) do not comprise an acute problem in Cyprus and therefore, there is not a pressing need for a relevant enforcement mechanism.

#### 1.1.5. Interplay amongst UCPD information requirements according to Article 7(4) with the information requirements in the horizontal consumer law instruments

Regarding the information requirements according to Article 7(4) UCPD ("invitation to purchase") in the advertising stage, please analyse:

- The level of awareness of traders as regards information requirements at the advertising stage, as in particular demonstrated by their practical application; [*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?*]

The general impression of the Regulator is that traders are not fully aware of these requirements and some of them omit to provide all information required by Article 7(4). The main characteristics of the product and the price are usually provided but the same is not true of the right of withdrawal when applicable. However, the Regulator has issued two decisions on the basis of Article 7(4) which corresponds to Article 6(4) of the Cypriot transposition law. Both of them found a violation of Article

6(4)(c) amongst others, that is, an omission to state the price. These cases did not involve standard consumer products (or goods) but advertisements communicated to consumers by SMS regarding a telecommunication service (voicemail service) in the Case 19/2014 and a dating-line service in the Case 07/2014. Importantly, none of the relevant advertisements stated the price of the relevant service and therefore, they should not have been considered as invitations to purchase triggering the relevant provision (see definition of 'invitation to purchase' in Section 2 of the Cypriot transposition law which is identical to that in Article 2(h), UCPD). As a result, they should have been decided based on the general provision on misleading omissions, namely Article 6(1) (corresponding to Article 7(1), UCPD) alone.

The Regulator agreed that, despite the existence of more detailed duties in the CRD, the information duties of Article 7(4) are considered useful as they target the specific stage of advertisements (that qualify as invitations to purchase) whereas the CRD imposes broader pre-contractual duties which can be complied with by traders at any stage before contract conclusion.

- 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?

Given that the information duties of Article 22 of the Services Directive refer to all information that should be available to service recipients in general and do not target the advertising stage, a more direct overlap exists between the UCPD and the E-Commerce Directive. Article 6 of the latter measure does, to some extent, overlap with Article 6 of the UCPD. The Regulator does not consider this to be a problem noting that the E-commerce Directive applies to online traders only whereas the UCPD applies to all traders. Yet, it should be stressed that given that the service (the Industry and Technology Service of the Ministry of Energy, Commerce, Industry and Tourism) that is entrusted with the application of the E-commerce and Services Directives is different from the one responsible with the application of the UCPD, there may be co-ordination issues that tend to increase costs. Costs can also arise for businesses, as this fragmentation in advertising law requires resort to and review of multiple laws and regulations for reliable advice as to the compliant nature of advertising to be offered to businesses.

#### 1.1.6. Relevance for business-to-business transactions

Regarding the area of unfair commercial practices/marketing, please analyse:

- 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 cross-border trade;

Business associations did not show any particular concern in relation to cross-border trade and academic literature on the subject is virtually non-existent.

- 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;

It is appropriate to keep separate legal regimes as the needs of the average consumer are certainly different from those of the average business. Yet, the two regimes can be aligned for example by including a provision on misleading omissions in the MCAD. It arose from the various interviews that business protection against unfair commercial practices is not considered a pressing need in Cyprus. As a business association noted, businesses usually solve relevant disputes between themselves or through their lawyers.

- 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 also cover unfair commercial practices during and after the transaction;

This depends on the level of protection that is intended to be afforded to businesses. If it covers all stages, then the relevant regime will be more aligned with the regime for B2C but would perhaps mean taking what stakeholders would consider an overly protective approach for businesses.

- Whether there is a need to have a black-list of practices in the business-to-business marketing area;

Again this depends on whether there is experience on a sufficient number of unfair practices that are commonly utilised in the B2B marketing arena. If such unfair practices do exist, a black-list should be included as it is a very useful tool of application of the law that facilitates the tasks of enforcement authorities and thus, improves the effectiveness of the law, as the Regulator has confirmed in relation to the UCPD. One unfair practice in the context of B2B relations concerns trademark registration. More specifically, when a business (or a professional party) files an application for the registration of a trademark, businesses dealing with the administration of trademarks somehow find out its details and the fact that it has filed a trademark application and send to the relevant business marketing material requesting the payment of fees for the taking up of the administration of the trademark. This marketing material however appears as an official notice coming from the official authority to which the trademark application has been submitted. Such practices would deserve a place in a relevant black list.

- What should be the enforcement cooperation mechanism in the business-to-business marketing area;

Enforcement cooperation mechanisms could be injunctions and perhaps also administrative fines, the latter for cases of repeated (and serious) violations of the law.

- Whether there is a need to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive;

No. Standard contract law remedies should be considered sufficient for businesses. A different approach would perhaps comprise a dramatic step towards blurring the line between businesses and consumers or treating businesses the same as consumers.

- Whether there is a need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive.

No such need arose from stakeholder interviews.

### 1.1.7. Relevance of contractual consequences of unfair commercial practices

Please analyse whether there are in your country:

- 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;

A breach of the law transposing the Unfair Commercial Practices Directive in Cyprus is not associated with any contractual consequences and there is also no private right to seek compensation. This is considered a major gap in the law by the majority of stakeholders. However, the Contract Law, Cap.149 contains provisions on the avoidance of the contract. More specifically, Sections 14 to 20 render a contract voidable if it has been concluded as a result of coercion, undue influence, fraud or misrepresentation.

- Any case law (enforcement decisions, court rulings) providing for such consequences;

Given the absence of legal provisions specifically linking a breach of the UCPD to contractual consequences, there are no relevant enforcement decisions or court rulings. Court rulings do exist however on the aforementioned provisions of Cap.149 on the avoidance of contracts. A ruling by the Cyprus Supreme Court (Ioannou Arestis Michael v. Annas Andrea Charalambidou (1998) 1 C.L.R. 555) found a transaction involving immovable property voidable on the ground of undue influence. The ruling made it clear that the vitiating factor of undue influence is relevant not only in the context of special relationships (such as between spouses) but also where the parties are in no special or close relationship. The difference is that in the latter case, the burden of proving undue influence is on the party alleging that his or her consent has been given as a result of undue influence while in the former case it is on the party who benefited from the transaction to prove the absence of undue influence. Thus, a consumer can allege undue influence by a trader in order to avoid a contract but the consumer will bear the burden of proving that his or her consent has been obtained as a result of undue influence exercised by the trader. Allegations of undue influence are frequently put forward by borrowers in the context of legal proceedings with banks whereby they seek to avoid their obligations under credit agreements, however these allegations are often rejected by the courts (ALPHA BANK LTD v. Philippou Raptopoulou and others, Civil Action no. 2256/04; ALPHA BANK LIMITED v. MOUNTIS ELECTRONICS AND SYSTEMS (CYPRUS) LTD and others, Civil Action no. 983/06; NATIONAL BANK OF GREECE (CYPRUS) LTD v. ZOES (ZOOULAS) EFSTATHIOU Lambros Nicolaides genus and others, Civil Action no. 2082/08; Martha Litra v. Ellinas Finance Ltd and others, Civil Action no. 7417/2002).

Misrepresentation has been relied upon in a case involving the sale of a car but the plaintiff (consumer) failed to prove his case and thus, his action failed (Peter John Franco Carlevero v. P. Limniotis & Sons Ltd, Civil Action no. 610/2004). In another case involving the sale of a car to a consumer, the consumer succeeded in avoiding the contract both on the ground of undue influence and on the ground of fraud; the seller sold the consumer a car involved in an accident (which he previously repaired) and represented it to the consumer as one which had never been involved in accident before and had no mechanical or other problems (Valentina Koursoumpa v. Marios Satsias, Civil Action no. 189/2005)

- Whether there is, based on past experience in your country, a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

Given the existence of Sections 14 to 20, Cap.149 mentioned above, there is no acute need to develop contractual consequences linked to the use of unfair commercial practices. A contract entered into as a result of an aggressive practice can potentially be avoided by operation of the provisions of Cap.149 on coercion and undue influence. Likewise, a contract entered into as a result of a misleading practice can potentially be

avoided by operation of the provisions of Cap.149 on misrepresentation or fraud. Indeed, under certain circumstances, even misleading omissions can qualify as fraud or misrepresentation under Cap.149. It is worth noting that according to Section 18(b), Cap.149, any breach of duty that (even unintentionally) misleads another to his or her detriment qualifies as misrepresentation rendering the contract voidable. One such duty can obviously be the duty of traders to provide to consumers all material information imposed on them by Section 6(1) of the law transposing the UCPD (corresponding to Article 7(1) of the UCPD).

On other hand, the relevant contract law provisions which apply to B2B and B2C contracts alike are subject to certain limitations. For example, by virtue of Section 18(3), in case of misrepresentation or omission amounting to fraud, the contract is not voidable if the party complaining about the misrepresentation or omission could discover the truth by exercising usual care. If the breach of the UCPD (which is a B2C-focused measure and thus relies on the notion of the consumer as the weaker party) were linked to contractual consequences, it is likely that a more consumer-friendly approach would be followed that does not burden the consumer with duties of attempting to discover the truth.

Moreover, the fact that the UCPD is not specifically associated with a right of private action is considered as a major disadvantage by almost all interviewed stakeholders. This means either that the relevance of the above-discussed provisions of Cap.149 is not fully appreciated by stakeholders who are not lawyers after all or that a consumer-specific right of private redress, (be it contractual or tortious) is considered by them to have the potential of increasing the effectiveness of the UCPD and hence, the level of consumer protection.

## 1.2. Contract conclusion and performance

### 1.2.1. Effectiveness of the current rules in establishing 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 Unfair Contract Terms in Consumer Contracts Law, Law 93(I)/96 transposes into Cyprus law, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts largely verbatim except from a couple of very recent amendments to the Cypriot law which are not derived from the Directive. Law 93(I)/96 has first appeared in case law in around 2007,<sup>3</sup> that is, ten years after it passed into law. Case law does exist but is rather limited and reveals that there are gaps in the understanding of the philosophy and aim of the law on the part of courts and lawyers representing consumers and also limited knowledge or at least, use of the relevant case law of the CJEU which does not find representation in Cypriot case law.<sup>4</sup>

It is noteworthy that no court ruling involves a thorough application of the principle-based approach in Section 5(1), Law 93(I)/96 or an application of all relevant factors listed in Section 5(2), Law 93(I)/96 (corresponding to Article 4(1), UCTD) and Section 5(3), Law 93(I)/96 (corresponding to Recital 16, UCTD, which refers to the factors relevant to the requirement of good faith). The few relevant Cyprus Supreme Court judgements exhaust the application of the test in a few lines stating that there has not

<sup>3</sup> Bank of Cyprus Public Company Limited v Vasileiou Koupa and others, legal action no. 4162/06.

<sup>4</sup> Christiana Markou, "Consumer Contracts an Unfair Terms: the Cypriot Reality", Conference 'Civil law and economic crisis', 8/5/2015, European University Cyprus, Cultural Centre. In the case Vasileiou Koupa, supra n.11, the court said that because the consumer signed the contract and did not dispute his or her signature, the consumer is estopped from putting forward allegations with regards to the existence of unfair terms in the said contract.



been any bad faith or undue influence in agreeing upon the terms and that therefore, the terms cannot be regarded as unfair (*Syrimi v. Pancyprian Finance Public Co Ltd* (2010) 1(B) C.L.R. 1131). This ruling has been followed by the Supreme Court in subsequent cases mainly concerning investment plans and contracts of loan financing the participation of investors in the plan and suggest that in the absence of specific evidence of bad faith (or absence of good faith), any allegations relating to unfair contract terms are rejected by Cyprus courts (*Gregoriou Gregoris v. Euroinvestment Finance Ltd*, (2011) 1 C.L.R. 2229; *Giorgos Koullapis v. National Bank of Greece (Cyprus) Ltd*, Appeal No. 141/2010; *Antonis Georgiou v. ELLINAS FINANCE LTD and others.*, Appeal No. 351/2010). Another decision by the Cyprus Supreme Court concerned a standard loan agreement and term therein giving the bank an unfettered right to terminate the agreement at any time and without notice (*FRAKAPOR COURIER LTD, ΠΡΩΗΝ FRAKAPOR COURRIER LTD κ.α. v. Bank of Cyprus*, Civil Appeal no. 9/2011, 15/6/2016). The argument about the unfairness of the term has again been rejected on the ground that the plaintiffs-appellants have not put before the court any evidence of bad faith. Remarkably, this is a decision in which the court did inquire into the unfairness test of the law by reference to the corresponding provision in the UCTD while the plaintiffs-borrowers were a company, i.e., not a consumer meaning that the relevant law was inapplicable and should not have been examined at all.

Also lower courts confine themselves to a very quick reference to the relevant law stating that in the absence of an allegation that the consumer entered into the contract involuntarily, the law can afford the consumer no defence to claims by financial institutions (*National Bank of Greece (Cyprus) Ltd v. Theokli Livadioti estate companies Ltd and others*, Case No. 1973/2012)

Various rulings of lower courts reveal limited understanding of the law. More specifically, there are rulings opining that from the moment the claimant does not dispute their signature on the agreement or because they knew of the terms beforehand and did not seek to negotiate them, they are estopped from raising an issue of unfair contract terms (*Bank of Cyprus Public Company Ltd v. Vasiliou Koupa and others*, Case No: 4162/06, 23 of January, 2007; *Nicoletta Evdokimou, minor via parent and natural guardians of Evdokimou and Marias Evdokimou v. PASCAL EDUCATION [LARNACA] LTD*, Case No: 30/2010, 30/4/2014).

Quite a few rulings have been given in the context of applications by financial institutions seeking registration of an arbitration award with the respondents often alleging that the arbitration clause that resulted in the dispute being decided by an arbitrator is unfair. These allegations have invariably been rejected with the courts which have emphasised that any such allegations should have been raised in the context of an appeal against the arbitration award (or decision) under Section 52, Law 22/85 and not in the context of an application for the registration of the arbitration award in relation to which there are only limited grounds of objections (*Limassol Co-operative Savings Society LTD v. YIANNOS HADJIMITSIS MOTORS LIMITED κ.α.*, General Application no.639/14, 18/5/2016; *Limassol Co-operative Credit Society Ltd, v. PANIKOS STYLIANOU and others*, General Application no. 59 /15, 29/10/2015; *Co-operative Central Bank LTD v. Sotiri Kaplani and others*, General Application no. 158/2014, 2/4/2015).

Several applications seeking a reference of the case to the CJEU for a preliminary ruling on the application of the unfair contracts terms law have been filed both in the context of appeals against arbitral decisions and in the context of applications for registration of arbitral decisions but have been rejected on the ground that they did not meet the conditions governing such referrals to the CJEU (*Limassol Semi-serine Co-operative Credit Society v. Phani Michael and others*, general application no: 240/13, 27/4/2015; *Aggeliki Taki Charalampous and others v. Limassol Co-operative Savings Society Ltd*, Joint Applications/Appeals, 115/13, 114/13 363/13, 25/2/2016).

Overall, Law 93(I)/96 has successfully been invoked only in very limited cases before the courts of Cyprus something that indicates that it is rather of limited effectiveness. There only appears to be one court ruling (by a lower court) which found a contract term unfair and thus non-binding (*Menelaos Herakleous*, case no 492/08, 12/1/2009)



and another more recent one in which a lower court has granted an interim injunction having adopted the CJEU in C-26/13 Kasler and Rabai. This case was against the bank and concerned a loan in Swiss-Francs (Christakis Chysostomou and others v. Hellenic Bank Public Company Ltd, Civil Action no. 4274/15, 30/9/2016)

The Regulator has issued a total of fifty (50) decisions on the law transposing the UCTD (Law 93(I)/96). All of those decisions however were issued between 2014 and 2016, something that confirms the fact that all of the previous years the law was not being utilised. It is worth noting that forty seven (475) of those decisions concerned terms in contracts for the sale of immovable property, two (2) concerned terms in a loan agreement between borrowers and a bank, and another one involved terms in a telecommunications contract between an electronic communications service provider and its customers, which is discussed below in this report. All of the decisions involved a finding of unfairness, however the Regulator has never sought an injunction through filing a relevant court application and therefore, these decisions have not been of any practical effectiveness. This is reinforced by the fact that there is also no administrative sanction that is imposed on traders when they are found to have used unfair contract terms. In fact, the Regulator had been under the impression that its decisions with regards to unfair contract terms comprise administrative decisions having immediate and binding effects on the party against which they were issued who would therefore have to comply with them. The Cyprus administrative court however has recently ruled that Law 93(I)/96 (transposing the UCTD) and in particular Section 9 which lays down the procedure for the protection of collective consumer interests, does not confer on the Regulator a power to decide on the unfairness of contract terms but only to ask a civil court, namely the competent District Court (through an application for an injunction) to do so, should it consider that a contract term is unfair. Accordingly, the administrative court has, in the context of that ruling, rejected an application for the judicial review against the Decision 56/2015 of the Regulator on the ground that the said Decision does not comprise an administrative action or decision with immediate and binding effects and is thus not amenable to judicial review (ALPHA BANK CYPRUS LTD v. Cyprus Trade, Industry, Tourism and Consumer Protection of the Ministry of Energy, Commerce, Industry and Tourism and others, Case No. 1549/15, 30/6/2016).

It should be added that the Regulator emphasised the fact that the concept of 'good faith' is an unknown legal concept in common law countries such as Cyprus and this presents difficulties in the application of the unfair contract terms law. Indeed, one notices that in many of the older decisions of the Regulator, good faith is mentioned but never analyzed or specifically applied. More recently however, the Regulator took the view that the content of the requirement of 'good faith' is the one adopted in continental civil law countries such as Greece and Germany and has thus started to apply the relevant requirement by citing rulings of Greek and German courts. This approach is most obvious in the Decision 56/2015 against Alpha Bank Ltd. The Financial Services Ombudsman stated that it follows the same approach, i.e., resorting to the principles of good faith as exemplified in civil law systems. In the literature, it is stated that the relevant requirement should indeed be interpreted by reference to European and continental standards, an approach that is also adopted by English law.<sup>5</sup>

Finally, it should be stated that unlike the Cyprus courts, the Regulator frequently refers to and relies on the relevant case law of the CJEU.

- 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 your MS? Does this work in practice or are there problems?*]

<sup>5</sup> Polyvios Polyviou, The Law of Contracts, Kyriakes and Kyprologikes Publications House, 2014 at pp.441-444.

Case law does not reveal a substantial use of the indicative list by the courts. However, in one case, a term allowing the bank to alter the interest in a loan agreement has been found not to be unfair despite the fact that it was too general and vague (BANK OF CYPRUS PUBLIC COMPANY LTD v. ANDREA ANDREOU CHR. alias ANDREA CHR. ANDREOU and others, case no. 1331/2008, 30/10/2014). The court's opinion has been influenced by para 2(b) of the Annex to the law (corresponding to para 2(b) of the Annex to the UCTD). As paras 2(a) and (b) of the Annex tended to be perceived as 'exceptions from unfairness' to the benefit of financial service providers whose relevant contract terms tended as a result to be considered permissible, Law 136(I)/2014 amended Law 93(I)/96 thereby deleting paras 2(a) and (b) of the Annex. The fact that the said paragraphs were considered as inappropriately lowering the level of consumer protection in the domain of financial services is explicitly stated in the said amending law which deleted and removed them from the main law.

By contrast, the Regulator makes heavy use of the indicative list. More specifically, the Regulator issued a total of fifty (50) decisions involving the UCTD and all of them involved an application of the list by an operation of which several terms at issue were found to be unfair. The Regulator considers the list as a very useful tool in the application of the unfair contract terms law, though the Regulator appreciates that it is not a black list

- 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; [*Note: If a black/grey list exists in your country, key aspects to consider are: How does the list work in practice? Does it make a difference to have such a list?*]

As the UCTD has been transposed almost verbatim in Cyprus, the list of terms in the Cypriot transposition law is stated to be indicative just as in the Directive.

- 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: In your country, have the effects of court decisions establishing the unfairness of an unfair term been extended to all contracts of the trader concerned or to the contracts of any other trader containing such a term? If so, how does this work in practice? What are the impacts on businesses? If there are no such effects of court decisions on unfair terms: what are the effects of this situation?*]

In the few cases where a term has been found by the court to be unfair (this research only located one such case, UNIVERSAL BANK PUBLIC LTD v. HERACLEOUS MENELAOS, Case No.: 4923/08, 12 January, 2009), no extension to any contract other than the one involved in the particular case has been made. The matter is not expressly tackled in the law and the cases finding a term as unfair are first instance rulings and not ones of the Cyprus Supreme Court. Rulings of the Cyprus Supreme Court would operate as binding precedent to be followed by courts dealing with subsequent similar cases, yet given the 'good faith' requirement which requires an inquiry into the specific facts of each case, it is unlikely that a previous court finding of unfairness will lead to similar or even, identical terms automatically being found unfair in subsequent cases.

The above observations refer to findings of unfairness in the context of civil legal actions and not to findings of unfairness in the context of an injunction application. As for the latter, the Regulator has confirmed during the interview, that there has never been an injunction issued for unfair contract terms. However, the law allows for such an injunction to be sought against multiple traders and even associations of traders (Article 9 (6), the Unfair Terms in Consumer Contracts Law 93(I)/1996).

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

In case law, the contractual transparency requirements contained in Section 7, Law 93(I)/96 have only been applied once and that was in the only case in which the term has been found to be unfair and non-binding, *UNIVERSAL BANK PUBLIC LTD v. HERACLEOUS MENELAOS*, Case No. 4923/08, 12 January, 2009. It was about a term affording the bank the freedom to increase the interest charged in the context of a loan agreement. The bank relied on that term claiming an interest higher than the one stated in the agreement. The court opined that the term was so vague and unclear that the court could not give a clear interpretation of it. As a result, the court found the term to be non-binding, something that meant that the bank was only entitled to the interest stated in the agreement (9%) and not to the interest as increased by the bank in reliance on the aforementioned relevant term (11.25%).

The Regulator on the other hand applies the contractual transparency requirements in the majority of its decisions involving an application of the UCTD and considers a violation of them as rendering the relevant terms as 'non-transparent' (see for example, 2016 /62(KP), 21/01/2016, *Alpha Panareti Public Ltd*). It should be stressed out that the Regulator expressed uncertainty over whether a violation of the requirements of transparency amount to unfairness or is just a factor to be taken into account when applying the principle-based test of the law. However, in one of its recent decisions, namely Decision 56/2015 against *Alpha Bank Ltd*, the Regulator has adopted the view of the Highest Greek Court that the lack of transparency leads to a significant imbalance contrary to the requirement of good faith.

- 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. [*Note: Question only relevant for MS that have put in place extensions of application of UCTD*]

No such extension has been put in place in Cyprus.

- 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?*]

As it arises from the answers to the previous questions, there is not much evidence as to how the sanction of non-binding terms works in practice but the practical effect of the 'unfairness' finding of the court in *HERACLEOUS MENELAOS*, Case No.4923/08 is described in the answer to the fifth question of section 1.2.1 of this report. As for whether the national courts take up the active role imposed by the CJEU, the answer is that they do not. Except the one case in which the court found a term to be unfair, there is no other case in which the court has examined the fairness of contract terms on its own initiative. On the contrary, there is case law indicating that the courts seem to take the view that this is a matter that cannot be examined if not raised. These are cases in which the court refused to examine the issue of unfairness because it was not pleaded in the appeal notice or because in the context of an application to set aside a judgement in default against the applicant, this applicant has not adequately justified or given enough details of the alleged unfairness (*Kallikas Yiannakis v. Hellenic Bank Ltd*, (2010) 1 CLR. 1238; *HELLENIC BANK PUBLIC COMPANY LTD v. ANDRONIKOU EVAGORA ANDRONIKOU* alias *ANDRONICOS EVAGORA* and others., case no: 3715/12, 19/12/2013). Moreover, the CJEU case law imposing an *ex officio* invocation of unfairness does not find any representation in Cyprus case law (it is not mentioned at all), except in the ruling of the administrative court discussed in point 1 of section

1.2.1 of this report; in discussing the law transposing the UCTD (Law 93(I)/96) in the context of deciding an application for judicial review of a relevant decision of the Regulator, the administrative court simply referred to CJEU case law referring to the ex officio role of courts in invoking unfairness.

It should be stressed out however that it is a deeply-rooted civil procedure rule in Cyprus that the hearing must take place strictly in accordance with the pleadings and that the courts cannot examine issues not pleaded by the parties (Courtis and others v. Iassonides (1970) 1 C.L.R. 180). The CJEU guidance that says otherwise is not sufficient as the relevant case law is not put before the courts by the parties and is thus easily missed by the courts. In a future amendment of the Directive, the obligation of the courts to examine the fairness of contract terms in their own initiative should be made express so that it appears expressly in the national (transposition) laws.

As already stated, there is no administrative remedy in this area for consumers.

- In a forward looking perspective: Are there other measures that could improve the effectiveness of the UCTD in establishing a high level of consumer protection in your country? Would a graphical presentation model improve the readability and comprehension by consumers of the T&Cs? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

No best practices in Cyprus. Cyprus lawyers and judges would appreciate education initiatives designed to update them with regards to the application of the UCTD especially given that the 'fairness' control of contract terms in Cyprus solely derives from the UCTD and there is therefore no (general) experience with the use or application of similar legal tests. As for consumers, the emphasis should indeed be placed on how terms and conditions (and other information) is presented to them so that the effectiveness of the various information and transparency duties imposed by EU law can be improved.

#### 1.2.2. Effectiveness of the current rules 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 disparities have an impact on cross-border trade; [*Key aspects to consider are: Do national differences in the application/implementation of the Directive play a role for businesses? Have these differences led to changes in their business strategy? Have these differences caused problems?*]

No relevant evidence exists for Cyprus though given that the law has only recently started becoming known and being utilised, it is unlikely that issues relating to its uniform implementation across the EU have affected the behaviour of businesses or consumers.

- 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;

Please see answer to the previous question.

- 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.

Please refer to the answer to the first question of 1.2.2. It should be added however that on a theoretical level, any disparities between national laws relating to trade tend to adversely affect cross-border trade, in the case of the UCTD, because it will require a trader to draft and use different contracts depending on the Member State in which he or she intends to sell his or her product. Alternatively, traders will have to deal with the uncertainty regarding whether their contracts will be considered legally-compliant and acceptable in a given Member State, something that tends to discourage freedom of movement.

### 1.2.3. Relevance for business-to-business transactions

Regarding the area of contractual fairness and in relation to the Unfair Contract Terms Directive, please analyse:

- Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;

Given that the use of the UCTD is still not very mature even in the B2C context, there is acute need to improve the utilisation and practical effects of the law in that context and no discussions took place on any need to strengthen the protection of businesses. The stakeholders interviewed expressed no particular views on this matter.

- 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;

There are no factors making this particular system of protection not appropriate for B2B transactions.

- 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;

No, as according to stakeholders, this would be a rather paternalistic approach. The Regulator is generally of the opinion that businesses are not in any particular need for protection. Moreover, the said approach could also be considered to entail an inappropriate intervention in the freedom to trade and conduct business.

- 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;

Credit agreements can contain terms that could be presumed to be unfair and these include vague interest alteration clauses, terms conferring on the banks the right to terminate the contract at any time and without reason, and terms that permit banks to calculate the annual interest in the context of a loan agreement by taking a year to consist of 360 instead of 365 days. Potentially unfair contract terms also exist in agreements concerning the listing of businesses in magazines or websites comparable to the Yellow Pages. Those often contain terms providing for the automatic renewal of the listing in return for a fee – terms which are in fine print and lack transparency so that the business is surprised when the company administering the magazine or websites asks to be paid the listing fee and claims to be entitled to it based on such "hidden" terms.

- Whether there is a need for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive;



The need is certainly not as acute as in B2C transactions. However, if the protection of the UCTD were to be extended to B2B transactions, such transparency requirements must inevitably be part of the overall unfairness test.

- Whether an extension of the Unfair Contract Terms Directive to B2B transactions can bring benefits for cross-border trade;

It could bring benefits only because certain Member States do have a system of protection comparable to the UCTD for B2B transactions. The remedying of this lack of uniformity would certainly benefit cross-border trade.

- Whether the consequences of such an extension would have an effect on innovation by or market opportunities for SME providers/suppliers;

Yes, as it would certainly strengthen the position of SMEs vis-à-vis large enterprises.

- Whether the benefits of extending the scope to business-to-business transactions would exceed the negative consequences of such an extension.

This question is not amenable to a simple answer as it would require in-depth economic and other analysis.

### 1.3. Injunctions

#### 1.3.1. Effectiveness of the current rules in establishing a high level of consumer protection

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

- To what extent is the use of the injunction procedure in your country contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment?<sup>6</sup>

The injunction procedure has never been utilised in Cyprus. There is no relevant case law. The Regulator has asked the attorney-general's office which represents the government to file one such application for an injunction against a bank based on its Decision No. 56/2015 according to which fifteen contract terms in its credit agreements have been found unfair under the law transposing the Unfair Contract Terms Directive. The first such application is, according to the Regulator, expected to be filed soon. The other qualified entities in Cyprus are two consumer protection associations, both of which have been interviewed and have stated that they do not possess the resources or necessary know-how to proceed with any such application to the court. Most of the consumer complaints received by them are referred to the Regulator.

- What measures in your national legislation on injunction procedure are considered to be particularly effective, if any: measures regarding the cost of the procedure, the 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?

As already mentioned, the injunction procedure has not been tested at all in Cyprus. Yet, according to the Regulator, all of the above measures are of particular

<sup>6</sup> 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.

effectiveness. It should be added that the summary procedure is of utmost importance and can be regarded as particularly effective. Legal proceedings in Cyprus are notoriously slow and thus comprise a weak incentive for compliance with the law. The summary procedure required by the Directive ensures that injunctions will be able to be secured fast, something that understandably also increases the effectiveness of the prior consultation process. The effects of the injunction order are also particularly effective. Section 6 of the law transposing the Injunctions Directive states that a violation of an injunction amounts to a contempt of court pursuant to the Courts Law, Law 14/60. Section 42 of Law 14/60 empowers the court, amongst others, to impose a fine or imprisonment on persons who have intentionally failed to comply with a court order and also to order the payment of compensation to any person who suffered damage as a result.

- Has your country extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunction Directive? If yes, what are the additional consumer rights covered?

No it has not.

- Analysis of the obstacles to the effective use of the injunction procedure, in particular by analysing which progress in removing obstacles has been made and/or new difficulties that have emerged in your country since 2012.

Please see answer to first question in this section of the report where it is stated that the procedure has not yet been utilised in Cyprus. There have been three amendments to the original law, the latter having taken place in 2015. All three of them merely purported to add a law into the Annex I to the law. The 2008 amendment added the unfair commercial practices law, the 2010 amendment added the law transposing the Services Directive and the 2015 amendment added Law 133(I)/2013 transposing the Consumer Rights Directive.

- In a forward looking perspective: Should the coverage of the Injunctions Directive be extended (by including additional legislation into Annex I to the Directive)? If so, which EU legislation should be included? Are there other measures that could improve the effectiveness of the ID in establishing a high level of consumer protection? Should the scope of the Injunctions Directive be extended to the protection of collective business' interests? Are there best practices in your country that could be relevant for other countries and considered as model for the injunction procedure at EU level?

No need for an extension of the Injunctions Directive by including additional legislation into Annex I has been identified by stakeholders, yet the said Annex I could potentially accommodate all EU legislation in the area of consumer protection.

The measures that are primarily needed to improve the effectiveness of the ID in establishing a high level of consumer protection in Cyprus are primarily measures aiming at the education of the Regulator, qualified authorities and the attorney-general's office on the injunction procedure as such education is understandably a condition precedent to its utilisation in the first place.

As already stated, stakeholders do not consider that business protection should be improved and therefore, they have not pointed towards the need to extend the scope of the ID to the protection of collective business' interests. Businesses have the means to protect themselves and can utilise standard injunction procedures to guard their interests, the need for an authority or qualified entity to do that on their behalf collectively being less acute.

Moreover, by collectively protecting consumer interests especially against unfair commercial practices and unfair contract terms, the current ID also simultaneously (and inevitably) protects collective business interests (in the sense that unfair



commercial practices, for example harm not only consumer interests but also (indirectly) the interests of competitors.

Of course, in Member States where small or medium-sized businesses qualify as consumers the current scope of the ID can already directly protect their collective interests. In Cyprus, no business can qualify as a consumer and therefore, the extension of the ID to collective business interests would make a material difference. Yet, given that there is not at EU level a body of legislation specifically aiming at protecting business interests (comparably to the body of consumer protection legislation), the potential in practice of such an extension of the scope of the ID sounds highly uncertain for the time being. In any event, the MCAD lays down a distinct injunction procedure, which does not find representation in Cyprus case law however, yet it is very similar to that laid down in the ID (Sections 7-9 of the Control of Misleading and Comparative Advertisements Law 92(I)/2000).

### 1.3.2. 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:

- How effective is the injunction procedure in addressing infringements originating in another EU country?

No experience at all in Cyprus.

- How effective is it to address infringements originating in another EU country that qualified entities in your country are enabled to seek injunctions in the other Member State (Article 4 of the Injunctions Directive)?

No experience at all in Cyprus.

- In a forward looking perspective: Are there non-legislative or/and legislative measures that could improve the effectiveness of the injunction procedure in addressing infringements originating in another EU country? Are there best practices in your country that could be relevant for other EU countries and could be considered as a model for the injunction procedure at EU level?

No experience at all in Cyprus.

### 1.3.3. Interplay between the Injunctions Directive and other enforcement instruments of consumer law

Please analyse:

- Is the injunction procedure as designed by the Injunctions Directive regulated separately in your country (in a separate legal act or as a separate procedure regulated within the same legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (UCPD, UCTD and by the Consumer Rights Directive)?

It is regulated separately in the law transposing the Injunctions Directive. The laws transposing the UCPD, the UCTD and the Consumer Rights Directive have been added in the Annex to the law transposing the Injunctions Directive however. So, while the laws transposing the UCPD, the UCTD and the Consumer Rights Directive have been added to the Annex to the Injunctions Directive, the provisions on the injunction procedure existing in the said individual measures have been retained. In the law transposing the UCTD, the provision allowing persons having an interest in the protection of consumer interests (e.g. consumer associations) to utilise the injunction procedure has been deleted by the amending Law 95(I)/2007, however, the

corresponding provisions in the laws transposing the UCPD (Section 16, Law 103(I)/2007) and the Consumer Rights Directive (Section 29, Law 133(I)/2007) have been retained.

- If these procedures are regulated separately: What are the main differences between them? How is the coherence between these procedures ensured? If these procedures are regulated in a single legal act (possibly as a single procedure): In what way do these procedures (or this procedure) go beyond measures foreseen by the Injunctions Directive?

The injunction procedures in the law transposing the UCPD, the UCTD and the Consumer Rights Directive are almost identical and they are largely the same with Section 5 of the law transposing the ID. The same has also been observed by the administrative court in the case of ALPHA BANK CYPRUS LTD v. Cyprus Trade, Industry, Tourism and Consumer Protection of the Ministry of Energy, Commerce, Industry and Tourism and others, Case No. 1549/15, 30/6/2016 where the court stated that injunction procedures in the law transposing the ID and in that transposing the UCTD do not differ materially. It is worth noting that the said court ruling (which is in the sphere of administrative law) is the only one in Cyprus referring to the Law transposing the ID. Certain differences between the individual injunction procedures and the ID procedure do exist, the main one being that the injunction procedure of the ID has a prior consultation obligation imposed on the qualified entity which is to apply to the court for an order, which does not exist in the injunction procedures of the three individual Directives. This comprises an obvious source of conflict as when the Regulator bases an application for an injunction on the relevant provisions of one of the individual Directives such as the UCTD, it seems uncertain whether the Regulator will have to comply with the prior consultation obligation of the law transposing the ID. The administrative court in the aforementioned case stated that the provisions of the law transposing the ID complements and particularise the injunction-related provisions of the law transposing the UCTD, yet this approach seems to regard the general ID law as *lex specialis* to the laws transposing the individual Directives. The issue can only be resolved by the civil courts (and conclusively by the Cyprus Supreme Court) but understandably this will not happen before the first injunction application is filed with the competent civil court by the Regulator.

## 1.4. Cross-cutting issues

### 1.4.1. Cost and benefits of the directives covered by the study

- To what extent is there evidence for benefits for consumers stemming from the protection provided by both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of benefits for consumers from the protection against unfair commercial practices and unfair standard terms in contracts; [*Note: a relevant aspect in this context is whether the costs for consumers in exercising their rights under these directives are limiting these benefits or not.*]

No quantitative evidence is available for Cyprus but the Regulator expressed the opinion that there are certainly benefits for consumers. To the extent that the consumers invoke these rights through a complaint to the Regulator there are no particular costs for consumers, yet consumer expectations are frustrated when they are informed that the Regulator can only take administrative action and/or seek an injunction and not order the trader to pay compensation to the consumer or order/enforce a solution to a given private dispute.

- To what extent is there evidence for benefits for traders stemming from both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of creating a level playing field for honest traders by providing a legal basis to

eliminate or at least constrain dishonest market practices, such as the use of unfair standard terms in contracts or unfair commercial practices, including through the application of the Injunctions Directive;

No quantitative evidence is available for Cyprus but the Regulator expressed the view that traders tend to view the rules stemming from the Directives as hostile to their interests and do not seem to appreciate any benefits.

- What are costs for traders due to the need to respect the requirements under the directives covered by the study? [*Note: Such as costs of research, legal advice and compliance as well as the amount of time necessary to comply with the directives*]

No quantitative evidence is available for Cyprus but traders are naturally burdened by the costs inherent in the taking of legal advice and the time necessary for them to comply with the Directives. It should be stressed out however that there is not a mature consumer protection culture in Cyprus and many traders do not invest in legal compliance beforehand. Compliance is rather achieved on a 'trial and error' basis, that is, if the Regulator or other stakeholder approaches them with particular evidence of lack of compliance (for example, because there has been a complaint), they will respond to that and probably, correct their specific practice.

- What are the costs involved in the public enforcement of these rules?

No quantitative evidence is available for Cyprus but the Regulator emphasised that the costs involved are high in the sense that they have limited resources and are also understaffed. This would seem to explain a self-regulatory body's allegation stating that cases of violations are examined and decided upon by the Regulator very slowly – a year or more may pass before the Regulator issues a relevant decision.

- Are there indications that the directives covered by the study are not implemented in your country in a cost-effective manner?

No such indications were provided by stakeholders

- Could the costs for implementing and enforcing the rules of the directives covered by the study be reduced without lowering the level of protection for consumers? If so, how?

It seems that there is no room for further reduction of the costs inherent in the implementation and enforcement of the rules of the Directives covered by the study given that the Regulator has stated that they already have very limited resources. A solution to improve cost-effectiveness is to take better advantage of self-regulation. A very active self-regulatory body interviewed (the Cyprus Advertising Regulation Organisation) indicated that it takes them 10 to 15 days to issue a decision on the fairness or acceptability of advertising. They also stated that their members and even non-members comply with their decisions. In this respect, the Regulator could refer cases falling within the scope of the UCPD to self-regulation and only step in afterwards and only provided that the speedy intervention and decision-issuing of the self-regulatory body provides no solution to the manner. Currently, self-regulation is not exploited in such a matter. According to the self-regulatory body interviewed, there has only been one case in relation to which there has been some co-operation between them and the Regulator that involved the manner in which terms and conditions applicable to commercial offers should be presented in TV advertisements.

On a more general note, stakeholders and in particular, the Regulator, the European Consumer Centre (ECC) and a consumer protection association pointed to the fact that consumer protection legislation exists in a piecemeal fashion (distributed amongst various statutes). They perceive this as a weakness of the law and called for a single consumer protection legislative act similar to the approach followed in Greece. In their opinion, this approach would make enforcement easier and more cost-effective and

would also facilitate consumer education, thereby improving the effectiveness of consumer protection rules.

#### 1.4.2. Interplay with EU sector-specific consumer protection legislation

Regarding the interplay of the horizontal EU consumer legislation [mainly UCPD and UCTD] with EU sector-specific consumer protection legislation in the areas of electronic communications, passenger transport, energy and consumer financial services, please:

- Analyse the levels of awareness of the requirements of the horizontal EU consumer legislation (mainly UCPD and UCTD) of businesses and consumers and the specific public enforcement bodies in the relevant sectors, as in particular demonstrated by their practical application; [*Key question here is: Are UCPD and UCTD applied in practice by national authorities and courts as a legal basis to combat unfair commercial practices and unfair standard terms in contracts in the regulated sectors?*]

No statistics are available but much of the case law on the UCTD involves contracts of financial services particularly credit agreements and share investment plans. Also, the most important decision of the Regulator on the UCTD, namely Decision 56/2015 involved foreign-currency loan agreements. Moreover, the Financial Services Ombudsman interviewed stated that in almost all of its decisions, the Ombudsman refers and/or applies the UCTD. It has to be noted however that these cases did not involve financial services falling with the sector-specific Directives relevant to this study, namely Directive 2002/65/EC and Directive 2008/48/EC.

The Regulator also applied the UCTD in a case against an electronic communications service provider and found terms furnishing the provider with an unfettered discretion to amend contract conditions as unfair (2014/16(KP), 30/10/14, Cablenet Communication Systems Ltd). No application of the UCTD has been made in the sectors of energy and passenger transport.

Case law on the UCPD is extremely limited and mostly consists of judicial review applications against administrative decisions of the Regulator. The Regulator issued a total of forty one (41) decisions on the UCPD and very few of them concerned the regulated sectors. More specifically, Decision 3/2012, Cyromania Group Ltd, 15/6/2012, concerned an advertising sign in a petrol station stating that the relevant trader was offering the cheapest prices for fuel, something which was proved to be untrue. The Regulator found that the use of the sign constituted a misleading action contrary to Section 5(2)(d) of Law 103(I)/2007 which corresponds to Article 6(1)(d) of the UCPD.

There have also been a few decisions in the electronic communications sector against telecommunication companies for persistent and unwanted solicitations by telephone (a black-listed aggressive practice) (Decision 43/2015, MTN Cyprus Ltd) and for misleading actions with regards to how special offers relating to telephony services or the content of cable TV services were advertised or presented (Decision 5/2015, MTN Cyprus Ltd; Decision 18/2014, CYTA). Another decision of the Regulator found a misleading omission contrary to Section 6 of Law 103(I)/2007, which corresponds to Article 7 of the UCPD specifically on the ground that the provider was inviting consumers to use its voicemail service without disclosing the fact there were charges involved (Decision 19/2014, MTN Cyprus Ltd).

The Regulator also applied the UCPD in one case falling within the financial services sector specifically with regards to an announcement by the Bank of Cyprus about a new upgrade to its electronic platform for the administration of transactions including loan repayments. The announcement gave the impression that there would not be any effects on the economic position of customers as a result of the introduction of this new system while in fact it led to a small increase in the APR to the benefit of the bank. As a result of the investigative proceedings conducted by the Regulator, the

bank refunded all extra charges to the customers. The Regulator still found an unfair commercial practice (specifically a misleading action) contrary to Sections 4(1) and 4(2)(c) in conjunction with Section 5 of Law 103(1)/2007 which correspond to Articles 5(1), 5(4)(a) and 6 of the UCPD (Decision 2/2015, Bank of Cyprus Public Company Ltd). Again, this case did not involve a service governed by the sector-specific Directives relevant to this study.

Business and consumer associations showed particular awareness of the relevance of horizontal consumer legislation, specifically the UCTD, in the sector of financial services.

- Specify whether in your country the same authority is responsible for the enforcement of the horizontal EU consumer law 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 UCPD/UCTD in the regulated sectors, as specified in the previous bullet?*]

For financial services in general, the competent (supervisory) authority is the Central Bank of Cyprus, though it arose from the interview that the Central Bank of Cyprus does not consider itself as having a (statutory) power to deal with consumer protection issues. Before the Financial Services Commissioner has started receiving complaints against banks, the Central Bank of Cyprus was receiving complaints from customers of commercial banks and was asking for the position of the commercial bank involved, which was then being forwarded to the complainant. In 21/12/2015, the Central Bank announced that it was no longer to be receiving complaints with regards to private disputes between banks and their customers and that any such complaints would have to be submitted to the Financial Services Commissioner.

It should be clarified however that for the financial services sector that falls within the scope of Directives 2002/65/EC and 2008/48/EC, the authority responsible is the same as the one responsible for the horizontal EU consumer law, i.e. the Regulator.<sup>7</sup> In relation to the latter however, the duties and powers of the Regulator are stated to be subject to the provisions of the banking legislation which designates the Central Bank of Cyprus as the competent supervisory authority.<sup>8</sup> This comprises a clear source of overlap calling for some institutionalised arrangement for co-operation or authority-sharing. However, given that the Regulator examined no case relating to the law transposing 2008/48/EC and the Central Bank of Cyprus does not consider to itself to have a power to deal with consumer protection issues, there has not been a case in which the issue arose as to how competence between the two authorities is shared in practice and no relevant conflict has arisen.

In the passenger transport sector, the Department of Civil Aviation and the Department of Merchant Shipping are the relevant public enforcement authorities in relation to the rights of air passengers and sea and inland waterway passengers respectively. The latter has not published any decisions and has not dealt with any relevant complaint as yet. Still, in 2015, the Implementation of European Community Regulations and European Community Decisions Law of 2007, Law 78(I)/2007 was amended introducing a mechanism of imposition of administrative fines in case of infringement of certain provisions of Regulation 1177/2010.<sup>9</sup>

In relation to air passengers, during 2015, the Department of Civil Aviation received a total of 293 complaints. More generally, the vast majority of the complaints that are

<sup>7</sup> This derives from Section 19 and Section 2 of Law 242(I)/2004, which transposes Directive 2002/65/EC into Cyprus law and Sections 2, 21-27 of Law 106(I)/2010 which transposes Directive 2008/48/EC into Cyprus law.

<sup>8</sup> Section 21, Law 106(I)/2010.

<sup>9</sup> The amending act is the Implementation of European Community Regulations and European Community Decisions Regulations of 2015, P.I. 195/2015.



received by the said Department relate to Regulation 261/2004<sup>10</sup> and as it arises from an earlier annual report of the Department, these mainly relate to flight delays or cancellations and boarding refusals.<sup>11</sup> Notably, since the ruling of the CJEU in the cases C-145/15 and C-146/15, the Department of Civil Aviation informs complaints that the Department is not responsible for the application of Article 16 of the Regulation and does not therefore have to take measures forcing the air carrier to pay the compensation provided for by the Regulation. It seems that the Department did not get to deal with the price transparency provisions of the Regulation and, as the relevant stakeholder has informed us, when a complaint pertains to consumer protection, they ask the complainant to contact the Regulator instead. The European Consumer Centre Cyprus (ECC Cyprus) has an increased activity in the domain, given that from the total of complaints received by the Centre in 2015, 39% referred to transport services, in particular air transport and car rentals.<sup>12</sup> The Centre believes that air carriers often invoke the existence of emergency circumstances to justify delays and refuse compensation and that this comprises a deficiency of the Regulation.

For bus and coach transport regular services, the competent public authority is the Ministry of Transport, Communications and Works but it does not have any substantial activity with regards to the handling of complaints under Regulation 181/2011. Passengers must first complain to the bus or coach company and can resort to the enforcement authority only if they are unsatisfied by the action taken by the company. As it arises from the report of the relevant Ministry published in compliance with Article 29 of the Regulation,<sup>13</sup> the Ministry monitors compliance with the Regulation through a system of management and control of the public contracts awarded (by the Ministry) to the various companies that operate buses and coaches providing regular transportation services. The vast majority of the complaints concerns the behaviour of company personnel, while in relation to intercity services, complaints most frequently relate to overbooking. Complaints are dealt with by the companies and the sanctions imposed are communicated to the Ministry.<sup>14</sup> The enforcement authority in relation to bus and coach occasional services is the Department for Road Transport of the Ministry of Transport, Communications and Works and has, during 2013-2014, received no complaints against companies provision occasional bus or coach transportation services.<sup>15</sup>

In the area of electronic communications, the responsible authority is the Office of the Commissioner of Electronic Communications and Postal Regulation. In the context of their interview, they have stated that they have no competence to apply any of the rules stemming from the horizontal Directives which are the focus of this study. When they receive complaints relating to these rules they refer them to the Regulator. One example they gave concerned a practice of an electronic communications service provider which charged consumers an extra fee if they decided to pay their bill at the cashier desk of the company instead of electronically. They considered this complaint to relate to the means of payment rather than to the service itself and as such, as falling outside the scope of competence of the Commissioner.

<sup>10</sup> Department of Civil Aviation, Annual Report 2015, [http://www.mcw.gov.cy/mcw/dca/dca.nsf/All/B84FD938D76FF8D8C2257FFC001E3CCE/\\$file/ETHΞIA%20EKΘΕΣΗ%202015.pdf](http://www.mcw.gov.cy/mcw/dca/dca.nsf/All/B84FD938D76FF8D8C2257FFC001E3CCE/$file/ETHΞIA%20EKΘΕΣΗ%202015.pdf) at p.7.

<sup>11</sup> Ministry of Transport and Works, Department of Merchant Shipping-Annual Report 2011, [http://www.mcw.gov.cy/mcw/mcw.nsf/All/5613B01D76A94AC0C2257A30002DE135/\\$file/%CE%95%CF%84%CE%B7%CF%83%CE%B9%CE%B1%CE%95%CE%BA%CE%B8%CE%B5%CF%83%CE%B7%CE%A5%CE%A3%CE%952011.pdf](http://www.mcw.gov.cy/mcw/mcw.nsf/All/5613B01D76A94AC0C2257A30002DE135/$file/%CE%95%CF%84%CE%B7%CF%83%CE%B9%CE%B1%CE%95%CE%BA%CE%B8%CE%B5%CF%83%CE%B7%CE%A5%CE%A3%CE%952011.pdf), pp.117-170 at p.121.

<sup>12</sup> ECC Cyprus, Annual Report 2015, [https://issuu.com/ecc-cyprus/docs/areport\\_eccc\\_15/29?e=8341200/36508786](https://issuu.com/ecc-cyprus/docs/areport_eccc_15/29?e=8341200/36508786) at pp. 8, 12.

<sup>13</sup> Ministry of Transport, Communications and Works, Activity Report for the years of 2013-2014 of the Ministry of Transport, Communications and Works as body for the enforcement of the provisions of Regulation 181/2011 concerning the rights of passengers in bus and coach transport, <https://www.mcw.gov.cy/mcw/mcw.nsf/190426a57db2acf6c2257678002e2824/901026d36309b04ac2257e700029c096?OpenDocument>.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

In the area of energy, the competent authority is the Energy Service of the Ministry of Energy, Commerce, Industry and Tourism but it has not engaged in substantial activity with regards to consumer protection as yet. So far, they have received only a few anonymous complaints which led to no official decision or the imposition of a fine. The only non-anonymous complaint they have received was by a competitor (rather than a consumer). The said complaint has been investigated but no violation of the relevant legislation was found. The relevant competent authority is now in the process of upgrading their website so that consumers will be able officially to submit complaints.

There is no institutional arrangement for co-operation but the competent authorities unofficially co-operate, this co-operation mainly involving mutual consultation and each authority referring any cases that fall within the competence of another authority to that other authority. This has been confirmed by all competent authorities involved.

- Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning contractual fairness, 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.?*]

The Regulator stated that there are grey areas and that relevant guidance with regards to the matters that specifically fall outside its competence (and within that of the sector-specific authorities) is necessary. This seems to be confirmed by the information given by the Office of the Commissioner of Electronic Communications and Postal Regulation. More specifically, the Commissioner referred to Section 20 of the Law on Electronic Communications and Postal Services Law, 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, in 2013, the Commissioner issued a decree (the Consumer Protection Decree, 42/2013) with regards to the appropriate content of contracts between consumers and electronic communications service providers as well as the provision of information to consumers and complaint handling by relevant providers. Understandably, these matters are closely connected and even overlap with issues governed by the UCPD and the UCTD for which the Regulator is responsible.

Overlap and confusion may also result because of Section 18 of Law 112(I)/2004 which obliges the Commissioner to act in a way that promotes consumer interests especially with regards to the price and the quality of electronic communications services. The Commissioner referred to a Supreme Court judgement in a judicial review application against a decision of the Commissioner who, resolving a dispute between various electronic communications service providers, indirectly set the retail price of certain telecommunication services provided by one such provider with the largest market share to the rest. The Supreme Court annulled that decision opining that the Commissioner did not have the power to set retail prices (CYTA v the Commissioner of Electronic Communications and Postal Regulation, Case no. 752/2006, 23/1/2008). The Commissioner perceives this judgement as urging the Commissioner to strictly confine its activity within the framework set by Law 112(I)/2004, thereby indirectly asserting that the Commissioner should refrain from interfering with broader areas such as the one referring to unfair commercial practices. Still, some overlap that may cause confusion over the exact boundaries between the competence of the Regulator and that of the Commissioner does exist. This is confirmed by a decision of the Commissioner in a case that the Commissioner assumed competence while the matter at stake clearly comprised an unfair commercial practice. That case was about excessive charges incurred by consumers when they were replying to messages sent by a four-digit number administered by an electronic communications service provider. The Commissioner ordered the relevant provider to cease this practice and also refund all charges it received from consumers opining that the provider omitted to inform consumers about the terms of use including the relevant charges beforehand and has thus misled them contrary to



relevant provisions of the Consumer Protection Decree 2013. The relevant decision is the Gravity Solutions Ltd, 23/9/2013.

Overlaps between the UCPD and sector-specific legislation may also be observed with regards to the Regulations on passenger rights and the Directives on energy, to the extent that the latter contain rules relating to price transparency and the provision of information. The UCPD resolves any conflict as it specifically states that those sector-specific rules shall prevail. Yet, as the Regulator has stated during the interview, the existing overlaps mean that it would be particularly useful, if not necessary, to provide guidance as to the exact issues that escape its competence.

- What are the benefits of the complementary application of the UCPD and UCTD in the regulated sectors? What are the costs due to the complementary application with the sectoral EU consumer protection legislation?

No quantitative information is available. However, the complementary application of the UCPD and the UCTD in the regulated sectors has clear benefits. First of all, these two Directives complete the protection afforded by sector-specific legislation by being there to fill in any gaps in the protection of consumers afforded by the sector-specific legislation which is not intended to address comprehensively all potential consumer protection issues. On a different level, this complementary application can be of great assistance to the Regulator who is responsible for a vast variety of legislation and is thus expected to have to cope with increased workload. Especially in the area covered by the UCPD, the existing overlaps can mean that a significant amount of cases especially relating to the sector of passenger transport and having to do with price transparency issues and the provision of information to passengers, can be dealt with by other authorities, thereby lifting some of the burden of the Regulator. It should be noted however that the sector-specific public enforcement authorities have not had to deal with issues relating to transparency and information so far.

- Assess any need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law.

As is explained in the answer to the previous questions, the indisputable existence of overlaps between EU sector-specific rules and horizontal EU consumer law creates the need for clarification, which can be given through guidance issued by the European Commission.

#### 1.4.3. Relevance of consumer law directives for consumer-to-business transactions

- Please analyse the need and potential for the application of the consumer law directives (mainly UCPD and UCTD) to 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).

Businesses inviting consumers to sell their jewellery to them have recently seen growth in Cyprus but very soon afterwards most of them ceased to exist. 'Electric appliances' businesses also invite consumers to offer them their old appliance at a given price and buy a new one in the context of a single transaction. Other than those however, C2B is not very widespread in Cyprus and as a result the need or potential for the application of consumer law Directives in this context is not topical in Cyprus and is not being discussed. Some of the stakeholders required an explanation of the C2B concept.

#### 1.4.4. Specific protection for vulnerable consumers

Please analyse:

- Whether the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined in the consumer law directives and relevant jurisprudence, and as applied by national authorities and courts in your country, continue to be valid and fit for purpose.

Cyprus adopts the definition of the term 'consumer' exactly as is provided for in the Directives and has not extended that definition in any way. The narrow 'consumer' definition adopted in Cyprus reflects the view of stakeholders as derived from the interviews, namely that there is no pressing need to afford any special or additional protection to businesses.

The definition of 'consumer' in the UCTD has been applied in recent court decisions and has led to the inapplicability of the UCTD on the ground that the party seeking to rely on it was not a 'consumer' but a professional or commercial party (Alpha Bank Cyprus Ltd v. Paul Steven Smith and others., case no 870 / 2013, 29/7/2015; KOKITA (ERGOSTASIO ZOOTROFON) LIMITED v. GEORGIU PROKOPI GEORGIOS, case no 1718/2015, 22/2/2016) or a legal person (K. SPYROU GENERAL BUSSINESS LTD v. ALPHA INSURANCE LTD, case no: 34/15, 25/5/2016). The Regulator on the other hand has in its Decision 56/2015, opined that the investment nature of a purchase does not exclude the 'consumer' label unless the person engages in investment systematically and for the purposes of profit or livelihood.

As for the concept of 'average consumer', this is mentioned mainly in case law dealing with trademark-related disputes and is not defined in detail. The Regulator often refers to the said concept but it does not define it. When it does such as in Decision 56/2015, it does not analyse or apply it. During the interview, the Regulator admitted to tend not to inquire into the details of the concept and explained that they apply the concept in a very consumer-friendly manner so that anything that could detrimentally affect the behaviour of a consumer who is not totally credulous or irresponsible, is considered an unfair commercial practice. In other words, the said concept is not applied rigidly at all.

As for the concept of 'vulnerable consumer', this does not find representation in Cypriot case law and the same holds true in relation to the decisions of the Regulator. The Regulator referred to two decisions, namely Decision 56/2015 against Alpha Bank Cyprus Ltd (dealing with unfair contract terms) and Decision 1/2012 against Netsmart (Cyprus) Ltd (dealing with unfair commercial practices). In the first case the complainants were retired persons and the second concerned promotional contests or games addressed amongst others to children. In both of these decisions however, no connection is made with the concept of 'vulnerable consumer' which is not expressly mentioned, let alone analysed or applied. In the second case, no reference to 'children' is made either.

It is worth noting that the Code administered by the Cyprus Advertising Regulation Organisation contains an appendix specifically covering advertising directed to children which states that the Organisation will take into account the age and experience of children and that advertising which is acceptable for teenagers is not necessarily equally acceptable for younger children.

It should be noted that as the Cyprus Advertising Regulation Organisation observed, the part of Article 5(3) of UCPD which states that 'this is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally', has not been included in the Cypriot law transposing the UCPD. Stakeholders did not however point to any practical effects that this omission may have.

- To what extent the existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers and whether, based on the

experiences in your country, specific provisions should be introduced in other directives concerned, in particular the Unfair Contract Terms Directive.

Given that the UCPD lays down a special test for vulnerable consumers, its rules are adequate in theory. As for their adequacy in practice, there is not enough evidence for Cyprus as neither the concept of 'vulnerable consumers' nor the test referring to them has ever been utilised by the courts or the Regulator

#### 1.4.5. EU added value

- Overall, would you consider that protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in your country since the implementation of the UCPD and the UCTD in national legislation?

Yes. This is especially so with regards to the UCTD as there was no comparable legislation in place before the law transposing the UCTD into Cyprus law. Before the law transposing the UCPD came into effect, only the Trade Descriptions Law of 1987 was in force in Cyprus. That law covers misleading but not aggressive practices and contains no black list of unfair commercial practices. It also concerns goods and services but not immovable property. In this respect, the protection of consumers again certainly improved in Cyprus as a result of the implementation of the UCPD.

- Overall, would you consider that the information of consumers regarding unit prices has improved since the implementation of the PID in national legislation?

Yes as this led to relevant information campaigns and also inspections of businesses by the Regulator. Of course, the stakeholders interviewed expressed the opinion that consumers do not appreciate the value or potential function of information on the unit price of a product.

- Overall, would you consider that the protection of businesses against unfair marketing in your country has improved since the implementation of the MCAD in national legislation?

Not really, because this is not a law that is being utilised by the Regulator. Moreover, given that it does not find representation in case law either, it seems that it is not really appreciated by businesses or their legal representatives.

- Overall, would you consider that it has become easier for businesses in your country to directly trade cross-border to final consumers located in other EU countries in recent years? Has it become easier for consumers in your country to directly purchase cross-border from traders located in other EU countries?

According to the European Commission only 12% of Cypriot online retailers sell cross-border and only 24% of consumers buy online from other EU countries.<sup>16</sup> More generally, it must have become easier, though there is no evidence demonstrating whether these capabilities are exploited in practice and to what extent. It is definite that the numbers of consumers who buy from traders in other EU countries are constantly increasing, however the same is not certain in relation to businesses selling directly to other EU countries.

- To what extent are these improvements, if any, due to the mentioned directives?

It is difficult to consider the increase in cross-border trade as being the result of the various directives discussed. The main factor that brought about this increase is the

<sup>16</sup> European Commission, Cyprus factsheet –Digital Contract for Europe, December 2015, [http://ec.europa.eu/justice/contract/files/digital\\_contracts/digital-contracts\\_factsheet-cy\\_en.pdf](http://ec.europa.eu/justice/contract/files/digital_contracts/digital-contracts_factsheet-cy_en.pdf)

increased popularity of the internet and the fact that people in Cyprus are increasingly becoming technology-savvy and seek to exploit the possibilities afforded to them by the internet. Average consumers and businesses in Cyprus are unlikely to be aware of the details and effects of harmonisation at EU level so as for this harmonisation to be able to affect their behaviour.

## Annex

## A. Transposition fact sheet

**Table 1: Fact sheet on transposition of directives in Member States' law – Cyprus**

Directive	Transposition legislation (National law, Article)	Comments	Specific provisions going beyond minimum harmonisation requirements/use of exemptions	Included in national legislation	Comments	
<b>Directive 93/13/EEC on unfair terms in consumer contracts</b>	The Unfair Terms in Consumer Contracts Law 93(I)/1996 as amended by Law 69(I)/1999, Law 95(I)/2007, Law 136(I)/2014 and Law 49(I)/2016		'Black list' of terms considered unfair in all circumstances	Yes	<i>Article 5 (5)</i>	<i>It is not a black list but rather a "black term" introduced by the amendment law of 2016. Article 5(5) states that a term calculating the interest based on 360 days or any number of days other than 365 or (in case of leap year) 366 days is considered an unfair contract term.</i>
			'Grey list' of terms which may be considered unfair	Yes		<i>This is an indicative list of terms that 'may be considered unfair' that also exists in the Directive</i>
			Extensions of the application of Directive to individually negotiated terms	No		
			Extensions of the application of Directive terms on the adequacy of the price and the main subject-matter	No		

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<b>Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market</b>	The Unfair Commercial Practices of Businesses towards Consumers Law of 2007, Law 103(I)/2007 as amended by Law 81(I)/2013 and Law 135(I)/2013		Provisions regarding financial services going beyond minimum harmonisation requirements	Yes	- Section 39, 40 and 44 of Law on Consumer Credit (Housing loan agreements and Hire-purchase agreements), Law 39(I)/2001  - Section 6(1) and 6(3) of the Business of Credit Institutions, Law 66(I)/1997	
			Provisions regarding immovable going beyond minimum harmonisation requirements	No		
			Application of UCPD to B2B transactions	No		
<b>Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers</b>	The Indication of the selling price and of the Unit Price of goods that are offered to Consumers Law of 2000, Law 112(I)/2000 as amended by Law 119(I)/2005 and Law 136(I)/2005		Extension of the application to other sectors (e.g. for immovable property)	No		
			Use of specific regulatory choices/derogations	No		
<b>Directive 2006/114/EC concerning misleading and comparative advertising</b>	The Control of Misleading and Comparative Advertisements Law of 2000, Law 92(I)/2000 as amended by Law 98(I)/2007 and Law 42(I)/2008					

<b>Directive 2009/22/EC on injunctions for the protection of consumers' interests</b>	The seeking of an injunction to protect the collective interests Consumer Law of 2007, Law 101(I)/2007					
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**Table 2: Fact sheet on Injunctions Directive – Cyprus**

Issue	Answer	Comments
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)?	- Yes, separate procedures in separate legal acts	<i>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.</i>
Who is entitled to bring an action seeking an injunction?	- Designated public bodies - Specified consumer associations	
Is the injunction procedure a court or an administrative procedure? If your country legislation foresees both forms of the procedure, please explain in the comments column for which infringements the court or administrative procedure is foreseen	- Court procedure	
Who bears the costs of an injunction procedure? If qualified entities (or some of their categories e.g. consumer organisations are entitled to an exemption of some/all cost related to the procedure please explain the characteristic of such exemption in the comments column.	- The costs are as a rule borne by the losing party	<i>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.</i>
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?	- No, scope of the Directive not extended	
Is protection of business' interests covered by the injunctions procedure? If scope of application extended to the protection of business' interests, please provide details in the comments column regarding type of business' interests covered by the injunctions procedure	- No	

<p>Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations</p>	<p>- Yes/No The question is not eligible to a definite answer. Section 3(1) of Law 101(I)/2007 states that an injunction can be sought “<i>against any person</i>” involved in or responsible for the violation without restricting the relevant possibility to <i>one</i> such person. Yet, the law does not expressly provide for the possibility of an injunction action against multiple traders and certainly, it does not refer to trader associations.</p>	<p><i>This is unlike the separate injunction procedure provided for in the law transposing the UCTD which specifically allows for such applications against multiple parties or associations (Section 9 (6), Law 93(I)/96).</i></p>
<p>Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID)</p>	<p>- No</p>	<p><i>It is not provided in the law. Yet, in practice there is some consultation prior to the court procedure. Moreover, Section 9(3), Law 93(I)/96 provides that the Director can take into account any commitment undertaken by a person in relation to the use of unfair contract terms.</i></p>
<p>Has your Member State taken specific measures regarding the prior consultation (Article 5 of the Injunctions Directive)?</p>	<p>- Yes, requirement for party seeking injunction to consult with the defendant</p>	
<p>Does the national legislation provide for measures ensuring summary procedure? Please specify main characteristics of the procedure (subject matter/time limits) in the comments column.</p>	<p>- No</p>	<p><i>A summary procedure in Cyprus is available through the filing of originating summons but the law transposing the Directive does not make specific reference to this procedure, unlike the injunction procedure provided for under the Control of the Misleading and Comparative Advertisements Law, Law 92(I)/2000 Section 7(1) which does specifically refer to the particular procedure. In my view, this is the procedure to be followed also under the law transposing the Injunctions Directive. Such originating summons usually take at least one year before they are heard and decided upon by the court.</i></p>
<p>Are there sanctions for non-compliance with the injunction order (Article 2(1) of the Injunctions Directive)? If sanctions in form of penalty or fine foreseen please specify in the comments column to who exactly should they be paid</p>	<p>- Yes, other sanction (please specify)</p>	<p><i>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</i></p>

Has your Member State taken specific measures regarding the publication of the decision and/or the publication of a corrective statement?	- No	<i>No other than mentioning the power of the court to order such publication</i>
Is it possible to claim within the injunction procedure for sanctions for the infringement?	- No	
Can an action for the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to other beneficiary be brought within the injunction procedure?	- No	
Can an action for damages to be paid to the qualified entity or the public purse be brought within the injunction procedure?	- Yes/No This is uncertain. The Law 101(I)/2007 (transposing the ID) does not provide for this possibility. However, Section 5(1) of Law 101(I)/2007 expressly subjects the power of the court to issue injunction to compliance with the provisions of the Courts Law, Law 14/60. Section 42 of Law 14/60 empowers the court to order the payment of compensation to any person to the benefit of whom the injunction has been issued. It is however uncertain whether this provision would in practice mean the payment of compensation to the public purse or the qualified entity bringing the injunctions proceedings.	
Can an action for damages or redress to be paid to the consumers concerned be brought within the injunction procedure?	- No	<i>However, Section 9 of the law transposing the ID specifically states that the injunction procedure is without prejudice to the right of parties who have suffered damage as a result of the violation to bring a legal action against the non-compliant trader.</i>
Can individual consumers base their individual claims for damages/remedies on the injunction order?	- Yes	<i>In the sense that the Injunction can serve as strong evidence of the wrong committed by the trader.</i>
Can the qualified entity claim other measures beyond the injunction, e.g. evidence of compliance with the judgment?	- No	

Are the effects of individual injunctions orders extended to the future infringements and/or same or similar illegal practices (of other traders)?	- No	
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## B. Data tables

### *Number of B2C disputes*

Please indicate how many B2C disputes have been decided in your country on the basis of consumer law directives covered by this study (UCPD, UCTD, PID) as a proportion of the total number of B2C disputes decided on the basis of other national consumer legislation (based on statistics, or based on estimates by enforcement authorities and other stakeholders, where this is not the available).

**Table 3: B2C disputes decided on the basis of consumer law directives covered by this study in comparison with total B2C disputes decided on the basis of other legislation (most recent year for which data is available)**

Year	Type of data	Total number of B2C disputes (number of cases)	Share of B2C disputes decided on basis of ...					Comment
			UCPD	UCTD	PID	other EU consumer protection legislation (e.g. CRD, Sales Directive, sectoral legislation)	national consumer legislation not based on EU directives	
2016	Consumer Protection Service (CPS) statistics	7 cases	1 case 14.28%	5 cases 71.42%	0%	0%	1 case 14.28%	
2015	same	51 cases	11 cases 21.56 %	36 cases 70.58%	0 %	1 case 1.96 %	3 cases 5.88 %	
2014	same	18 cases	4 cases 22.22%	14 cases 77.77%	0%	0%	0%	
2013	same	8 cases	8 cases 100%	0%	0%	0%	0%	
2012	same	5 cases	5 cases 100%	0%	0%	0%	0%	
2011	same	1 case	1 case 100%	0%	0%	0%	0%	
2010	same	1 case	1 case 100%	0%	0%	0%	0%	

Note: It should be clarified that the above numbers concern only decisions by the enforcement authority (the regulator). As stated in the report, case law on the UCPD and the PID is extremely limited and does not involve an application of the provisions of the said law. As far as the UCTD is concerned, case law started emerging from 2007 onwards and is continuously increasing. Most of this case law is summarised and discussed in the report. It may however be useful to add that for 2016 so far, we have located 18 rulings of lower courts and 4 Supreme Court rulings involving a discussion of the law transposing the UCTD. For 2015, the numbers are 14 and 2 respectively, something that confirms the increasing invocation of the relevant law. It is worth noting that though according to stakeholders, the bulk of problems and consumer complaints relate to the 2-year guarantee for goods, we have located only very few cases applying Law 7(I)/2000 which transposes Directive 1999/44/EC into national law.

*Costs of obtaining redress for a hypothetical case of invoking unfairness of a standard contract term*

- Please estimate the costs, including time, for consumers in obtaining redress when invoking the unfairness, and thereby the non-binding character of standard contract terms in a contract they concluded. Please provide the estimate for the hypothetical example below, focusing on costs (and needed time) of a lower court procedure and the use of ADR or other relevant procedure (if applicable).<sup>17</sup>

<sup>17</sup> For the hypothetical example it is assumed that both the provider and the consumer are located in your country.

**Table 4: Estimate of costs for consumers in obtaining redress when invoking the unfairness of standard contract terms in a contract they concluded (for the hypothetical example provided in the box below)**

Redress mechanism	Estimated court fees (national currency)	Estimated lawyer's fees (national currency)	Other costs, if any (national currency)	Estimated time involved for consumer (hours)	Comments
<b>Lower court procedure</b>	<p>EUR 72.21 stamp duty fees (for claims between EUR 2000 - 10 000)</p> <p>Please note that all fees stated here increase with the increase of the claim. So they are different for claims between EUR 10 000 - 50 000, for example</p>	<p>EUR 516 legal fees based on the relevant official rules of the Cyprus Bar Association (plus fees which are similar to what is stated below regarding the fees for the case the consumer is the defendant and depend on appearances before the court, interim applications and hearings that will take place)</p>	<p>EUR 11-23 for serving the writ of summons, EUR 15 – 20 for any additional application that may need to be filed</p>	<p>If a lawyer is used then the time for the consumer is approximately an hour (to explain the case to the lawyer, furnish them with all relevant documentation and sign the relevant retainer which will enable the lawyer to file the legal action). If no lawyer is used it is very difficult to estimate the time that would be necessary as this would depend on the level of knowledge and sophistication of the consumer but it would definitely be a time-consuming process for consumers acting personally.</p>	<p>It should be noted that if no lawyer is used, these fees can be avoided, yet court procedures are not easily manageable by non-lawyers and therefore, lawyers are used in the vast majority of cases</p>



<p><b>ADR or other relevant procedure</b></p>	<p>Fees for applying for arbitrator procedure: claimed amount up to EUR 500: EUR 5</p> <p>Up to EUR 1000: EUR 9</p> <p>Up to EUR 2500: EUR 13</p> <p>Up to EUR 5000: EUR 17</p>	<p>A lawyer is not necessary</p>	<p>EUR 85 arbitrator's fees (for claims EUR 0 – EUR 2500)</p> <p>EUR 170 arbitrator's fees (for claims EUR 2500 – EUR 5000)</p>	<p>It is very difficult to estimate time as that would depend on the level of knowledge and sophistication of the consumer. However, ADR procedures are much simpler and consumer-friendly than court ones and it is therefore expected that it would be much less time-consuming for consumers than the court procedures.</p> <p>As for the time needed to obtain a decision to the dispute, the law does not allow for an accurate estimation of time but given that the arbitrator must set a hearing date within 20 days from the date they are assigned the case and issue a decision within 15 days from the date the hearing ends, it is expected that the whole process will not exceed 3-6 months.</p>	<p>No ADR or other relevant procedure of private dispute resolution was followed in Cyprus. The information given to the left is based on Law 148(I)/2015 which transposes into Cyprus law Directive 2013/11/EU and which has not been tested as yet.</p>
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Notes: It should be noted however that almost invariably consumers invoke unfairness of a standard contract term in civil proceedings instituted against them by claimants who are often financial institutions. The time for obtaining redress is the standard time needed for civil actions to be tried and decided upon. If the claimant does not file an application for summary judgement, that time may exceed 4-5 years. If an application for summary judgment is filed then the time needed is usually 2 years approximately. The legal fees for the defendant in civil actions based on the relevant guide of Cyprus Bar Association are approximately EUR 601 (this amount contains fees for filing an appearance to the action, drafting and filing a defence, appearances before the court, drafting of affidavits, preparation for hearing and the hearing and it is an approximate minimum amount). If judgement is secured against the defendant then they will be ordered also to pay the claimant's costs. It also be clarified that these are the costs that will be ordered by the court or approved by the registrar.

**Hypothetical example: Terms which inappropriately exclude/limit consumers' rights to compensation**

*A consumer went on a package holiday with a friend to Kenya for which they paid € 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 €5,000 (€4,000 for the cost of the package and €1,000 for lost time and enjoyment). The tour operator agreed to compensate them €1,000 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/unfair-contract-terms/index\\_en.htm](http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-contract-terms/index_en.htm)]*

- Please estimate how often court and ADR procedures are used in your country for invoking the unfairness, and thereby the non-binding character of standard contract terms (i.e. the number of cases per year)?

No case was found in which the consumer in his or her capacity as plaintiff sued a trader for damages and also raised an issue of unfair contract terms. In this respect, the answer to this question must be that such cases in Cyprus are rare, if not non-existent.

## C. Interviews conducted and literature reviewed

**Table 5: Interviews conducted for this study**

Organisation	Stakeholder type	Date
Cyprus Association of Retail Trade Enterprises	Business association	17/06/2016
Cyprus Workers Confederation	National Consumer Organisation	01/06/2016
Department of Merchant Shipping	National Consumer Enforcement Authority	12/07/2016
Competition and Consumer Protection Service of the Ministry of Energy, Commerce, Industry and Tourism	Ministry/Regulator	23/06/2016
European Consumer Centre Cyprus	European Consumer Centre	28/06/2016
Cyprus Consumer Organisation	Consumer Organisation	10/06/2016
Cyprus Advertising Regulation Organisation	Business Association	07/07/2016
Cyprus Consumer Union and Quality of Life	National Consumer Organisations	05/07/2016
Office of the Commissioner of Electronic Communications and Postal Regulation	National Independent Authority	22/06/2016
The Financial Ombudsman of the Republic of Cyprus	National Independent Authority	18/07/2016
Department of Civil Aviation of the Ministry of Transport, Communications and Works	Ministry	27/07/2016
Central Bank of Cyprus	Independent Authority	29/07/2016
Department of Road Transport of the Ministry of Transport, Communications and Works	Ministry	26/8/2016
The Energy Service of the Ministry of Energy, Commerce, Industry and Tourism	Ministry	26/8/2016

**Table 6: Literature reviewed for country report**

Author/Source	Year	Title of publication
Christiana Markou	2015	Consumer Contracts an Unfair Terms: the Cypriot Reality (Conference Presentation)
University of Bielefeld European Commission	2007	EC Consumer Law Compendium
European Commission	2012	Report from the Commission to the European Parliament and the Council concerning the application of Directive 2009/22/EC of the European Parliament and of the Council on Injunctions for the Protection of Consumers' Interest
Polyviou Polyvios	2014	The Law of Contracts
Andreas Neocleous & Co LLC	2010	Introduction to Cyprus Law

# 1. Study to support the Fitness Check of EU Consumer law – Country report CZECH REPUBLIC

## 1.1. Unfair commercial practices and marketing

### 1.1.1. Effectiveness of the UCPD in establishing a high level of consumer protection

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

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

Most interviewed stakeholders state that the UCPD is the most relevant Directive to promote a high level of consumer protection in the internal market. Regarding the principle-based approach, experts underline that the only applicable way to combat all unfair commercial practices, including new ones (e.g. those engaged in by online shops), is a principle-based approach. Authorities and national courts are used to performing the unfairness test according to Art. 5 UCPD,<sup>1</sup> even if the first decision from the Supreme Court with harmonising effect regarding the application of the unfairness-test is from the end of 2014.<sup>2</sup>

Czech law transposed the UCPD in Act. 634/1992 Sb. on consumer protection in 2008<sup>3</sup> (further Act. 634/1992 Sb.), but the implementation was not complete. On 23.1.2014, the European Commission found that several provisions of the Czech transposition were not in compliance with the Directive.<sup>4</sup> This incorrect implementation related to many provisions (e.g. on 'product', 'business-to-consumer commercial practices', 'undue influence', 'invitation to purchase', 'materially distort the economic behaviour of consumers' etc.), but also the approach to the temporal application of the Directive according to Art. 3 (1) (before, during, and after a commercial transaction) was not in accordance with the Directive. The Czech legislature finally increased the standards,<sup>5</sup> and since 28.12.2015 the UCPD is fully transposed into Czech law by Act. 378/2015 Sb.

The enforcement of this Directive is carried out in the Czech Republic mainly by administrative authorities, like the Czech Trade Inspection Authority, Czech Telecommunication Authority, Czech Energy Authority, and also by the Czech National Bank and seven other authorities.<sup>6</sup> Civil enforcement against unfair commercial practices and the right to claim damages in cases of misleading advertising and misleading identification of goods and services is ensured by § 2988 Czech Civil Code<sup>7</sup>

<sup>1</sup> See: § 4 Rn 14, Blanka Vítková: Zákon o ochraně spotřebitele, Wolters Kluwer, 2016, Praha.

<sup>2</sup> Judgement Highest Administrative Court 7 As 110/2014-54.

<sup>3</sup> By the Act. 36/2008 Sb.

<sup>4</sup> European Commission formal notice (2013/2204) from 23.1.2014 regarding Art. 2,3,4,5,6,7,8, and Annex I 8, 11, 14: the Commission criticised further that some Czech legislation including norms regarding commercial practices are more prescriptive than the Directive. See also EU Pilot project 2514/11 from 15.12.2011.

<sup>5</sup> Act. 378/2015 Sb.

<sup>6</sup> § 23 634/1992 Sb. delegates the enforcement of the consumer protection to more than 17 authorities. The competences are very fragmented, horizontally and vertically, and the consumer has many problems to find the competent authority. The biggest problem is that the authorities do not delegate the consumer complaints further in the case they are not competent, see: Rita Sik-Simon: správněprávní sankce za porušování spotřebitelských práv v České Republice a v Maďarsku in Luboš Tichý (ed.) Ochrana Spotřebitele CPK, PF Univerzita Karlova v Praze, 2014 v nakladatelství Eva Rozkotová, p. 207.

<sup>7</sup> Act. 89/2014 Sb. Translation is available <http://obcanskyzakonik.justice.cz/images/pdf/Civil-Code.pdf>

(further CzCC) for the consumer, but this law does not play a highly relevant role.<sup>8</sup> Also consumer organisations can file an injunction action according to § 25 (2) Act 634/1992 Sb., to combat unfair practices, but it is very rare<sup>9</sup> in practice. What is more common – predominant – is when the consumer initiates administrative proceedings according to §26 634/1992 Sb., because this is the cheaper and faster solution with the greatest sanctioning effect on the traders. Administrative enforcement plays a dominant role in the Czech Republic, i.e. the Czech Trade Inspection Authority processes ca. 23 000 consumer complaints annually.<sup>10</sup> The maximum imposable fine is 5 million CK (approx. EUR 185 000) under § 24 (14) d) Act 634/1992 Sb.,<sup>11</sup> which has a strong dissuasive effect on traders.<sup>12</sup>

Regarding sector specific fields, the Czech National Bank added that in the financial area, they cannot assess the effectiveness of the UCPD, because they are used to applying the sector specific rules, not the UCPD. Only in the absence of a '*lex specialis*' do they have scope for application of the UCPD.

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

According to the stakeholders, if something appears on the black list, it is practically non-existent on the market. This is the most important benefit for the consumer. The black list is very easy to understand for the traders and controlling it is easy for the authorities. The main trade chains 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. According to the control bodies, the most common unfair practices involved giving incorrect information.

Inspectors can most easily control those commercial practices that are blacklisted or fail to fulfil the information requirements. In relation to misleading and aggressive commercial practices (Art. 6 to 9. UCPD), the inspectors must examine the circumstances further, but the most complicated aspect to review is the general unfairness test under Art. 5 (2) UCPD.<sup>13</sup> Stakeholders generally underline the difficulties with the application of Art. 5 (2). The Czech Trade Inspection Authority, the main enforcer of the UCPD norms, added that uniform application of the general unfairness test according to Art. 5 (2) UCPD by 350 inspectors - who are not lawyers - is nearly impossible. The main problem is the fulfilment of the criteria. To ensure unified application in every regional inspection office, it would be necessary to have personnel trained and guidelines provided.

A sector specific authority, the Czech National Bank, added that the application of the black list is difficult on the financial market.

Regarding the implementation of the black list (Annex I) it should be added that with Act. No 378/2015 Sb., the Czech legislature finally transposed all 31 unfair commercial practices. Newly corrected or added practices (December 2015) include the following: No. 8, 11, 14, and 31 of the Annex. Because the Czech legal definition of 'product' is not used for services,<sup>14</sup> only exclusively for goods, see § 2 (1) f) Act 634/1992 Sb., it

<sup>8</sup> Even if we can find some cases NS 23 Cdo 3704/2011, NS 23 Cdo 466972010 etc. regarding the former Czech Civil Code, there are still no cases according to § 2988 of the new Civil Code, which is in force since 1.1.2014.

<sup>9</sup> See chapter injunction 1.3.

<sup>10</sup> The number of yearly controls done by the Czech Trade Inspection is over 40 000. Annual reports <http://www.col.cz/en/about-ctia/annual-reports/annual-reports-on-ctia-activities/>

<sup>11</sup> But in some special cases also 50 million CK (approx. EUR 1 850 000).

<sup>12</sup> Regarding some unfair commercial practices f.e. at banned consumer lottery the Czech Trade Inspection Authority cannot impose fine, see 8 As 136/2015-51

<sup>13</sup> See court advices on unfairness test 7 As 110/2014-52

<sup>14</sup> This is a separate definition under § 2 (1) g Act. No 634/1992.

was necessary to rewrite the definitions to include the word services in many descriptions on the black-list.

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

There are no practical benefits for the Czech consumer. The Czech Republic did not implement any further restrictive or prescriptive requirements in relation to financial services regarding UCPD. In relation to financial services is necessary to remind that many sector specific directives go significantly beyond the UCPD. If this sector specific European legislation on financial services permits the national legislature, the national rules go in some cases beyond the UCPD and lays down detailed rules for the conduct of financial institutions with consumer. The Financial Arbitrator underlines that the regime of minimum harmonization in respect of financial services should be retained in the UCPD, otherwise it may cause conflict with other EU directives, of which some are based on minimum harmonization, others on targeted harmonization and others on full harmonization.<sup>15</sup>

- 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 what 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 UCPD has not yet been applied in the context of environmental claims. Neither the Czech Trade Inspection Authority nor Ministerial experts have seen in their practice, misleading environmental claims. Consumer organisations' experts add that the Czech consumer may not be fully aware of the importance and the practical benefits of these types of claims. Business organisations added Czech traders do not stress environmental benefits of their products in their marketing yet.

- 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 rigidly?*]

The 'average consumer' is not a relevant reference point in the Czech consumer protection Act. The reference point regarding unfair commercial practices is still the consumer according to § 4 (1) 634/1992 Sb.: 'the commercial practice is unfair if it is contrary to the requirements of professional diligence and it materially distorts or is likely to materially distort the economic behaviour of the consumer to whom is it addressed.' But the new standard from 2016 finally adopted the average member of the group as the reference point when the commercial practice is directed to a particular group (§ 4 634/1992 Sb.). Experts of Ministry of Trade and Industry highlight, that the § 4 (1) of 634/1992 Sb. refers to the average consumer, even if the norm is not using the expression 'average'.<sup>16</sup>

The consumer concepts are not defined in Czech commentaries. Not even one of the three main Civil Code commentaries say a word about consumer concepts regarding § 419 'consumer' CzCC. Also the commentary on the Act on consumer protection remains silent about situational or normative models, not to mention the different

<sup>15</sup> Also regarding Directive 2014/17/EC on Mortgage Credit, it was not obvious that the legislature would like to ensure a higher consumer protection level than the Directive prescribes.

<sup>16</sup> See: Highest Administrative Court 3 As 29/2007, Highest Administrative Court 8 As 83/2010, Supreme Court 23 Cdo 784/2010.



consumer concepts applied by the CEJEU depending on whether the judgement regards unfair competition practices or contract law.<sup>17</sup>

Academics are criticizing<sup>18</sup> that in the Czech jurisdiction the average consumer is only briefly mentioned. Previously the average consumer was cited in trademark law regarding brand collisions, where the court examined how the consumer compares and visualises different brands. In many cases courts transfer this consumer 'model' to consumer law cases, or they do not define the term 'consumer' further.<sup>19</sup> Another trend can be reported whereby the courts use the phrase: 'the observance of the so called average consumer nowadays should be judged more strictly than earlier (not only superficially, with the usual attention, - see in Rn 18. of the preamble of UCPD)'.<sup>20</sup> Some of the judgements state that 'the benchmark is the average consumer who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the CJEU'<sup>21</sup> or that 'national courts should exercise their own faculty of judgement, having regard to the case-law of the Court of Justice'.<sup>22</sup> Further citation of concrete CJEU case law is still missing in the majority of the Czech jurisdiction.

Also, consumer organisations indicated the problem that the consumer model applied by the Czech courts has not yet crystallised enough.<sup>23</sup> They also underlined that the courts usually expect a relatively high intellectual potential on behalf of the average consumer, which reduces the protection level accordingly. The Czech National bank reported no problem with the consumer concept, and stated that it applies the concept according to the circumstances of each case. Only the Financial Arbitrator (i.e. the Czech Financial Ombudsman) underlined the importance and difficulty of the application of the average consumer model. In the 'account maintenance fees' cases,<sup>24</sup> the right application of this model depended on which service should have been understood as an account maintenance service and which not.

Some experts also claimed that the new Czech Civil Code envisages a very high level of intellect of all contracting parties, because according to § 4 CzCC 'Every person having legal capacity is presumed to have the intellect of an average individual and the ability to use it with ordinary care and caution, and anybody can reasonably expect every such person to act in that way in legal transactions.'<sup>25</sup> This principle can lead in judicial practice to a fictional, ideal consumer, rather than to an average consumer which is the reality.

- 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 in your country recognised new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted)?*]

The Czech judiciary is also very reluctant to define a consumer group as a vulnerable consumer group. Even in the Proenzi case,<sup>26</sup> regarding misleading advertising of a dietary supplement, the Supreme Court did not define the group to whom the

<sup>17</sup> Sik-Simon Rita: Fogyasztókép és szabályozás MTA Law Working Paper 2/2016 [http://jog.tk.mta.hu/uploads/files/2016\\_02\\_Sik-Simon.pdf](http://jog.tk.mta.hu/uploads/files/2016_02_Sik-Simon.pdf)

<sup>18</sup> NS 23 Cdo 3773/2010, 23 Cdo 4384/2008, 32 Cdo 3895/2007.

<sup>19</sup> NS 33 Cdo 930/2006, NSS 6A 61/2002-52.

<sup>20</sup> NS23 Cdo 4384/2008, NS 32 Cdo 3895/2007.

<sup>21</sup> NS 32 Cdo 3895/2007.

<sup>22</sup> NS 32 Cdo 3895/2007.

<sup>23</sup> See Jakub Jedlinský: Koncept průměrného spotřebitele v českém a evropském právu, 2012, Martina Kousalová: Koncept průměrného spotřebitele 2013.

<sup>24</sup> 181/SU/2012, 19/SU/2013.

<sup>25</sup> <http://obcanskyzakonik.justice.cz/images/pdf/Civil-Code.pdf>

<sup>26</sup> NS 32 Cdo 1721/2012.

advertisement was addressed as a vulnerable consumer group. The court found that the average consumer can differentiate between the effect of a medicine and a dietary supplement.<sup>27</sup> In a later decision, in multiMun AKUT,<sup>28</sup> the court stressed that “it should be considered, that physically unhealthy persons maintain lower criticism and higher belief in advertisements”.

Control authorities apply § 4 (2) of 634/1992<sup>29</sup> more often, where Art. 5 (3) of UCPD was transposed. The Czech Trade Inspection Authority and the Czech Telecommunication Authority apply these norms to achieve a proportional protection for children, pregnant women and pensioners. The inspectors should be aware of the uniqueness of the individual cases, with regard to whether or not a particular group has been affected. However, new vulnerable consumer groups, such as indebted or poor, have not been shown up in practice yet. Fines can be imposed e.g. in cases of omission of information according to Directive 2008/48/EC. Whether a particular consumer group has been affected by the omission of information has not been further analysed. The recognition of vulnerable groups was not considered necessary in the practice.

In financial cases there is no application of this consumer model in the Czech Republic.

- 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 tradition to combat unfair commercial practices with self-regulation existed before the communist period in the Czech Republic, but this trend was interrupted, as stated by business organisations. Nowadays there are more and more new initiatives e.g. the Association for electronic commerce (APEK) created an E-shop codex.<sup>30</sup> But the number of these initiatives is still very low. The existing Ethical Codex is valid just for a limited group of traders, because membership in chambers or associations is not obligatory. Usually as summarized by consumer organisations, the traders join an association and are concerned more about their reputation, and therefore do not perform unfair commercial practices. In the opinion of business associations this kind of self-regulation should be supported in the future. Also the main consumer organisation DTest is active and gives certification for reliable e-shops.

Some authorities are also active in influencing the self-regulation of the traders, e.g. the Czech Telecommunication Authority published the second edition of its recommendation of fair contract terms and commercial practices for the operators.<sup>31</sup> However, e.g. the Czech National Bank, supervisory authority of financial markets, did not create many recommendations in the consumer protection field.

The Financial Arbitrator is rather sceptical regarding self-regulation, because the market – as cases have shown<sup>32</sup> – is not ripe for it. Even if a Codex exists, the association is not able to sanction those members who fail to comply with the Codex. Some self-regulation norms, like the Codex ‘Client mobility’ dealing with bank account switching procedures, are not real self-regulation norms since they were adopted

<sup>27</sup> NS 32 Cdo 1721/2012, see also Martina Kousalová: Koncept průměrného spotřebitele 2013.

<sup>28</sup> 4 As 98/2013-88

<sup>29</sup> The new provisions of the Consumer Act of 2016 (188/2016 Sb.) completely transposed Art. 5 (3) of UCPD via the “copy and paste” method.

<sup>30</sup> <https://www.apek.cz/kodex-terminologie-lhut-dodani>

<sup>31</sup> The recommendation contains 48 pages. See: <http://www.ctu.cz/doporuceni-ctu-k-navrhum-smluv-o-poskytovani-verejne-dostupnych-sluzeb-elektronickych-komunikaci>

<sup>32</sup> Case OVB Allfinanz- Helvag; Lukáš Štork.

under the pressure of the European Commission. Moreover, this agenda is now subject to European 'hard law'.<sup>33</sup>

The Czech National Bank added that these types of actions could be effective but they also have their limits. In the financial sector the actions work especially in situations where sellers are also responsible for the behaviour of their distribution channels (e.g. intermediaries).

- 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?

The majority of the stakeholders suggested that there is no need to modify the black list. In the last 20 years traders, courts, and also consumers had experience in combatting unfair practices.

Some presently problematic commercial practices are:

- Unilateral change of contract requirements without right to termination;
- Contract switches with prolongation of the contract in an 'uninvited' doorstep selling situation. (A typical case in the telecommunication or energy field would be: intermediary of the service provider comes to check the monthly invoice, and recommend a 'better' service package - the consumer signs a temporary contract including the changes with binding effect for 2 to 3 years);
- Organised selling events (also business organisations added that at these selling events the withdrawal right should be guaranteed for the consumer at least for 3 or maximum for 6 months from signing the contract);
- '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. lending a modem for the time period of the internet service contract - for not returning it the consumer should pay ca. 5 000 CZK [approx. EUR 185], but the new acquisition value is just 1 000 CZK [approx. EUR 37]).

- Are there other measures that could improve the effectiveness of the UCPD in establishing a high level of consumer protection in your country? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

In the Czech Republic the consumer protection level is ensured by frequent control by the authorities. Despite the fact that the administrative enforcement of consumer rights is not the preferred method for every Member State, frequent controls contribute to a higher level of consumer protection.

Regarding best practices, the Czech legislature reacted to the problem of organised selling events. First the legislature stipulated in 2013<sup>34</sup> that these kind of events should be registered in advance at the Czech Trade Inspection Authority, according to § 20 Act 634/1992 Sb. Not only the address and the exact date of these events had to be previously announced at the Czech Trade Inspection Authority, but also the goods or services to be offered. At the end of 2015<sup>35</sup> the legislature amended the list of such required information to include also the price of the good/service (without any

<sup>33</sup> Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features

<sup>34</sup> See 476/2013 Sb.

<sup>35</sup> 378/2015 Sb.

discount). Furthermore the new § 20b of 634/1992 prohibits the seller from receiving compensation during this event, and also prohibits the seller before the expiry of seven days from contract signing, to seek or request fulfilment of the contract or of a part of it. This prohibition includes also the deposit for payment of fees or any other fee. The norm clarifies further that this prohibition shall not affect the provisions regarding withdrawal under another act.

### 1.1.2. Effectiveness of the PID in establishing 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;

The transposition of the PID was carried out in 2003<sup>36</sup> with the Act on prices 526/1990 Sb. Stakeholders agree that it functions effectively, that consumers are well informed and that traders are complying with the rules.

- 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 measurement unit for a product's performance exists in very few products, with the exception of washloads. Also consumer organisations and ministerial experts underline that the 1 kg or 1 litre price unit is more precise and informative, and also easier to count for the producer, than a unit for a product's performance. On the basis of unit price, consumers are able to compare the products and choose according to their preferences.

- The effects of the regulatory choices/derogations allowed by the Directive and applied by Member States. [*Key aspects to consider are: Is the derogation relevant? Do companies make use of it? Are there consumer complaints because of this? If so, approximately how many per year?*]

The Czech legislature allowed in § 13 (9) 526/1990 some derogation from unit pricing in the following circumstances (the citation follows the letters of the legal source):

- b) If the product was sold in person;
- c) If the product was sold by self-service in a shop smaller than 400 m<sup>2</sup>;
- j) If the product was sold in a vending automate.

These derogations were valid until 1.5.2014. Since then there are valid derogations just in special cases, like art and antiquity, or because of the risk of devaluation of a product (e.g. if it is perishable).

There are no consumer complaints in relation to these special cases.

### 1.1.3. Effectiveness of the MCAD in providing protection for businesses

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

<sup>36</sup> See 124/2003 Sb.

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

Business organizations and ministerial stakeholders stated that the current legal regulation for advertising is sufficient. Until recently, sales and marketing companies were often unsure of what exactly would be deemed as 'permissible' advertising in the phase of transposition of the MCAD, especially regarding comparative advertisements, but now companies are implementing the rules without any difficulties.

The MCAD was transposed in the Czech Republic in the former Czech Commercial Act, whose norms were almost unchanged when transferred into the new CzCC. The rules about misleading advertising are in § 2977 and 2979 CzCC and the rules on comparative advertising in § 2980 CzCC among the rules of unfair competition. In misleading advertising cases the competitors can sue in civil courts, and, as mentioned in the part on commercial practices in B2B transactions, the competitors can request the violator according to § 2988 CzCC to refrain from competing unfairly and to return the injured party to the position they were in before the harm occurred.

The definition of advertising and the allocation of the control-competencies of authorities are regulated in Act. 40/1995 Sb. on the regulation of advertising.<sup>37</sup> The notion of 'advertising' according to § 1 (2) Act. 40/1995 Sb. is wide: 'Advertisement means a notice, visual presentation or other presentation that is distributed primarily through the mass media.' This Act also lists the most important communication media in § 1 (3),<sup>38</sup> but the list is not exclusive.<sup>39</sup> The allocation of the control-competencies is very fragmented. According to § 7 Act. 40/1995 Sb. the Council for Radio and Television Broadcasting is competent if the advertising is on radio or television, otherwise eight other authorities are responsible, for example the Office for Personal Data Protection, State Agricultural and Food Inspection Authority, State Authority for the Control of Pharmaceuticals, Ministry of Health, etc. In case there is no entity that would be competent or the advertisement is in print papers, the Trade Licensing Authority is competent. All these authorities can impose a fine for misleading advertising, according to § 8 (5) c) Act. 40/1995 Sb. maximum 2 million CZK [approx. EUR 74 000]. Companies can appeal the decision in administrative courts.<sup>40</sup>

Regarding misleading advertising rules, there are many previous cases concerning the former Czech Commercial Code,<sup>41</sup> but as of yet no cases are available concerning the new CzCC. Also there are cases on the regulatory activity of the authorities.<sup>42</sup> Statistical data are not available. (Courts do not publish all their decisions, and they do not collect statistical data, and the authorities do not publish details on cases in their annual reports.)

In B2C cases the rules of Act 634/1992 Sb. are valid where the UCPD was transposed.

<sup>37</sup> The English translation of some provisions is available here: <http://www.tobaccocontrollaws.org/files/live/Czech%20Republic/Czech%20Republic%20-%20Law%20No.%2040-1995%20on%20Ads%20.pdf>

<sup>38</sup> (3) A communications medium whereby the advertising is disseminated, means the medium that enables the dissemination of the advertisement, particularly printed periodicals 2) and non-periodical publications, 3) radio and television broadcasts, audiovisual production, 4) computer networks, audiovisual media, posters and leaflets.

<sup>39</sup> See: Aleš Rozehnal: Mediální zákony, Komentář, 2008, Praha, Wolters Kluvers, § 1

<sup>40</sup> On 20.5.2016 the Highest Administrative Court confirmed a 300.000 CZK fine imposed by the State Agricultural and Food Inspection Authority against Lidl, because of a misleading advertisement called the "right Czech feast". The reason was the origin of the meat, which included German meat.

<sup>41</sup> Most important: NS 28 Cdo 4755/2009, NS 23 Cdo 2749/2008, NS 32 Cdo 229/2006, VS v Praze 3 Cmo 380/2005, 9 As 38/2010-71 etc.

<sup>42</sup> Rc 7 A 54/96, SJS 11 A 263/2010 – 42, SJS 9 A 111/2011- 55, SJS 45 A 60/2012 – 58, Arbitrážní komise Rady pro reklamu (ADR) 013/99/Stríž

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

The interviewed stakeholders add that the principle based approach is very effective to combat misleading advertising. 'Unfairness' is a key question in the court decisions.<sup>43</sup> Also, an important orientation point is the average consumer and their interpretation of the advertisement.<sup>44</sup> Regarding vulnerable consumer groups, like children or physically unhealthy persons, there are also a few judgements, but only very few.<sup>45</sup>

- The effects of the minimum harmonisation provisions on misleading advertising; [*Key aspects to consider are: 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)?*]

Experts of the Ministry of Industry and Trade add that Czech national rules don't go beyond the MCAD. The level of protection ensured by the MCAD is sufficient. The Czech legislature has no interest in stricter norms. The MCAD provided protection level is satisfactory also for business organizations. Companies can understand these rules well and operate based on them. Business organizations add that in cross-border transactions consumers from different Member States have different knowledge about products. Czech consumers for example are well-informed regarding any beer product, so the advertising rules can be less strict in the Czech Republic towards these products. The minimum harmonization provisions can take into account these national differences, so for this reason the current rules are satisfactory.

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

Comparative advertising was not permitted for a long time in the Czech Republic.<sup>46</sup> Because of the uncertainty of the companies most questions regarding the transposition of the MCAD were brought to the authorities on this topic. The full harmonization provisions are accepted by all stakeholders including companies. Ministerial experts add that there are very few Czech cases regarding comparative advertising, only one or two annually.

- 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;

The rules provide an effective legal framework also for modern types of marketing.

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

The current rules on enforcement seem to be effective for all stakeholders in the Czech Republic.

In a cross border context, ministerial experts say they get very few questions regarding advertising. Some French and Polish companies asked for advice regarding advertising on billboards, but such requests are very rare.

<sup>43</sup> See VS v Praze 3 Cmo 380/2005,

<sup>44</sup> NS 32 Cdo 229/2006 or NS 23 Cdo 2749/2008.

<sup>45</sup> SJS 5 A 114/2010-10 baby food, SJS 4 AS 98/2013 -88 multiMun AKUT

<sup>46</sup> Petr Hajn in Jiří Švestka, Jan Dvořák, Jozef Fiala a kolektiv Občanský zákoník Komentář, § 2980 Wolters Kluwer.



- Are there measures that could improve the effectiveness of the MCAD in providing protection for businesses (see also 1.1.6 below)? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

The Czech companies can orientate themselves well based on the rules and are satisfied with the ensured protection level. They did not feel the need for further improvement.

Regarding vitamin and food supplementary trading business organizations, stakeholders add that a stricter evidence requirement on the effect of those products would be appreciated, similar to the USA's rules (the case of B12 vitamins), before the effect of such products could be promoted in an advertisement. As a relevant best practice, the self-regulation of the Codex of Advertising of the Association for Communication Agencies (AKA)<sup>47</sup> must be mentioned, to which more than 30 Advertising Agencies have joined. Interestingly the Czech Advertising Standards Council makes decisions on wheatear the members of the Association comply with the Codex.

#### 1.1.4. Effectiveness of current rules 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;

Regarding different business strategies, stakeholders added that the majority of Czech traders are not active in other countries, so they did not expect disparities having an impact on cross-border trade.

On the other hand business organisations underline that disparities create costs (legal advice, different web content etc.) which will be paid in the end by the consumer as an additional cost. For this reason traders would prefer a standardised European system of unfair commercial practices throughout all Member States, like a traffic light.

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

Uniform lists all over Europe are applied effectively for traders. But the formulation of the black list of the UCPD, and also the formulation of misleading commercial practices, is not easy to understand, according to stakeholders.

- Whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade. [*Do the national differences play a role in a business perspective? Have they caused problems?*]

No problems were observed.

<sup>47</sup> See <http://www.aka.cz/samoregulace/>.



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;

The majority of Czech traders are not active in other countries, and do not apply the MCAD with cross-border effect. There are no disparities observed regarding the advertising of foreign traders in the Czech market.

- Whether the minimum harmonisation character of provisions on misleading advertising represents a barrier to cross-border trade;

No barriers were observed.

- 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;

The legal framework is considered to be appropriate by stakeholders.

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

The majority of Czech traders are not active in other countries, so they cannot evaluate barriers to cross-border trade. But cross-border enforcement seems to be very expensive for all parties (higher legal costs, translation, travelling etc.), and for this reason Czech traders would hesitate to bring claims in other countries.

Regarding CPC cooperation the Czech Trade Inspection reported about 3-4 cross-border B2C cases since 2004, which is also extremely few. About B2B cases no statistic is available.

#### 1.1.5. Interplay amongst UCPD information requirements according to Article 7(4) with the information requirements in the horizontal consumer law instruments

Regarding the information requirements according to Article 7(4) UCPD ("invitation to purchase") in the advertising stage, please analyse:

- The level of awareness of traders as regards information requirements at the advertising stage, as in particular demonstrated by their practical application; [*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?*]

Answers of stakeholders show different awareness levels amongst traders. The majority of bigger traders, trade chains, and entities supervised by the Czech National Bank have an awareness of provision § 5a (3), which transposed Art. 7 (4) UCPD. On the other hand e-shops are heavily criticised by consumer organizations, who say that just 1/5 of the web-shops comply with the information requirements. Also the Czech Trade Inspection Authority confirms that the information requirements are the main subjects of control for the inspectors and in 60% of the cases they find deficiencies. The Czech Telecommunication Authority also added that the bigger operators more or less comply with the information requirements, and the smaller firms copy their web-pages.

Regarding to CRD, ministerial experts add that the CRD clarified the information requirements, and the traders focus now on complying with these new rules.

- 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?

No costs and practical problems were reported.

#### 1.1.6. Relevance for business-to-business transactions

Regarding the area of unfair commercial practices/marketing, please analyse:

- 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 cross-border trade;

The majority of the stakeholders do not see a need for revision or extension of UCPD or MCAD to B2B transactions (see below).

The Czech norms extend the scope of both Directives practically also to B2B transactions according to § 2976-2990 CzCC<sup>48</sup> and provide contractual consequences in case of breaches of the UCPD (see the next question).

- 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;

The CzCC norms<sup>49</sup> extend the scope of the UCPD in many areas also to B2B transactions. According to § 2976-2990 CzCC,<sup>50</sup> 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. It is interesting that CzCC entitles also a legal person who is defending the interests of competitors to bring an action against the violator according to § 2989 (1) CzCC. It is a relief in these cases that civil courts do not need to conduct the unfairness test according to Art. 5 UCPD. It is furthermore a relief that in all these cases the violator must prove that he or she did not compete unfairly according to § 2989 (2).

Furthermore the new Czech Civil Code Act 89/2012 Sb. enshrines the protection of the weaker party as a general principle according to § 433.<sup>51</sup> The protection of the weaker party<sup>52</sup> is automatically strengthened in all B2B relationships, not just SMEs, but it

<sup>48</sup> <http://obcanskyzakonik.justice.cz/images/pdf/Civil-Code.pdf>

<sup>49</sup> Petr Hajn in Jiří Švestka, Jan Dvořák, Jozef Fiala a kolektiv Občanský zákoník Komentář, § 2988 Wolters Kluwer

<sup>50</sup> <http://obcanskyzakonik.justice.cz/images/pdf/Civil-Code.pdf>

<sup>51</sup> Havel in Melzer/Tégl a kol. Občanský zákoník, Velký komentář, 2014-2017, Leges, § 433.

<sup>52</sup> Josef Bejček: Smluvní Svoboda a ochrana slabšího obchodníka, Acta Universitatis Brunensis, iuridica edition Scientia vol. 557, Masarikova univerzita, Brno 2016, p 43 ff. 52

only ensures a situational protection. Because of this general protection, national courts can apply more protective rules to balance the differences between the contractual parties. An extra extension for all B2B transactions is considered to be not necessary in the Czech Republic.

On the other hand, some academics<sup>53</sup> criticise the distinction between B2C and B2B enforcement. In the case of unfair competition, competitors and consumers can enforce their interest at civil courts. In case of unfair commercial practices, consumer rights are protected mainly administratively, by authorities, with exception of the § 2988 CzCC regarding misleading advertising and misleading identification of goods and services.

- 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 also cover unfair commercial practices during and after the transaction;

See above. An extra extension for all B2B transactions is not considered to be necessary in the Czech Republic, according to stakeholders.

- Whether there is a need to have a black list of practices in the business-to-business marketing area;

A black list of practices in the business-to-business marketing area is not considered to be necessary, according to stakeholders.

- What should be the enforcement cooperation mechanism in the business-to-business marketing area;

Czech law allows enforcement via arbitration and regular courts, and also legal persons entitled to defend the interests of competitors can bring an action against the violator. Competitors or business clients can also bring complaints to authorities. All these different types of enforcement have different costs and outputs for the participants.

- Whether there is a need to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive;

According to § 2988 CzCC in conjunction with § 2977 (misleading advertising) and § 2980 (comparative advertising), the Czech legal system has developed contractual consequences. '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.

- Whether there is a need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive.

There is no need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive, according to stakeholders.

<sup>53</sup> Marta Ptačková: Veřejnoprávní regulace obchodních praktik, 2015.

### 1.1.7. Relevance of contractual consequences of unfair commercial practices

Please analyse whether there are in your country:

- 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;

In the case of breaches to the UCPD, the consumer should bring complaints to authorities (administrative enforcement), where the trader will be sanctioned, but he or she cannot automatically file a lawsuit as a follow up procedure for compensation of damages at civil court. In the Czech Civil procedure *actio popularis* are missing with compensation claims or follow up compensation claims – likewise for collective redress or so called *Musterklagen*. If consumers wish to be compensated for their damages, first they should bring a complaint to the traders and then they could file an individual claim at regular courts and bring all the evidence before the courts. Consumer organisations underline that even aggressive commercial practices are very complicated to substantiate, not to mention misleading omissions or misleading actions.

Since February 2016 consumers can also initiate an ADR-resolution at the Czech Trade Inspection Authority<sup>54</sup> according to § 20d 634/1992.

In some cases there are contractual consequences for breach to UCPD, but just in several cases, e.g. misleading and comparative advertising, and misleading identification of goods and services – in those cases the consumer can file a lawsuit according to § 2988 CzCC at the regular civil court. In these cases the consumer is in a better position regarding evidentiary burdens since according to § 2989 (2) the violator must prove that he did not compete unfairly. And if a consumer asserts his or her right to compensation for damage, the violator must prove that the damage was not caused by unfair competition.

In the special situation of unsolicited performance (if an entrepreneur has supplied a thing to the consumer without the consumer's order and if the consumer assumed the possession thereof, the consumer is considered to be a possessor in good faith) the CzCC provides contractual consequences. According to § 1838 CzCC, the consumer is not obliged to give anything back to the entrepreneur at his own expense in return for the unsolicited performance.

- Any case law (enforcement decisions, court rulings) providing for such consequences;

Regarding § 2988 no consumer law cases have been decided. Regarding § 1838<sup>55</sup> there were two court decision published. It should be mentioned, that these rules have been in force since 1.1.2014.

- Whether there is, based on past experience in your country, a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

It seems to be unjustified to allow in B2B transactions regarding unfair competition reversal of the burden of proof and not to allow it at all in unfair commercial practices against consumers. The legislature could easily resolve this discrepancy by extending contractual consequences linked to the use of all unfair commercial practices (not just acc. to § 2988). It would also possibly be useful for the legislature to consider reversing the burden of proof in certain cases concerning unfair commercial practices.

<sup>54</sup> Since February 2016 till the end of June more than 1400 ADR proceedings have been initiated by consumers (!)

<sup>55</sup> KS v Praze 22 Co 177/54 (Rc 135/1954), KS v Českých Budějovicích 10 A 181/2014 – 69.

## 1.2. Contract conclusion and performance

### 1.2.1. Effectiveness of the current rules in establishing 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 principle-based approach under the UCTD is generally evaluated by the stakeholders as effective. While the general principles build a solid foundation for the judiciary, the European grey list (from which Czech law formed a black list, see below) allows an easier control-mechanism primarily for the sector-specific authorities (Czech Telecommunication Office, Financial Arbitrator, Czech Energy Office) and also for the retailers. The average consumer is mainly protected by the general provision. Regarding the sector-specific directives, e.g. financial services and electronic communications, there is little room left for the application of the general principles of the UCTD. Authorities and also business organizations suggested that the majority of sector specific traders should prepare their general business terms according to the sector-specific rules, but the necessity of application of UCTD are often unclear.

The new Czech Civil Code, Act. No. 89/2012. Sb.,<sup>56</sup> which entered into force on January 1, 2014, defined and/or corrected most of the remaining incomplete and incorrect transpositions from the past.<sup>57</sup> The new Civil Code extends the application of the Directive in many cases, i.e. to individually negotiated terms under § 1813 CzCC, and to implied and unwritten contracts under § 1812 CzCC.<sup>58</sup> The limitation of No. 2 Annex of the Directive is not applied for financial services. Some mechanism of contract control is also applicable in B2B relations in favour of the weaker party under § 433 CzCC. Nevertheless there are still some imperfections, i.e. the indicative list of the UCTD Annex is not completely reflected, actions for injunction to prevent the continued use of unfair terms according to Art. 7 are not visible in the Czech Republic, not to mention the lack of existence of other collective redresses. The formulation of consequences of unfair terms according to § 1815 caused uncertainties, even if the literature emphasises '*non negotium*', the non-binding effect of unfair terms unless they are invoked by the consumer.<sup>59</sup>

Regarding the judiciary in the decisions of the lower Czech Courts, we cannot find references to CJEU judgements relating to the UCTD – this was emphasised by consumer organisation stakeholders, and also ministerial experts. Higher courts, like the Czech Supreme Court and the Constitutional Court, refer rarely to CJEU decisions (II.ÚS 1512/12, II. ÚS 3/06, I.ÚS 3512/11, NS 33 Cdo 1201/2012), but the courts still do not base their argumentation on the Directive in case of uncertainty regarding the Directive's conformity with the interpretation of national rules. In some cases it is one of the lawyers who informs the court that it is necessary for national rules to be

<sup>56</sup> Of 3. February 2012, in force since 1.1.2014 see: <http://obcanskyzakonik.justice.cz/images/pdf/Civil-Code.pdf>

<sup>57</sup> After a letter of formal notice in 2007, the European Commission sent on 8.10.2010 a reasoned opinion (IP/09/1451 of Brussels, 8 October 2009) to the Czech Republic because contrary to the Directive, a consumer in the Czech Republic was bound by an unfair contract term as long as he did not actively invoke its unfairness. The Czech legislature reacted to the infringement proceeding with Act no. 155/2010 Sb.

<sup>58</sup> Švestka/Dvořák/Fiala/Pelikánová/Pelikán/Bányaiová a kolektiv: Občanský zákoník, Komentář, Svazek V (§1712 – 2520) Wolters Kluwer, 2014 p. 189.

<sup>59</sup> Lavický, Petr, a kol. Občanský zákoník V. Závazkové právo (Obecná část § 1721-2054). Komentář. Praha, C. H. Beck, 1. Vydání, Beck, 2014, § 1815.

interpreted in conformity with the Directive,<sup>60</sup> courts sometimes being unaware of the necessity. It should be noted that the court reasoning usually does not reflect awareness of this necessity.

In the reasoning of the higher courts in the last few years, concrete consumer protection norms have been more frequently cited,<sup>61</sup> but still many decisions apply general civil principles such as good faith. Interestingly, we can also find decisions of the Constitutional Court regarding contractual penalties (I.ÚS 3512/11), which extend the applicability of B2B commercial norms regarding the burden of proof on the traders, to ensure the same level of protection also for the consumer.<sup>62</sup>

Stakeholders also emphasised problems with the ex officio review, which is more questionable in contracts of telecommunications service providers, where the Czech Telecommunication Office has exclusive competences instead of the court regarding § 129 (5) Act. no 127/2005. Some stakeholders add that professional training in EU consumer law would be essential for the improvement of the work of national judges at the lower court level.

Although the Czech Courts referred 48 cases<sup>63</sup> for preliminary ruling to CJEU, there is just a single case (from August 2014)<sup>64</sup> which deals with the interpretation of the UCTD (see further at ex-officio). On the other hand, other institutions, like the Financial Arbitrator, are fully aware of CJEU's decisions and in relevant cases these decisions create a solid base for Financial Arbitrator's decisions.<sup>65</sup>

- 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 your MS? Does this work in practice or are there problems?*]

The indicative list of the UCTD is interpreted in § 1814 of the Czech Civil Code<sup>66</sup> as a black list, but Czech regulation does not include all terms of the Annex. The terms that are not transposed are 1. e), h), m), n), and p), and not fully transposed are terms 1 b), i), k), l), o). The main problem with the Czech black list is that the terms do not deal with such defaults as delay of delivery, exclusion from the right to withdraw, reduction of interest upon delay, etc. In these cases, or where the indicative list was not fully transposed by the Czech legislature, the consumer should file a lawsuit based on the general terms of § 1813 of the CzCC (i.e. the general test of unfairness), which was fully implemented.<sup>67</sup>

Regarding the scope of subparagraphs g), j) and l) of the Annex, the Czech rules do not allow exclusion for financial services, so the Czech Code provides greater protection for the consumer in the financial sector without considering the fluctuations

<sup>60</sup> 28 Cdo 4556/2010.

<sup>61</sup> Some cases: 35 C 175/2014, 19C 215/2014, 33 Cdo 1956/2007, 9 As 8/2011- 63 I. ÚS 3512/11.

<sup>62</sup> According to the argumentation the trader must bear the burden of proof regarding the opportunity for the consumer to become acquainted with the contract penalties before the conclusion of the contract

<sup>63</sup> The main topics of the civil law cases of the 48 referred Czech cases are: mutual assistance by the competent authorities, mutual assistance for the recovery of claims, taxation, interconnection obligation, cartel, imposing of measures on the operators of online marketplace, insolvency proceedings and consumer credit, see:

[http://www.nsoud.cz/judikaturans\\_new/ns\\_web.nsf/Edit/InternationalRelations~CzechPreliminaryReferences?Open&area=International%20Relations&grp=Czech%20Preliminary%20References&lng=EN](http://www.nsoud.cz/judikaturans_new/ns_web.nsf/Edit/InternationalRelations~CzechPreliminaryReferences?Open&area=International%20Relations&grp=Czech%20Preliminary%20References&lng=EN)

<sup>64</sup> CJEU C-377/14, Radlinger, ECLI:EU:C:2016:283.

<sup>65</sup> Financial Arbitrator 19/SU/2013.

<sup>66</sup> See Petr Lavický a kol.: Občanský zákoník V. Závazkové právo. Obecná část 831721-2054) 1. Vydání, Beck, 2014 p 450-473

<sup>67</sup> Even if the requirement of "good faith" is only explicitly mentioned in the general rules of the Civil Code in § 1 (1) CzCC.



or other changes in the financial market. Art. 15. 2) of Directive 2002/65/EC was also transposed into the Czech black list as § 1814 k).<sup>68</sup>

Regarding the practical effectiveness of the indicative list, some stakeholders mentioned that it was very complicated for the legislature to find the right formulation for certain subparagraphs, which are sometimes not required. The courts often have difficulties interpreting the particular subparagraphs and they prefer to apply the general terms of § 1813 CzCC. In the literature it is criticised that during the recodification of the Czech Civil Code, the legislature applied a barely changed text of the old black list from the former Code Act No 40/1964 Sb. Even if the reasoning of the adaptation focused on continuity and it was only a secondary goal to transpose the UCTD-Annex by the European legislature (see: KOM (2008) 614. final), in the end the Czech legislature did not fully conform to the directive but created a more practical amendment of the black list in the new Civil Code.<sup>69</sup>

- 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; [*Note: If a black/grey list exists in your country, key aspects to consider are: How does the list work in practice? Does it make a difference to have such a list?*]

To have a black list mainly benefits the businesses, and secondly the courts, because the latter does not have to rely on applying the general test of fairness only, according to stakeholders. In the judicial decisions the opposite approach is evident: the courts prefer to apply the general test of fairness. In case of unfair contract terms in the telecommunication sector, where the Czech Telecommunication Office also has the power for contract 'litigation', a black list can be very helpful. Since the black list is in force in the Czech Republic, the biggest traders are making an effort to eliminate unfair terms from their contracts (according to experts from consumer organisations). When a consumer is complaining at a consumer organisation about an unfair contract term, it is easiest to handle those terms that are on the black list, because due to legal advice from the European Consumer Centre some of the major businesses who care about their reputation, are disposed to change the contract terms. (Note that the ECC in the Czech Republic is instituted and co-financed by the Czech Trade Inspection Authority, which increases their power and prestige.) Another consumer organisation reported 'cosmetic' changes of contract terms by the traders after the new Civil Code.

Regarding the black list, the Czech courts have dealt mainly with two types of unfair terms: arbitration agreements<sup>70</sup> and agreements about court competence (MS v praze 93 Co 214/2014). Both issues were so intensely discussed that the legislature also reacted. With the new modification<sup>71</sup> of the Czech Civil Procedure<sup>72</sup> (further: CzCP), the applicability agreements about court competence have been limited just to B2B litigation (in B2C cases it is not possible), and the Act on arbitration 216/1994 Sb. introduced consumer protection rules (§ 25 2) and 3) and § 31 g) and h)), which have been in force since January 1, 2014. The applicability of this kind of agreement was controversial, and regarding the review of the Act on Consumer credit,<sup>73</sup> members of

<sup>68</sup> § 1814 The prohibition particularly applies to stipulations which: k) pass onto the consumer the burden of proof that the entrepreneur has fulfilled his duty imposed on him by the provisions of a contract for the provision of financial services.

<sup>69</sup> See Lavický, Petr, a kol. Občanský zákoník V. Závazkové právo (Obecná část § 1721-2054). Komentář. Praha, C. H. Beck, 1. Vydání, Beck, 2014 p. 469.

<sup>70</sup> ÚS II. ÚS 2164/10 KS v Ostravě 38 ICM 178/2010, VS 12Cmo 496/2008, 33 Cdo 1201/2012, 30 Cdo 3712/2012 and see a long list on Lavický, Petr, a kol. Občanský zákoník V. Závazkové právo. Obecná část (§1721-2054) 1. Vydání, Beck, 2014 p. 464-466.

<sup>71</sup> Act. 293/2013 Sb.

<sup>72</sup> Act. 99/1963 Sb.

<sup>73</sup> Parlament print version 679 (Sněmovní tisk 679).



the Czech Parliament tried to completely eliminate arbitration agreements in consumer credit contracts.<sup>74</sup> But there have also been many cases decided before Czech courts concerning compensation upon withdrawal and compensation for product liability.<sup>75</sup>

- 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: In your country, have the effects of court decisions establishing the unfairness of an unfair term been extended to all contracts of the trader concerned or to the contracts of any other trader containing such a term? If so, how does this work in practice? What are the impacts on businesses? If there are no such effects of court decisions on unfair terms: what are the effects of this situation?]

All stakeholders emphasized that the Czech Court decisions can only have a legally binding effect on individual relationships between the specific trader and the consumer according to § 159a) (1) CzCP. Ministerial experts added that it is hard to imagine how the extension of the binding effect *erga omnes* could function in a court decision, even if in other Member States the extension of *res judicata* is possible to all affected consumers. Despite this general position of the stakeholders, § 159a) (2) CzCP allows a collective effect for decisions in special cases: '2) An opinion of a final judgment, which ruled in the cases mentioned in § 83, paragraph 2, is not only binding for the parties, but also for other persons entitled against the defendant for the same claims from the same act or condition. Special legislation states in which other cases and to what extent the verdict or final judgment is binding on persons other than the parties.' Matters considered in § 83 are: a) rights breached or threatened by unfair competition conduct, b) protection of consumer rights, c) consideration in a squeeze-out d) other cases.<sup>76</sup> Regarding consumer protection, only injunction actions are allowed. While the commentaries<sup>77</sup> note more cases regarding squeeze-out and unfair competition conduct, they remain silent about cases regarding consumer protection.

Between 1993-2008 the consumer protection organisation SOS filed 10 injunction actions in civil courts but in most of the cases the organisation abandoned the action because the disputes should have been solved by alternative dispute resolution. There are two injunction cases that had legal effect, one from 2005, the 'gift card' case,<sup>78</sup> and the other from 2013, the 'bank charging' case.<sup>79</sup> In both cases the consumer organisation lost the suit, so there is no evidence how a court would deal with the extension of the legal effect.

Regarding the follow up effect of individual binding decisions, it should be mentioned – as stakeholders underline it – that the bigger traders are well informed and follow the judicature, especially if the case does not solely belong to the court's competence but also to another body. The reason is that those other bodies i.e. the Financial Arbitrator or the Czech Telecommunication Office could not only award compensation to the consumer but also impose a fine on the trader. Regarding contract law, there are overlaps according to court competences in financial issues. The consumer can file a suit in court or initiate a more friendly, fast and cheap ADR-procedure at the Financial Arbitrator according to § 1 (1) Act no. 229/2002 Sb., where the Arbitrator can impose

<sup>74</sup> See Act. 257/2016 Sb. and Act. 258/2016 Sb.

<sup>75</sup> Regarding product liability, special norms are also in force, so the general terms of § 1813, 1814 have not been applied too often.

<sup>76</sup> <http://www.czechlegislation.com/en/99-1963-sb>

<sup>77</sup> Bohumil Dvořák in Petr Lavický a kol. Občanský soudní řád, Praktický komentář, Wolter Kluvers, Praha, 2016 § 159a bod 32-35.

<sup>78</sup> NS 33 Cdo 1956/2007.

<sup>79</sup> OS pro Prahu 5 10 C 49/2013.

a fine. In telecommunication contract issues, the CTO has an exclusive decision making power according to § 129 (5) Act no. 127/2005 Sb. Both of these authorities underline the 'domino-effect' of their decisions and the willingness of the traders to self-correct contract terms.

The Czech ECC stressed that they are using the judicature of CJEU and the Czech courts as 'case law', and relying on their legal opinions. Most of the traders take their critical remarks regarding consumer contract law seriously. Banking and other associations are warning and informing their members after failed judgements. On the other hand, it is possible to recognise a so called 'wear out strategy' of the traders, before a legally binding judgement, which can take several years. Even if it is foreseeable that the Financial Arbitrator will decide the case in favour of a consumer, the banks wait for the result of the court decision and hesitate to eliminate the unfair term.

It must be underlined that even if in its written form Czech law includes the possibility of extending the effect of a court decision, it is not practised in consumer cases. The self-correction of the traders happens more or less in cases where an administrative sanction is expected. A further problem is the inactivity of the consumers in terms of filing a lawsuit. Here there is not a domino-effect. Reasons for refraining from that are the following: relatively high court costs, costs associated with legal action, risk of unfavourable judgement, cases taking too long.

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

Stakeholders generally underline the positive effect of the UCTD and the Consumer Rights Directive on contractual transparency. Consumer organisations add that many of the unfair agreements have disappeared from the market, like hidden arbitration agreements or hidden contract fines. Unilateral contractual changes, however, are still causing many problems for the consumer.

At the implementation of the Consumer right directive and the improved transposition of UCTD the Czech legislature codified in § 1811 (1) a clause for general transparency: 'All of an entrepreneur's communications with a consumer must be made clearly and understandably in the language in which the contract is concluded.'

Also, former court practice interpreted<sup>80</sup> the definition of transparency and requires 'readable, synoptic and logical ordering' of consumer contracts, especially of template-contracts. In sector-specific consumer litigation, it is not clear what should be the appropriate expectation regarding contractual transparency. It is questionable whether the absence of calculation mechanisms regarding consumer credit agreements<sup>81</sup> can lead to non-transparency. As regards consumer credit agreements, the Financial Arbitrator also added that the courts have major difficulties regarding the understanding and application of the annual percentage rate of charge.<sup>82</sup>

- 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. [*Note: Question only relevant for MS that have put in place extensions of application of UCTD*]

The Civil Code has extended the application of the Directive in many places: first regarding individually negotiated terms according § 1813 CzCC, and second regarding

<sup>80</sup> ÚS III. ÚS 3725/13, I. ÚS 3512/11, VS v Praze 76 ICm 876/2010, 103 VSPH 84/11.

<sup>81</sup> PE CONS 25/13 -2011/0062, 32 Cdo 191/2014.

<sup>82</sup> FA/SU/112/2014, 264/SU/2013.

*implied* and unwritten (or oral) contracts under § 1812 CzCC. The intention of the Czech legislature, in extending application, was to make it easier for the consumer to appeal to court in cases where an unfair term was agreed individually between an unreliable trader and the consumer.

Regarding the price and main subject matter, there are not evident extensions. On the contrary: Czech law is very restrictive regarding the possibility of price control. The literature reveals a fear of the 'atomization of the contract-control'. This problem was highly visible regarding the banking fee cases. Referring to the German BGH decision regarding the account maintenance fees,<sup>83</sup> Czech consumers also filed several similar lawsuits and in November 2013 Czech consumer submitted 93139 petitions to the Financial Arbitrator to start proceedings.<sup>84</sup> Some city courts of Prague struck down the fees,<sup>85</sup> some others allowed<sup>86</sup> it, as long as the Supreme Court defined the fees as part of the price,<sup>87</sup> with a unifying effect of this decision. Also the Constitutional Court refused<sup>88</sup> a consumer claim. The Financial Arbitrator mentioned an actual case regarding his decision of 19/SU/2013, where the City Court Prague misinterpreted the definition of the price as main subject matter under Art. 4 (2) UPCD. The City Court eliminated the necessity of the unfairness-test regarding the unilateral change of a banking fee with the argument that this also falls under the main subject matter of the contract.<sup>89</sup>

- 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?*]

The non-binding character of unfair contract terms is anchored in Czech Civil law according to § 1815 CzCC. This norm also allows a relativisation of the nullity if the consumer insists on the validity: 'Disproportionate stipulations are disregarded unless invoked by the consumer'.

Regarding the foreseeability of the sanctioning of unfair terms, stakeholders of consumer organisations criticize the excessive length of court procedure and the differences in the application of the norms in § 1813, 1814 CzCC by several lower courts, which causes uncertainty for the consumer, but also for the traders, as in the banking-fee case.

The unfairness control ex officio is not satisfactory in the Czech Republic. We can detect two main problems. Firstly there is a discrepancy between ex officio and so called *dispositions maxima* according to § 153 99/1963 CzCP,<sup>90</sup> which is one of the main principles of civil procedure. The second problem is the application of ex officio control in the 'quasi litigation-procedure' by sector specific authorities, like the Czech Telecommunication Authority.

Consumer organisations emphasise the problem that courts regularly order contract penalty payment in favour of the traders without applying the unfairness-test

<sup>83</sup> BGH XI ZR 388/10.

<sup>84</sup> See: <http://www.finarbitr.cz/cs/informace-pro-verejnost/tiskove-zpravy/tiskova-zprava-prubezna-informace-k-hromadne-podanym-navrhum-na-zahajeni-rizeni-o-poplatek-za-spravu-uveru-330.html>

<sup>85</sup> OS pro Prahu 5 25 C 261/2012, Ks v Plzní 25 Co 60/2013.

<sup>86</sup> OS pro Prahu 5 10 C 49/2013.

<sup>87</sup> NS Cpjn 203/2013.

<sup>88</sup> III. ÚS 3725/13.

<sup>89</sup> The case is pending and not published yet.

<sup>90</sup> The commentary does not deal with the question and possibilities of ex-officio, see Bohumil Dvořák in Petr Lavický a kol. Občanský soudní řád, Praktický komentář, Wolter Kluvers, Praha, 2016 § 8.

regarding penalty clauses, unless the proceeding was initiated by the consumer. Also, ministerial experts are concerned that lower courts are not adequately performing ex officio control, as required by the CJEU judicature. Other experts add that in the Czech Republic consumers should have proper legal knowledge to be able to enforce their rights.

The problems with invoking unfairness ex officio are clearly visible in Radlinger case C-377/14.<sup>91</sup> The Regional Court of Prague referred mainly to the necessity of the application of ex-officio control, and partly to the non-binding effect of unfair contract terms.<sup>92</sup>

Regarding the 'quasi litigation' competence of sector specific authorities according to § 129 of 127/2005 Sb. for the Czech Telecommunication and according to § 96 b) 458/2000 Sb. for the Czech Energy Authority, it must be added that these bodies are even more inadequately performing of unfairness-test ex officio, than in the regular courts. Stakeholders of these authorities are not certain if they should invoke unfairness automatically. On the other hand, the Financial Arbitrator applies ex officio an unfairness-test even in cases related to the period (contracts signed before 1<sup>st</sup> August 2010) in which due to incorrect transposition of the UCTD the contracts were not 'absolutely' but only 'relatively' void, i. e. the consumer had to claim it.

Stakeholders agree that the Czech judicature does not apply the CJEU guidance because of the judges' lack of knowledge of it.

Administrative remedies do not exist in this area for the Czech consumer.

- In a forward looking perspective: Are there other measures that could improve the effectiveness of the UCTD in establishing a high level of consumer protection in your country? Would a graphical presentation model improve the readability and comprehension by consumers of the T&Cs? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

The transposition of the UCTD in the Czech Republic and the rules of the new CzCC impacted consumer contract law very positively. Illegible fine print and unexpected contract terms have disappeared from the majority of contracts, but the provision of quality information by the traders is still problematic in practice.

Other measures: Regarding the indicative list, experts of ministries and the Financial Arbitrator agree that Chapter V of the Proposal for a Directive of the European Parliament and of the Council on consumer rights of 2008 from 8.10.2008 COM(2008) 614 final, 2008/0196 (COD)<sup>93</sup> contained elaborate requirements for contract terms, requirements which should be applied in the future. These requirements could build the basis/foundation of possible future EU legislation.

Some best practices can be reported in the Czech Republic:

- The Czech judicature requires that agreements on contract penalties cannot be contained in T&Cs, rather they should be a separate paragraph or provision of the contract;
- Regarding § 6 (1) 145/2010 Sb. Act on consumer credit, only the applied T&Cs part should be cited in the contract, if T&Cs are part of it. In that case the printed presentation of applied T&Cs should not be smaller than other parts of the contract;

<sup>91</sup> ECLI:EU:C:2016:283.

<sup>92</sup> See ECLI:EU:C:2016:283 remarks 51,54,56,58,59,60,66,74,77,97,100,100 (!) Further question was the calculation of the annual percentage rate according to 2008/48/EC Directive.

<sup>93</sup> See [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/com/com\\_com\(2008\)0614\\_/com\\_com\(2008\)0614\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2008)0614_/com_com(2008)0614_en.pdf)

- The Czech telecommunication authority published the second edition of its recommendation of fair contract terms (containing 48 pages);<sup>94</sup>
- The Association for electronic commerce (APEK) created an E-shop Kodex;<sup>95</sup>
- The main consumer organisation DTest gave certification for reliable e-shops;
- The Czech organisation People in Need recommended to compose a codex of fair consumer credit contract rules (not realised yet).

Nonetheless the Financial Arbitrator added that the effectiveness of application of UCTD rules still can be much better in the Czech Republic.

### 1.2.2. Effectiveness of the current rules 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 disparities have an impact on cross-border trade; [*Key aspects to consider are: Do national differences in the application/implementation of the Directive play a role for businesses? Have these differences led to changes in their business strategy? Have these differences caused problems?*]

Business organisations agree that traders are now used to applying the provisions of the UCTD. But the traders would prefer a standardised system of fairness clauses all over the Member states, like a traffic light. Regarding further questions of necessity of full harmonisation of rules, the business stakeholders stated they would not need major changes, but expressed that unified rules would be great.

Disparities create costs (legal advice, different web-content etc.) which will be paid in the end by the consumer as an additional cost.

Regarding different business strategies, stakeholders add that the majority of Czech traders are not active in other countries, so they cannot estimate the extent of costs incurred.

- 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;

Respondents did not notice such cross-border trade barriers. Ministerial experts and the Financial Arbitrator would exclude the indicative list according to Chapter V of the Proposal for a Directive of the European Parliament and of the Council on consumer rights of 2008 from 8.10.2008 COM(2008) 614 final, 2008/0196 (COD).<sup>96</sup>

- 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.

The extension to individually negotiated terms is possible in the Czech Republic. Experience in the Czech Republic regarding extension of the application to individually negotiated terms could be recommended for other Member States.

<sup>94</sup> <http://www.ctu.cz/doporuceni-ctu-k-navrhum-smluv-o-poskytovani-verejne-dostupnych-sluzeb-elektronicky-komunikaci>

<sup>95</sup> <https://www.apek.cz/kodex-terminologie-lhut-dodani>

<sup>96</sup> See [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/com/com\\_com\(2008\)0614\\_/com\\_com\(2008\)0614\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2008)0614_/com_com(2008)0614_en.pdf)

### 1.2.3. Relevance for business-to-business transactions

Regarding the area of contractual fairness and in relation to the Unfair Contract Terms Directive, please analyse:

- Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;

Similar to other European Codes the new Czech Civil Code Act 89/2012 Sb. enshrines the protection of the weaker party as a general principle according to § 433.<sup>97</sup> The protection of the weaker party<sup>98</sup> is automatically strengthened in all B2B relationships, not just SMEs, but it only ensures a situational protection. '(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.' The decisive factor is whether the entrepreneur's act is unrelated to his business. (This is a *praesumptio iuris tantum*, the burden of proof is on the weaker party.)

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.

It must be mentioned that the weaker party is not protected *per se*, rather only in case of abuse or exploitation of his right to his disadvantage (until now there were no civil court decisions regarding this norm).<sup>99</sup> Regarding the level of protection of the weaker party, commentaries underline that the upper level of the protection cannot exceed consumer protection rules and that stipulations on the subject of performance or price cannot be controlled.<sup>100</sup>

- 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;

The protection level for the weaker party in B2B transactions is ensured in the Czech Republic by CzCC. Business organisations underline that B2B regulation should be light-handed, otherwise competition law provisions may be compromised. Excessively widespread regulation brings the risk of overregulation. Czech Act. 395/2009 Sb. on the significant market power in the sale of agricultural and food products is an example of that. According to the regulation, the Czech Competition authority has too

<sup>97</sup> Havel in Melzer/Tégl a kol. Občanský zákoník, Velký komentář, 2014-2017, Leges, § 433.

<sup>98</sup> Josef Bejček: Smluvní Svoboda a ochrana slabšího obchodníka, Acta Universitatis Brunensis, iuridica edition Scientia vol. 557, masarikova univerzita, Brno 2016, p 43 ff. 52.

<sup>99</sup> Havel in Melzer/Tégl a kol. Občanský zákoník, Velký komentář, 2014-2017, Leges § 419-645, p. 35.

<sup>100</sup> Lavický, Petr, a kol. Občanský zákoník V. Závazkové právo. Obecná část (§1721-2054) 1. Vydání, Beck, 2014, § 1798.



broad and too flexible a scope for intervention by which not only SMEs but also big retail chains can be protected.

- 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;

The protection of the weaker party in Czech civil law is a general principle. Theoretically it is also applicable for individually negotiated terms depending on the subject-matter, but only in cases – and it should be underlined - where there is a clear and unjustified imbalance between the mutual rights and duties of the parties. The literature emphasises that individual agreements express the will of the parties better than T&Cs,<sup>101</sup> which should be taken into account and the level of the protection should be lower.

- 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;

Czech Act. 395/2009 Sb. on the significant market power in the sale of agricultural and food products includes not just a general prohibition of abuse of significant market power over suppliers but also a black list regarding unfair contract terms and unfair commercial practices (see the annexes of the act). This practice could be used also in other Member States, but practical problems show that the protection should be limited exclusively to SMEs, not all suppliers or retail-chains. Otherwise the regulation would be a partially overreaching intervention in the autonomy of the traders i.e. in statutory payment periods.

- Whether there is a need for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive;

According to stakeholders, these requirements could be extended also for B2B transactions.

- Whether an extension of the Unfair Contract Terms Directive to B2B transactions can bring benefits for cross-border trade;

According to business organisations, unified norms bring the most benefits for cross-border trade. In a real cross-border perspective, business organisations add that Europe should stress the merit of European norms also for traders from third countries. Otherwise the European traders may suffer from relative competitive disadvantage.

- Whether the consequences of such an extension would have an effect on innovation by or market opportunities for SME providers/suppliers;

This might be possible, but the extensions – as experience in the Czech Republic shows – should be applied only for SME traders or for weaker business partners, and then only in cases of clear and unjustified imbalance in the mutual rights and duties of the parties.

<sup>101</sup> See also Lavický, Petr, a kol. Občanský zákoník V. Závazkové právo. Obecná část (§1721-2054) 1. Vydání, Beck, 2014, According to § 1751.



- Whether the benefits of extending the scope to business-to-business transactions would exceed the negative consequences of such an extension.

It is important to mention that the main purpose of the protection of B2C and (theoretically) B2B is different - this should not be misinterpreted.<sup>102</sup> B2B transactions involve a different professional level of participants than B2C transactions. This concept is stated in § 5 (1) of CzCC: 'A person who offers professional performance as a member of an occupation or profession, whether publicly or in dealings with another person, demonstrates his ability to act with the knowledge and care associated with his occupation or profession. If the person fails to act with such professional care, he bears the consequences.'

### 1.3. Injunctions

#### 1.3.1. Effectiveness of the current rules in establishing a high level of consumer protection

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

- To what extent is the use of the injunction procedure in your country contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment?<sup>103</sup>

According to the changes of the Czech Act on consumer protection on 21.3.2002, only consumer associations are now entitled to file an injunction action at regular courts according to § 25 (2) Act No. 634/1992.<sup>104</sup> This right of the protection of the collective interest of consumers was extended in 2006<sup>105</sup> to certain entitled bodies as well which protect consumer rights after getting authorisation by the Ministry of Industry and Trade. Since 23.2.2011,<sup>106</sup> the Czech Act on consumer protection allows also for professional organisations to file an action. Actually the Ministry of Industry and Trade names six specific organisations<sup>107</sup> which are entitled for injunction action. The interest of organisations is increasing. Other public authorities or organisations cannot file injunction actions.

Despite the correct transposition of the ID in the Czech Republic, injunction actions do not play any (relevant) role in reduction of the number of infringements or reduction in violating consumer rights. The number of cases in the last 13 years was only 11.

Between 2003-2008, the consumer protection organisation SOS filed 10 injunction actions, most of them against ASKO furniture, Sky Europe Airlines, Eurocomm Group, and Exim Tours. The SOS consumer organisation withdrew the actions in most of the cases, because the dispute was resolved through alternative dispute resolution, which actually shows the positive effect of injunctions. In the so-called 'gift card' lawsuit against Kasa.cz<sup>108</sup> where the SOS organisation complained that the company did not refund the purchase price after the expiration of the gift-card, the organisation lost the case. It was the last injunction sought by this organisation, because the procedure's costs (including the lawyers' fees) represent a significant economic burden for the

<sup>102</sup> See Reich/Micklitz/Rott/Tonner: European Consumer Law, Chapter 1, p. 6.

<sup>103</sup> 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.

<sup>104</sup> The subparagraph was inserted by Act No. 151/2002 from 21.3.2002 in force from 1.1.2003.

<sup>105</sup> Act 229/2006 Sb.

<sup>106</sup> 28/2011 Sb.

<sup>107</sup> 1. Sdružení českých spotřebitelů, z. ú, 2. DTest o. p. s., 3. Sdružení obrany spotřebitelů – Asociace, z. s, 4. Společná obrana, z. s, 5. Unicampus 6. HELP – Sdružení práv podvedených (HELP - Cheated Consumers' Rights Association).

<sup>108</sup> NS 33 Cdo 1956/2007.

organisation. (In ADR cases the parties bear their own costs, so the cost of the legal representation must be borne by the consumer organisations).

In 2013, DTest – the most active consumer organisation in the Czech Republic - also sought an injunction action against Unicredit Bank about bank account fees, but the organisation lost the case.<sup>109</sup> Due to financial difficulties, DTest could not file the suit at the second level of the jurisdiction.

Other organisations have not yet sought any injunctions.

- What measures in your national legislation on injunction procedure are considered to be particularly effective, if any: measures regarding the cost of the procedure, the 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?

Regarding the transposition of Art. 2 ID, it should be added that the Czech law § 83 (2) Czech Civil Procedure<sup>110</sup> ensures only the cessation or the prohibition of the infringement, according to Art. 2 (1) a). The Czech norms do not include any special rule for the publication of the decisions according to Art. 2 (1) b. According §351 on Czech Civil Procedure exist a general sanction in the case of failure to comply with the decision. The maximum of the sanction is CZK 100 000 (approx. EUR 3700). A prior consultation before seeking an injunction – as Art. 5. ID allows it – is not a necessary condition under the Czech law.

It is interesting that a judgement on an injunction action according to § 159a of Czech Civil Procedure, is a single type of judgement which is, however, binding for the collective: 'An opinion of a final judgment which ruled in the cases mentioned in § 83, paragraph 2, is not only binding on the parties, but also on other persons entitled against the defendant for the same claims from the same act or condition. Special legislation states in which other cases and to what extent the final verdict is binding on persons other than the parties.' This protection of the collective interest is possible not only in consumer law but also in cases of unfair competition and so called squeeze-out (crowd-out) cases.<sup>111</sup>

- Has your country extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunction Directive? If yes, what are the additional consumer rights covered?

The Czech Republic extended the scope of application in general, to all consumer protection fields which are under the scope of the Act on consumer protection 634/1992 Sb. The reason for the extension was that the legislature did not want to change the Act in the future and rebalance the scope of the national norms according to future changes of the Annex.

For example, Directive 2011/83/EU on consumer rights is covered.

<sup>109</sup> OS Praha 4 7C 308/2013-140.

<sup>110</sup> Act 99/1963 Sb. on Czech Civil Procedure

<sup>111</sup> Bohumil Dvořák in Petr Lavický a kol. Občanský soudní řád, Praktický komentář, Wolter Kluvers, Praha, 2016 § 83 Nr. 15.

- Analysis of the obstacles to the effective use of the injunction procedure, in particular by analysing which progress in removing obstacles has been made and/or new difficulties that have emerged in your country since 2012.

Even if the transposition grants the right of action to entitled organisations, invoking such rights is not common in the Czech Republic. The main obstacle is the lack of financial means of consumer organisations. Stakeholders also added that a lost suit can even cause insolvency for the consumer organisation. The acquisition of a lawyer and payment of court costs should be secured in other ways. Furthermore, the Czech injunction model does not make it possible to append to the injunction a request to pay back the amounts received from consumers as a result of an unlawful practice. This could raise the significance/weight of the injunction action remarkably. Similarly, sanctioning the failure to comply with the decision is recommended.

After 2012 the situation has not changed in the Czech Republic, and still not after the recommendation of the Commission of 11 June 2013 on the common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU).

A further obstacle that should be removed is competence in telecommunication contracts. In this contract type regarding B2C disputes, the Czech Telecommunication Office has exclusive competence instead of the court under § 129 (5) Act 127/2005 Sb. But injunction cases do not fall under these types of disputes, and the legal justification for an injunction action is based on different rules, on § 25 (2) Act 634/1992 Sb. in conjunction with § 83 (2) b) Act 99/1963 Sb. on Civil Procedure. The consumer organization DTest failed on 15.7.2016 in a T&Cs injunction action against O2, seeking to prohibit a T&Cs condition, because the promoted 'unlimited internet service' was limited by some conditions in the T&Cs. The Civil Court Praha 4 rejected on 18.7.2016 the injunction claim with the argument of lack of competence.<sup>112</sup> DTest filed an appeal. The Czech Telecommunication Office is arguing also on the basis of lack of competence, because there is no contractual relationship between DTest and O2. It remains to be seen how this key question can be solved.

- In a forward looking perspective: Should the coverage of the Injunctions Directive be extended (by including additional legislation into Annex I to the Directive)? If so, which EU legislation should be included? Are there other measures that could improve the effectiveness of the ID in establishing a high level of consumer protection? Should the scope of the Injunctions Directive be extended to the protection of collective business' interests? Are there best practices in your country that could be relevant for other countries and considered as model for the injunction procedure at EU level?

Based on the available evidence and the interviews conducted for this country report, it is concluded that a request to pay back the amounts received from consumers based on unlawful practice should be ensured, either in the same procedure or as a follow-up process. Also, sanctioning in case of failure to comply with the decision should be generally recommended.

Because of the difficulties of seeking an injunction in Czech Republic non-legislative or legislative procedural measures should be urgently taken to improve the effectiveness of the injunction procedure, including: clarifying the court competences, financial support of legal cost of consumer organisations, which seek an injunction (consumer organizations are asking to relieve their injunction costs or to support their litigation costs.) Other possibility is the ensuring of authorities of the right to seek injunction actions. Also *actio popularis* collective redresses, like in Hungary, could be recommended.

<sup>112</sup> OS Praha 4 40 C 196/2016-48

Regarding the protection of collective business interests, § 2989 (1) of the Czech Civil Code ensures the protection of B2B in the case of unfair competition. '(1) The right to have the violator refrain from competing unfairly or to have the violator remedy the situation to its original state may, in addition to the cases under § 2982 to 2985, be also asserted by a legal person entitled to defend the interests of competitors or customers.'<sup>113</sup> In this case the legislature protects the competitors (and the consumers) also by the reversal of the burden of proof. This norm was adopted from the former Czech Commercial Code (§ 54 (1)) into the Civil Code. Relating to the old norm of the former Commercial Code, there are many cases, but none relating to § 2989 of the new Czech Civil Code yet.

### 1.3.2. 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:

- How effective is the injunction procedure in addressing infringements originating in another EU country?

Czech stakeholders reported that no injunction procedures had been sought in another EU country by Czech entitled organizations.

Czech consumer organisations lack the financial resources and are not active in filing injunction actions even within the Czech Republic. Seeking such actions in another Member State would be even more difficult, risky, costly, and would require extensive legal knowledge about the legal system of the other EU country.

The only entity that is very active and successful in cross-border-relations is the European Consumer Centre, but it is not entitled to file injunction actions.

- How effective is it to address infringements originating in another EU country that qualified entities in your country are enabled to seek injunctions in the other Member State (Article 4 of the Injunctions Directive)?

Here, a similar lack of activity can be reported. However, it is easy to address the infringements in another EU country with the help of the European Consumer Centre, whose service is free of charge. Stakeholders reported that national consumer organisations suggest the consumer in cross-border issues to contact the ECC in Prague. The ECC in Prague has resolved 926 consumer disputes with traders.<sup>114</sup> In 2015 they reported a significant increase in cross-border disputes when compared with 2014.

On the other hand, to address 'intra-Community' infringements in the Czech Republic, according to Art. 3 b), Regulation (EC) No. 2006/2004 is incorporated in Czech law. Qualified entities can apply not only to court, but also to the sector specific administrative authorities, as sector specific rules ensure that.<sup>115</sup> Experts of the Czech Trade Inspection Authority added that the Inspection has addressed some infringement actions to other national authorities in the framework of the CPC Regulation, and also issued one final decision on the request of an authority of another Member State. (Two other decisions are not yet final).

<sup>113</sup> <http://obcanskyzakonik.justice.cz/images/pdf/Civil-Code.pdf>

<sup>114</sup> <http://www.evropskyspotrebitel.cz/files/ecc-cz-activities-of-2014.pdf>

<sup>115</sup> F.e. see § 7c 64/1986 Sb. concerning the Czech Trade Inspection or §44a (3) Act 6/1993 concerning the Czech National Bank

- In a forward looking perspective: Are there non-legislative or/and legislative measures that could improve the effectiveness of the injunction procedure in addressing infringements originating in another EU country? Are there best practices in your country that could be relevant for other EU countries and could be considered as a model for the injunction procedure at EU level?

Regarding injunctions, there are no best practices in the Czech Republic.

Non-legislative or legislative procedural measures should be taken to improve the effectiveness of the injunction procedure in general and also to address infringements originating in another EU country. The lack of financial resources of the consumer organisations hinders their ability to file an injunction action or to address infringements in cross-border relationships.

### 1.3.3. Interplay between the Injunctions Directive and other enforcement instruments of consumer law

Please analyse:

- Is the injunction procedure as designed by the Injunctions Directive regulated separately in your country (in a separate legal act or as a separate procedure regulated within the same legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (UCPD, UCTD and by the Consumer Rights Directive)?

The right of consumer protection and other organisations to file an injunction action is regulated in the Act on consumer protection 634/1992, where norms are laid out to protect against unfair commercial practices and concerning alternative dispute resolution and administrative enforcement. The transposition of the UCPD and the ADR Directive is placed there. The UCTD and the Consumer Rights Directive were implemented in the Czech Civil Code, where many other provisions are transposed.

But the rules about the injunction procedure are regulated in the Czech Civil Procedure according to § 83 (2) Czech Civil Procedure. In the Czech Republic there is a distinction between civil and administrative enforcement. The rules for civil enforcement are regulated in the same Act, in the Civil Law Procedure, but the administrative enforcement rules are regulated in several sector specific rules. In § 23 Act on consumer protection, there are more than 12 authorities named which control and enforce consumer protection. Administrative enforcement plays a key role in the Czech Republic.<sup>116</sup>

- If these procedures are regulated separately: What are the main differences between them? How is the coherence between these procedures ensured? If these procedures are regulated in a single legal act (possibly as a single procedure): In what way do these procedures (or this procedure) go beyond measures foreseen by the Injunctions Directive?

We should distinguish between civil law enforcement and administrative law enforcement. Regarding civil law enforcement, entitled organisations and consumers file and finance their lawsuits according to the general rules of the Civil Procedure.

Administrative enforcement can be initiated either ex officio or based on a complaint from a consumer organisation, or from a consumer. In all cases the procedure is free of charge, but regarding § 26 634/1992, the administrative authority should inform

<sup>116</sup> See <http://www.andrassyuni.eu/publikationen/nr-32-dr-iur-sik-simon-rita-ll-m-kollektive-durchsetzung-der-verbraucherrechte-in-ungarn-und-tschechien.html> or <http://www.andrassyuni.eu/pubfile/de-80-39-di-wp-sik-simon-verwaltungsrechtliche-sanktionen-abgenommen.pdf>

the consumer organisation about the initiated process within 2 months. (The Authority is not obligated to start a process).

The main differences between administrative and civil enforcement are the cost of the procedure and the output of the procedure. In administrative cases, unfair practices will be not only prohibited but also an administrative fine will be issued (which can also be effective and can motivate the trader). In civil enforcement an unfair contract term or practice can be prohibited.

For compensation of consumer losses the consumers should file a law suit themselves. Upon injunction it is not possible to seek compensation.

## 1.4. Cross-cutting issues

### 1.4.1. Cost and benefits of the directives covered by the study

- To what extent is there evidence for benefits for consumers stemming from the protection provided by both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of benefits for consumers from the protection against unfair commercial practices and unfair standard terms in contracts;

The main benefit for the consumer is the lack of black listed, unfair commercial practices and an increasing contractual transparency. All stakeholders state that these two developments are due to these directives. Consumer organizations add that without European Directives the Czech consumers would not be able to exercise half of the rights which they can exercise nowadays. From the perspective of the costs for the consumer while exercising their rights, they should be differentiated regarding the enforcement type of these rights. In case of administrative enforcement (UCPD, PID, MCAD) the exercising of the right has no cost, but the consumer cannot be compensated for his damages or get refunded for overpayments. Regarding contractual disputes under civil enforcement (UCTD or damage claims regarding unfair commercial practices), the consumer should file a suit, but the risk and the cost of litigation can be higher than the damage the consumer is trying to replace through the suit.

The risk and cost of the litigation is raised by two factors. At courts, the consumer usually stands against a bigger bank or telecommunication company, which can easily pay for adequate legal support, and in case the consumer loses the suit, it can be very expensive to pay the legal cost of the attorneys hired by the bank or other major firm. The second problem is the uncertainty of the decision. Consumer organizations add that the Czech Highest Administrative Court and the Constitutional Court are consumer friendly, but the Supreme Civil Court - which has competence in contractual disputes - is not. These organizations also underline that the civil courts have in general less knowledge about very specific sectoral issues, like details of a telecommunication contract or a mortgage contract. For this reason, it is safer for the consumer to turn to the administrative authorities or to the Financial Arbitrator. But if the telecommunication company or the bank files an appeal against their decision then the civil or administrative courts will decide these disputes. The Financial Arbitrator added that in these cases the court does not inform the Financial Arbitrator about the litigation, and never asks questions regarding special financial questions, e.g. calculation of the annual percentage rate of charge (APRC). Regarding the litigation risk and costs, it can be assumed that the inaction of the consumer is rational and reasonable.



Effective collective actions and collective redress mechanisms do not exist in the Czech Republic, and to seek an injunction is very complicated in practice.<sup>117</sup> The ensuring of authorities of the right to seek injunction actions could be recommended. Consumer organizations are asking to relieve their injunction costs or to support their litigation costs.

- To what extent is there evidence for benefits for traders stemming from both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of creating a level playing field for honest traders by providing a legal basis to eliminate or at least constrain dishonest market practices, such as the use of unfair standard terms in contracts or unfair commercial practices, including through the application of the Injunctions Directive;

Business organizations summarize that honest traders are trying to fulfil all national rules and see their client as a partner. Dishonest or 'catch and go' traders have short term goals and different attitudes. Even these directives cannot change their mentality, but e.g. high administrative fines which the authorities can impose in case of unlawful action can be restraining. Consumer organizations claim that the implementation of these directives helped traders to see the consumer from another perspective, which practically helped them to be more consumer-friendly.

- What are costs for traders due to the need to respect the requirements under the directives covered by the study? [*Note: Such as costs of research, legal advice and compliance as well as the amount of time necessary to comply with the directives*]

The traders have two types of cost: legal advice and defence costs in case of administrative investigations. Both these costs increased in relation to the directives. To what extent the cost for legal advice increased could not be stated by business organizations. The Czech Trade Inspection Authority stated that for typical Czech traders - which are mostly small and medium sized companies - to follow all information requirements which are laid down by the directives is almost impossible. The Czech legal rules are very fragmented, hard to understand and follow. These companies are used to joining professional associations which help them and advise them on how to fulfil the requirements. According to the Czech Trade Inspection Authority, it is obvious that even an honest trader - with high probability - will violate some requirements, not because they want to, but because of missing information or uncertainty. The cost of legal advice needed in such cases rose significantly.

Consumer organizations added that while bigger traders are able to pay for legal advice reading consumer law, smaller traders just copy the T&Cs of the bigger ones on their web-pages.

- What are the costs involved in the public enforcement of these rules?

Administrative enforcement is in general free of charge for consumers and consumer organizations. With public enforcement the consumer cannot reclaim their damages, as he is not part of the procedure. The consumer could in theory use the declaratory decision of the authority on the unfair or unlawful practice of the trader in court to claim their damages, but it could be a long procedure. The second problem is that the consumer is not part of the administrative procedure, so the consumer has an information gap.

<sup>117</sup> Luboš Tichý, Jan Balarin: *Kolektivní ochrana procesních práv v ČR. Sen či skutečnost? (Návrh právní úpravy a jeho odůvodnění)*, Bulletin advokacie 3/2013, Sik-Simon: Verwaltungsrechtliche Sanktionen der Verletzung der Verbraucherrechte in der Tschechischen Republik und Ungarn, Donau-Institut Working Paper No. 39, 2014



In telecommunication cases, where the Czech Telecommunication Authority is a 'quasi' litigator, the consumer should pay at least CZK 100 (approx. EUR 3.70) as a process fee (in the second instance, at least CZK 200 (EUR 7.40) or 4% of the value of the claim), which can deter the consumer from initiating an administrative claim, especially in small or low value cases.

- Are there indications that the directives covered by the study are not implemented in your country in a cost-effective manner?

No, ministerial experts add that in the Czech Republic this is not possible. All competent Ministries should implement the European rules solely in a cost-effective manner.

- Could the costs for implementing and enforcing the rules of the directives covered by the study be reduced without lowering the level of protection for consumers? If so, how?

All interview subjects said no to this question.

#### 1.4.2. Interplay with EU sector-specific consumer protection legislation

Regarding the interplay of the horizontal EU consumer legislation [mainly UCPD and UCTD] with EU sector-specific consumer protection legislation in the areas of electronic communications, passenger transport, energy and consumer financial services, please:

- Analyse the levels of awareness of the requirements of the horizontal EU consumer legislation (mainly UCPD and UCTD) of businesses and consumers and the specific public enforcement bodies in the relevant sectors, as in particular demonstrated by their practical application; [*Key question here is: Are UCPD and UCTD applied in practice by national authorities and courts as a legal basis to combat unfair commercial practices and unfair standard terms in contracts in the regulated sectors?*]

The awareness of sector specific requirements in the Czech Republic in general is higher than the knowledge of general horizontal EU consumer legislation, stakeholders emphasize. There are many reasons for this. Firstly the fragmentation of the competences of the authorities leads to more awareness of the sector specific rules. (As mentioned in 1.1.1, in the Czech Republic there are more than 17 authorities involved in the enforcement of consumer protection according to § 23 Act 634/1992 Sb.) Secondly, the legislature tends to delegate the sector specific tasks to the authorities first, and often forgets to solve the issues in general, like the control of unfair contract terms in a specific field – adds the Check Trade Inspection Authority.

Because of the fragmented competence of the authorities, in practice the negative competence conflicts between the authorities are not unknown, but this phenomenon in the end eliminates the protection of consumer rights.

Consumer organizations underline that in the field of telecommunication, the awareness of horizontal EU consumer legislation and sector specific rules is getting better and better, and the Czech Telecommunication Authority applies both types of rules at the same time. But in the field of energy, there is not a similar awareness. Not only is the control authority uncertain of the relevance of the horizontal EU consumer legislation (UCPD) in the energy field, but the consumers are also not sure which general rules are valid regarding energy supplier contracts – adds a consumer organization.

In the field of financial services there are so many sector specific rules, adds the Financial Arbitrator, that the relevance of general consumer legislation like UCTD is very narrow.

Traders also have the same (lack of) awareness. First they are trying to fulfil all the sector specific requirements, but the traders have much less awareness of the requirements of the general consumer rules.

- Specify whether in your country the same authority is responsible for the enforcement of the horizontal EU consumer law 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 UCPD/UCTD in the regulated sectors, as specified in the previous bullet?*]

The main authority which is responsible for the enforcement of UCPD is the Czech Trade Inspection Authority, while sector specific rules are part of the competence of sector specific authorities. The Czech Trade Inspection Authority underlined that they are also not competent if no other sector specific authority has competence. In many cases the competence is problematic in practice. The distribution of the competences seems to be logical – adds the Czech Trade Inspection Authority – but it is not very clear, and often very complicated. For example, in financial services, the Czech National Bank has competence in UCPD cases involving all financial institutions, but not towards financial institutions like HOME CREDIT which belongs to the competence of the Czech Trade Inspection Authority. With the transposition of the Mortgage Credit Directive<sup>118</sup> this distribution of competences will be modified, and from 2017 the Czech National Bank will have all competence also towards non-financial institutions. Regarding advertisement of financial products, authorities are also more competent depending on which media was used for the advertising.

There is a trend of redistribution of competence to sector specific authorities – asserts the Czech Trade Inspection Authority. Otherwise the competence is very often given according to product types, like petrol or labelling of products. There are cooperation contracts between the sector specific authorities and the Czech Trade Inspection Authority, and they very often organize joint control campaigns, particularly regarding relevant topic-controls, which are yearly planned in advance.

- Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning contractual fairness, 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.?*]

All stakeholders had a problem with answering these questions. They could not point to too many overlaps or conflicts, but reported uncertainties and difficulties in application. They couldn't assess whether the difficulties in application are due to the European legislation or rather to the Czech legislation, but both could use a review and simplification to ensure more transparency.

The Czech Trade Inspection Authority underlined as the main problem not the overlaps but rather the still existing competence gaps between different authorities. However there is a question whether such competence gaps can be bridged in practice.

<sup>118</sup> See 257/2016 Sb. on Consumer Credit and will take into force from the 1<sup>st</sup> December 2016.

- What are the benefits of the complementary application of the UCPD and UCTD in the regulated sectors? What are the costs due to the complementary application with the sectoral EU consumer protection legislation?

The possibility of the complementary application of the UCPD and UCTD provides safety also in regulated sectors. Similar to the principle-based approach the complementary application is important – underline stakeholders, even if it is becoming less and less important with the rising number of sector specific rules. Stakeholders are not sure if there are costs due to the complementary application. But to eliminate the duplication of the national rules, which were caused by the transposition of the sector specific rules and the UCPD and UCTD legislature could create a lot of work.

- Assess any need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law.

In practice it is necessary to:

- Regulate the content of energy supply contracts;
- To clarify the overlaps between the information requirements of Directive 2011/83/EU and other sector specific information requirements.

#### 1.4.3. Relevance of consumer law directives for consumer-to-business transactions

- Please analyse the need and potential for the application of the consumer law directives (mainly UCPD and UCTD) to 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 majority of the stakeholders see a very different protection aim between B2C and C2B relations, and do not find it necessary to regulate C2B relations. Business organizations add that in C2B relations the business should be informed in the same way the consumer is informed in B2C relations.

#### 1.4.4. Specific protection for vulnerable consumers

Please analyse:

- Whether the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined in the consumer law directives and relevant jurisprudence, and as applied by national authorities and courts in your country, continue to be valid and fit for purpose.

As mentioned in 1.1.1 the commentaries remain silent on the different consumer models, and in Czech case law the average consumer is only briefly mentioned. Even if some of the judgments state that the benchmark is the average consumer, as interpreted by the CJEU, there is still a lack of further citation of concrete CJEU case law in the majority of Czech cases, not to mention absence of further judicial analyses of the average consumer. Consumer organizations and also Financial Arbitrator underlined that the courts usually expect a relatively high intellectual potential on behalf of the average consumer, which reduces the protection level accordingly.

Cases where a vulnerable consumer group is defined are completely missing in the Czech judicature. The consumer models which are applied by Czech courts have not yet crystallized enough.

National authorities apply both consumer models more often than courts, but in the majority of the complaints and control, they base their decision on the average consumer definition.

Even in financial cases, there was no application of the vulnerable consumer model in the Czech Republic.

- To what extent the existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers and whether, based on the experiences in your country, specific provisions should be introduced in other directives concerned, in particular the Unfair Contract Terms Directive.

All stakeholders state that the existing rules are adequate to protect vulnerable consumers, but judicial practice and also the practice of the national authorities shows the application of these rules is missing.

#### 1.4.5. EU added value

- Overall, would you consider that protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in your country since the implementation of the UCPD and the UCTD in national legislation?

All stakeholders state that the role of these two EU directives is crucial for improvements in consumer protection in Czech Republic. Consumer organizations add that as long as the Czech Trade Inspection Authority, the Financial Arbitrator and also the Czech Telecommunication Authority implement these Directives in a consumer-friendly way, then Czech judicial practice should improve in the future.

- Overall, would you consider that the information of consumers regarding unit prices has improved since the implementation of the PID in national legislation?

Overall yes, in Czech Republic there has been a significant improvement in this field.

- Overall, would you consider that the protection of businesses against unfair marketing in your country has improved since the implementation of the MCAD in national legislation?

Overall yes, however it is not just thanks to the MCAD but also rather mainly to the requirements of fair competition rules.

- Overall, would you consider that it has become easier for businesses in your country to directly trade cross-border to final consumers located in other EU countries in recent years? Has it become easier for consumers in your country to directly purchase cross-border from traders located in other EU countries?

For consumers it has become much easier to directly purchase cross-border from traders located in other EU countries. The Czech European Consumer Centre underlines that the cross-border enforcement of consumer rights is still very limited. More and more consumers make use of the services of the ECC, but they are often not inclined to file a consumer complaint against a foreign trader, not to mention to file a suit in another EU country. The risk and the cost of the litigation in another EU country is too high for the consumer.

Regarding businesses, stakeholders added that the majority of Czech traders are small and middle sized companies which are not active in other countries. They have mainly national business strategies, so this part of the question cannot be answered.

- To what extent are these improvements, if any, due to the mentioned directives?

All stakeholders state that the role of the EU directives is crucial for improvements in consumer protection in Czech Republic.

## Annex

## A. Transposition fact sheet

**Table 1: Fact sheet on transposition of directives in Member States' law – Czech Republic**

Directive	Transposition legislation (National law, Article)	Comments	Specific provisions going beyond minimum harmonisation requirements/use of exemptions	Included in national legislation		Comments
<b>Directive 93/13/EEC on unfair terms in consumer contracts</b>	Act 89/2012 Sb.		'Black list' of terms considered unfair in all circumstances	Yes	§ 1814	
			'Grey list' of terms which may be considered unfair	No		
	Act 89/2012 Sb.		Extensions of the application of Directive to individually negotiated terms	Yes	§ 1813	
			Extensions of the application of Directive terms on the adequacy of the price and the main subject-matter	No		
<b>Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market</b>	Act 634/1992 Sb.		Provisions regarding financial services going beyond minimum harmonisation requirements	No	§ 4 -8a	<i>Enforcement at administrative authorities</i>
			Provisions regarding immovable going beyond minimum harmonisation requirements	No		
	Act 89/2012 Sb.		Application of UCPD to B2B transactions	Yes (but the norms did not target the transposition of UCPD)	§ 2976-2990	<i>Enforcement at civil court, reverse burden of proof</i>

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	Act 634/1992 Sb.		Black list		<i>Annex Nr. 1</i>	
<b>Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers</b>	Act 526/1990 Sb.		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	§ 1 (1) and (3)	
			Use of specific regulatory choices/derogations	Yes	§ 13 (9)	<i>Derogation for antiquity, art, perishable goods etc.</i>
<b>Directive 2006/114/EC concerning misleading and comparative advertising</b>	Act 89/2012 Sb.		...		<i>§ 2977 misleading, § 2980 comparative advertising</i>	
	Act 40/1995 Sb.				<i>Administrative enforcement</i>	
<b>Directive 2009/22/EC on injunctions for the protection of consumers' interests</b>	Act 634/1992 Sb.					
	Act 99/1963 Sb.					



**Table 2: Fact sheet on Injunctions Directive – Czech Republic**

Issue	Answer	Comments
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)?	- No, single procedure	<i>The procedure do not go beyond measures foreseen by the ID</i>
Who is entitled to bring an action seeking an injunction?	- Authorized/registered consumer associations (6 organizations)	<i>1.Association of Czech Consumers, 2.dTest, 3. Consumer Defense Association – Syndicate, 4. Common defense, 5. Unicampus, 6. HELP - Cheated Consumers' Rights Association</i>
Is the injunction procedure a court or an administrative procedure? If your country legislation foresees both forms of the procedure, please explain in the comments column for which infringements the court or administrative procedure is foreseen	- Court procedure	<i>Problem: in the field of telecommunication the Civil court denies its competence in favour of the Czech Telecommunication Authority. As far as we know the court decision regarding its subject-matter jurisdiction has been challenged but we have no information on the final decision of the appellate court (Municipal Court of Prague).</i>
Who bears the costs of an injunction procedure? If qualified entities (or some of their categories e.g. consumer organisations are entitled to an exemption of some/all cost related to the procedure please explain the characteristic of such exemption in the comments column.	- The costs are as a rule borne by the losing party	
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?	- Yes, scope of application extended to cover consumer law in general	<i>e.g. Directive 2011/83/EU is also covered</i>
Is protection of business' interests covered by the injunctions procedure? If scope of application extended to the protection of business' interests, please provide details in the comments column regarding type of business' interests covered by the injunctions procedure	- Yes acc. § 2989 (1) Act 89/2012 Sb. In conjunction with § 83 (2) a) Act 99/1963 Sb.	<i>But the norm did not target the transposition of the Injunction Directive</i>

Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations	- Controversial § 91 (2) in conjunction with § 112 99/1963 Sb. would allow it, but the prevailing judicial view deny this possibility	<i>No practice until now</i>
Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID)	- No	
Has your Member State taken specific measures regarding the prior consultation (Article 5 of the Injunctions Directive)?	- No such requirement	
Does the national legislation provide for measures ensuring summary procedure? Please specify main characteristics of the procedure (subject matter/time limits) in the comments column.	- No	
Are there sanctions for non-compliance with the injunction order (Article 2(1) of the Injunctions Directive)? If sanctions in form of penalty or fine foreseen please specify in the comments column to who exactly should they be paid	- Theoretically yes, § 351 (1) Act 99/1963 Sb.	<i>Max. 100.000 CZK (approx. EUR 3700)</i>
Has your Member State taken specific measures regarding the publication of the decision and/or the publication of a corrective statement?	- 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)	<i>A publication provision of court decision in general is missing</i>
Is it possible to claim within the injunction procedure for sanctions for the infringement?	- No	
Can an action for the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to other beneficiary be brought within the injunction procedure?	- No	
Can an action for damages to be paid to the qualified entity or the public purse be brought within the injunction procedure?	- No	
Can an action for damages or redress to be paid to the consumers concerned be brought within the injunction procedure?	- Theoretically yes, if the two claims are connected in same procedure.	<i>No existence of practical experiences</i>
Can individual consumers base their individual claims for damages/remedies on the injunctions order?	- Theoretically the injunction order could be one of the evidences for the individual claim for damages, but we cannot speak about basing the claim on the injunction order	
Can the qualified entity claim other measures beyond the injunction, e.g. evidence of compliance with the judgment?	- No	

Are the effects of individual injunctions orders extended to the future infringements and/or same or similar illegal practices (of other traders)?	To the same illegal practice of the same traders to other consumers - Theoretically yes according § 159a (2) Act 99/1963	<i>No existence of practical experiences</i>
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## B. Data tables

*Number of B2C disputes***Table 3: B2C disputes decided on the basis of consumer law directives covered by this study in comparison with total B2C disputes decided on the basis of other legislation (most recent year for which data is available)**

Year	Type of data	Total number of B2C disputes (number of cases)	Share of B2C disputes decided on basis of ...					Comments
			UCPD	UCTD	PID	other EU consumer protection legislation (e.g. CRD, Sales Directive, sectoral legislation)	national consumer legislation not based on EU directives	
2015	Czech Telecommunication Authority	285						
2015	Ministry of Finance				5			
2014	Ministry of Finance				6			

Court statistics could not be obtained. The court decisions are not public in Czech Republic, just the main decisions are published.

Regarding the statistics of the Czech Telecommunication Authority, it is not possible to share the disputes according to the different EU Directives.

The enforcement of the UCPD is carried out mainly by Czech Trade Inspection Authority, which starts a procedure ex officio in some cases based on the consumer complaint. But this Authority did not solve B2C disputes until the ADR regulation from 378/2015 Sb. From 1.2.2016 the Authority registered 1215 initiative on ADR-procedure by consumer.

*Costs of obtaining redress for a hypothetical case of invoking unfairness of a standard contract term*

- Please estimate the costs, including time, for consumers in obtaining redress when invoking the unfairness, and thereby the non-binding character of standard contract terms in a contract they concluded. Please provide the estimate for the hypothetical example below, focusing on costs (and needed time) of a lower court procedure and the use of ADR or other relevant procedure (if applicable).<sup>119</sup>

<sup>119</sup> For the hypothetical example it is assumed that both the provider and the consumer are located in your country.

**Table 4: Estimate of costs for consumers in obtaining redress when invoking the unfairness of standard contract terms in a contract they concluded (for the hypothetical example provided in the box below)**

Redress mechanism	Estimated court fees (national currency)	Estimated lawyer's fees (national currency)	Other costs, if any (national currency)	Estimated time involved for consumer (hours)	Comments
<b>Lower court procedure</b>	Ca. CZK 6 750 (approx. EUR 250)	CZK 15 000 (approx. EUR 555)	Losing party pays all costs	Civil law litigations may last from 1-3 years	
<b>ADR or other relevant procedure</b>	No fee at ADR procedure	ca. CZK 10 000 (approx. EUR 370)	Expertise costs, if necessary	Ca. 5-6 months	Regarding § 20u Act 634/1992 Sb. a successful ADR ends with an agreement. If no agreement is accomplishable the involved time is lost time.

**Hypothetical example: Terms which inappropriately exclude/limit consumers' rights to compensation**

A consumer went on a package holiday with a friend to Kenya for which they paid € 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 €5,000 (€4,000 for the cost of the package and €1,000 for lost time and enjoyment). The tour operator agreed to compensate them €1,000 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/unfair-contract-terms/index\\_en.htm](http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-contract-terms/index_en.htm)]

- Please estimate how often court and ADR procedures are used in your country for invoking the unfairness, and thereby the non-binding character of standard contract terms (i.e. the number of cases per year)?

Since 1.2.2016 the Czech Trade Inspection Authority registered 1215 initiative on ADR-procedure by consumer on UCPD.

In 2015 were 962 ADR procedure initiated by the consumer at the Financial Arbitrator. In the time period 1.1.2016 – 30.6.2016 the number of initiated ADR procedure rose to 1450.

## C. Interviews conducted and literature reviewed

**Table 5: Interviews conducted for this study**

Organisation	Stakeholder type	Date
Union of Trade and Tourism Czech Republic	Business association	14.6.2016
Czech Trade Inspection Authority	National consumer enforcement authority	3.6.2016
Czech Telecommunication Authority	National regulatory authority	7.6.2016
Ministry of Industry and Trade	Ministry	8.6.2016
Ministry of Finance	Ministry	10.6.2016
Czech National Bank	National regulatory authority	Written answers delivered on 15.6.2016
Financial Arbitrator	National consumer enforcement authority	14.6.2016
Czech European Consumer Centre	European Consumer Centre	7.6. 2016
SOS Consumers Protection Association	Consumer organisation	3.6.2016
Czech Consumer Association DTEST	Consumer organisation	6.6.2016

**Table 6: Literature reviewed for country report**

Author/Source	Year	Title of publication
Josef Bejček	2016	Smluvní Svoboda a ochrana slabšího obchodníka, Acta Universitatis Brunensis, iuridica edition Scientia vol. 557, masarikova univerzita, Brno
Jakub Jedlinský	2012	Koncept průměrného spotřebitele v českém a evropském právu
Martina Kousalová	2013	Koncept průměrného spotřebitele
Petr Lavický a kol.	2014	Občanský zákoník V. Závazkové právo (Obecná část § 1721-2054). Komentář. Praha, C. H. Beck, 1. Vydání, Beck,
Filip Melzer, Petr Tégl a kol.	2014-2017	Občanský zákoník, Velký komentář, Leges,
Petr Lavický a kol	2015	Občanský soudní řád, Praktický komentář, Wolters Kluwer, Praha, 2016 § 159a bod 32-35.
Marta Ptačková	2015	Veřejnoprávní regulace obchodních praktik
Aleš Rozehnáł	2008	Mediální zákony, Komentář, Praha, Wolters Kluwer
Jiří Švestka, Jan Dvořák, Josef Fiala a kolektiv	2014	Občanský zákoník Komentář, Wolters Kluwer
Rita Sik-Simon	2014	Kollektive Durchsetzung der Verbraucherrechte in Ungarn und Tschechien, Donau-Institut Working Paper No. 32
Rita Sik-Simon	2016	Fogyasztókép és szabályozás MTA Law Working Paper 2/2016
Markéta Selucká, Jaromír Tauchen, Gregor Stein,	2009	Entwicklungstendenzen des Verbraucherschutzes in der Tschechischen Republik, WIRO, 2009, 298- 301
Luboš Tichý (ed.)	2014	Ochrana Spotřebitele CPK, PF Univerzita Karlova v Praze, v nakladatelství Eva Rozkotová
Luboš Tichý, Jan Balarin	2013	Kolektivní ochrana procesních práv v ČR. Sen či skutečnost? (Návrh právní úpravy a jeho odůvodnění), Bulletin advokacie 3/2013
Blanka Vítková	2016	Zákon o ochraně spotřebitele, Wolters Kluwer, Praha



## 1. Study to support the Fitness Check of EU Consumer law – Country report DENMARK

### 1.1. Unfair commercial practices and marketing

#### 1.1.1. Effectiveness of the UCPD in establishing a high level of consumer protection

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

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

In national law, Denmark had a principle-based approach within marketing law before the UCPD. Thus, it seems – according to stakeholders – to work fine, even though some of the concepts are new and to some extent unclear.

ECC Denmark noted that the most disturbing (cross-border) cases they have concern rogue traders that have no intention of playing by the rules (fraudulent practices) and thus, where the UCPD provides no real protection, as the rogue traders simply ignore threats or action taken by enforcement bodies. ECC Denmark primarily deals with unfair commercial practices in a civil law setting, e.g. the trader's failure to perform in conformity with the contract.

A business organisation noted that the inherent vagueness of the principle-based approach could have implications in connection with criminal sanctions, where a clear prohibition is required under national law (Section 1 of the Danish Criminal Code).

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

Generally speaking, the feeling among stakeholders is that the blacklist does not include many situations that would not be caught by the Directive's general prohibitions. It is noted by the Danish Consumer Ombudsman that the list entails procedural benefits with regard to its relative clarity, i.e. in particular, there is no need to prove that the economic behaviour of consumers is materially distorted by the practice (as is required under the general clause (article 5 (2) (b))). One business organisation has said that the list is beneficial in the context of advising businesses.

The Danish Consumer Ombudsman has used the blacklist's Item 31 in connection with subscription traps and emphasised that the blacklist has some importance in cross-border enforcement.

The Danish Competition and Consumer Authority noted that some of the items on the blacklist are quite peculiar and not relevant for the situation in Denmark. It was emphasised that it could be problematic if the same list of *per se* prohibitions applied in all Member States. It was also noted that it was unclear at the time when the list was negotiated, whether sales promotions were comprised in the scope of the UCPD. That in itself would be a proper reason to revise the blacklist.

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

None reported.

- 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 what 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?*]

Generally speaking, there is little case law in which the national implementation of the UCPD has been applied. One reason is that most cases are dealt with by the Danish Consumer Ombudsman and that cases are likely to be settled in that process, including cases where the trader accepts an administrative fine. One case (initiated by a competitor) has reached the Danish Supreme Court, where it was found that *inter alia* environmental claims were not sufficiently substantiated.<sup>1</sup> In another case, the Danish Maritime and Commercial Court established, also with reference to the ICC Code, that high standards must be applied for the use of environmental statements in order to avoid unfair competition. Such statements must be clear, truthful, concrete, and not misleading. And it must be possible to substantiate the statement by an independent expert.<sup>2</sup> In light of these cases, it seems that the current legislation is in fact effective (also) in the context of environmental claims.

The Danish Consumer Ombudsman has issued Guidance on Environmental and Ethical Marketing Claims (August 2014).<sup>3</sup> The Danish Consumer Ombudsman has dealt with a number of cases concerning the use of environmental aspects in marketing. It was found that it was misleading to state that there was no CO<sub>2</sub> emission from an electric car without noting that there is CO<sub>2</sub> emission from the production of electricity.<sup>4</sup> In another case it was found problematic to use the brand 'PlantBottle', when the bottle contained only 15 per cent plant material. However, the case was not pursued further.<sup>5</sup> In the marketing of a gasoline product, it was emphasised that an environmental benefit must be documented if flowers, grass, and green colours are used in the marketing.<sup>6</sup>

- 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 your country rigidly?*]

In assessing whether marketing is likely to mislead consumers, a court must apply a particular standard for the due care that is expected by consumers. The use of some sort of average consumer has always been applied implicitly or explicitly; also as a consequence of consistency in the application of the MCAD, which according to earlier CJEU case law also relies on reasonable expectation from an average consumer. In that vein the introduction of the average consumer concept in the UCPD seems more like a codification rather than the introduction of a new concept with particular (new) benefits for consumers. Generally speaking, the reference to the average consumer is usually made implicitly in Danish case law. There are only a few examples of explicit reference, including in an administrative case decided by the Danish Financial Supervisory Authority.

It appears that the Member States have gained more flexibility in the assessment of the average consumer, when compared with the MCAD.<sup>7</sup> It follows from Recital 18

<sup>1</sup> Case 267/2013 of 30 April 2015. The case is reported in *Ugeskrift for Retsvæsen* 2015.2565.

<sup>2</sup> S.H.D. 30 December 2011, Case H-9-10. The case is reported in *Ugeskrift for Retsvæsen* 2012 977.

<sup>3</sup> See <http://www.consumerombudsman.dk/Regulatory-framework/dcoguides/Environmental-and-ethical-marketing>.

<sup>4</sup> Case 12/00351.

<sup>5</sup> [www.forbrugerombudsmanden.dk](http://www.forbrugerombudsmanden.dk), case no n/a.

<sup>6</sup> [www.forbrugerombudsmanden.dk](http://www.forbrugerombudsmanden.dk), case no n/a.

<sup>7</sup> See Trzaskowski, Jan, Lawful Distortion of Consumers' Economic Behaviour – Collateral Damage Under the Unfair Commercial Practices Directive, *European Business Law Review*, 2016, pp. 25-49.

that National courts and authorities will have to exercise “their own faculty of judgement” and that social, cultural and linguistic factors must be taken into account.

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. It was emphasised that we do not know how the provision on vulnerable consumers will play out in practice. It is suggested that a lower standard for the average consumer should be applied.

- 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 in your country recognised new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted)?*]

The concept of vulnerable consumers has not been applied by the Danish courts and has not as such proven to provide practical benefits for consumers. No new groups of vulnerable consumers have been identified. In Denmark, the primary focus has been on children and young people. Recently, in the administration of the law, there has been a focus on micro loans that poor people may be more susceptible to. It has been stated by a number of stakeholders that the meaning and consequences of this provision is unclear.

ECC Denmark has noted that there are a number of cases where vulnerable consumers fall prey to fraudulent practices. In many cases, these disputes can be resolved through charge back-rules relating to the used payment instrument; such charge back-rules allow consumers to have the paid amount returned to e.g. their credit card, unless the trader demonstrates that the amount is actually due. The Danish Competition and Consumer Authority emphasised that it finds it unfortunate that it remains unclear whether the list of vulnerabilities is exhaustive or not.

The Danish Financial Supervisory Authority noted that there are a number of products that may be targeted towards more vulnerable consumers, including in particular young people and indebted people (e.g. micro loans). It was noted that much of the consumer protection in the financial sector is focused on (standardised) information that consumers in general, and vulnerable consumers in particular, are not likely to read and (fully) comprehend. Better protection of vulnerable consumers may be achieved through the regulation of particular financial products.

- 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 Danish Consumer Ombudsman can issue guidelines after negotiations with business and consumer organisation. This guideline-institution seems to work very well and to the stakeholders’ overall satisfaction. In addition, the Danish Consumer Ombudsman can issue guidance that provides its interpretation of the law or assessment of facts. The conclusion is that self/co-regulation works very well in Denmark.

- 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?

The general opinion among stakeholders was that it could be beneficial to revise the blacklist and in that process to examine the need for further blacklisted practices. It was noted that it seems to be a challenge that there is only one blacklist for all

Member States as there is a vast diversity in traditions and marketing cultures in various Member States. The Danish Consumer Council suggested that provisions concerning subscriptions and consent could be added to the blacklist.

It was the general impression that the stakeholders needed more time to prepare specific suggestions for amendments. Hence there seems to be a need for a separate and open discussion of the blacklist.

- Are there other measures that could improve the effectiveness of the UCPD in establishing a high level of consumer protection in your country? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

It was emphasised by several stakeholders, including the Danish Competition and Consumer Authority, that there should be a much more open process in connection with the European Commission's work on the UCPD guidance. It was noted that a working group of some sort would benefit future revisions.

#### 1.1.2. Effectiveness of the PID in establishing 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;

There is agreement among stakeholders that consumers in general are effectively informed about price and that there are very few cases on this matter. However, there are issues in connection with misleading information about discounts etc., but generally traders seem to comply with the requirement of price indications.

The Danish Consumer Ombudsman, who administers the rules, noted that there are very few inquiries etc. concerning the Danish rules implementing the PID. The Danish Competition and Consumer Authority noticed that the rules are from a time, where e-commerce was not widespread. There is a need for clarification of price indication in this context and it should be considered to harmonise the rules with those concerning price indication for services.

The Danish Consumer Council has observed that there is a rise in the use of different package size for similar or identical products; and that these are used to offer discounts (on particular size packages). However, this is probably more a question about whether the practice is misleading.

- 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?

Stakeholders' input with respect to this question does not allow for an answer to be provided. There is no legislation addressing this issue directly.

- The effects of the regulatory choices/derogations allowed by the Directive and applied by Member States. [*Key aspects to consider are: Is the derogation relevant? Do companies make use of it? Are there consumer complaints because of this? If so, approximately how many per year?*]

Stakeholders' input with respect to this question does not allow for an answer to be provided.

### 1.1.3. Effectiveness of the MCAD in providing protection for businesses

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

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

The Danish Marketing Practices Act applies also to B2B. The MCAD does not play an important role in the daily life of Danish law, but there is general satisfaction with the minimum level it provides in the context of cross-border marketing.

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

The principle-based approach works fine.

- The effects of the minimum harmonisation provisions on misleading advertising; [*Key aspects to consider are: 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 general provisions of the Danish Marketing Practices Act does not make much of a distinction between B2B and B2C situations, but it is implicitly expected that different standards for fair competition apply when marketing is directed at consumers and businesses, respectively. The Danish law has particular provisions on trade names (Section 18) and trade secrets (Section 19) that concern B2B situations.

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

There seemed to be an overall satisfaction with the rules. Denmark does not have well-developed traditions for comparative advertising in Denmark. The enforcement authorities have more focus on provision on misleading commercial practices rather than comparative advertising (which requires that the advertising is not misleading).

- 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;

There is no unambiguous answer to this question and no problems seem to have surfaced in courts, administrative practice, or the practical life of traders. The Danish cases concerning comparative advertising has focused on whether the advertising was misleading or unlawfully trading on another trader's goodwill. Both situations are, in addition to the rules on comparative advertising, addressed in specific provisions in the Danish Marketing Practices Act.

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

There is no unambiguous answer to this question.

- Are there measures that could improve the effectiveness of the MCAD in providing protection for businesses (see also 1.1.6 below)? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

No. Generally speaking there is not much awareness of the MCAD in Denmark after the introduction of the UCPD.

#### 1.1.4. Effectiveness of current rules 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;

The business organisations, as well as the Danish Competition and Consumer Authority, have emphasised differences in the implementation, interpretation, and enforcement of – as well as the assessments under – the Directive. The differences entail that Danish businesses are met with ‘unfair’ competition from foreign businesses. This relates in particular to the use of sales promotions. The Danish enforcement authority (the Danish Consumer Ombudsman) has confirmed certain problems with the cross-border enforcement of marketing that is considered unfair under Danish law, but not under the law where the trader is established.

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

There is no unambiguous answer to this question. However, see answers above concerning the blacklist as such.

- Whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade. [*Do the national differences play a role in a business perspective? Have they caused problems?*]

No problems have been identified.

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;

No problems have been reported.

- Whether the minimum harmonisation character of provisions on misleading advertising represents a barrier to cross-border trade;

No problems have been reported.

- 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;

No problems have been reported.

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

No problems have been reported.



#### 1.1.5. Interplay amongst UCPD information requirements according to Article 7(4) with the information requirements in the horizontal consumer law instruments

Regarding the information requirements according to Article 7(4) UCPD ("invitation to purchase") in the advertising stage, please analyse:

- The level of awareness of traders as regards information requirements at the advertising stage, as in particular demonstrated by their practical application; [*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?*]

The rules seems to work well, but there are some uncertainty concerning the definition of invitation to purchase and how it should be understood in connection with situations where the medium used to communicate the commercial practice imposes 'limitations of space or time' (Article 7(3)); could this rule e.g. apply to print advertising? Several stakeholders have emphasised that because of the amount of information that must be given, the mandatory information requirements may to some extent both fail to properly inform consumers and result in cluttered marketing material. There seems to be a general understanding that it would be worthwhile to reconsider the amount of mandatory disclosure and to convey a smarter means of properly informing consumers.

The Danish Competition and Consumer Authority emphasised that Annex II of the UCPD is unclear and that there seems to be too many different rules on information requirement. There is a need to coordinate and reconsider these information requirements; this includes attention to where in the contractual process the information is to be provided.

- 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?

No problems have been identified or reported.

#### 1.1.6. Relevance for business-to-business transactions

Regarding the area of unfair commercial practices/marketing, please analyse:

- 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 cross-border trade;

The UCPD is designed to protect consumers and it does not seem suitable to just expand the scope to B2B situations. The general provisions on unfair, misleading, and aggressive practices may be applicable to B2B situations, which is the situation in Denmark. There seems to be general satisfaction with the (minimum) harmonised B2B rules in the MCAD and none of the stakeholders has encouraged an broadening of this scope. No cross-border problems in B2B marketing have been identified under this study.

- 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;

It seems to work well as it is. Both the UCPD and MCAD provide appropriate 'backbones' for national marketing law.



- 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 also cover unfair commercial practices during and after the transaction;

There is general satisfaction with the rules the way they are now; i.e. minimum harmonisation with a focus on misleading and comparative advertising.

- Whether there is a need to have a black-list of practices in the business-to-business marketing area;

There seems to be no urge.

- What should be the enforcement cooperation mechanism in the business-to-business marketing area;

In Denmark, public enforcement is focused on the situations where the need for consumer protection is dominant. Businesses are encouraged to take possible issues concerning unfair competition in B2B situations to court themselves.

- Whether there is a need to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive;

This does not seem to be the case.

- Whether there is a need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive.

No such need has been identified by stakeholders.

#### 1.1.7. Relevance of contractual consequences of unfair commercial practices

Please analyse whether there are in your country:

- 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;
- Any case law (enforcement decisions, court rulings) providing for such consequences;

There is no direct link between unfair commercial practices and the validity/enforceability of a contract entered in that vein. However, preceding advertising may play a role in the assessment of product defects and the fairness of contract terms ('conditions at the time of conclusion'). Furthermore, according to Section 20 of the Danish Marketing Practices Act, concurrently with a prohibitive injunction or subsequently, the court is authorised to issue such mandatory injunctions that may be considered necessary to ensure (1) compliance with the prohibition, including injunctions to the effect that agreements entered into in conflict with a prohibition be invalid, and (2) restitution of the status quo ante, including e.g. not only correction of statements but also court orders to pay back money received. An example is found in a judgment of 31 January 2013<sup>8</sup> from the Danish Maritime and Commercial Court demanding a parking company to pay back an unlawful reminder fee to all car owners from whom it had claimed the fee.

Most of the stakeholders, except the Danish Consumer Council, did not find a need to introduce (additional) civil law consequences.

<sup>8</sup> Case SHD N-2-10. The case is reported in *Ugeskrift for Retsvæsen* 2013.1181.

- Whether there is, based on past experience in your country, a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

Only the Danish Consumer Council expressed the wish for enhancing such a link.

## 1.2. Contract conclusion and performance

### 1.2.1. Effectiveness of the current rules in establishing 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;

Stakeholders expressed a general satisfaction with the rules as to their effectiveness. The Ministry of Justice, who is responsible for the Danish rules implementing the UCTD, noted that they have not received any report of dissatisfaction from consumer or business organisations (and they would be likely to hear about possible problems). It was emphasised that Denmark has a provision on unfair contract terms (Section 36, the so-called General Clause, of the Danish Contracts Act) that goes beyond the protection awarded through the UCTD. It applies to contracts in general, including B2C and B2B. All types of contract terms are within the scope (including individually negotiated terms) and certain terms such as e.g. the main subject matter and the remuneration are not excluded.

Public enforcement of the UCTD is carried out by the Danish Consumer Ombudsman under the powers conferred in the Danish Marketing Practices Act. In that vein, the use of unfair contract terms is perceived as an unfair commercial practice. The Danish Consumer Ombudsman noted that they have very few cases on this matter.

- 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 your MS? Does this work in practice or are there problems?*]

The indicative list has only limited practical importance in Denmark, although it may provide some guidance for courts, law enforcers, and businesses.

- 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; [*Note: If a black/grey list exists in your country, key aspects to consider are: How does the list work in practice? Does it make a difference to have such a list?*]

There is no black or grey list.

- 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: In your country, have the effects of court decisions establishing the unfairness of an unfair term been extended to all contracts of the trader concerned or to the contracts of any other trader containing such a term? If so, how does this work in practice? What are the impacts on businesses? If there are no such effects of court decisions on unfair terms: what are the effects of this situation?*]

Legally, a court decision applies only between the parties. However, the trader is expected by authorities to resolve other disputes in light of losing such case.

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

This provision seems to work well. The provision has become particularly relevant in the context of online consumer contracts where many consumers are not likely to spend much time on reading the finer details. This has led to a number of cases concerning subscriptions, including so-called subscription traps where a decoy (e.g. a gift) removes attention from the contractual details. These cases are characterised by a very favourable offer, e.g. a free phone, where credit card details must be provided to pay for delivery. It follows from the fine print that the consumer agrees to pay for a subscription of a service. Usually the proper details are provided, but it is not obvious – unless one reads the fine print – from the presentation of the offer that acceptance involves the subscription to a service.

- 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. [*Note: Question only relevant for MS that have put in place extensions of application of UCTD*]

As mentioned above The General Clause applies to contracts in general, including B2C and B2B and all types of contract terms are within the scope. The criteria for applying the General Clause are considered flexible enough to allow such differences to be taken into account to the extent it is appropriate in view of the facts of the individual case.

- 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?*]

The rules seem to work fine in helping the consumers, not least in cases brought before the rather easily accessible Consumer Complaint Boards. However, there must be many consumers who are unaware of their rights and thus, many cases that are not taken to court or brought before the Consumer Complaints Boards. The courts and the Consumer Complaints Board will invoke unfairness rules ex officio. Stakeholders' input with respect to this question does not allow for a more thorough answer to this question.

- In a forward looking perspective: Are there other measures that could improve the effectiveness of the UCTD in establishing a high level of consumer protection in your country? Would a graphical presentation model improve the readability and comprehension by consumers of the T&Cs? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

No suggestions have been proposed or otherwise identified during this study. It is difficult to see how a graphical presentation model can be elaborated for provisions that require individual assessment. It should be emphasised that concern about the amount of mandatory disclosure rules have been raised by several stakeholder, representing both consumers and traders.

### 1.2.2. Effectiveness of the current rules 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 disparities have an impact on cross-border trade; [*Key aspects to consider are: Do national differences in the application/implementation of the Directive play a role for businesses? Have these differences led to changes in their business strategy? Have these differences caused problems?*]

These rules do not appear to play a significant role in cross-border trade.

- 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;

No problems reported.

- 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.

No problems reported.

### 1.2.3. Relevance for business-to-business transactions

Regarding the area of contractual fairness and in relation to the Unfair Contract Terms Directive, please analyse:

- Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;

As mentioned above the General Clause of the Danish Contracts Act) also applies to B2B situations. There seem to be no interest in expanding the scope of the UCTD.

- 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;

See the answer to the previous question.

- 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;

As mentioned above the General Clause of the Danish Contracts Act applies to all types of contract terms, also when they are individually negotiated. As mentioned, there has not been expressed a wish to extent the EU rules on this point.

- 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;

During this study, no suggestions for contractual terms to be presumed unfair have been made. Most court cases on the application of the Danish provision in B2B relations concern contractual penalties.

- Whether there is a need for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive;

According to stakeholders there is no such need.

- Whether an extension of the Unfair Contract Terms Directive to B2B transactions can bring benefits for cross-border trade;

This has not been suggested by any of the stakeholders.

- Whether the consequences of such an extension would have an effect on innovation by or market opportunities for SME providers/suppliers;

No clear answer to this question has emerged.

- Whether the benefits of extending the scope to business-to-business transactions would exceed the negative consequences of such an extension.

This will depend of the nature of such provision. As mentioned above, none of the stakeholders interviewed under this study have found the need for such an extension of the UCTD.

## 1.3. Injunctions

### 1.3.1. Effectiveness of the current rules in establishing a high level of consumer protection

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

- To what extent is the use of the injunction procedure in your country contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment?<sup>9</sup>

The injunction procedure is not widely used by Danish authorities to enforce consumer protection law. Cross border issues concerning marketing law are mainly resolved through the Cross-border enforcement and cooperation (CPC). If this procedure cannot resolve the issue, the ID is not likely to be useful (it has been considered in one case with the Netherlands, but the practice in question was not unfair under Dutch

<sup>9</sup> 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.

law). The Danish Consumer Ombudsman noted that there are substantial variations in the attention of and speed involved in authorities' handling of cases under the CPC.

The Danish Consumer Ombudsman reported one instance, where he successfully had an injunction issued by the Danish Maritime and Commercial Court against a trader established in Estonia.<sup>10</sup> Hereafter, the individual consumers were encouraged to make individual claims against the trader.

- What measures in your national legislation on injunction procedure are considered to be particularly effective, if any: measures regarding the cost of the procedure, the 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?

The benefits of the injunction procedure lie primarily in the fast procedure and the sanctions for non-compliance; as well as the applicant's liability in case the injunction is later found not to be justified.

Courts can order natural or legal persons to act, refrain from acting, and/or tolerate certain acts. Preliminary injunction can be ordered if the applicant establishes or renders probable that 1) s/he has the right that is sought to be protected by the injunction, 2) that the other party requires that injunction is issued, and 3) that the applicants' possibility to seek justice will be spoiled if the party was to await normal judicial procedure.

- Has your country extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunction Directive? If yes, what are the additional consumer rights covered?

The national injunction procedure that was in place before the ID covers basically the infringement of all laws, not only those listed in the ID. Therefore there is access to the injunction procedure beyond the scope of the ID, but the ID cannot as such be said to be extended.

- Analysis of the obstacles to the effective use of the injunction procedure, in particular by analysing which progress in removing obstacles has been made and/or new difficulties that have emerged in your country since 2012.

No observations made by the stakeholders.

- In a forward looking perspective: Should the coverage of the Injunctions Directive be extended (by including additional legislation into Annex I to the Directive)? If so, which EU legislation should be included? Are there other measures that could improve the effectiveness of the ID in establishing a high level of consumer protection? Should the scope of the Injunctions Directive be extended to the protection of collective business' interests? Are there best practices in your country that could be relevant for other countries and considered as model for the injunction procedure at EU level?

It was a common opinion that the ID does not provide any added value and that cross-border issues should be resolved under CPC, which is currently under revision.

<sup>10</sup> Case N-1-13, decision of 25 February 2014.

### 1.3.2. 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:

- How effective is the injunction procedure in addressing infringements originating in another EU country?

Not effective according to stakeholders. Cross border issues concerning marketing law are mainly resolved through the Cross-border enforcement and cooperation (CPC).

- How effective is it to address infringements originating in another EU country that qualified entities in your country are enabled to seek injunctions in the other Member State (Article 4 of the Injunctions Directive)?

Not effective according to stakeholders. Cross border issues concerning marketing law are mainly resolved through the Cross-border enforcement and cooperation (CPC).

- In a forward looking perspective: Are there non-legislative or/and legislative measures that could improve the effectiveness of the injunction procedure in addressing infringements originating in another EU country? Are there best practices in your country that could be relevant for other EU countries and could be considered as a model for the injunction procedure at EU level?

The CPC has proven to be a much better solution than the ID.

### 1.3.3. Interplay between the Injunctions Directive and other enforcement instruments of consumer law

Please analyse:

- Is the injunction procedure as designed by the Injunctions Directive regulated separately in your country (in a separate legal act or as a separate procedure regulated within the same legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (UCPD, UCTD and by the Consumer Rights Directive)?

The injunction procedure designed by the ID is implemented in one law (separated from national procedural law to which it is linked).<sup>11</sup>

- If these procedures are regulated separately: What are the main differences between them? How is the coherence between these procedures ensured? If these procedures are regulated in a single legal act (possibly as a single procedure): In what way do these procedures (or this procedure) go beyond measures foreseen by the Injunctions Directive?

The injunction procedure does not go beyond the ID.

## 1.4. Cross-cutting issues

### 1.4.1. Cost and benefits of the directives covered by the study

- To what extent is there evidence for benefits for consumers stemming from the protection provided by both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of benefits for consumers from the protection against

<sup>11</sup> See Act no. 1257 of 20 December 2000.



unfair commercial practices and unfair standard terms in contracts; [Note: a relevant aspect in this context is whether the costs for consumers in exercising their rights under these directives are limiting these benefits or not.]

The principles found in the UCPD and UCTD were already known in national law. Hence the directives do not provide substantial benefits for consumers (to some extent to the contrary), but this fact also suggests the justification for such regulation.

- To what extent is there evidence for benefits for traders stemming from both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of creating a level playing field for honest traders by providing a legal basis to eliminate or at least constrain dishonest market practices, such as the use of unfair standard terms in contracts or unfair commercial practices, including through the application of the Injunctions Directive;

Because the rules are harmonised, it is both easier to resolve disputes across borders and the legislation provides a level playing field for businesses; though it has been emphasised that there are differences in how the rules are applied and enforced in various Member States. Danish business organisations find that to some extent the rules under the UCPD are applied and thus, enforced too efficiently in Denmark compared to some other Member States. This has been confirmed in one cross-border case concerning the Netherlands, where it was not possible for the Danish Consumer Ombudsman to prevent a particular commercial practice as it was not found unfair under Dutch law.

- What are costs for traders due to the need to respect the requirements under the directives covered by the study? [Note: Such as costs of research, legal advice and compliance as well as the amount of time necessary to comply with the directives]

It has not been possible to obtain detailed information on this point, but it seems that the business organisations generally find the cost of compliance fair. It should be noted that traders also benefit from such standards.

- What are the costs involved in the public enforcement of these rules?

It has not been possible to obtain detailed information on this point.

- Are there indications that the directives covered by the study are not implemented in your country in a cost-effective manner?

No.

- Could the costs for implementing and enforcing the rules of the directives covered by the study be reduced without lowering the level of protection for consumers? If so, how?

No suggestions from stakeholders.

#### 1.4.2. Interplay with EU sector-specific consumer protection legislation

Regarding the interplay of the horizontal EU consumer legislation [mainly UCPD and UCTD] with EU sector-specific consumer protection legislation in the areas of electronic communications, passenger transport, energy and consumer financial services, please:

- Analyse the levels of awareness of the requirements of the horizontal EU consumer legislation (mainly UCPD and UCTD) of businesses and consumers and the specific public enforcement bodies in the relevant sectors, as in particular demonstrated by

their practical application; [*Key question here is: Are UCPD and UCTD applied in practice by national authorities and courts as a legal basis to combat unfair commercial practices and unfair standard terms in contracts in the regulated sectors?*]

There seems to be a good awareness, understanding, and application of the horizontal EU consumer legislation. However, it has not been possible to obtain statistics on this matter. The Danish Consumer Ombudsman has emphasised that sector specific regulation only prevails, when there is a conflict. No such conflicts are identified during this study, and thus, no problems in the interplay between the UCPD and sector specific regulation are reported.

It is noted by the Danish Consumer Ombudsman that clarification of the scope of the rules concerning unsolicited communication in the ePrivacy Directive is needed. There are substantial differences in the understanding and implementation of these rules. The Danish Competition and Consumer Authority suggested that it would provide more clarity, if the rules on unsolicited communication were moved to the UCPD.

For the financial sector, it has been pointed out that the UCTD does not play an important role, as there is much sector specific regulation and that politicians, generally speaking, are not reluctant to regulate. The Danish Financial Supervisory Authority has used the UCTD twice; and in one case it led to new legislation. Also for the area of the UCPD, there is a substantial amount of sector specific regulation. There is specific regulation on financial services which to a large extent follows the rules found in the Danish Marketing Practices Act, and thus, also the UCPD.<sup>12</sup>

The Danish Consumer Council has noted that in the energy field, awareness of the requirements is growing in both business and enforcement bodies. The telecoms field which was liberalized earlier, has already been through a process of aligning the different protection rules. The energy field has only recently seen a proper convergence and coordination. In the wake of the liberalization of energy markets traders are to a larger degree testing the limits of consumer protection which calls for a coordinated approach to implementation and enforcement of general consumer protection and sector-specific consumer protection.

- Specify whether in your country the same authority is responsible for the enforcement of the horizontal EU consumer law 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 UCPD/UCTD in the regulated sectors, as specified in the previous bullet?*]

The UCPD is primarily enforced by the Danish Consumer Ombudsman across all sectors. The financial sector is an exception, but there is a well-functioning (and formalised) institutional cooperation between the two authorities involved.

- Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning contractual fairness, 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.?*]

No reports on conflicts have been noted during this study. Thus the legal framework seems to be coherent, but it has been noted that it is not always clear and to some extent too fragmented.

The Danish Competition and Consumer Authority has emphasised that there are many different information requirements that could need coordination and revision. This is

<sup>12</sup> See Order No. 330 of 7 April 2016.

also the situation for the various terms used for marketing (commercial practices, commercial communication, advertising etc.).

- What are the benefits of the complementary application of the UCPD and UCTD in the regulated sectors? What are the costs due to the complementary application with the sectoral EU consumer protection legislation?

No unambiguous response has been obtained.

- Assess any need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law.

There is a real need for clarification. It is found that the new European Commission guidance on the UCPD provides helpful insight to understand the interplay. Generally speaking, business organisations seem to be very capable of understanding these issues and communicating this information to their members.

It was emphasised by several stakeholders (including the Danish Competition and Consumer Authority and the Danish Consumer Council) that there are a number of unfortunate uncertainties as to the UCPD's scope of application, including taste and decency and C2B situations as discussed immediately below in this study.

#### 1.4.3. Relevance of consumer law directives for consumer-to-business transactions

- Please analyse the need and potential for the application of the consumer law directives (mainly UCPD and UCTD) to 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).

It is the general impression that the directives should (and actually do) apply to these situations.

#### 1.4.4. Specific protection for vulnerable consumers

Please analyse:

- Whether the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined in the consumer law directives and relevant jurisprudence, and as applied by national authorities and courts in your country, continue to be valid and fit for purpose.

The principle-based approach is, as mentioned above, generally accepted and the concepts leave a sufficient amount of flexibility for the assessment. Generally speaking, the concepts are considered valid and fit for purpose.

It has been noted that there is a significant inconsistency in the terms concerning consumer protection which in literal interpretations provides ambiguity. That being said, this inconsistency does not pose significant problems in interpretation.

- To what extent the existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers and whether, based on the experiences in your country, specific provisions should be introduced in other directives concerned, in particular the Unfair Contract Terms Directive.

There has been so little use of the provision on vulnerable consumers that it is not possible to answer this question. The provision in the UCPD is relatively ambiguous and further interpretation by the CJEU is needed. It is not possible to determine whether the UCTD provides sufficient protection.

Generally speaking, there is an increased need to focus on consumer vulnerabilities (not only vulnerable consumers as such). This is in particular true for e-commerce, where it may be difficult for consumers to understand and adapt to new developments that happen at a fast pace. Studies within behavioural sciences reveal insights in bounded rationality that can be exploited by traders and used by legislators to protect consumers better.<sup>13</sup>

#### 1.4.5. EU added value

- Overall, would you consider that protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in your country since the implementation of the UCPD and the UCTD in national legislation?

The protection of consumers has not improved significantly as Denmark had similar rules before. To some extent, the protection concerning sales promotions have been lowered. Benefits due to harmonisation have been noted.

- Overall, would you consider that the information of consumers regarding unit prices has improved since the implementation of the PID in national legislation?

The protection of consumers has not significantly improved.

- Overall, would you consider that the protection of businesses against unfair marketing in your country has improved since the implementation of the MCAD in national legislation?

The protection of businesses has not significantly improved as Denmark had similar rules before.

- Overall, would you consider that it has become easier for businesses in your country to directly trade cross-border to final consumers located in other EU countries in recent years? Has it become easier for consumers in your country to directly purchase cross-border from traders located in other EU countries?

It seems to be the general impression among stakeholders that cross border trade has become easier.

- To what extent are these improvements, if any, due to the mentioned directives?

Much of these improvements are due to the abovementioned directives as they provide a common framework ('backbone') and, therefore, understanding of consumer protection in other countries. It has been emphasised that businesses still need to conduct market research, as there are different cultures and traditions in various Member States.

<sup>13</sup> See e.g. Trzaskowski, Jan, Lawful Distortion of Consumers' Economic Behaviour – Collateral Damage Under the Unfair Commercial Practices Directive, European Business Law Review, 2016, pp. 25-49.

## Annex

## A. Transposition fact sheet

**Table 1: Fact sheet on transposition of directives in Member States' law – DENMARK**

Directive	Transposition legislation (National law, Article)	Comments	Specific provisions going beyond minimum harmonisation requirements/use of exemptions	Included in national legislation	Comments	
<b>Directive 93/13/EEC on unfair terms in consumer contracts</b>	Sections 36 and 38A–38D of the Danish Contracts Act ('aftaleloven')		'Black list' of terms considered unfair in all circumstances	No		
			'Grey list' of terms which may be considered unfair	No		
			Extensions of the application of Directive to individually negotiated terms	Yes	Consolidated Act No. 193 of 2 March 2016, Section 36.	
			Extensions of the application of Directive terms on the adequacy of the price and the main subject-matter	Yes	Consolidated Act No. 193 of 2 March 2016, Section 36.	

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<b>Directive 2005/29/EC concerning unfair business-to- consumer commercial practices in the internal market</b>	The Danish Marketing Practices Act ('markedsføringsloven')	<i>The UCPD provides full harmonisation. There is ongoing work in order to ensure that the Danish Marketing Practices act is in compliance with that fact. A Commission Report has just been published (July 2016) and a new act is expected to be adopted by the end of 2016 (entry into force in mid-2017). Thus, a number of provisions are currently not fully compliant with this requirement, but this is not in the form of specific provisions going beyond minimum harmonisation.</i>	Provisions regarding financial services going beyond minimum harmonisation requirements	Yes	Order No. 330 of 7 April 2016	
			Provisions regarding immovable going beyond minimum harmonisation requirements	Yes	Act No.526 of 28 May 2014 and Order No. 1230 of 21 November 2014	
			Application of UCPD to B2B transactions	No		

<b>Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers</b>	Section 13 of the Danish marketing practices act ('markedsføringsloven')		Extension of the application to other sectors (e.g. for immovable property)	Yes	Section 13(1) Section 13(2)	<i>The requirement of price indications apply to electronic commerce to the extent it is possible to place an order</i>  <i>The rules apply to services as well</i>
	More detailed rules are found in a number of Orders issued in accordance with Section 13(8) of the Danish marketing practices act. The most important are:  -'Bekendtgørelse om oplysning om salgspris og enhedspris for forbrugsvare' (BEK nr 866 af 18/09/2000)  - Bekendtgørelse om mærkning eller skiltning samt annoncering med kortvarige generelle prisnedsættelser for varer (BEK nr 10002 af 16/03/1988).		Use of specific regulatory choices/derogations	Yes	Section 13(1)	<i>Article 3(1) does not apply to sales by auction and sales of works of art and antiques (cf. Article 3(2)).</i>  <i>According to BEK 10002 it is possible to announce price reduction for a shorter period (2 weeks) by use of signage</i>
			Extension of price indications in advertising in Article 1(4)		Section 13(3)	<i>Includes oral references to price</i>



<p><b>Directive 2006/114/EC concerning misleading and comparative advertising</b></p>	<p>The Danish marketing practices act ('markedsføringsloven')</p>		<p>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.</p> <p>The rules on comparative advertising do not go beyond the Directive.</p>		
<p><b>Directive 2009/22/EC on injunctions for the protection of consumers' interests</b></p>	<p>Act No. 1257 of 20 December 2000</p>				

**Table 2: Fact sheet on Injunctions Directive – DENMARK**

Issue/	Answer	Comments
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)?	- No, it is a single procedure	
Who is entitled to bring an action seeking an injunction?	- Designated public bodies - Specified consumer associations - Individual consumers - Other  [the plaintiff must have a sufficient interest in the case]	<i>The ID is implemented in Act no. 1257 of 20 December 2000. It grants designated (foreign) authorities and organisation the right to use the normal Danish procedure for injunctions.</i>
Is the injunction procedure a court or an administrative procedure?  If your country legislation foresees both forms of the procedure, please explain in the comments column for which infringements the court or administrative procedure is foreseen	- Court procedure	
Who bears the costs of an injunction procedure? If qualified entities (or some of their categories e.g. consumer organisations are entitled to an exemption of some/all cost related to the procedure please explain the characteristic of such exemption in the comments column.	- The costs are as a rule borne by the losing party	
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?	- No, scope of the Directive not extended	
Is protection of business' interests covered by the injunctions procedure?  If scope of application extended to the protection of business' interests, please provide details in the comments column regarding type of business' interests covered by the injunctions procedure	- No	
Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations	- Yes	<i>All traders must be identified.</i>
Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID)	- No	
Has your Member State taken specific measures regarding the prior consultation (Article 5 of the Injunctions Directive)?	- No such requirement	

Does the national legislation provide for measures ensuring summary procedure? Please specify main characteristics of the procedure (subject matter/time limits) in the comments column.	- Yes	<i>Ordinary rules on preliminary injunctions apply</i>
Are there sanctions for non-compliance with the injunction order (Article 2(1) of the Injunctions Directive)? If sanctions in form of penalty or fine foreseen please specify in the comments column to who exactly should they be paid	Violation of an injunction may trigger penalty of a fine or imprisonment up to 4 months	<i>Fines are paid to the state.</i>
Has your Member State taken specific measures regarding the publication of the decision and/or the publication of a corrective statement?	- No	
Is it possible to claim within the injunction procedure for sanctions for the infringement?	- No	<i>See below concerning damages</i>
Can an action for the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to other beneficiary be brought within the injunction procedure?	-Yes	<i>Act No. 1257 of 20 December 2000 section3(1).</i>
Can an action for damages to be paid to the qualified entity or the public purse be brought within the injunction procedure?	- No/Yes	<i>A (private plaintiff's) claim for damages can be brought before the court in the same case if the conditions for joinder according to general rules of civil procedure are met.</i>
Can an action for damages or redress to be paid to the consumers concerned be brought within the injunction procedure?	- No/Yes	<i>See comment above on preceding question</i>
Can individual consumers base their individual claims for damages/remedies on the injunctions order?	- No	<i>This would require new individual cases or a class action.</i>
Can the qualified entity claim other measures beyond the injunction, e.g. evidence of compliance with the judgment?	- No	
Are the effects of individual injunctions orders extended to the future infringements and/or same or similar illegal practices (of other traders)?	- Yes	<i>An identical illegal practice would be considered a failure to comply with the injunction.</i>

## B. Data tables

*Number of B2C disputes*

Please indicate how many B2C disputes have been decided in your country on the basis of consumer law directives covered by this study (UCPD, UCTD, PID) as a proportion of the total number of B2C disputes decided on the basis of other national consumer legislation (based on statistics, or based on estimates by enforcement authorities and other stakeholders, where this is not the available).

**Table 3: B2C disputes decided on the basis of consumer law directives covered by this study in comparison with total B2C disputes decided on the basis of other legislation (most recent year for which data is available)**

Year	Type of data	Total number of B2C disputes (number of cases)	Share of B2C disputes decided on basis of ...					Comments
			UCPD	UCTD	PID	other EU consumer protection legislation (e.g. CRD, Sales Directive, sectoral legislation)	national consumer legislation not based on EU directives	

Note: Data not available.

It has not been possible to retrieve statistical data to meaningfully complete this table.

*Costs of obtaining redress for a hypothetical case of invoking unfairness of a standard contract term*

- Please estimate the costs, including time, for consumers in obtaining redress when invoking the unfairness, and thereby the non-binding character of standard contract terms in a contract they concluded. Please provide the estimate for the hypothetical example below, focusing on costs (and needed time) of a lower court procedure and the use of ADR or other relevant procedure (if applicable).<sup>14</sup>

<sup>14</sup> For the hypothetical example it is assumed that both the provider and the consumer are located in your country.

**Table 4: Estimate of costs for consumers in obtaining redress when invoking the unfairness of standard contract terms in a contract they concluded (for the hypothetical example provided in the box below)**

Redress mechanism	Estimated court fees (national currency)	Estimated lawyer's fees (national currency)	Other costs, if any (national currency)	Estimated time involved for consumer (hours)	Comments
<b>Lower court procedure</b>	DKK 500 [approx. EUR 67]	DKK 6000 [approx. EUR 806]		2 hours	
<b>ADR or other relevant procedure</b>			Complaint fee DKK 275 [approx. EUR 37]	1 hour	The procedure before the Package Travel Complaint Board can easily be carried out without a lawyer. The complaint fee is returned if the claimant is successful.

**Hypothetical example: Terms which inappropriately exclude/limit consumers' rights to compensation**

A consumer went on a package holiday with a friend to Kenya for which they paid € 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 €5,000 (€4,000 for the cost of the package and €1,000 for lost time and enjoyment). The tour operator agreed to compensate them €1,000 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/unfair-contract-terms/index\\_en.htm](http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-contract-terms/index_en.htm)]

- Please estimate how often court and ADR procedures are used in your country for invoking the unfairness, and thereby the non-binding character of standard contract terms (i.e. the number of cases per year)?

It has not been possible to retrieve statistical data to meaningfully complete this table.

## C. Interviews conducted and literature reviewed

**Table 5: Interviews conducted for this study**

Organisation	Stakeholder type	Date
<b>Danish Financial Supervisory Authority (Finanstilsynet)</b>	Business association	16 June 2016
<b>ECC Denmark (Forbruger Europa)</b>	European Consumer Centre	16 June 2016
<b>Danish Energy Agency (Energistyrelsen)</b>	National regulatory authority (telecommunication)	16 June 2016
<b>Danish Consumer Ombudsman (Forbrugerombudsmanden)</b>	National consumer enforcement authority	17 June 2016
<b>Danish Competition and Consumer Authority (Konkurrence- og Forbrugerstyrelsen)</b>	Ministry	23 June 2016
<b>The Confederation of Danish Enterprise (Dansk Erhverv)</b>	Business association	24 June 2016
<b>Danish Consumer Council (Forbrugerrådet)</b>	Consumer organisation	28 June 2016
<b>Creativity and Communication (Kreativitet &amp; Kommunikation)</b>	Business association (advertising industry)	29 June 2016
<b>Ministry of Justice (Justitsministeriet)</b>	Ministry	1 July 2016
<b>Danish Energy Agency (Energistyrelsen)</b>	National regulatory authority (energy)	No interview was conducted as they had no comments to the questionnaire.

**Table 6: Literature reviewed for country report**

Author/Source	Year	Title of publication
Møgelvang-Hansen et al	2011	Markedsføringsretten
Andersen & Madsen	2012	Aftaler og mellemænd
Multiple	Online	Karnovs lovsamling
Heide-Jørgensen	2012	Lærebog I konkurrence- og markedsføringsret
Trzaskowski	2016	Lawful Distortion of Consumers' Economic Behaviour – Collateral Damage Under the Unfair Commercial Practices Directive, European Business Law Review, 2016, pp. 25-49

# 1. Study to support the Fitness Check of EU Consumer law – Country report ESTONIA

## 1.1. Unfair commercial practices and marketing

### 1.1.1. Effectiveness of the UCPD in establishing a high level of consumer protection

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

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

Unfair commercial practices is a topic that has not gained much academic interest in Estonia. Until the implementation of the UCPD there was no special legislation on fighting unfair commercial practices and it was an area that was not given much attention to in practice. There was a norm on misleading information in the Competition Act of 2001 (§ 51) – a tort law norm by nature – but in practice it was not relied upon by traders. The Consumer Protection Act of 2004 also stipulated in § 12 that unfair commercial practices, including misleading advertising are prohibited. However, the public enforcement of this provision remained an exception rather than the rule. Even an official of a regulator emphasised that they have mostly invested in information campaigns for consumers on unfair commercial practices and less in real supervision, as there is considerable shortage of both financial and personnel resources.

The competent supervision bodies in Estonia are the Consumer Protection Board and, since 2015, also the Financial Supervision Authority who share the competence with the Consumer Protection Board for the finance sector under § 65 (5) of the Consumer Protection Act. There are no other sectoral regulators in Estonia as far as unfair commercial practices and advertising are concerned.

According to the stakeholders, use of unfair commercial practices happens quite often in Estonia but there is not much case law due to the limited resources. This, in turn, does not enable to make far-reaching conclusions on the effectiveness of the principle-based approach under the UCPD. A regulator's official suggested, however, that the approach is justified: the black list of the Directive makes it easier for all parties to understand which practices are always deemed unfair and therefore those cases almost never end in court. Thus, the black list has been fostering transparency and legal certainty.

Resorting to the general clause is much more uncertain in practice and leads often to disputes, also in court. Furthermore, it can be argued that in some cases, the Estonian Consumer Protection Board has not applied the general clause correctly, as it has issued precepts without analysing whether the particular practice has materially distorted or is likely to materially distort the economic behaviour of an average consumer. For example, in one case the Estonian Consumer Protection Board issued a precept<sup>1</sup> because a creditor had indicated the APRC to be 761 % that was 0.61 % lower than was actually the case.<sup>2</sup> One might wonder whether such a small difference really is able to influence the credit-taking decision of an average consumer. This is, however, an enforcement problem of a particular regulator and not a problem of the principle-based approach of the UCPD.

<sup>1</sup> A precept is an administrative act which imposes on a person an obligation to perform a required act or refrain from a prohibited act. If the addressee fails to perform the obligation imposed by a precept a penalty payment may be issued.

<sup>2</sup> Precept of the Consumer Protection Board, 04.06.2015, no 6-25/14-004945-009.



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

Both a government official as well as a consumer association assessed the black list of unfair commercial practices of the Directive as effective and positive. They emphasized that traders are usually avoiding the blacklisted commercial practices and the list makes it easier for consumers to recognize unfair practices, thus raising the consumer protection standard. It also makes the enforcement easier for the regulators as it is avoiding arguing over whether a particular practice should be considered unfair or not and thus, the black list also fosters legal certainty and clarity. As for practical examples, a consumer association referred to cases where traders have sent memorial coins marketed as 'free' but later on the consumer was still required to pay. Another example concerned 'free' mobile phone ringtones advertised to minors.

A representative of a consumer association brought out the following cases of black-listed unfair commercial practices that has been occurring in their practice and that have been settled in the favour of the consumer:

- Including in marketing material an invoice or similar document seeking payment that gives the consumer the impression that the consumer has already ordered the marketed product when this is not the case. Mainly used in case of distance sales, different packages including books or food supplements, etc. sent to consumers;
- Falsely claiming or creating the impression that the trader is not acting for purposes relating to the trader's trade, business, craft or profession, or falsely representing oneself as a consumer. This is most common in the sale of second-hand cars;
- Undertaking to provide after-sales service to consumers with whom the trader has communicated prior to a transaction in a language, which is not an official language of the Member State where the trader is located and then making such service available only in another language without clearly disclosing this to the consumer before the consumer is committed to the transaction. This is common in cross-border cases when the trader's website targeted to consumers is displayed in different languages, but the complaints are accepted only in the language of the trader;
- Pyramid schemes.

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

The Estonian legislator has not made use of Article 3(9) UCPD. In academic writing, this topic has not been discussed either. No unfair commercial practices were cited by Estonian respondents in the area of immovable property. As for financial services, there have been cases with incorrect information on APRC in consumer credit contracts.

- 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 what 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?*]

None of the respondents was able to report any such problems on the energy market. There have been no investigations or case law on this issue.

- 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 rigidly?*]

A government official admitted that it is not possible to evaluate the practical benefits for the consumers. A representative of a regulator, however, pointed out that there is a lot of ambiguity concerning the notion of 'average consumer'. For example, 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 the statistics concerning what services an average mobile service client is using and what price he or she is ready to pay for that. However, the respondents were not able to point out any case law where the court had dealt with the notion of an 'average consumer'.

- 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 in your country recognised new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted)?*]

There is no court case law on the notion of 'vulnerable consumer' in Estonia but in the enforcement practice of the Consumer Protection Board, there have been several disputes on who should be regarded as vulnerable consumer. One example of a new category of vulnerable consumers stems from the recent enforcement practice and concerns an e-driving school case about young, just-graduated people who were inexperienced in concluding contracts. Their vulnerability was, inter alia, shown by the fact that it was their parent and not themselves who turned to the Consumer Protection Board for legal help. In other cases, it was the poor economic situation as well as low educational background of the consumer that was the basis of the vulnerability: e.g. cases of usurious instant loans.<sup>3</sup>

- 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?*]

In general, interviewed stakeholders considered self- and co-regulation good measures to overcome the burdensome and often unnecessary over-regulation in various spheres of economic activities. By subjecting themselves to self-imposed rules, market participants have the opportunity to rule out the use of unfair commercial practices and give consumers a clear signal, which market participants act ethically towards the consumers. Some of the positive examples that come to mind are the agreement not to sell alcohol to inebriated consumers by Estonian retail chains. To a certain extent, some acknowledgements also carry this function, e.g. the certification of trustworthiness given by the Estonian E-Commerce Association that gives the consumers a guarantee of the reliability of the business.

The problem with self-regulation and sector-wide certifications is that the customers may not be aware of such actions and thus are not considering this in their behaviour. Secondly, several stakeholders pointed out that self-regulation is until now not very widely practiced in Estonia and is rather a new concept for most of the market players. The most prominent example of self-regulation in Estonia are the Guidelines on Good Commercial Practices put together by the Estonian Traders' Association in 2007. As for its effectiveness, the stakeholders expressed different opinions: whereas an official of the regulator was rather sceptical, a representative of a traders' association considered it definitely useful in practice. Neither of them was able to provide specific

<sup>3</sup> On the problem of usurious instant loans in Estonia and its devastating social impact, see K. Sein, Protection of Consumers in Consumer-Credit Contracts: Expectations and Reality in Estonia. *Juridica International* 2013, pp 32-36.

examples to back their claims, however. Based on the above, it can be concluded that co-regulation is definitely a right step forward but it is not able to substitute the traditional public enforcement.

- 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?

A representative of a business association as well as an official of a regulator found that considering the rapid growth of e-commerce and sharing economy, developments in these and related areas should be accounted for when reviewing the list. They were not able to provide a more specific suggestion, however.

Other stakeholders did not report of any necessity to extend or modify the black list. A regulator stressed that the current black list is justified and working effectively because it is clear and thus eliminating many disputes. Therefore, in their enforcement practice disputes mostly arise if an administrative procedure was initiated based on the general clause.

- Are there other measures that could improve the effectiveness of the UCPD in establishing a high level of consumer protection in your country? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

The respondents have not reported of any such measures or best practices. An official of a regulator was of the opinion that the legal rules concerning unfair commercial practices do not contain any major flaws or shortcomings; it is the (domestic) enforcement regulation that could be improved.

#### 1.1.2. Effectiveness of the PID in establishing 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;

The PID is implemented in the Consumer Protection Act and in a government regulation 'Requirements for indicating the prices of services and goods'. As for the awareness of consumers, all respondents were of the opinion that Estonian consumers are well-informed of the unit selling price. According to the Eurobarometer data, 45 % of Estonian consumers looked at the unit price often, 27 % sometimes and 11 % seldom. The consumers mainly consider unit price when buying food products. A regulator stressed that the awareness in Estonia is so high (also due to several information campaigns) that regulators even do not need for an extensive surveillance anymore. The traders have accepted the obligation and it seems that it has also become part of competitive factors: if a trader does not show the unit price then consumers might start preferring a competitor.

- 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?

Currently the unit price is based on '1 litre' or '1 kg' and the respondents were of the opinion that both traders and consumers have got used to it. Therefore, they see no need for a change (introducing e.g. a number of washloads parameter) right now. They consider most important that the price for comparable products remains comparable and it is not so important which unit should be taken as a basis.

- The effects of the regulatory choices/derogations allowed by the Directive and applied by Member States. [*Key aspects to consider are: Is the derogation relevant? Do companies make use of it? Are there consumer complaints because of this? If so, approximately how many per year?*]

Not relevant for Estonia.

### 1.1.3. Effectiveness of the MCAD in providing protection for businesses

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

- 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 is implemented in the Advertising Act. For Estonia, the problem is not that the Directive's scope is limited to the notion of 'advertising', but rather the fact that advertising is defined somewhat ambiguously and possibly even not conforming to the MCAD in the Estonian law (§ 2 (1) of the Advertising Act). Whereas § 2 (a) of the MCAD defines advertising as 'making of a representation in any form', § 2 (1) of the Estonian Advertising Act defines advertising as 'information which is made public in any generally perceived form'. This has created problems in the enforcement process as non-complying traders argue that e.g. offers sent directly to a particular consumer do not constitute advertising and, hence, do not fall under the rules on misleading and comparative advertising. This problem has been reported both by a government official as well as by a regulator. However, this is a transposition problem and not a problem concerning the Directive itself.

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

Most respondents were not able to evaluate the effectiveness of that. An official of a regulator evaluated the strategy concerning misleading advertising as effective but also referred that it has been controversial in practice what constitutes 'advertising' and what 'invitation to buy'.

- The effects of the minimum harmonisation provisions on misleading advertising; [*Key aspects to consider are: Which national rules that go beyond the MCDA, 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)?*]

Estonian legislator has not set forth any rules that go beyond the MCDA. There are also no other rules protecting B2B transactions.

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

The respondents were not able to evaluate the effects of the full harmonisation provisions on comparative advertising. There is also no literature to be found on this particular issue.

- 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;

Most of the respondents were not able to evaluate that. An official of a regulator considered the comparative advertising rules to be effective for all marketing channels.

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

A representative of a regulator considered the rules effective enough.

- Are there measures that could improve the effectiveness of the MCAD in providing protection for businesses (see also 1.1.6 below)? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

Estonian regulators have had good experiences with cooperating with traders. For example, Estonian traders are eager to use the opportunity to consult the regulator before publishing their advertisements. Similar and very beneficial cooperation exists with several advertising and marketing companies and media portals.

In addition, the Consumer Protection Board has published a number of detailed guidelines for advertising specific products/services for the traders. One of the regulators also reported a self-regulation practice where a trader who submitted a complaint about another competitor to the regulator copied this e-mail also to the competitor being complained about. This enabled the competitor who had violated the advertising rules to comply with the complaint immediately if they so wished.

#### 1.1.4. Effectiveness of current rules 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;

Business associations representing Estonian entrepreneurs reported that Estonian businesses have not encountered such problems due to the UCPD.

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

As Estonian entrepreneurs report no problems due to UCPD one can assume that the black list has served its purpose on fostering free movement of goods and services.

- Whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade. [*Do the national differences play a role in a business perspective? Have they caused problems?*]

Stakeholders and regulators have not reported such problems. However, those problems might arise, e.g. in respect to consumer financial services offered cross-border.

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;

There are no negative experiences in Estonia in this respect.

- Whether the minimum harmonisation character of provisions on misleading advertising represents a barrier to cross-border trade;

Stakeholders and regulators have not reported of such barriers.

- 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;

The respondents were not able to evaluate that.

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

Stakeholders and regulators have not reported such barriers.

#### 1.1.5. Interplay amongst UCPD information requirements according to Article 7(4) with the information requirements in the horizontal consumer law instruments

Regarding the information requirements according to Article 7(4) UCPD ("invitation to purchase") in the advertising stage, please analyse:

- The level of awareness of traders as regards information requirements at the advertising stage, as in particular demonstrated by their practical application; [*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?*]

The respondents were of the opinion that bigger traders are certainly aware of the information requirements and implement them but smaller (and possibly also middle-sized) ones probably do not. It was reported that the more detailed information obligation requirements of the CRD play a far greater role in practice. As for the consumers, a representative of a consumer association found that parallel information requirements do not create confusion for the consumers and is rather informative. Based on the evidence and opinions expressed, one can conclude that many traders in Estonia do not give enough attention to the information requirements or are even knowingly ignoring them.

- 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 respondents did not report on any costs arising for public authorities/businesses due to multiple information requirements in different directives. While they admitted that there are indeed different information requirements arising from different directives they did not bring out any specific overlaps or real practical problems.



### 1.1.6. Relevance for business-to-business transactions

Regarding the area of unfair commercial practices/marketing, please analyse:

- 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 cross-border trade;

The respondents, especially an official of a regulator, did not see any necessity for such extension or revision. This issue has not been reported as a problem and it has not received any attention in the legal literature, even not for the domestic trade. This might be because the same practical result can be reached under §§ 14 and 115 of the Law of Obligations Act. Those provisions set forth the option of a damages claim for breaching pre-contractual information obligations, including an obligation to 'inform the other party of all circumstances with regard to which the other party has, based on the purpose of the contract, an identifiable essential interest.'<sup>4</sup>

- 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;

The respondents saw no problems about keeping separate legal regimes for B2B and B2C transactions in the area of commercial practices.

- 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 also cover unfair commercial practices during and after the transaction;

There was no enthusiasm for the latter option among the respondents. For them, the protection in B2B transactions should, as a rule, cover only the pre-contractual stage and generally not be extended to unfair commercial practices during and after the transactions. A representative of a traders' association, however, believes that some certain types of unfair practices which are borderline fraudulent in their nature and have a cross-border effect, should be addressed on an European level, such as misleading invoices (European Business Number, fraudulent invoices regarding IP-rights) and other types of scams (e.g. creating an organisation with similar symbols to an official institution and deceiving companies into participating in seminars, selling them materials etc.). The last problem is very common among Estonian businesses as well, and counter-measures to this type of operations should definitely be taken.

- Whether there is a need to have a black-list of practices in the business-to-business marketing area;

The business associations did not report a need for such black list for B2B marketing area.

- What should be the enforcement cooperation mechanism in the business-to-business marketing area;
- Whether there is a need to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive;

There is no need to develop contractual consequences linked to the breaches of MCAD. The contract law rules on mistake and fraud, as well as on transactions violating good morals, are already providing necessary protection in individual cases.

<sup>4</sup> See further on that P. Varul et al, *Võlaõigusseaduse üldosa. Kommenteeritud väljaanne*, Juura 2006, pp 58-62.



- Whether there is a need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive.

On 14 February 2013, the Estonian Government adopted the Estonian position on the EU Commission's Communication on unfair commercial practices in B2B transactions. Estonia supports revision of the MCAD in order to refine the scope of the Directive, provide for a definition of unfair commercial practice and create a list of unfair practices. Further, it supported provision of a legal basis for cross-border enforcement measures as well as creating a cooperation scheme for enforcement entities of the Member States.

Whereas the Government of Estonia supports further action on the EU level, a representative of a traders' association stressed the opposite. The representative found that although there are cases in which such measures could theoretically help with creating a fairer internal market that is also in the best interests of Estonian businesses, strict regulation for B2B transactions on a European level is not of utmost importance. This is due to the risk that such regulation could bring about too many unfounded complaints and legal arguments.

#### 1.1.7. Relevance of contractual consequences of unfair commercial practices

Please analyse whether there are in your country:

- 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;

In Estonian law there is an explicit provision in the Consumer Protection Act (§ 13 (2)) stating that violation of the prohibition on the use of unfair commercial practices does not result, in itself, in the nullity of the transaction. The literature suggests, however, that the nullity of a contract cannot be ruled out as under certain circumstances it can also follow from § 86 of the General Part of Civil Code Act that foresees the nullity of transactions violating good morals (*bona mores*).<sup>5</sup> In addition, such contracts may, under certain circumstances be avoided due to fraud or mistake (§§ 92-95 of the General Part of Civil Code Act). Avoidance is executed by a notice to the other party, i.e. extra-judicially. In those cases, also a negative damages claim is available under § 101 of the General Part of Civil Code Act.

- Any case law (enforcement decisions, court rulings) providing for such consequences;

There is no case law available on that issue. There is case law on nullity of contracts because of immoral behaviour/usury<sup>6</sup> but not connected to unfair commercial practices.

- Whether there is, based on past experience in your country, a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

Neither the government officials nor the consumer associations see a need for developing contractual consequences linked to the use of unfair commercial practices. A regulator pointed out that there might be a need for that as currently declaring certain commercial practice to be unfair has no direct legal consequence for the consumer. Such necessity does not seem to be real, however, as in serious cases nullity of the contract can be reached by § 86 of the General Part of Civil Code Act that foresees the nullity of transactions violating good morals (*bona mores*). For most of the cases, there are already enough remedies available under Estonian law.

<sup>5</sup> M. Kingisepp. *Tarbijakaitseõigus Euroopa Liidus ja Eestis*. Läte, 2011, p 156.

<sup>6</sup> See on that, K. Sein, *Protection of Consumers in Consumer-Credit Contracts: Expectations and Reality in Estonia*. *Juridica International* 2013, pp 32-36.

However, representative of a consumer association pointed out that in practice consumers who have entered into contract due to the misleading or aggressive practises have no legal possibility to claim damages out of court, even if it has been confirmed by the competent authority that the trader has used unfair commercial practices and has therefore been sanctioned. According to this representative, this means that consumer complaints cannot be solved efficiently out of court.

## 1.2. Contract conclusion and performance

### 1.2.1. Effectiveness of the current rules in establishing 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 overall impression gained from the interviews is that the principle-based approach of the UCTD (and the Estonian transposing norms) are working effectively. The fact that the Directive is rather general and abstract calls for more detailed regulation at the national level. It was submitted that Estonia has achieved quite a well-balanced result here with a more detailed (but directive-conforming) rules, including a list of terms that are to be considered unfair in consumer contracts.

The general principles underlying the UCTD are reasonable and justified. The real problem in Estonia is not the normative framework but rather the limited supervision resources.

- 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 your MS? Does this work in practice or are there problems?*]

It is difficult to evaluate the practical effectiveness of the indicative list of unfair terms annexed to the Directive as the Estonian legislator has decided to set forth a binding and very detailed list of terms (altogether 34 terms) that are to be considered unfair in consumer contracts. The list in Estonian law is considerably longer than the one in the Annex of the UCTD and therefore practical experiences exist only in relation to the domestic list.

- 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; [*Note: If a black/grey list exists in your country, key aspects to consider are: How does the list work in practice? Does it make a difference to have such a list?*]

It is hard to define whether the Estonian solution is the one of a black and/or grey list of unfair terms. Estonian law (§ 42 (3) of the Law of Obligations Act) provides for a list of standard contract terms considered unfair and thus void in all circumstances (for consumer contracts). This seems to suggest that Estonia has adopted the so-called black list. However, many terms of this list involve notions as 'unreasonably high', 'unreasonably long' etc. and are thus rather 'grey' in nature as they require evaluation by the court. Thus, one can conclude that the Estonian law contains both a black and a grey list of unfair terms. This list contains 34 items and several of them cannot be found in the annex of the UCTD. For example, according to § 42 (3) item 11 a term prescribing that, in the event of a breach of the contract by the party supplying the term, the other party may exercise the party's legal remedies against the party supplying the term only if the other party has previously filed a claim against a third

party with a court, is unfair. Other examples of unfair terms: term providing the party supplying the term with the right to require security of unreasonably high value (item 22); prescribing the obligation of the other party to accept goods or services which were not ordered in addition to the goods and services agreed upon (item 23). In addition, the Estonian Law of Obligations Act contains a general clause in § 42 (1), transposing art. 3 (1) of the UCTD.

The respondents found such a combination of a black/grey list and a general clause to be working well enough. In practice, it is easier to declare a term unfair based on the list; it is more complicated to argue it only under the general clause. In addition, the list provides good guidelines for the entrepreneurs of what the allowed/not allowed clauses are and thus facilitates legal certainty and predictability. The general clause, in turn, provides a good safety net for cases that cannot be dealt with under the list. The Estonian Supreme Court has used both the black/grey list as well as the general clause in its case law.<sup>7</sup>

- 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: In your country, have the effects of court decisions establishing the unfairness of an unfair term been extended to all contracts of the trader concerned or to the contracts of any other trader containing such a term? If so, how does this work in practice? What are the impacts on businesses? If there are no such effects of court decisions on unfair terms: what are the effects of this situation?*]

Under Estonian law, a court decision is only binding to the parties of the particular case so a court decision establishing the unfairness of an unfair term does not extend to all contracts of the trader concerned, not to speak to the contracts of other traders containing similar term. However, § 457 (7) of the Estonian Code of Civil Procedure stipulates that if a person applying a standard term violates a court judgment whereby termination of the application of the standard term is required, the standard term is deemed to be invalid if the other contracting party relies on the court judgment. Furthermore, a court decision, especially a Supreme Court decision declaring a particular standard term unfair certainly has a strong impact on how the rules of unfair terms should be interpreted. Traders tend to consider such Supreme Court decisions rather quickly as they have a high interpretative value in the Estonian legal practice. A representative of a regulator also stressed that after a certain clause has been declared unfair and thus void by the Supreme Court it is very much easier for them to induce other traders to stop using a similar term.<sup>8</sup> This does not apply to the insurance sector, however: they tend to continue using terms even after they have been declared unfair or not transparent by the Supreme Court.

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

The transparency requirements under art. 4 (2) and 5 of UCTD are reasonable and justified. However, Estonian law contains somewhat more detailed rules on transparency than the Directive does. Namely, § 37 (3) of the 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

<sup>7</sup> See for example P. Kalamees, K. Lilleholt, Early Termination of Consumer Contracts for the Leasing of Cars under Estonian and Norwegian Laws, *European Review of Private Law* (4) 2014, p 553-554 and K. Sein, K. Lilleholt, Enforcement of Security Rights in Residential Immovable Property and Consumer Protection: An Assessment of Estonian and Norwegian Law, *Oslo Law Review* (1) 2015, pp 31-32.

<sup>8</sup> This tendency has also been reported in the literature, see K. Sein, K. Lilleholt, Enforcement of Security Rights in Residential Immovable Property and Consumer Protection: An Assessment of Estonian and Norwegian Law, *Oslo Law Review* (1) 2015, pp 31-32.

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. Thus Estonian law deals with transparency issues under the incorporation test and not as a part of unfairness test. The legal consequences are, at least under Estonian law, the same: an unclear/non-transparent clause is not binding for the consumer.<sup>9</sup>

A government official expressed the opinion that Estonia's more detailed domestic regulation puts the consumer to a slightly better position than the Directive does and thus enables a somewhat higher consumer protection standard. Officials of a regulator also stressed that transparency of standard terms is in many cases a central problem in practice. In case law, the transparency test has been used several times to declare certain terms of insurance contracts to be non-binding to the consumer.<sup>10</sup>

- 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. [*Note: Question only relevant for MS that have put in place extensions of application of UCTD*]

Estonia has not extended the application of the UCTD to individually negotiated terms or to terms on the adequacy of the price and the main subject-matter. However, the rules on unfair terms also apply to individual employment contracts.<sup>11</sup>

- 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?*]

The sanction 'term not binding to the consumer' is effective and reasonable in practice. Under Estonian law, when a clause is declared unfair, the consequence is that the clause becomes null and void with effects *ex tunc* and legal provisions concerning the type of contract concerned are applied in lieu of such terms (§ 41 of the Law of Obligations Act).<sup>12</sup> A reduction of an unfair term to the acceptable level is expressly prohibited in § 39 (2) of the Law of Obligations Act and the rule is accepted in the court practice as well.<sup>13</sup>

The Estonian courts usually follow the obligation to invoke unfairness *ex officio*; however, the rule seems to be that the Supreme Court leads the way and after its decision to declare a particular term unfair also courts of lower instance follow the pattern in similar cases. There is no explicit provision in the Estonian law on the *ex officio* assessing obligation but the Supreme Court has stressed it in its continuous

<sup>9</sup> K. Saare, K. Sein, *Transparenzgebot der AGB-Klauseln in den Verbraucherverträgen*, *Juridica International* (1) 2012, pp 64-65.

<sup>10</sup> See e.g. the decisions of the Estonian Supreme Court no 3-2-1-112-14, available at <http://www.riigikohus.ee/?id=11&indeks=0,2,10246,10624,10629&tekst=RK/3-2-1-112-14> and no 3-2-1-76-07, available at <http://www.riigikohus.ee/?id=11&indeks=0,2,10246,10624,10629&tekst=RK/3-2-1-76-07>

<sup>11</sup> See the decision of the Estonian Supreme Court no 3-2-1-39-11, available at <http://www.riigikohus.ee/?id=11&indeks=0,2,10246,10624,10625&tekst=RK/3-2-1-39-11>

<sup>12</sup> An exception is foreseen for cases of dividable terms via the „blue pencil test“, see P. Varul et al, *Võlaõigusseseaduse üldosa. Kommenteeritud väljaanne*. Juura 2006, p 141.

<sup>13</sup> See the decision of the Estonian Supreme Court no 3-2-1-123-12, available <http://www.riigikohus.ee/?id=11&tekst=RK/3-2-1-123-12>

case law<sup>14</sup> and the principle seems to be well-anchored in the Estonian legal practice. A government representative considered it the most reasonable and consumer-friendly result compared to other possible solutions where consumer should be active themselves. However, the official claimed that Estonia will not oppose if the Commission wants to lay down this principle *expressis verbis* in the legal act.

There is no real administrative remedy in this area under Estonian law. The Consumer Protection Board is entitled to file a claim at the civil court and demand that the application of unfair standard terms be terminated (§ 65 (3) of the Consumer Protection Act). However, the Consumer Protection Board has no power to rule on legal consequences of an unfair term (damages, restitution). There has been theoretical discussion within a regulatory body as to whether using unfair terms can be viewed as an unfair commercial practice with the result that the regulator is able to use administrative remedies (issue precepts under § 64 (1) of the Consumer Protection Act) to stop the use of unfair terms. However, there has been no case law yet.

- In a forward looking perspective: Are there other measures that could improve the effectiveness of the UCTD in establishing a high level of consumer protection in your country? Would a graphical presentation model improve the readability and comprehension by consumers of the T&Cs? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

The respondents were hesitant on that question. While they generally agreed that graphical presentation would improve transparency and readability of the terms, at the same time doubts were expressed whether it would be possible to use graphical presentation for all standard terms (irrespective of the products or services offered). Another concern expressed by a government official is that it would probably be very complicated to regulate graphical presentation of standard terms as in different sectors and different business models presentation of standard terms may be very different both in terms of form and content.

There are no best practices or lessons learned in Estonia that could be relevant for other Member States.

As a way forward, a government official suggested to lay down a binding list of non-negotiated terms that would always be considered unfair. Such list could be based on the common ground found in the grey/black lists of the Member States. However, such list cannot be comprehensive and needs to be complemented by a general clause.

### 1.2.2. Effectiveness of the current rules 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 disparities have an impact on cross-border trade; [*Key aspects to consider are: Do national differences in the application/implementation of the Directive play a role for businesses? Have these differences led to changes in their business strategy? Have these differences caused problems?*]

The respondents have not reported of such cases and there is no empirical evidence to suggest that such disparities influence the decisions of consumers and traders to engage in cross-border transactions. Based on the interviews and the lack of empirical

<sup>14</sup> See on that K. Saare, K. Sein, Amtsermittlungspflicht der nationalen Gerichte bei der Kontrolle von missbräuchlichen Klauseln in Verbraucherverträgen, *Journal of European Consumer and Market Law* (1) 2013, pp 19-20; P. Varul et al, *Võlaõigusseadus I. Üldosa. Kommenteeritud väljaanne*, Juura 2006, p 126.

evidence, it can be concluded that differences in transposing and/or applying the general fairness clause of UCTD have not caused real problems to the Estonian traders or consumers.

- 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;

The respondents have not reported such cases, see above.

- 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.

Not relevant as Estonia has not extended the scope of application of the UCTD.

### 1.2.3. Relevance for business-to-business transactions

Regarding the area of contractual fairness and in relation to the Unfair Contract Terms Directive, please analyse:

- Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;

A business association answered that certain measures could definitely help benefit SMEs that sometimes have no other options than to succumb to the rules foreseen by the other contracting party. In particular, there have been problems connected to the supply chains of food products as bigger supermarkets and other retailers block smaller producers out. However, in Estonia, most businesses are SMEs and making a distinction based on the size of the company may not be the most effective measure, at least in Estonia.

- 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;

Estonia has extended the applicability of the rules on unfairness control also to B2B relations. Under § 44 of the Law of Obligations Act if a standard term is used in a contract where the other party to the contract is a person who entered into the contract for the purposes of the economic or professional activities of the person, the term is presumed to be unfair. In practice, however, establishing the unfairness of a standard term in B2B contracts is an exception rather than the rule. It is probably the reason why the applicability of unfair terms rules has not been contested in the Estonian legal literature.

- 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;

According to the business association, the scope should definitely not cover the question of price, which should remain a question that parties can decide upon. The same applies to the main subject-matter of the contract. The importance of party autonomy in those matters is also stressed in the literature.<sup>15</sup>

<sup>15</sup> P. Varul et al. Võlaõigusseaduse üldosa. Kommenteeritud väljaanne. Juura, 2006, pp 139, 152.



- 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;

A business association found that in cross-border contracts the clauses on applicable law and jurisdiction are often established by the so-called stronger party and do not leave the other (usually smaller) business many options to challenge the terms of the contract or go to court against the other party in case of a breach.

- Whether there is a need for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive;

No such need has been reported by the respondents.

- Whether an extension of the Unfair Contract Terms Directive to B2B transactions can bring benefits for cross-border trade;

There have been no indications in Estonia to suggest that this would be the case.

- Whether the consequences of such an extension would have an effect on innovation by or market opportunities for SME providers/suppliers;

There have been no indications in Estonia to suggest that this would be the case. On the contrary, it seems highly unlikely that extending unfairness control would have any influence on innovation as in this area other aspects such as contract price is much more important for the market players.

- Whether the benefits of extending the scope to business-to-business transactions would exceed the negative consequences of such an extension.

The benefits of extending the scope to b2b transactions would not exceed the negative consequences of such an extension, according to stakeholders.

## 1.3. Injunctions

### 1.3.1. Effectiveness of the current rules in establishing a high level of consumer protection

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

- To what extent is the use of the injunction procedure in your country contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment?

Estonia has two different injunctions procedures: administrative procedure (issuing precepts<sup>16</sup> and in case of non-compliance, applying a penalty payment) and court procedure (in civil court). A government official as well as a regulator, assessed the administrative procedure to be considerably more effective (faster and cheaper) than the civil court procedure. Since 2015, the maximum amount of penalty payments (now EUR 9600) has been considerably higher than before (EUR 640): this has, on the one hand, a higher preventive effect but on the other hand, it also induces traders to contest the penalty payments in court. The court procedure has been used only once (for stopping the use of an unfair term in a mobile operator's standard terms); the proceedings up to the Supreme Court lasted ca. 1.5 years.

<sup>16</sup> A precept is an administrative act which imposes on a person an obligation to perform a required act or refrain from a prohibited act. If the addressee fails to perform the obligation imposed by a precept a penalty payment may be issued.



The cross-border system, on the contrary, does not function very well according to the assessment of the respondents. The Estonian Consumer Protection Board has not initiated any proceedings abroad nor have foreign consumer associations/regulators initiated proceedings in Estonia.

- What measures in your national legislation on injunction procedure are considered to be particularly effective, if any: measures regarding the cost of the procedure, the 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?

Both a government official as well as a regulator considered an administrative injunction order (issuing a precept) to be the most effective (including cost-effective) measure. If the trader does not comply with the precept voluntarily, then the Consumer Protection Board can apply penalty payment. However, issuing a precept was not considered the most effective measure when it comes to short-time violations (e.g. short advertising or sale campaigns). In those cases misdemeanour procedure should, in their view, be used instead.

A government official found that it would be most effective for the consumers if the traders could be forced by the regulator to compensate the consumer right away; this is currently the case concerning the compensation under the Flight Passenger Rights Regulation. Namely, the Estonian Consumer Protection Board is entitled to issue a precept and force the trader via this administrative measure to compensate for the cancelled or delayed flight. It should be noted, however, that this is a real exception and as a rule, the consumers must turn to court or the Consumer Complaints Committee to claim damages.

There is currently no system of collective redress in Estonia.

- Has your country extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunction Directive? If yes, what are the additional consumer rights covered?

Yes, under § 64 of the Consumer Protection Act the Consumer Protection Board is entitled to apply the injunction procedure to all violations of collective consumer interests.

- Analysis of the obstacles to the effective use of the injunction procedure, in particular by analysing which progress in removing obstacles has been made and/or new difficulties that have emerged in your country since 2012.

The Estonian Consumer Protection Board has not initiated an injunction procedure in other Member States.

A representative of a regulator reported several problems in case of cross-border cases starting from finding the right addressee and ending with the actual cross-border enforcement.

Costs of the proceedings were indicated as one of the major obstacles to a wider use of injunctions. Because of the 'loser pays' principle in the Estonian law there is a risk of paying the fees and costs of the opposing party. Due to the cost risks linked to litigation, regulators only launch injunctive actions when they are sure to win. The consumer associations in Estonia are entitled to launch injunctions but in reality have never done so because of shortage of resources.

- In a forward looking perspective: Should the coverage of the Injunctions Directive be extended (by including additional legislation into Annex I to the Directive)? If so, which EU legislation should be included? Are there other measures that could improve the effectiveness of the ID in establishing a high level of consumer protection? Should the scope of the Injunctions Directive be extended to the protection of collective business' interests? Are there best practices in your country that could be relevant for other countries and considered as model for the injunction procedure at EU level?

The respondents did not indicate any additional legislation to which the scope of the ID should be extended. Although in Estonia, injunctions can be used in case of any violations of collective consumer interests, there have been no practical cases outside the scope of the ID to suggest that this pattern should be followed throughout the EU.

### 1.3.2. 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:

- How effective is the injunction procedure in addressing infringements originating in another EU country?
- How effective is it to address infringements originating in another EU country that qualified entities in your country are enabled to seek injunctions in the other Member State (Article 4 of the Injunctions Directive)?
- In a forward looking perspective: Are there non-legislative or/and legislative measures that could improve the effectiveness of the injunction procedure in addressing infringements originating in another EU country? Are there best practices in your country that could be relevant for other EU countries and could be considered as a model for the injunction procedure at EU level?

The respondents were not able to evaluate it as they have not had any cross-border enforcement experiences. It must be kept in mind that so far the Estonian Consumer Protection Board has only initiated one action to ban unfair terms. This is due to limited resources and it would require even more resources and know-how to act cross-border. Therefore it may be concluded that the legal and financial obstacles are too high for the Estonian regulator to seek injunctions in the courts of another Member State. The same is true for foreign consumer protection bodies: they have not filed a single claim in the Estonian courts. On the other hand, information exchange between regulators of different Member States on an informal level is used quite often.

### 1.3.3. Interplay between the Injunctions Directive and other enforcement instruments of consumer law

Please analyse:

- Is the injunction procedure as designed by the Injunctions Directive regulated separately in your country (in a separate legal act or as a separate procedure regulated within the same legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (UCPD, UCTD and by the Consumer Rights Directive)?

There is no separate procedure in Estonia; the injunction procedures (both civil court procedures and an administrative procedure, i.e. right to issue precepts) are general, i.e. applicable for all kinds of violations of collective consumer interests. Both of them are regulated in the Consumer Protection Act; the administrative procedure also underlies provisions of the Administrative Procedure Act. Issuing a precept is part of administrative procedure and it can be used also in cases of other violations of collective consumer interests.

In practice, the Consumer Protection Board is not using the civil court procedure (more precisely, it has done that in one case only<sup>17</sup>). The reason for not using the civil court procedure is the risk of losing the case with the result of the obligation to pay for the other parties' costs. The civil court procedure follows according to the provisions of the Code of Civil Procedure.

- If these procedures are regulated separately: What are the main differences between them? How is the coherence between these procedures ensured? If these procedures are regulated in a single legal act (possibly as a single procedure): In what way do these procedures (or this procedure) go beyond measures foreseen by the Injunctions Directive?

Estonian law does not provide for separate procedures.

## 1.4. Cross-cutting issues

### 1.4.1. Cost and benefits of the directives covered by the study

- To what extent is there evidence for benefits for consumers stemming from the protection provided by both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of benefits for consumers from the protection against unfair commercial practices and unfair standard terms in contracts; [*Note: a relevant aspect in this context is whether the costs for consumers in exercising their rights under these directives are limiting these benefits or not.*]

There are no official statistics on the costs for consumers and the stakeholders were reluctant to offer an estimate of such costs. In Estonia, the consumers turn to courts relatively seldom; the reason for that is probably both the court fees as well as the psychological hurdle to start a court case. Turning to the Consumer Complaints Committee that works at the Consumer Protection Board, this is used much more often and it is free for the consumers so that the consumer rights under the directives should be protected well enough. The Consumer Protection Board is also entitled to represent several consumers (or a group of consumers) in court: this helps to reduce the legal costs for consumers.

- To what extent is there evidence for benefits for traders stemming from both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of creating a level playing field for honest traders by providing a legal basis to eliminate or at least constrain dishonest market practices, such as the use of unfair standard terms in contracts or unfair commercial practices, including through the application of the Injunctions Directive;

The stakeholders were not able to provide statistical data or particular examples for that question. However, the general feeling was that the directives have constrained unfair market practices and thus fostered fair competition between the traders.

- What are costs for traders due to the need to respect the requirements under the directives covered by the study? [*Note: Such as costs of research, legal advice and compliance as well as the amount of time necessary to comply with the directives*]

The respondents were not able to provide detailed answers or statistical data for that. Some traders have complained that following all consumer protection rules is time and money consuming but there is no official data to back that claim.

<sup>17</sup> The so-called Elisa case, see the decision of the Estonian Supreme Court no 3-2-1-135-15, 24.11.2015.

- What are the costs involved in the public enforcement of these rules?

It is not possible to quantify those costs. Administrative procedure (issuing a precept) is deemed to be cost-effective for the Consumer Protection Board as there are not too high costs involved. Civil court procedure is much more costly and risky (obligation to compensate for the other parties' costs if losing the case), both for individual consumers as well as for the Consumer Protection Board. Therefore there has only been one court case launched by the Consumer Protection Board this far.

- Are there indications that the directives covered by the study are not implemented in your country in a cost-effective manner?

No. The respondents agreed that using the administrative procedure is cheaper and more effective for consumers, regulators and possibly even for the traders than using the civil court procedure.

- Could the costs for implementing and enforcing the rules of the directives covered by the study be reduced without lowering the level of protection for consumers? If so, how?

The respondents made no such suggestions.

#### 1.4.2. Interplay with EU sector-specific consumer protection legislation

Regarding the interplay of the horizontal EU consumer legislation [mainly UCPD and UCTD] with EU sector-specific consumer protection legislation in the areas of electronic communications, passenger transport, energy and consumer financial services, please:

- Analyse the levels of awareness of the requirements of the horizontal EU consumer legislation (mainly UCPD and UCTD) of businesses and consumers and the specific public enforcement bodies in the relevant sectors, as in particular demonstrated by their practical application; [*Note: Key question here is: Are UCPD and UCTD applied in practice by national authorities and courts as a legal basis to combat unfair commercial practices and unfair standard terms in contracts in the regulated sectors?*]

The regulators are aware of the regulations but there is no data concerning the awareness of consumers and traders. The respondents were not able to evaluate that exactly but the general understanding was that both consumers and traders are quite well informed of the UCPD as there have been many information campaigns of the Estonian Consumer Protection Board on that. The awareness of UCTD is probably substantively lower as the case law on unfair terms is yet developing and is not as extensive as in some other Member States. As already reported above, there has been only one court case on injunctions related to unfair terms and that concerned a regulated sector (mobile phone operator). There have been very few administrative cases enforcing the UCPD in regulated sectors so it is difficult to provide a concise answer.

- Specify whether in your country the same authority is responsible for the enforcement of the horizontal EU consumer law 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 UCPD/UCTD in the regulated sectors, as specified in the previous bullet?*]

The main supervisory and enforcement authority is the Consumer Protection Board who is responsible for enforcing the UCPD/UCTD also in the regulated sectors. The

only exception is financial sector where the Financial Supervision Board has co-supervision competence under § 65 (5) of the Consumer Protection Act. However, this co-supervision competence was introduced only in 2015 so there is very little practical experience yet. In practice, the leading partner/supervisor has always been the Consumer Protection Board.

- Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning contractual fairness, 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.?*]

Overlaps certainly do exist but the respondents have not reported on any practical problems due to that.

- What are the benefits of the complementary application of the UCPD and UCTD in the regulated sectors? What are the costs due to the complementary application with the sectoral EU consumer protection legislation?

There is certain overlap between horizontal and sector-specific regulations but the practical problems have concerned only the question as to which regulator has supervisory competence. A case has been reported where the Consumer Protection Board issued a precept to a credit institution but the credit institution argued that the supervisory power lies solely within the Financial Supervision Board and not within the Consumer Protection Board.

There is no quantitative data available on the costs due to the complimentary application of dual regulations in the regulated areas.

- Assess any need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law.

The respondents have not reported such a need for clarification.

#### 1.4.3. Relevance of consumer law directives for consumer-to-business transactions

- Please analyse the need and potential for the application of the consumer law directives (mainly UCPD and UCTD) to 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).

There seem to be no practical reasons to extend the scope of those directives to C2B transactions. In Estonia, since March 2016, unfair commercial practices rules also apply to C2B transactions but there have been no cases to report on. The unfair terms rules also apply to C2B contracts as § 35 of the Law of Obligations Act does not require that the trader acts as a seller or service provider, but again, there are no specific cases to report. Other than that, consumers are able to rely on general contract law rules, including rules concerning avoidance of transactions due to fraud and mistake.

#### 1.4.4. Specific protection for vulnerable consumers

Please analyse:

- Whether the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined in the consumer law directives and relevant jurisprudence, and as applied by national authorities and courts in your country, continue to be valid and fit for purpose.

The respondents evaluated the concepts of 'consumer' and 'average consumer' appropriate and fit for purpose. The notion of 'vulnerable consumer' is somewhat more complicated. A government representative reported that in the Estonian enforcement practice the main criteria for defining vulnerability has been age. Minors as well as elderly people have been considered vulnerable in certain cases. Minors for example in certain advertising or unfair commercial practices cases, elderly people for example in deciding whether charging for paper bills is unfair or not or whether they should consult the trader's internet web page in addition to the information sent them on paper.<sup>18</sup>

- To what extent the existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers and whether, based on the experiences in your country, specific provisions should be introduced in other directives concerned, in particular the Unfair Contract Terms Directive.

The respondents could not report of any specific provisions that should be introduced in other directives. It seems that the UCPD is working well and allows adequate protection of vulnerable consumers in Estonia. The real problem for Estonia is not the regulation but rather the enforcement side (not enough resources for effective enforcement of the rules).

#### 1.4.5. EU added value

- Overall, would you consider that protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in your country since the implementation of the UCPD and the UCTD in national legislation?

The respondents agreed that transposing those directives into Estonian law and implementing them has certainly improved the level of consumer protection in Estonia. Before the transposition of those directives, there was no such specific consumer protection law in force in Estonia. It is general understanding that accession to the European Union and the resulting transposition of consumer law directives has increased the consumer protection standard in Estonia to a level much higher than previously in force.

- Overall, would you consider that the information of consumers regarding unit prices has improved since the implementation of the PID in national legislation?

Implementing the PID into Estonian law has definitely improved considerably the awareness of Estonian consumers about the unit price. Low-income consumers are especially attentive of unit prices.

- Overall, would you consider that the protection of businesses against unfair marketing in your country has improved since the implementation of the MCAD in national legislation?

Yes, that is the case. For example, comparative advertising was not even regulated in Estonia before 2001.

<sup>18</sup> Decision of Harju County Court no 3-13-965.

- Overall, would you consider that it has become easier for businesses in your country to directly trade cross-border to final consumers located in other EU countries in recent years? Has it become easier for consumers in your country to directly purchase cross-border from traders located in other EU countries?

Those directives have fostered (cross-border) competition and increased consumers' trust in traders. The Estonian consumers are increasingly buying goods from other Member States (via e-shops and when travelling). In e-commerce, geo-blocking and not the use of unfair commercial practices remains the biggest problem for Estonian consumers.

- To what extent are these improvements, if any, due to the mentioned directives?

It is hard to evaluate on a directive-by directive basis. Overall, the standard of consumer protection is rising in Estonia, the competition between traders, including cross-border trading is becoming more intense and less unfair. All this has also increased consumers' trust.



## Annex

## A. Transposition fact sheet

**Table 1: Fact sheet on transposition of directives in Member States' law – Estonia**

Directive	Transposition legislation (National law, Article)	Comments	Specific provisions going beyond minimum harmonisation requirements/use of exemptions	Included in national legislation	Comments	
<b>Directive 93/13/EEC on unfair terms in consumer contracts</b>	Law of Obligations Act ( <i>Võlaõiguseadus</i> , 11.03.2016, 2)		'Black list' of terms considered unfair in all circumstances	Yes	<i>§ 42 (3) of the Law of Obligations Act</i>	<i>The list in this provision contains both "black" and "grey" terms</i>
			'Grey list' of terms which may be considered unfair	Yes	<i>§ 42 (3) of the Law of Obligations Act</i>	<i>The list in this provision contains both "black" and "grey" terms</i>
			Extensions of the application of Directive to individually negotiated terms	No		
			Extensions of the application of Directive terms on the adequacy of the price and the main subject-matter	No		
<b>Directive 2005/29/EC concerning unfair business-to-consumer</b>	Consumer Protection Act ( <i>Tarbijakaitseadus</i> , RT I 11.03.2016, 8)		Provisions regarding financial services going beyond minimum harmonisation requirements	No	<i>§§ 13-18 of the Consumer Protection Act</i>	
			Provisions regarding immovable going beyond minimum harmonisation requirements	No		

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<b>commercial practices in the internal market</b>			Application of UCPD to B2B transactions	No		
<b>Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers</b>			Extension of the application to other sectors (e.g. for immovable property)	No		
	Consumer Protection Act ( <i>Tarbijakaitseadus, RT I 11.03.2016, 8</i> )		Use of specific regulatory choices/derogations	Yes	<i>§ 7-8 of the Consumer Protection Act</i>	<i>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</i>
<b>Directive 2006/114/EC concerning misleading and comparative advertising</b>	Requirements for indicating the prices of goods and services (Regulation) <i>(Kauba ja teenuse hinna avaldamise nõuded, RT I 11.02.2016, 17)</i>				<i>§ 5 (1) of the Regulation "Requirements for indicating the prices of goods and services"</i>	
	Advertising Act ( <i>Reklaamiseadus, RT I 11.03.2016, 7</i> )				<i>§ 4 of the Advertising Act</i>	
					<i>§ 5 of the Advertising Act</i>	
<b>Directive 2009/22/EC on injunctions for the protection of consumers' interests</b>	Consumer Protection Act ( <i>Tarbijakaitseadus, RT I 11.03.2016, 8</i> )					

**Table 2: Fact sheet on Injunctions Directive – Estonia**

Issue	Answer	Comments
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)?	- No	<p><i>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.</i></p> <p><i>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.</i></p>
Who is entitled to bring an action seeking an injunction?	<ul style="list-style-type: none"> <li>- Designated public bodies</li> <li>- Specified consumer associations</li> </ul>	
Is the injunction procedure a court or an administrative procedure? If your country legislation foresees both forms of the procedure, please explain in the comments column for which infringements the court or administrative procedure is foreseen	- Both forms of procedure	<p><i>Both an administrative procedure (issuing a precept) as well as court procedure are foreseen in case of activities harmful to the collective interests of the consumers (§ 64 (1) of the Consumer Protection Act)</i></p>
Who bears the costs of an injunction procedure? If qualified entities (or some of their categories e.g. consumer organisations are entitled to an exemption of some/all cost related to the procedure please explain the characteristic of such exemption in the comments column.	- The costs are as a rule borne by the losing party	<p><i>Certain deviations made by the court possible</i></p>
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?	- Yes, scope of application extended to cover areas of consumer law that are not part of Annex I of the Directive	<p><i>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)</i></p>

<p>Is protection of business' interests covered by the injunctions procedure?</p> <p>If scope of application extended to the protection of business' interests, please provide details in the comments column regarding type of business' interests covered by the injunctions procedure</p>	- Yes	<p><i>Yes, according to § 45 (2) of the Law of Obligations Act a non-profit association whose objectives as specified in the articles of association thereof include protection of the rights of undertakings or persons engaged in professional activities is entitled to file a court claim to terminate the use of unfair term(s).</i></p>
<p>Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations</p>	- No	
<p>Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID)</p>	- No	
<p>Has your Member State taken specific measures regarding the prior consultation (Article 5 of the Injunctions Directive)?</p>	- No such requirement	
<p>Does the national legislation provide for measures ensuring summary procedure?</p> <p>Please specify main characteristics of the procedure (subject matter/time limits) in the comments column.</p>	- No	
<p>Are there sanctions for non-compliance with the injunction order (Article 2(1) of the Injunctions Directive)?</p> <p>If sanctions in form of penalty or fine foreseen please specify in the comments column to who exactly should they be paid</p>	- No, no sanction	<p><i>No specific sanction but the court may order a fine for non-compliance</i></p>
<p>Has your Member State taken specific measures regarding the publication of the decision and/or the publication of a corrective statement?</p>	- Yes	<p><i>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).</i></p>
<p>Is it possible to claim within the injunction procedure for sanctions for the infringement?</p>	- No	
<p>Can an action for the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to other beneficiary be brought within the injunction procedure?</p>	- No	

Can an action for damages to be paid to the qualified entity or the public purse be brought within the injunction procedure?	- No	
Can an action for damages or redress to be paid to the consumers concerned be brought within the injunction procedure?	- No	<i>Generally no, but as an exception the Consumer Protection Board may issue a precept (an administrative injunction) to pay a compensation under Flight Passenger's Rights Regulation to a consumer (60<sup>3</sup> (2) of the Aviation Act)</i>
Can individual consumers base their individual claims for damages/remedies on the injunctions order?	- No	
Can the qualified entity claim other measures beyond the injunction, e.g. evidence of compliance with the judgment?	- No	
Are the effects of individual injunctions orders extended to the future infringements and/or same or similar illegal practices (of other traders)?	- No	

## B. Data tables

*Number of B2C disputes*

Please indicate how many B2C disputes have been decided in your country on the basis of consumer law directives covered by this study (UCPD, UCTD, PID) as a proportion of the total number of B2C disputes decided on the basis of other national consumer legislation (based on statistics, or based on estimates by enforcement authorities and other stakeholders, where this is not the available).

**Table 3: B2C disputes decided on the basis of consumer law directives covered by this study in comparison with total B2C disputes decided on the basis of other legislation (most recent year for which data is available)**

Year	Type of data	Total number of B2C disputes (number of cases)	Share of B2C disputes decided on basis of ...					Comments
			UCPD	UCTD	PID	other EU consumer protection legislation (e.g. CRD, Sales Directive, sectoral legislation)	national consumer legislation not based on EU directives	
2015	Consumer Complaints Committee Statistics	538 cases	98%	1.6%	0.3%	No data	No data	Total of percentages should add up to 100%

There are no court statistics available on consumer cases.

*Costs of obtaining redress for a hypothetical case of invoking unfairness of a standard contract term*

- Please estimate the costs, including time, for consumers in obtaining redress when invoking the unfairness, and thereby the non-binding character of standard contract terms in a contract they concluded. Please provide the estimate for the hypothetical example below, focusing on costs (and needed time) of a lower court procedure and the use of ADR or other relevant procedure (if applicable).<sup>19</sup>

<sup>19</sup> For the hypothetical example it is assumed that both the provider and the consumer are located in your country.

**Table 4: Estimate of costs for consumers in obtaining redress when invoking the unfairness of standard contract terms in a contract they concluded (for the hypothetical example provided in the box below)**

Redress mechanism	Estimated court fees (national currency)	Estimated lawyer's fees (national currency)	Other costs, if any (national currency)	Estimated time involved for consumer (hours)	Comments
<b>Lower court procedure</b>	EUR 400	Up to 5 hours of lawyer's work; ca EUR 400-500	No	2-3 hours	
<b>ADR or other relevant procedure</b>	No fees	Up to 5 hours of lawyer's work; ca EUR 400-500	No	2-3 hours	

**Hypothetical example: Terms which inappropriately exclude/limit consumers' rights to compensation**

A consumer went on a package holiday with a friend to Kenya for which they paid € 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 €5,000 (€4,000 for the cost of the package and €1,000 for lost time and enjoyment). The tour operator agreed to compensate them €1,000 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/unfair-contract-terms/index\\_en.htm](http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-contract-terms/index_en.htm)]

- Please estimate how often court and ADR procedures are used in your country for invoking the unfairness, and thereby the non-binding character of standard contract terms (i.e. the number of cases per year)?

There is no official statistics on that issue. Until now, there has been only one collective injunction proceeding where the Consumer Protection Board has filed a claim at the court to stop the use of unfair terms by an Estonian mobile operator. There are not many unfairness cases at the Consumer Disputes Committee and consumers in the court proceedings do not often invoke the unfairness of a standard term either. However, in recent years courts have been more and more willing to invoke unfairness of a contract term ex officio.



## C. Interviews conducted and literature reviewed

**Table 5: Interviews conducted for this study**

Organisation	Stakeholder type	Date
Eesti Kaubandus-Tööstuskoda	Business association	17 June 2016
Tarbijakaitseamet	National consumer enforcement authority	16 June 2016
Finantsinspeksioon	National regulatory authority	29 June 2016
Justiitsministeerium	Ministry	16 June 2016
Euroopa Liidu tarbija nõustamiskeskus	European Consumer Centre	26 July 2016
Tarbijate Koostöökoda	Consumer organisation	16 June 2016
Majandus-ja Kommunikatsiooniministeerium	Ministry	20 June 2016

**Table 6: Literature reviewed for country report**

Author/Source	Year	Title of publication
M. Kingisepp	2011	Tarbijakaitseõigus.
P. Varul, I. Kull, V. Kõve, M Käerdi	2006	Võlaõigusseadus I. Üldosa. Kommenteeritud väljaanne.
K. Sein, P. Kalamees	2014	Early Termination of Consumer Contracts for the Leasing of Cars under Estonian and Norwegian Laws
K.Sein, K. Lilleholt	2015	Enforcement of Security Rights in Residential Immovable Property and Consumer Protection: An Assessment of Estonian and Norwegian Law
K.Saare, K. Sein	2013	Amtsermittlungspflicht der nationalen Gerichte bei der Kontrolle von missbräuchlichen Klauseln in Verbraucherverträgen
K. Saare, K. Sein	2012	Transparenzgebot der AGB-Klauseln in den Verbraucherverträgen.
T. Silem	2015	Muudatused tarbijakrediidi reklaami regulatsioonis.
K. Sein	2014	Consumer Credit Contracts in Estonia – Expectations and Reality

## 1. Study to support the Fitness Check of EU Consumer law – Country report FINLAND

### 1.1. Unfair commercial practices and marketing

#### 1.1.1. Effectiveness of the UCPD in establishing a high level of consumer protection

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

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

Finnish consumer law based on the Nordic tradition has its origins in the Consumer Protection Act (hereinafter CPA)<sup>1</sup> from 1978. Compliance with the CPA is primarily supervised and enforced by the Consumer Ombudsman (*kuluttaja-asiamies*), Consumer Disputes Board (*kuluttajariitalautakunta*) and the Competition and Consumer Authority (*Kilpailu- ja kuluttajavirasto*). The CPA is built on general clauses regulating unfair commercial practices in Ch. 2 and unfair contract terms in Ch. 3. The Consumer Ombudsman's dual authority to negotiate industry contract terms and issue preliminary injunctions and bring cases to the Market Court (*markkinaoikeus*) on behalf of consumers suffering from a trader's unfair commercial practices, has secured a high level of consumer protection in practice.<sup>2</sup>

While based on the CPA, the interpretation of general clauses is otherwise aligned with general principles of contract law, as well as general principles of law based on the Contracts Act.<sup>3</sup> Interpretation is also aligned with Market Court case law upholding honest practices (*hyvä tapa*) through the established concept of 'honest commercial practice' (*hyvän tavan vastaisuus*)<sup>4</sup> in B2B as well as B2C relationships. This is essential, since the CPA and the Unfair Business Practices Act<sup>5</sup> may be simultaneously applicable to a case before the Market Court.<sup>6</sup>

The general concepts of private law also apply to C2B and C2C transactions in the Sale of Goods Act<sup>7</sup> or sector-specific legislation (e.g. real estate transactions). Private persons may bring suit in general court. The Supreme Court has recently favoured inquiry under general contract law, rules of procedure or sector-specific legislation, rather than adjusting contract terms or conducting a reasonableness inquiry referencing the relationship between the parties or consumer protection grounds.<sup>8</sup>

<sup>1</sup> Kuluttajansuojalaki 20.1.1978/38.

<sup>2</sup> Tuomas Majuri, Finland-Legislative Techniques at 73 in University Bielefeld / European Commission, 2007, EC Consumer Law Compendium - Comparative Analysis [http://ec.europa.eu/consumers/archive/cons\\_int/safe\\_shop/acquis/comp\\_analysis\\_en.pdf](http://ec.europa.eu/consumers/archive/cons_int/safe_shop/acquis/comp_analysis_en.pdf) (Hereinafter Majuri 2007)

<sup>3</sup> L varallisoikeudellisista oikeustoista 1929/228.

<sup>4</sup> The Finnish concept does not define 'honest' or 'honest commercial practices'; it only defines what are not honest commercial practices.

<sup>5</sup> L sopimattomasta menettelystä elinkeinotoiminnassa 22.12.1978/1061.

<sup>6</sup> Government Bill HE 32/2008 at 2.1.

<sup>7</sup> Kauppalaki 27.3.1987/355.

<sup>8</sup> KKO 2015:60, where the court concluded that a contract term that stipulated the interest accrued on the debt did not specifically address penalty interest in excess of the maximum interest chargeable under Section 4:1 of Interest Act. The interest amounted to 118 % of the principal debt. However, the standard contract terms applicable were interpreted against the drafter due to vagueness of the terms (general contract law). The court rejected that the C2B relationship would have decisive legal relevance for the outcome. In KKO 2014:30 a tenant had reached agreement with the landlord (C to C) to terminate a 3-year apartment rental agreement after one year, due to 5 months of unpaid rent. The termination agreement was signed on the tenant's initiative and included terms for immediate pre-termination of the fixed term lease, repayment of outstanding rents and a compensation fee of 3500 euros payable to the landlord. The original rental agreement had two personal guarantors. The landlord sought enforcement both against the tenant and the guarantors for outstanding rents and the compensation fee. The Supreme Court rejected adjustment of the termination agreement for the tenant, upholding contractual freedom

The Consumer Ombudsman has successfully secured negotiated contract terms also in industries regulated by sector-specific regulation. The success of the soft law approach naturally results in less case law.<sup>9</sup> The Consumer Ombudsman therefore prioritizes cases that may be generalized across industry sectors and may bring the case to the Market Court to obtain a precedent, even if a particular trader has changed or abandoned the practice.<sup>10</sup>

The principle-based approach of the UCPD fits well with the established framework for Finnish consumer protection. The UCPD did not change substantive law nor the established practice by the Consumer Ombudsman and Market Court, but made some changes to the statutory text in Ch. 2.<sup>11</sup> The UCPD requirement of extending the prohibition from pre-contractual marketing to unfair business practices during the customer-relationship was included in Ch.2:1.1. The Consumer Ombudsman had previously intervened on behalf of consumers under Ch. 3 CPA, when negotiating industry contract terms.<sup>12</sup> The UCPD concept of honest practices in national law was deliberately extended to protect more than the consumer's financial interest. In line with national law, consumers are also protected against commercial practices that offend public values and dignity.<sup>13</sup> The Council of Ethics in Advertising<sup>14</sup> established by the Finnish Chamber of Commerce also similarly applies the concept of honest practices, which further strengthens the effectiveness of consumer protection in practice.<sup>15</sup> The principle-based approach as applied to consumer protection in Finland, thus effectively captures activity outside the scope of the CPA.<sup>16</sup>

Government officials found that the principle-based approach fits well with the national legal tradition of consumer protection, which is based on general clauses. One remarked that principle-based regulation is the only way to keep legislation up-to-date. The UCPD did not effect a great change in national legislation, with the exception of the inclusion of a specific black list. The Consumer Ombudsman<sup>17</sup> found the UCPD central to Finnish consumer law and it has functioned predominately well. In practice

and the binding force of contract (general contract law) between private persons. The Act on Personal Guarantees required the consent of the guarantor, when substantial changes were made to the rental agreement for the guarantee to remain in effect. Thus, the Supreme Court found that the guarantors were responsible for the unpaid rent under the original lease, but not party to the termination agreement, and thus not liable for the compensation fee of 3500 euros. The court rejected claims of adjustment and the reasoning emphasized that equal parties are held to their contracts (general contract law).

<sup>9</sup> The Market Court is a specialised court that has subject matter jurisdiction of public procurement (561/934 in 2015), intellectual property rights (342/934 in 2015) and unfair competition law cases (19/934 in 2015). General competition law and cases brought by the relevant authority under the Financial Services Act (1/934 in 2015), Electricity Market Act (7/934 in 2015), Natural Gas Market Act are also included, but cases are few and far between (10/934 in 2015). The Supreme Court (korkein oikeus) serves as the court of appeal in cases relating to consumer protection or unfair commercial practices. Two cases were brought and decided by the Consumer Ombudsman under the CPA Ch. 3 & 4 and none were brought or decided regarding unfair contract terms (CPA Ch. 2). These numbers confirm that the authority under the CPA effectively induces enterprises to comply with soft law mechanisms used by the Consumer Ombudsman or the Consumer Disputes Board. Statistics available on the Market Court website: <http://www.markkinaoikeus.fi/fi/index/markkinaoikeus/tilastojajakasittelyajat.html>

<sup>10</sup> Anja Peltonen, Kuluttajaoikeus – kansallista vai kansainvälistä Kuluttajansuojalain 2 ja 3 lukujen sääntely ja ratkaisukäytäntö, Kilpailu- ja kuluttajaviraston julkaisut 20.5.2014 at 2, available at [http://www.kkv.fi/globalassets/kkv-suomi/julkaisut/artikkelit/peltonen\\_anja\\_kuluttajaoikeus\\_-\\_kansallista\\_vai\\_kansainvalista.pdf](http://www.kkv.fi/globalassets/kkv-suomi/julkaisut/artikkelit/peltonen_anja_kuluttajaoikeus_-_kansallista_vai_kansainvalista.pdf). Last accessed 30.11.2016. (hereinafter Peltonen 2014)

<sup>11</sup> HE 32/2008 at 1.1. See also Majuri (2007) at 72-75

<sup>12</sup> HE 32/2008 at 2.1.

<sup>13</sup> Recital 7 of UCPD. HE 32/2008 at 1.1 and 2.1. Peltonen (2014) at 4.

<sup>14</sup> Mainnonnan eettinen neuvosto.

<sup>15</sup> Peltonen (2014) at 4. Majaniemi at 45.

<sup>16</sup> Peltonen (2014) at 1 and Majuri (2007) at 73.

<sup>17</sup> The Consumer Ombudsman issued a public statement on the effectiveness and functioning of EU consumer legislation (7 Directives) with specific comments for directives 93/13/EEC, 99/44/EC, 2005/29/EC, 98/6/EC and 2011/83/EU, KKV/857/03.03/2016, 5.9.2016 available at <https://www.eduskunta.fi/FI/vaski/JulkaisuMetatieto/Documents/EDK-2016-AK-69477.pdf> (hereinafter Statement by Consumer Ombudsman).

problems with effectiveness relate to lack of direct sanctions for clear infringements, compensation for breach of marketing requirements and of the black list.<sup>18</sup>

Consumer associations found that there were no extraordinary problems in implementing the principle-based approach. Preference for a minimum harmonisation directive was expressed, but regardless of the principle-based approach, the UCPD has not been considered too broad or vague in practice. Consumer associations found that the Finnish national approach despite high level of consumer protection aims at producing broad consumer legislation. Consumer rights have not been weakened by the UCPD. Business associations confirmed that the principle-based approach has not materialized as less requirements in business experience (i.e., that it has not resulted in a lower level of protection).

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

The black list as an instrument of consumer protection was novel to Finnish law. Sections 5, 7, 9, 10, 11, 15, 17, 20 and 28 were already categorically considered unfair in the established case law of the Market Court and others would likely be captured by the general clause.<sup>19</sup> The required list was implemented by ministerial decree.<sup>20</sup>

Only some government officials mentioned the procedural benefit of the black list. The Consumer Ombudsman also mentioned the benefit of not having to perform case-specific assessment.<sup>21</sup>

Stakeholders across the board mainly expressed concerns with the black list. The fear of stagnation and loss of flexibility was expressed by government officials. There was also concern expressed by consumer associations and consumer authorities for the list sending the wrong signal to businesses, thinking that activity outside the black list would be legal, although there is established case law indicating that additional unfair commercial practices are covered under the general clause. However, business associations found that there could be some 'educational value' in concretising clearly unlawful practices. The concrete examples also clearly benefit consumers.

Government officials emphasized the unsuitability of closed lists. Likewise, the list includes irrelevant practices. While the list could be updated, an excessively long black list could render the general clause redundant. All interviewees expressed a clear preference for the general clause, since it responds well to ever-changing, borderline commercial practices. The Consumer Ombudsman emphasized the practical importance of regulation targeting grey practices for effective enforcement, since there may be varying interpretations and use of the black list in different member states.<sup>22</sup>

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

Government officials found sector-specific regulation preferable to minimum harmonisation. Relying solely on general regulation is unsuitable, especially for the financial sector. While preferring minimum to complete harmonisation, consumer associations had not experienced any practical benefits for consumers. Consumer authorities confirmed lack of practical relevance of the UCPD Ch. 2 in Finland.

<sup>18</sup> Statement by Consumer Ombudsman at 3.

<sup>19</sup> HE 32/2008 at 2.1.

<sup>20</sup> Valtioneuvoston asetus kuluttajien kannalta sopimattomasta menettelystä markkinoinnissa ja asiakassuhteissa 19.1. 2008/601.

<sup>21</sup> Statement by Consumer Ombudsman at 4.

<sup>22</sup> Statement by Consumer Ombudsman at 1 and 3-4.

- 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 what 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 UCPD did not bring any change in this regard, since marketing was regulated in the CPA prior to the Directive. Government officials confirm that enforcement in the energy sector relies on the Electricity Market Act (*sähkömarkkinalaki*) and Act on Unfair Contract Terms (*Laki kohtuuttomista kaupan ehdoista*). Business associations had not found evidence of practical relevance.

- 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 your country rigidly?*]

The Finnish consumer legislation is based on a consumer concept that protects the weaker party from unfair commercial practices in marketing. In the Finnish and 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.<sup>23</sup> The consumer concept, thus, is not based on the ideal '*homo economicus*'; rather, the concept is influenced by behavioural economics.<sup>24</sup> 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.<sup>25</sup> National law continues to refer to the traditional concept of 'consumer' to avoid confusion.<sup>26</sup> 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.<sup>27</sup> The meaning of the Finnish 'consumer' concept is well-established and consistently applied in interpretation of the CPA and sector-specific legislation.<sup>28</sup> The Market Court has referred to the average consumer as a rational actor, when denying the Consumer Ombudsman's request for an injunction against an advertiser of a lottery. The Market Court argued that a rational consumer cannot expect a guaranteed win in a lottery, if they purchase every day products.<sup>29</sup>

The stakeholders across the board expressed concerns with the concept of the 'average consumer'. Government officials recognised that the concept refers to an overly optimistic image of the consumer, especially relating to the ability to digest information and make rational decisions. Consumer authorities and associations expressed preference for a concept based on behavioural economics studies that would more accurately reflect the way consumers make decisions. Business and consumer associations found that the concept is applied in practice. Several government officials called for clarification of the concept, as well as consistent application also outside the UCPD.

The Consumer Ombudsman emphasized that emotions, intuition and distorted behavioural models affect all consumers' – not only vulnerable consumers' – decisions. Hence, it is not enough that model behaviour is considered for pre-contractual

<sup>23</sup> HE 8/1977. Supreme Court KKO 2006:6.

<sup>24</sup> Peltonen (2014) at 6-7.

<sup>25</sup> Supreme Court KKO 2011:65 adopts this approach.

<sup>26</sup> HE 32/2008 at 13.

<sup>27</sup> HE 32/2008 at 13 and Peltonen (2014) at 6-7.

<sup>28</sup> HE 32/2008 at 13.

<sup>29</sup> MAO 55/2014 at 13, 19, 24 and 33.

information obligations, but scientific results should apply across the board in legislation and application of consumer protection law.<sup>30</sup>

- 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 in your country recognised new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted)?*]

New categories of vulnerable consumers have not been included based on the UCPD. However, national law already recognised that a consumer can be vulnerable or weak in certain situations without having to make categorisations based on poverty or debt. A decision by the Consumer Ombudsman relates to an electricity provider automatically requiring a EUR 500 security deposit from all consumers that have any mark in the credit register (*maksuhäiriömerkintä*) without assessing the consumer's actual ability to pay for the service.<sup>31</sup> Finnish law recognises that contract performance may be adjusted based on a social obstacle to performance (*sosiaalinen suorituseste*).

The stakeholders confirmed the state of the law.

- 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?*]

According to government officials self/co-regulation works depending on business commitment. Consumer protection law could not rely solely on self-regulation. Government officials referred to quasi-regulation being introduced solely to avoid government interference. As a general note government officials noted several positive aspects with self/co-regulation to compliment mandatory legislation, when the industry is committed. The government mentioned good experiences with the Finnish Direct Marketing Association (*Suomen Asiakkuusmarkkinointiliitto*) regarding guidelines for tele-marketing. The established position of the Consumer Ombudsman, Consumer Disputes Board and the Consumer & Competition Authority create a fruitful climate for both co-regulation and industry self-regulation in Finland. Soft law mechanisms are predominately used to uphold a high level of consumer protection in practice.<sup>32</sup>

All stakeholders, including consumer associations found industry self-regulation useful for the purposes of weeding out unfair commercial practices at grass-root level. Associations mentioned the Realtors Union's Ethical Board (*kiinteistövälittäjien liiton eettinen lautakunta*) and the Board of Business Practice (*Liiketalautakunta*) as functioning, effective and cheap enforcement.

The Energy Authority does not work with industry in assessing contract terms, since it lies within the jurisdiction of the Consumer Ombudsman. Finnish Energy (*Energiateollisuus ry*) actively produces guidelines and recommendations, which the industry actors follow reasonably well. There are a few exceptions from time to time.

- 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?

As mentioned above, Finnish interviewees were not keen on the black list. For government officials the problem lies with a closed list, since speculation naturally

<sup>30</sup> Statement by Consumer Ombudsman at 3.

<sup>31</sup> KKV/661/14.08.01.05/2016.

<sup>32</sup> Statement by Consumer Ombudsman at 1. Majuri (2007) at 72.



follows regarding why some harmful behaviours are mentioned and others are not. Authorities suggest a systematic review of the list. Now the list includes mostly marketing items, and it could be considered whether business practices during the customer relationship should be included. The Consumer Ombudsman makes similar suggestions, however, shows more scepticism to the functioning of the black list as an enforcement tool. Special measures should be taken so as not to extend the list too much, and thereby endanger the practical functioning of the general clause.<sup>33</sup>

Business associations do not express any specific concerns, however they note the value of introducing a systematic reviewing mechanism. Consumer associations are against closed lists, as they benefit neither business nor consumers. A list of examples of illegal practices could be useful for traders, since it increases foreseeability for business.

- Are there other measures that could improve the effectiveness of the UCPD in establishing a high level of consumer protection in your country? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

Business associations found that Finnish consumer protection works well. Consumer associations found that the tools are efficient and effective, however, the lack of awareness of the rules is the main problem. Businesses are not aware of their obligations and consumers are not aware of their rights. Raising awareness of consumer protection continues to be a challenge. Authorities mentioned that collaboration between member states' authorities is established.

The Energy Authority reports that consumer protection is effective in the energy sector and there is no need for revisions.

#### 1.1.2. Effectiveness of the PID in establishing 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;

As a general note from all stakeholders the PID works well relating to consumer goods, and problems are sector-specific. Government officials express concern about the outdated directive and calls for prioritizing review. Finnish legislation extends the requirements to services, and a variety of sector-specific legislation is in force. It is recognised that this jungle of requirements presents a real problem for businesses in terms of knowing the applicable law. Business associations mentioned internet travel services in particular, where listed hotel or airfare prices are increased, with extra costs being added during confirmation or payment with a credit card. In Finland there are good guidelines for businesses also relating to price indication of services, guidelines which function well and which Finnish business comply with. Consumer associations mention some (small) problems with price indication of goods in smaller stores.

- 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?

The Ministry of Employment and Trade notes that review of the national regulation was discussed in 2014. The stakeholders could not reach consensus on the need for

<sup>33</sup> Statement by Consumer Ombudsman at 4.

review of existing rules. It was concluded that the relevant authorities could not issue guidelines. Businesses were however allowed to introduce additional information for the purposes of performance comparison relating to number of washloads, as long as the information required by the national regulation was met (price per kg or per litre).<sup>34</sup>

The positions have not changed. Consumer authorities find that it is possible to include additional information, as long as it is comparable. Consumer associations agree, however they raise the concern of confusing consumers with too many markings, which in turn leads to consumers ignoring the markings. Consumer associations emphasized that the problem is not the lack of clear rules, but rather that businesses are not following them. Business associations took the opposite view. It may be true that a clear comparable indicator may be hard to find, but the current situation is unnecessarily complicated from the business perspective.

The Consumer Ombudsman agrees that the existing requirements on the EU-level (stemming from different directives) make supervision and compliance difficult. The rules apply depending on the marketed product, type of sale and priority of rules. The rules can be randomly targeting or have huge gaps. The existing rules are completely non-functioning as a whole and should be revised with great priority. There should be a simple and business-neutral standard for price indication.<sup>35</sup>

- The effects of the regulatory choices/derogations allowed by the Directive and applied by Member States. [*Key aspects to consider are: Is the derogation relevant? Do companies make use of it? Are there consumer complaints because of this? If so, approximately how many per year?*]

Finland has not enacted specific rules that apply to SMEs.<sup>36</sup> The Consumer Ombudsman specifically advocated against introducing special rules according to business size.<sup>37</sup>

### 1.1.3. Effectiveness of the MCAD in providing protection for businesses

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

- 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 was implemented through the Unfair Commercial Practices Act. The rules on comparative advertising were removed from the CPA and the jurisdiction of the Consumer Ombudsman. Instead, traders affected by comparative advertising can bring suit directly against another trader in the Market Court.<sup>38</sup> This development was welcome since traders are more likely affected by comparative advertising than consumers. The Unfair Commercial Practices Act 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.<sup>39</sup>

Business associations did not report problems with effectiveness that should be addressed.

<sup>34</sup> TEM Muistio 22.10.2016 Pesuaineiden hinnan ilmoittaminen markkinoinnissa.

<sup>35</sup> Statement by Consumer Ombudsman at 4.

<sup>36</sup> Commission Communication on implementation of the Price Indication Directive 1998/6/EC, COM(2006) 325 final at 9.

<sup>37</sup> Statement by Consumer Ombudsman at 4.

<sup>38</sup> HE 32/2008 at 14.

<sup>39</sup> HE 32/2008 at 15.

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

Business associations did not report problems with effectiveness that should be addressed.

- The effects of the minimum harmonisation provisions on misleading advertising; [*Key aspects to consider are: Which national rules that go beyond the MCDA, 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 concept of 'against good commercial practices' is constantly developed in the case law of the Market Court, and non-binding recommendations by the Commercial Practice Board, The Council of Ethics in Commercial Advertising, and the Consumer Disputes Board. Business associations had not discovered problems with effectiveness that should be addressed.

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

Business associations found the rules to be functioning well.

- 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;

Business associations found the rules to be functioning well.

- Are there measures that could improve the effectiveness of the MCAD in providing protection for businesses (see also 1.1.6 below)? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

Business associations did not mention proposals for measures.

#### 1.1.4. Effectiveness of current rules 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;

Business associations did not have concrete evidence to offer. On a general level, it would seem that harmonisation would remove problems relating to disparities. However, since businesses are also subject to different national regulation, Finnish businesses (that comply with national law) are at a disadvantage, because consumer protection is higher in Finland.

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

No specific experience reported. The Consumer Ombudsman points to divergent interpretations and legal uncertainty in Member States as the most harmful effect of black lists.<sup>40</sup>

- Whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade. [*Do the national differences play a role in a business perspective? Have they caused problems?*]

No specific experience reported.

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;

No specific experience reported.

- Whether the minimum harmonisation character of provisions on misleading advertising represents a barrier to cross-border trade;

No specific experience reported.

- 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;

Business associations did not have experience of comparative advertising between companies active in different Member States.

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

The mechanism for cross-border complaints has been in place for 20 years, which means that there is no need for a new mechanism. Business associations recall approximately 3 cases with Finnish business, of which 2 are relatively recent.

#### 1.1.5. Interplay amongst UCPD information requirements according to Article 7(4) with the information requirements in the horizontal consumer law instruments

Regarding the information requirements according to Article 7(4) UCPD ("invitation to purchase") in the advertising stage, please analyse:

- The level of awareness of traders as regards information requirements at the advertising stage, as in particular demonstrated by their practical application; [*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?*]

The Finnish legislator did not complement information requirements or set language requirements. It was clear that the Consumer Ombudsman already possessed means through Ch. 3 CPA to intercede against unfair commercial practices before and during

<sup>40</sup> Statement of the Consumer Ombudsman at 1.

the customer relationship. No requirement of sending a confirmation was implemented, since it was considered to actually weaken the position of the consumer in telemarketing. Instead, the Consumer Ombudsman would intensify enforcement in telemarketing.<sup>41</sup>

Government officials found that traders are reasonably aware of information requirements relating to advertising. Business associations did not find problems with traders in Finland. Consumer associations reported lack of awareness based on their experience. Small business' problems with compliance relate to lack of resources. The Energy Authority could not assess awareness of the EU Directive. Established traders are well aware of the functionally similar provision in the Electricity Market Act. Traders are primarily aware of and implement the sector-specific requirements, which mirror those of the UCPD.

- 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?

There should be special consideration of overlaps between directives in the upcoming review. There is significant overlap between the Services Directive and the E-Commerce Directive for more than advertising requirements.

Business associations reported that overlaps and conflicting requirements are harmful. Likewise, the benefits of consumer protection are lost when information requirements are too specific, because the consumer cannot or will not bother digesting all the given information. Businesses nonetheless face the extra cost. This is a particular problem for Finnish businesses that meticulously investigate and comply with all rules to be on the safe-side. This cost is reflected in consumer prices.

#### 1.1.6. Relevance for business-to-business transactions

Regarding the area of unfair commercial practices/marketing, please analyse:

- 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 cross-border trade;

The Finnish system is based on a strong divide between consumer protection law and general contract law. In theory and in practice B2B relationships are considered equal. The exception of adjusting contracts in B2B relationships is rarely invoked and seldom applied. An extension of the UCPD to B2B relationships is not necessary, since the leading concept of honest commercial practices is already significantly aligned, regardless of the divide between B2C and B2B relationships. The change would have fundamental negative consequences for the coherence of Finnish contract law without any foreseeable necessity or obvious benefit for 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;

Business associations were in favour of keeping separate regimes. Consumer protection laws protect the weaker party, while the freedom of contract should reign supreme in B2B transactions. Complicating B2B transactions with more regulation would not yield positive results. There is already enough regulation (SopMenL,

<sup>41</sup> HE 157/2013 at 3.2.1.

OikToimL and Kilpailulaki), but scarce case law. Contracts are rarely adjusted based on unreasonableness in practice. This is an indicator of a functioning market.

- 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 also cover unfair commercial practices during and after the transaction;

Business associations reported that there are no problems with existing regulation.

- Whether there is a need to have a black-list of practices in the business-to-business marketing area;

Business associations reported that there are no problems with existing regulation.

- What should be the enforcement cooperation mechanism in the business-to-business marketing area;

If at all appropriate, it could at most include information exchange between the relevant authorities in different Member States.

- Whether there is a need to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive;

Business associations reported that there are no problems with existing regulation.

- Whether there is a need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive.

Business associations reported that there are no problems with existing regulation.

#### 1.1.7. Relevance of contractual consequences of unfair commercial practices

Please analyse whether there are in your country:

- 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;

Government officials reported that there are strict consequences for breach of information requirements in Insurance Contracts Law (*vakuutusopimuslaki*). Consumer authorities noted that there are no such consequences in the existing CPA, but it would be advisable to consider contractual consequences at EU level. Business associations reported that there is no need for contractual consequences.

- Any case law (enforcement decisions, court rulings) providing for such consequences;

Contractual consequences are not available under the CPA.

- Whether there is, based on past experience in your country, a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

The Consumer Ombudsman calls for contractual consequences and a right to compensation.<sup>42</sup> Business associations reported that there is no need for contractual consequences.

## 1.2. Contract conclusion and performance

### 1.2.1. Effectiveness of the current rules in establishing 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 principle-based approach has worked well in Finland according to government officials, since it has not caused conflict with the general principles of contract law nor the general principles of Finnish law. The flexible approach is welcomed, and should remain so in the future as well. Consumer associations do not find that the UCTD reflects principle-based regulation, most likely because it could be considered less principle-based than Finnish law.

The Consumer Ombudsman found that the Directive has worked well, and should favour a principle-based approach in the future as well. The general clauses should apply to all types of consumer contracts equally. Industry-based regulation on unfair contract terms should not be allowed. The statement should be read in the Finnish context of the Consumer Ombudsman's essential insight in representing consumers' rights under CPA Chapter 3. Industry self-regulation is not ideal in assessing unfairness of terms from the perspective of consumers. However, regulation should leave room for industry-specific (co/self) regulation of contract terms, meaning that it is most efficient if the industry produces standard contract terms. EU regulation should continue to allow national discretion to align consumer protection with existing principles of contract law and general principles of law to maintain consistency in application.<sup>43</sup>

- 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 your MS? Does this work in practice or are there problems?*]

Government officials remarked that a list of unfair contract terms is not the most transparent way to address a layman audience. Consumer associations found that established case law on the matter renders the list redundant.

The Consumer Ombudsman favours a principle-based approach together with an indicative list of unfair terms as most effective in practice. The list could be supplemented based on CJEU case law.<sup>44</sup>

- 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; [*Note: If a black/grey list exists in your country, key aspects to consider are: How does the list work in practice? Does it make a difference to have such a list?*]

<sup>42</sup> Statement by Consumer Ombudsman at 3.

<sup>43</sup> Statement by Consumer Ombudsman at 2.

<sup>44</sup> Statement by Consumer Ombudsman at 2.



Black or grey lists (understood as presumptively illegal terms that can be rebutted)<sup>45</sup> do not exist in Finnish legislation. Government officials mentioned that clearly illegal behaviour and established case law to the same effect is often mentioned in preparatory works, which is a highly regarded source of law in Finland.<sup>46</sup> Grey lists are not customary in contract law due to the preference for general clauses, soft law mechanisms and industry self/co-regulation with the Consumer Ombudsman over *in casu*-fact finding. From the Finnish point of view, regulatory lists increase litigation since they raise the question of whether specific conduct (question of fact) falls within or outside the behaviour listed. The Finnish system allows the Consumer Ombudsman to assess new commercial behaviour (CPA Ch. 2) or contract terms (CPA Ch. 3) in light of established interpretation of statutory text in preparatory works, case law and doctrine (question of law).

As mentioned before, the Finnish stakeholders as a rule are not keen on lists. The stakeholders also expressed hope that industry-specific lists would not be allowed, nor that there would be industry-specific exceptions. The Consumer Ombudsman stated a preference against black lists, despite the positive effect of increased legal certainty. The lack of flexibility, as well as increased *in casu*-review of whether a term falls within the black list or not, effectively drains resources from more effective consumer protection. If the emphasis on black lists is increased there is a risk of less effective enforcement against new or borderline practices and an increased threshold for use of the general clause (if need to prioritize cases due to limited resources).<sup>47</sup>

- 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: In your country, have the effects of court decisions establishing the unfairness of an unfair term been extended to all contracts of the trader concerned or to the contracts of any other trader containing such a term? If so, how does this work in practice? What are the impacts on businesses? If there are no such effects of court decisions on unfair terms: what are the effects of this situation?*]

By law the decisions brought to the Market Court by the Consumer Ombudsman have, if applicable, a collective effect. Consumer authorities report that all cases in which the Consumer Ombudsman actions (request, decision, preliminary injunction) have a collective effect in practice. Business associations confirm the practical effect of highly-publicized cases (once appeals are exhausted), like a recent case relating to whether a company providing a basic service can bill the consumer for paper invoices.<sup>48</sup> The Consumer Ombudsman's dual role of supervisor of industry-specific contract terms, and sanctioning authority, enhances the collective effect.

In practice, many consumer cases are effectively addressed in the Consumer Disputes Board (*kuluttajariitalautakunta*), although it, when appropriate, issues non-binding recommendations to traders to compensate the consumer. Many cases relate to compensation for travel services. The Consumer Authority publishes a black list for traders that do not follow the recommendation of the Consumer Disputes Board.

<sup>45</sup> An indicative list in Finland is coupled with a general clause, which captures borderline behaviour. A 'grey' list without a general clause would decrease discretion of the Consumer Ombudsman to interpret law, and increase litigation-like processing against the Consumer Ombudsman. At present, the Consumer Ombudsman interferes with unfair contract terms either in pre-negotiations (before use in consumer contracts) or by query to the business (if notified by consumer complaint of term). Most business change terms when notified, since the Consumer Ombudsman has the power to bring the case to the Market Court and in fear of media exposure for decisions relating to use of unfair contract terms.

<sup>46</sup> HE 32/2008 vp lists examples of unfair commercial practices in advertising to children at 13.

<sup>47</sup> Statement by Consumer Ombudsman at 2.

<sup>48</sup> Kotimaan Energia, KKV/509/14/14.08.01.05/2016, 23.8.2016. This case seeks clarification to KKO 2016:49.

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

According to government officials the transparency requirement is necessary, and applied in practice. Sometimes it is applied in conjunction with other rules, or stands alone as a basis for a decision. Cases are intermittent. The transparency requirement was also included in the recent Information Society Code.<sup>49</sup>

- 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. [*Note: Question only relevant for MS that have put in place extensions of application of UCTD*]

Yes, consumer protection is enhanced.

- 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?*]

Previously, individual consumers have had the right to raise this argument, and courts have generally not done so. A recent Supreme Court<sup>50</sup> case has placed an obligation on authorities to raise the argument *ex officio*. The consumer authority reports that the effect remains to be seen in practice. Consumer associations note that these types of cases are very rarely taken to court. Business associations confirm that the consumer must raise the argument. However, all stakeholders agree that the services of the Consumer Ombudsman and the Consumer Disputes Board constitute the primary avenue to protect the interests of consumers.

- In a forward looking perspective: Are there other measures that could improve the effectiveness of the UCTD in establishing a high level of consumer protection in your country? Would a graphical presentation model improve the readability and comprehension by consumers of the T&Cs? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

Consumer authorities recognize that there is need for improvement. The problem, especially acute in digital contracts, remains that consumers do not read contracts. Business associations confirm that graphical presentation can help at times in the digital environment. However, graphical presentations can be interpreted differently, which does not address the underlying problem (focus the consumer's attention to relevant terms at the right time, i.e. at the conclusion of contract). Consumer associations do not see added value in a fixed graphical or other presentation model. Instead, national discretion to develop suitable models should be preferred.

### 1.2.2. Effectiveness of the current rules 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:

<sup>49</sup> HE 67/2016. Tietoyhteiskuntakaari 7.11.2014/917.

<sup>50</sup> KKO 2015:60 and KKO 2015:76 (District Ct. should have dismissed the case *ex officio*).

- Whether the application of the general fairness clause in different Member States shows disparities in the understanding of this principle and, if so, whether disparities have an impact on cross-border trade; [*Key aspects to consider are: Do national differences in the application/implementation of the Directive play a role for businesses? Have these differences led to changes in their business strategy? Have these differences caused problems?*]

Business associations did not report disparities.

- 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;

Business associations found it possible that lists would create obstacles to cross-border trade.

- 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.

No assessment available.

### 1.2.3. Relevance for business-to-business transactions

Regarding the area of contractual fairness and in relation to the Unfair Contract Terms Directive, please analyse:

- Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;

Business associations did not report such a need. The Consumer Ombudsman has stated a strong preference against making distinctions based on the size of business.<sup>51</sup>

- 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;

Business associations did not state a preference here, but as mentioned above it is clear from the context of the interview that the separate regimes are preferred.

- 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;

Business associations preferred a flexible approach, since one-size does not fit all.

- 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;

Business associations preferred a flexible approach, since one-size does not fit all.

- Whether there is a need for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive;

<sup>51</sup> Statement by Consumer Ombudsman at 1.

Business associations did not report such a need.

- Whether an extension of the Unfair Contract Terms Directive to B2B transactions can bring benefits for cross-border trade;

Business associations preferred a flexible approach, since one-size does not fit all.

- Whether the consequences of such an extension would have an effect on innovation by or market opportunities for SME providers/suppliers;

Business associations did not assess effects.

- Whether the benefits of extending the scope to business-to-business transactions would exceed the negative consequences of such an extension.

Business associations did not evaluate benefits and consequences.

### 1.3. Injunctions

#### 1.3.1. Effectiveness of the current rules in establishing a high level of consumer protection

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

- To what extent is the use of the injunction procedure in your country contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment?<sup>52</sup>

Finnish consumer law based on the Nordic tradition has its origins in the Consumer Protection Act (hereinafter CPA)<sup>53</sup> from 1978. Compliance with the CPA is primarily supervised and enforced by the Consumer Ombudsman (*kuluttaja-asiamies*), Consumer Disputes Board (*kuluttajariitalautakunta*) and the Competition and Consumer Authority (*Kilpailu- ja kuluttajavirasto*). The CPA is built on general clauses regulating unfair commercial practices in Ch. 2 and unfair contract terms in Ch. 3. The Consumer Ombudsman's dual authority to negotiate industry contract terms and issue preliminary injunctions and bring cases to the Market Court (*markkinaoikeus*) on behalf of consumers suffering from a trader's unfair commercial practices has secured a high level of consumer protection in practice.<sup>54</sup>

Only courts may issue injunctions under the Finnish Code of Civil Procedure. The Consumer Ombudsman may issue a preliminary injunction against an enterprise that violates the CPA. The Consumer Ombudsman also may bring suit in Market Court on behalf of consumers. The Market Court has sole jurisdiction on issuing final injunctions and payment of fines for violation of the injunction. Businesses may violate the CPA, but generally discontinue use of contested terms or practices when notified. The Consumer Ombudsman may not seek other sanctions on behalf of consumers (damages). Punitive damages are not available under Finnish law.<sup>55</sup>

<sup>52</sup> 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.

<sup>53</sup> Kuluttajansuojalaki 20.1.1978/38.

<sup>54</sup> Tuomas Majuri, Finland-Legislative Techniques at 73 in University Bielefeld / European Commission, 2007, EC Consumer Law Compendium - Comparative Analysis [http://ec.europa.eu/consumers/archive/cons\\_int/safe\\_shop/acquis/comp\\_analysis\\_en.pdf](http://ec.europa.eu/consumers/archive/cons_int/safe_shop/acquis/comp_analysis_en.pdf) (Hereinafter Majuri 2007)

<sup>55</sup> Recently Nokia Tyres was caught having consistently cheated in tyre tests, where the tested tyres did not equal those sold. Tyres were naturally sold to both businesses and private persons. A law firm advertised

The availability of injunctions is generally regulated in the Code of Civil Procedure and tailored in sector-specific legislation. Finnish consumer protection is built on soft law instruments, voluntary compliance and cases rarely go to court. The Consumer Disputes Board handles the bulk of consumer complaints and effectively induces businesses to comply with non-binding rulings favouring compensation. The Competition and Consumer Authority publishes a black list of traders that have not complied with the Consumer Disputes Board's recommendation.

The strong protection of consumers in Finland is embedded in the legal culture. Small claims may be subject to summary procedure under the Code of Civil Procedure and judgment may issue, even if the consumer does not respond to the claim (*yksipuolinen tuomio*). Recently the Supreme Court held that a judge must *ex officio* raise the issue to protect a consumer by denying relief, when enforcement of an excessive claim is sought.<sup>56</sup>

Government officials reported that the ID did not change the law in Finland. Injunctions were available long before the ID was introduced. The cross-border injunctions procedure has not been applied one way or the other. Government officials estimate the reason to be that the procedure is burdensome in relation to the harm to the consumer. Consumer harm rarely reaches that threshold. The desired result can easily be achieved through cross-border cooperation between authorities (Reg. 2006/2004). This conclusion is in line with the earlier findings of the Commission.<sup>57</sup>

Consumer associations reported that ID did not affect their operations at all in practice. The Energy Authority confirms that the procedure is not applied in the energy sector. Under national law the Energy Authority may seek sanctions in the Market Court.

- What measures in your national legislation on injunction procedure are considered to be particularly effective, if any: measures regarding the cost of the procedure, the 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?

No specific experiences reported other than those stated above.

- Has your country extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunction Directive? If yes, what are the additional consumer rights covered?

The Consumer Ombudsman may issue injunctions relating to all offering, selling and marketing of consumer goods, services or other benefits under the CPA and special sector-specific legislation, where the Ombudsman has sole or shared jurisdiction. In issues relating to financial services or marketing of securities the Ombudsman must hear the Finnish Financial Supervisory Authority before issuing a final or temporary injunction.<sup>58</sup> The relevant court (Market Court or District Courts) may issue

for buyers to contact them in order to pursue negotiations for compensation collectively. While a law suit is technically possible (joint complaint) relief is limited to actual damages. There is little incentive to settle the case, for consumers to carry litigation costs, or for the law firms to continue representation. The parties have not reached settlement.

<sup>56</sup> KKO 2015:60.

<sup>57</sup> Report from the Commission to the European Parliament and the Concerning the application of Directive 2009/22/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interest, COM (2012)635 final at 3.

<sup>58</sup> Sections 10 and 11 Act on the Competition and Consumer Authority 30.11.2012/661; final injunction in uncontested matters on clear points of law (Section 10.2).

preliminary or permanent injunctions under Chapter 7 Section 3 Code of Judicial Procedure (1.1.1734/4).

- Analysis of the obstacles to the effective use of the injunction procedure, in particular by analysing which progress in removing obstacles has been made and/or new difficulties that have emerged in your country since 2012.

No specific experiences reported other than those stated above.

- In a forward looking perspective: Should the coverage of the Injunctions Directive be extended (by including additional legislation into Annex I to the Directive)? If so, which EU legislation should be included? Are there other measures that could improve the effectiveness of the ID in establishing a high level of consumer protection? Should the scope of the Injunctions Directive be extended to the protection of collective business' interests? Are there best practices in your country that could be relevant for other countries and considered as model for the injunction procedure at EU level?

No specific experiences reported other than those stated above.

### 1.3.2. 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:

- How effective is the injunction procedure in addressing infringements originating in another EU country?

No specific experiences reported other than those stated above. There is a preference for cooperation between qualified entities in Finland and in the other EU country, where each qualified entity brings an injunction action in its own jurisdiction.

- How effective is it to address infringements originating in another EU country that qualified entities in your country are enabled to seek injunctions in the other Member State (Article 4 of the Injunctions Directive)?

No specific experiences reported other than those stated above. There is a preference for cooperation between qualified entities in Finland and in the other EU country, where each qualified entity brings an injunction action in its own jurisdiction.

- In a forward looking perspective: Are there non-legislative or/and legislative measures that could improve the effectiveness of the injunction procedure in addressing infringements originating in another EU country? Are there best practices in your country that could be relevant for other EU countries and could be considered as a model for the injunction procedure at EU level?

No specific experiences reported other than those stated above. There is a preference for cooperation between qualified entities in Finland and in the other EU country, where each qualified entity brings an injunction action in its own jurisdiction.

### 1.3.3. Interplay between the Injunctions Directive and other enforcement instruments of consumer law

Please analyse:

- Is the injunction procedure as designed by the Injunctions Directive regulated separately in your country (in a separate legal act or as a separate procedure



regulated within the same legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (UCPD, UCTD and by the Consumer Rights Directive)?

The availability of injunctions is generally regulated in the Code of Civil Procedure and tailored in sector-specific legislation. Finnish consumer protection is built on soft law instruments, voluntary compliance and cases rarely go to court.

- If these procedures are regulated separately: What are the main differences between them? How is the coherence between these procedures ensured? If these procedures are regulated in a single legal act (possibly as a single procedure): In what way do these procedures (or this procedure) go beyond measures foreseen by the Injunctions Directive?

Not applicable to Finland.

## 1.4. Cross-cutting issues

### 1.4.1. Cost and benefits of the directives covered by the study

- To what extent is there evidence for benefits for consumers stemming from the protection provided by both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of benefits for consumers from the protection against unfair commercial practices and unfair standard terms in contracts; [*Note: a relevant aspect in this context is whether the costs for consumers in exercising their rights under these directives are limiting these benefits or not.*]

Consumer authorities reported that consumers benefit from lower prices due to increased legal certainty. They emphasized that protection of the weaker party should never be reduced to a question of cost.

- To what extent is there evidence for benefits for traders stemming from both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of creating a level playing field for honest traders by providing a legal basis to eliminate or at least constrain dishonest market practices, such as the use of unfair standard terms in contracts or unfair commercial practices, including through the application of the Injunctions Directive;

Consumer authorities predicted benefits to traders from clear rules relating to e.g. liability for defective products (*virhevastuu*). Increased legal certainty reduces costs to traders. Business associations reported that existing consumer protection laws are necessary and benefit traders one way or the other. Consumer associations reported that consumer protection benefits honest traders.

- What are costs for traders due to the need to respect the requirements under the directives covered by the study? [*Note: Such as costs of research, legal advice and compliance as well as the amount of time necessary to comply with the directives*]

Business associations reported that there are always compliance costs. Consumer associations rejected the notion that costs for running a lawful business would be considered a cost for traders.

- What are the costs involved in the public enforcement of these rules?

No specific experiences reported other than those stated above (Finnish authorities do not view protection of the weaker party as a cost, but as a government obligation).



- Are there indications that the directives covered by the study are not implemented in your country in a cost-effective manner?

Business associations reported that national supplementary regulation is not cost-effective. Implementation of harmonised provisions is not problematic, but for instance opening up the honest practices clause<sup>59</sup>, which has not been applied in practice. Consumer associations reported that there are no indications of implementation that is not cost-effective.

- Could the costs for implementing and enforcing the rules of the directives covered by the study be reduced without lowering the level of protection for consumers? If so, how?

Consumer associations did not find the question relevant for Finland.

#### 1.4.2. Interplay with EU sector-specific consumer protection legislation

Regarding the interplay of the horizontal EU consumer legislation [mainly UCPD and UCTD] with EU sector-specific consumer protection legislation in the areas of electronic communications, passenger transport, energy and consumer financial services, please:

- Analyse the levels of awareness of the requirements of the horizontal EU consumer legislation (mainly UCPD and UCTD) of businesses and consumers and the specific public enforcement bodies in the relevant sectors, as in particular demonstrated by their practical application; [*Key question here is: Are UCPD and UCTD applied in practice by national authorities and courts as a legal basis to combat unfair commercial practices and unfair standard terms in contracts in the regulated sectors?*]

According to the Energy Authority it is not likely that consumers nor businesses relate requirements of consumer protection especially to a named directive, since implementation has coincided with reform of national regulation. According to a government official, businesses, especially established actors, are well aware of the requirements of the Electricity Market Act in the energy sector. New businesses, especially foreign enterprises are less aware of the requirements. Most unfair practices in the energy sector relate to tele-marketing and consumers' awareness of the requirements of the Electricity Market Act is relatively weak.

Consumer awareness is on the rise through some recent highly publicized case involving Caruna Ltd., the owner of electricity transmission network in Finland. After purchasing the network from the government in 2014, Caruna informed their clients of a rise in the basic electricity transmission fee by 22-27%. Caruna claimed raised costs due to necessary investments in the network. The Consumer Ombudsman intervened and reached a settlement with Caruna, to reduce the raise by 25 % in 2016, refrain from raises in 2017, and keep future raises within 10-15% stretched over a longer period of time, and calculated on the consumer's earlier fee, including VAT.<sup>60</sup> Suur-Savon Sähkö's practice of automatically requiring a 500 euro deposit prior to entering to a contract with a person that has any mark in the credit register was unreasonable, since they provided a basic utility service.<sup>61</sup>

Consumer financial services are regulated separately in the CPA. The Consumer Ombudsman frequently uses the power to negotiate industry contract terms for consumer services in the financial sector under Ch. 3 CPA.<sup>62</sup> Traders are generally

<sup>59</sup> Likely referring to maintaining claims, when the consumer's financial interest is not affected.

<sup>60</sup> Caruna Oy, KKV/207/14.08.01.05/2016, 18.2.2016.

<sup>61</sup> Suur-Savon Sähkö Oy KKV&661/14.08.01.05/2016, 15.9.2016.

<sup>62</sup> Peltonen at 13.

aware of their obligations under law and consumer rights. Consumers are likely unaware of their rights. Standards contracts relating to passenger transports and package deals are supervised by the Consumer Ombudsman. The Consumer Disputes Board provides a form for consumer complaints, which consumers frequently use to claim compensation.<sup>63</sup>

The Consumer Ombudsman has also targeted traders in different sectors that do not offer paper bills or a free non-digital means to acquire billing information. One case involving a mobile phone company was reversed by the Supreme Court, since the company offered the billing information via text message for free.<sup>64</sup> Another case is set for court involving an energy company that charges a fee for paper bills.<sup>65</sup>

- Specify whether in your country the same authority is responsible for the enforcement of the horizontal EU consumer law 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 UCPD/UCTD in the regulated sectors, as specified in the previous bullet?*]

The Consumer Ombudsman has general jurisdiction relating to all consumer protection issues, and coordinates consumer protection with sector-specific authorities or regional /municipal authorities. For example, the Consumer Ombudsman and Finnish Transport Safety Agency Trafi share supervising duties relating to passenger transports. The Consumer Ombudsman shares jurisdiction with Finnish Financial Authority (*Finanssivalvonta*), which in practice shifts consumer matters to the Consumer Ombudsman. The Energy Authority shares jurisdiction with the Consumer Ombudsman, however, they approach regulation from different perspectives. The Consumer Ombudsman is responsible for supervision of the CPA. There is no formal or systematic cooperation between the public authorities, but there is a framework for executive assistance and cooperation.

- Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning contractual fairness, 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.?*]

Consumer authorities reported that the legal framework is neither clear nor coherent at present. One problem relates to sector-specific rules surpassing and complementing the horizontal consumer provisions (instead of falling within the general framework). Particular problems relate to the general marketing rules and information requirements. It was advanced that reasonableness regulation should be placed in horizontal regulation and sector-specific regulation should only serve to specify horizontal regulation.

The Energy Authority did not report inconsistencies. There is overlap between the CPA and the Electricity Market Act, with the latter providing more specific rules.

- What are the benefits of the complementary application of the UCPD and UCTD in the regulated sectors? What are the costs due to the complementary application with the sectoral EU consumer protection legislation?

<sup>63</sup> Forms are available in Finnish and Swedish. Instructions to fill in the form in English. <http://kuluttajariita.fi/fi/index/valituksenteko/valituslomakkeet.html>

<sup>64</sup> KKO 2016:49.

<sup>65</sup> Kotimaan Energia, KKV/509/14/14.08.01.05/2016, 23.8.2016.

See above. Consumer authorities stated that the broad jurisdiction of consumer authorities in Finland simplifies supervision and creates synergies in the regulated sectors. As a rule the costs are higher the more scattered regulation and supervision duties are.<sup>66</sup>

The Energy Authority mainly implements the Electricity Market Act. The Consumer Authorities may apply the CPA simultaneously with the Electricity Market Act. If there are benefits from the overlaps they would fall within the Consumer Authorities purview.

- Assess any need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law.

Government officials requested more cooperation and communication between DG working groups in charge of different regulation. Sometimes it seems that essential expertise is lacking on cross-cutting or inter-sectional issues. Consumer authorities expressed a strong preference for clarification.

The Energy Authority was satisfied with the current framework, since the Electricity Market Act serves its purpose. There is no need to extend EU-level regulation.

#### 1.4.3. Relevance of consumer law directives for consumer-to-business transactions

- Please analyse the need and potential for the application of the consumer law directives (mainly UCPD and UCTD) to 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).

Government officials noted that there may be isolated incidents, which could be reviewed. Yet, it is a marginal issue. Consumer authorities indicated that review could be timely, since the traditional role of the consumer is currently changing. Business associations expressed a need for review, if it is professional activity. Application has not been necessary in isolated incidents in the past. If regulation is reviewed or developed in this regard it should take the form of guidelines. Consumer associations did not find a need for development in this regard, since national legislation (Sale of Goods Act) provides rules for this eventuality.

#### 1.4.4. Specific protection for vulnerable consumers

Please analyse:

- Whether the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined in the consumer law directives and relevant jurisprudence, and as applied by national authorities and courts in your country, continue to be valid and fit for purpose.

Government officials referred to answers above that the regulators' view of the consumer is too optimistic. Consumer authorities also advocated for a move away from an ideal consumer towards a more realistic view of consumer behaviour. The concepts should also be consistent in content and application across sectors. According to consumer associations the concept of vulnerable consumers is too broad, and does not account for differences between e.g. children, the elderly and the visually impaired.

<sup>66</sup> Majuri (2007) at 75.

In the energy sector the national concept of 'consumer' is consistently applied. The concepts of 'average consumer' or 'vulnerable consumer' are not applied in the context of the Electricity Market Act. It should be noted that the Consumer Ombudsman has joint jurisdiction with the Energy Authority to apply the CPA and Electricity Market Act in the energy sector.

- To what extent the existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers and whether, based on the experiences in your country, specific provisions should be introduced in other directives concerned, in particular the Unfair Contract Terms Directive.

Business associations reported that there is no evidence that existing rules would not offer adequate protection. Consumer associations reported that existing rules do not offer adequate protection.

#### 1.4.5. EU added value

- Overall, would you consider that protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in your country since the implementation of the UCPD and the UCTD in national legislation?

Government officials found that the directives did not improve the situation in Finland, but clarified some issues. Consumer authorities agreed that the black list has codified some issues that were previously relying on general clause (and case law). As a whole there was nothing new, since consumer protection was high in Finland. Business associations confirm that not much effect can be seen, since consumer protection is high in Finland. Consumer associations report added value.

The Energy Authority attributed the added value to the Electricity Market Directive, although recognized that there is likely overlap between the directives.

- Overall, would you consider that the information of consumers regarding unit prices has improved since the implementation of the PID in national legislation?

Consumer authorities are very critical of the 'regulatory jungle' relating to price indication. Overlaps and wide gaps (esp. services) render the regulation unworkable in practice. Business associations see some benefits, but report added misunderstandings and confusion among traders. Consumer associations report that the implementation of PID has weakened the position of consumers in practice.

- Overall, would you consider that the protection of businesses against unfair marketing in your country has improved since the implementation of the MCAD in national legislation?

There is a steady stream of cases to the Market Court relating to comparative advertising, where affected traders can seek direct redress based on general harm to consumers.<sup>67</sup>

- Overall, would you consider that it has become easier for businesses in your country to directly trade cross-border to final consumers located in other EU countries in recent years? Has it become easier for consumers in your country to directly purchase cross-border from traders located in other EU countries?

<sup>67</sup> KKO 2011:88 where Unilever, Valio's primary competitor, was not specifically mentioned in comparative advertising, but could seek an injunction.

Government officials report that there is no evidence of a change and that the role of regulation is exaggerated in this regard. Consumer authorities share the view that differences in consumer protection is exaggerated. Differences in consumer protection levels is rarely the most significant issue affecting traders' willingness or ability to trade in Finland.

Business associations did not find it difficult to find information about consumer protection requirements in different member states. However, understanding the differences in culture and implementation require the most resources to master. These differences present an obstacle to many traders. Consumer associations on the other hand found that it is unlikely that the main differences would be removed by regulation. They found the language and culture the biggest obstacle to trade in Finland, not legislation.

As a clarification it could be added that the size of the potential market in relation to e.g. language costs are essential non-regulatory factors affecting traders' willingness to trade in Finland.

- To what extent are these improvements, if any, due to the mentioned directives?

Business associations reported that guidelines may be somewhat helpful. The Energy Authority reported that the high level of consumer protection in the energy sector is unlikely a result of these directives. However, there are no significant problems or conflicts to note.

## Annex

## A. Transposition fact sheet

**Table 1: Fact sheet on transposition of directives in Member States' law – FINLAND**

Directive	Transposition legislation (National law, Article)	Comments	Specific provisions going beyond minimum harmonisation requirements/use of exemptions	Included in national legislation		Comments
Directive 93/13/EEC on unfair terms in consumer contracts	Laki kuluttajansuojalain muuttamisesta / Lag om ändring av konsumentkyddslagen (1211/2013) 30/12/2013  Virallinen julkaisu: Suomen Saadoskokoelma (SK); Virallisen lehden numero: 1211/2013; Julkaisupäivämäärä: 2013-12-31		'Black list' of terms considered unfair in all circumstances	No	<i>Kuluttajansuojalaki 2 ja 3 luku</i>	
			'Grey list' of terms which may be considered unfair	No		
	Sähkömarkkinalaki 9.8.2013/588	Changing of contract terms allowed in special circumstances 93 §	Extensions of the application of Directive to individually negotiated terms	Yes	<i>Yes, national law has broadened the scope of the unfairness assessment to individually negotiated contractual terms</i>	

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			Extensions of the application of Directive terms on the adequacy of the price and the main subject-matter	Yes	<i>Yes, national law has broadened the scope of the unfairness assessment to the adequacy of the price or remuneration.</i>	
	Laki sähkömarkkinalain 88 §:n muuttamisesta / Lag om ändring av 88 § i elmarknadslagen (1212/2013) 30/12/2013 Virallinen julkaisu: Suomen Saadoskokoelma (SK); Virallisen lehden numero: 1212/2013; Julkaisupäivämäärä: 2013-12-31		Confirmation requirement not adopted, except in energy contracts.	Yes and No	<i>HE 157/2013 at 3.2.1. Sähkömarkkinalaki 88 §</i>	
<b>Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market</b>	30.12.2013/1211		Provisions regarding financial services going beyond minimum harmonisation requirements	No	<i>Kuluttajansuojalaki 2 luku ja Laki sopimattomasta menettelystä elinkeinotoiminnassa 2 luku.</i>	
	27.8.2010/746		Provisions regarding immovable going beyond minimum harmonisation requirements	No		
	29.8.2008/561		Application of UCPD to B2B transactions	No		



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<b>Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers</b>	Asetus kulutushyödykkeen hinnan ilmoittamisesta markkinoinnissa, 30.12.1999/1359 repealed		Extension of the application to other sectors (e.g. for immovable property)	No	<i>Kuluttajansuojalaki 2 luku. Regulation on Price Indications in Marketing of Consumer Goods has been repealed and replaced by Valtioneuvoston asetus kulutushyödykkeen hinnan ilmoittamisesta markkinoinnissa 553/2013.</i>	
	Valtioneuvoston asetus kulutushyödykkeen hinnan ilmoittamisesta markkinoinnissa 553/2013.		Use of specific regulatory choices/derogations	No		
<b>Directive 2006/114/EC concerning misleading and comparative advertising</b>	Laki sopimattomasta menettelystä Lelinkeinotoiminnassa (1978/1061) muuttamisesta 29.8.2008/562					
<b>Directive 2009/22/EC on injunctions for the protection of consumers' interests</b>	Laki rajat ylittävästä kieltomenettelystä 21.12.2000/1189 1					
	Laki kuluttajansuojalain muuttamisesta 27.8.2010/746					

	Laki muussa kuin viranomaisessa tapahtuvassa kuluttajariitojen ratkaisemisesta 30.12.2015/1696					
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**Table 2: Fact sheet on Injunctions Directive – FINLAND**

Issue	Answer	Comments
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)?	- Yes, separate procedures in separate legal acts	<i>The ID did not change the law in Finland, since injunctions were already available under the CPA and sector-specific legislation</i>
Who is entitled to bring an action seeking an injunction?	- Designated public bodies	
Is the injunction procedure a court or an administrative procedure? If your country legislation foresees both forms of the procedure, please explain in the comments column for which infringements the court or administrative procedure is foreseen	- Court procedure	
Who bears the costs of an injunction procedure? If qualified entities (or some of their categories e.g. consumer organisations are entitled to an exemption of some/all cost related to the procedure please explain the characteristic of such exemption in the comments column.	-The qualified entities are exempted from costs	
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?	- Yes, scope of application extended to cover consumer law in general	
Is protection of business' interests covered by the injunctions procedure? If scope of application extended to the protection of business' interests, please provide details in the comments column regarding type of business' interests covered by the injunctions procedure	- No	
Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations	- No	<i>But the Consumer Ombudsman can bring parallel cases simultaneously.</i>
Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID)	- Yes	<i>The Consumer Ombudsman can issue decisions and preliminary injunctions.</i>
Has your Member State taken specific measures regarding the prior consultation (Article 5 of the Injunctions Directive)?	- No such requirement	<i>It was considered to slow down the process to include a requirement of consultation. Consultations are encouraged.</i>
Does the national legislation provide for measures ensuring summary procedure? Please specify main characteristics of the procedure (subject matter/time limits) in the comments column.	- Yes	

<p>Are there sanctions for non-compliance with the injunction order (Article 2(1) of the Injunctions Directive)?</p> <p>If sanctions in form of penalty or fine foreseen please specify in the comments column to who exactly should they be paid</p>	- Yes, penalty of a fine for each day of non-compliance	
<p>Has your Member State taken specific measures regarding the publication of the decision and/or the publication of a corrective statement?</p>	- Yes	<i>All decisions are published on the websites of the Competition &amp; Consumer Authority</i>
<p>Is it possible to claim within the injunction procedure for sanctions for the infringement?</p>	- No	
<p>Can an action for the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to other beneficiary be brought within the injunction procedure?</p>	- No	
<p>Can an action for damages to be paid to the qualified entity or the public purse be brought within the injunction procedure?</p>	- No	
<p>Can an action for damages or redress to be paid to the consumers concerned be brought within the injunction procedure?</p>	- No	
<p>Can individual consumers base their individual claims for damages/remedies on the injunctions order?</p>	- Yes	<i>Established traders comply. Many times cases are brought against companies that are out of business or unreachable for enforcement, which renders the question moot in practice.</i>
<p>Can the qualified entity claim other measures beyond the injunction, e.g. evidence of compliance with the judgment?</p>	- No	
<p>Are the effects of individual injunctions orders extended to the future infringements and/or same or similar illegal practices (of other traders)?</p>	- Yes	<i>Injunction on pain of fine</i>

## B. Data tables

*Number of B2C disputes*

Please indicate how many B2C disputes have been decided in your country on the basis of consumer law directives covered by this study (UCPD, UCTD, PID) as a proportion of the total number of B2C disputes decided on the basis of other national consumer legislation (based on statistics, or based on estimates by enforcement authorities and other stakeholders, where this is not the available).

**Table 3: B2C disputes decided on the basis of consumer law directives covered by this study in comparison with total B2C disputes decided on the basis of other legislation (most recent year for which data is available)**

Year	Type of data	Total number of B2C disputes (number of cases)	Share of B2C disputes decided on basis of ...					Comments
			UCPD	UCTD	PID	other EU consumer protection legislation (e.g. CRD, Sales Directive, sectoral legislation)	national consumer legislation not based on EU directives	
<b>2016</b>	Decisions Consumer Ombudsman	26 cases	0 %	11 %	7%	82 %	100 %	All cases are based on national legislation
<b>2015</b>	Decisions Consumer Ombudsman	21 cases	5 %	0%	14%	81%	100%	All cases are based on national legislation
<b>2014</b>	Decisions Consumer Ombudsman	19 cases	0 %	16%	11%	73%	100%	All cases are based on national legislation
<b>2012-2016</b>	Injunctions by Consumer Ombudsman	8 cases	0%	0%	25%	75%	100%	All cases are based on national legislation
<b>2013-2016</b>	Consumer cases in Market Court	17 cases	0 %	47%	5 %	48%	100%	All cases are based on national legislation

Note: Since the directives are implemented in the Consumer Protection Act, it is not possible to acquire the requested statistics. Many cases are also simultaneously advancing several claims. Most directives did not affect a change in existing national law. The case has been marked as generally falling within the theme of the directive, although it may not have actually applied a provision stemming from the directive. Cases from the Consumer Disputes Board have been omitted, since they tend to concern compensation for defective products/services, which is not within the scope of this study. The Board does not assess commercial practices, which is within the jurisdiction of the Consumer Ombudsman.

*Costs of obtaining redress for a hypothetical case of invoking unfairness of a standard contract term*

- Please estimate the costs, including time, for consumers in obtaining redress when invoking the unfairness, and thereby the non-binding character of standard contract terms in a contract they concluded. Please provide the estimate for the hypothetical example below, focusing on costs (and needed time) of a lower court procedure and the use of ADR or other relevant procedure (if applicable).<sup>68</sup>

**Table 4: Estimate of costs for consumers in obtaining redress when invoking the unfairness of standard contract terms in a contract they concluded (for the hypothetical example provided in the box below)**

Redress mechanism	Estimated court fees (national currency)	Estimated lawyer's fees (national currency)	Other costs, if any (national currency)	Estimated time involved for consumer (hours)	Comments
<b>Lower court procedure</b>	Civil case District court EUR 500 + Appeals court EUR 500	EUR 2000 – 3000 unlikely to qualify for legal aid	Witnesses, travel cost to hearing, loser pays rule on attorney fees	Preparation time not possible to assess, likely requiring a lawyer. Court procedure & decision: 6 months to 1 year	Time estimates are difficult since civil cases are usually complicated. This case would not go to D. Ct.
<b>ADR or other relevant procedure</b>	Consumer Disputes Board (defect in service or good) EUR 0	EUR 0 There is a 2- page form designed for travel complaints available on the website. Lawyer not required.	Written procedure	Preparation time 1 day Decision in 2 - 3 months	

Notes: The unfairness of standard contract terms is raised *ex officio*, or via a complaint to the Consumer Ombudsman, who decides whether to pursue the case on behalf of consumers against the trader (request, negotiations, decision, preliminary injunction, Market Court).

<sup>68</sup> For the hypothetical example it is assumed that both the provider and the consumer are located in your country.

**Hypothetical example: Terms which inappropriately exclude/limit consumers' rights to compensation**

*A consumer went on a package holiday with a friend to Kenya for which they paid € 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 €5,000 (€4,000 for the cost of the package and €1,000 for lost time and enjoyment). The tour operator agreed to compensate them €1,000 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/unfair-contract-terms/index\\_en.htm](http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-contract-terms/index_en.htm)]*

- Please estimate how often court and ADR procedures are used in your country for invoking the unfairness, and thereby the non-binding character of standard contract terms (i.e. the number of cases per year)?

Rarely, if ever, since the Consumer Ombudsman pre-negotiates standard contract terms with industry. The Consumer Ombudsman has made 6 decisions relating to unfair contract terms; vagueness of term (1), consumer carry repair costs of trade-in-phone (1); changing terms (1); requirement of security deposit (1) and payment for paper bills (2). One was appealed to the Market Court (MAO 170/03), and one reversed by the Supreme Court (KKO 2016:49).



## C. Interviews conducted and literature reviewed

**Table 5: Interviews conducted for this study**

Organisation	Stakeholder type	Date
<b>Finland Chamber of Commerce</b>	Business association	7.9.2016
<b>Federation of Finnish Financial Services</b>	Business association	5.9.2016
<b>Competition and Consumer Authority</b>	National consumer enforcement authority	6.9.2016
<b>Energy Authority</b>	National regulatory authority	7.9.2016
<b>Financial Supervisory Authority</b>	National regulatory authority	10.8.2016
<b>Ministry of Justice</b>	Ministry	5.9.2016
<b>Ministry of Economic Affairs and Employment</b>	Ministry	23.10.2016
<b>ECC Finland</b>	European Consumer Centre	26.8.2016
<b>Finnish Consumer Association</b>	Consumer organisation	6.9.2016
<b>Consumer Ombudsman</b>	Consumer Authority	Public statement issued on 5.9.2016

**Table 6: Literature reviewed for country report**

Author/Source	Year	Title of publication
COM (2006) 325 final	2006	Communication of the Commission on the implementation of the Price Indication Directive 1998/6/EC.
COM (2008) 756 final	2008	Report from the Commission concerning the application of Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interest
COM (2012)635 final	2012	Report from the Commission to the European Parliament and the Council concerning the application of Directive 2009/22/EC of the European Parliament and the Council on injunctions for the protection of consumers' interest
HE 32/2008 vp	2008	Ehdotus hallituksen esitykseksi Eduskunnalle laiksi kuluttajansuojalain 2 luvun muuttamisesta ja eräksi siihen liittyviksi laeiksi
HE 157/2013 vp	2013	Hallituksen esitys eduskunnalle laeiksi kuluttajansuojalain ja sähkömarkkinalain 88 §:n muuttamisesta
HE 67/2016 vp	2016	Hallituksen esitys eduskunnalle laeiksi tietoyhteiskuntaaaren muuttamisesta ja väliaikaisesta muuttamisesta sekä eräitä tuoteryhmiä koskevista ilmoitetuista laitoksista annetun lain muuttamisesta
KKV/857/03.03/2016	2016	EU:n kuluttajalainsäädännön toimivuutta koskeva julkinen kuuleminen, 5.9.2016.
Tuorila, Helena-Määttä, Kalle – Peltonen, Anja	2016	Kuluttajahuijaukset, Kilpailu- ja kuluttajaviraston selvityksiä 1/2016. <a href="http://www.kkv.fi/globalassets/kkv-suomi/julkaisut/selvitykset/2016/kkv-selvityksia-1-2016-kuluttajahuijaukset.pdf">http://www.kkv.fi/globalassets/kkv-suomi/julkaisut/selvitykset/2016/kkv-selvityksia-1-2016-kuluttajahuijaukset.pdf</a>
Majaniemi, Sirpa	2007	Kuluttajamarkkinoinnin käsikirja
Majuri, Tuomas	2007	Finland- Legislative Techniques in University Bielefeld / European Commission, 2007, EC Consumer Law Compendium - Comparative Analysis <a href="http://ec.europa.eu/consumers/archive/cons_int/safe_shop/acquis/comp_analysis_en.pdf">http://ec.europa.eu/consumers/archive/cons_int/safe_shop/acquis/comp_analysis_en.pdf</a>
Peltonen, Anja	2014	Kuluttajaoikeus- kansallista vai kansainvälistä Kuluttajansuojalian 2 ja 3 lukujen sääntely ja ratkaisukäytäntö, Kilpailu- ja kuluttajaviraston julkaisut, 20.5.2014. <a href="http://www.kkv.fi/ratkaisut-ja-julkaisut/julkaisut/artikkelit/">http://www.kkv.fi/ratkaisut-ja-julkaisut/julkaisut/artikkelit/</a>
TEM/TMO/KTL/Sari Alho	2016	Muistio pesuaineiden hinnan ilmoittamisesta markkinoinnissa, 22.10.2016.

# 1. Study to support the Fitness Check of EU Consumer law – Country report FRANCE

## 1.1. Unfair commercial practices and marketing

### 1.1.1. Effectiveness of the UCPD in establishing a high level of consumer protection

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

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

Stakeholders stress the benefits of a well-balanced, 'future-proof' and flexible general clause but also point at the legal uncertainty it causes. The UCPD does not contain any positive obligations. General clauses are at odds with French legal tradition since they leave much room for the judiciary to appreciate the circumstances of the case in view of their broadly worded definitions and, by doing so, to interpret the clauses at the expense of the legislator.<sup>1</sup> What is more, general clauses do not sit well with a judicial system which is known for the length and the complexity of its procedures. As a matter of fact, there are many contradictory decisions at all levels of the judiciary. A decision of a Court of Appeal deeming a radio advertisement misleading has recently been overturned by the *Cour de Cassation* for not having taken the 'limitations of the communication medium' into account.<sup>2</sup>

Consumer associations are rather negative about the effectiveness of the open-textured clauses of the Directive in combination with the maximum harmonisation clause, which does not allow for specific bans on commercial practices other than the ones on the black list.<sup>3</sup>

The general nature of the clauses has no deterrent effect and makes actions by enforcement bodies less convincing: the openness of the clauses encourages traders to enter time-consuming discussions on the fairness of a practice and the outcome of the action is highly uncertain given the level of legal uncertainty. This discourages enforcement bodies from taking action on the basis of the general clause.

The exhaustive nature of the black list and the full harmonisation goal of the UCPD have led to the removal of often used clear-cut national bans on certain commercial practices. The 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 laid down in Art. L. 121-1 ff. *Code de la consommation* (hereafter: C.conso.)<sup>4</sup> before being condemned. In practice, such practices are sometimes deemed fair, which means that the French consumer is less protected than before the Directive was enacted. The *Cour de Cassation* has referred preliminary questions to the CJEU about the fairness of a tied offer consisting of the sale of a computer equipped with pre-installed software, in order to secure greater clarity and to increase legal certainty. Taking into consideration the ruling of the CJEU, which hinted at the commercial practice being unlikely to materially distort the

<sup>1</sup> Not all the stakeholders knew about the Guidance document of the Commission (which is not available in French).

<sup>2</sup> Supreme Court, 1 September 2015, n° 14-85.791, MARIONNAUD PARFUMERIES c/ unknown.

<sup>3</sup> One stakeholder regretted in that respect that the legislative part on commercial practices in the *Code de la consommation* no longer applies to C2C relationships.

<sup>4</sup> The *Code de la consommation* has been amended on the 1st of July 2016. The articles referred to in the report are the new articles.

average consumer's behavior, the *Cour de Cassation* recently confirmed that the combined offer of sale of a computer with a pre-installed software is a fair practice.<sup>5</sup>

On the other hand, trade associations consider that ending the ban on specific practices, even if it creates legal uncertainty, could potentially benefit the consumer. Following a Court Order,<sup>6</sup> the legal definition of the reference price that is used in price reduction announcements has recently been amended. The new definition is considered to be less rigid, and allows for a differentiation between products and a more truthful comparison between prices (e.g. seasonal products). Consumers might be better off if the reference price is indeed more realistic, which is of course something the announcer must account for. The effective enforcement of the fairness of the price comparison (old-new) is however a problem.

What is more, the effectiveness of the general clause is jeopardized by the lack of an autonomous sanctioning mechanism under French law. Claimants must fall back on the sub-clauses or the black list. The articulation of (the criteria of) the general clause and the sub-clauses of art. 6-8 UCPD, is unclear to legal scholars and practitioners who find it difficult to comprehend the interaction between the general clause and the sub-clauses, in view of the jurisprudence of the CJEU.<sup>7</sup> Can a practice be deemed unfair without being misleading or aggressive and inversely, can a practice be deemed misleading without being unfair, i.e. in breach of the requirements of professional diligence?

At the individual level, the principle-based approach is considered by the stakeholders to not be very effective for it creates problems of proof and results in lengthy and expensive procedures. The clauses and corresponding sanctions are not geared towards the solution of individual B2C conflicts.

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

The black list offers some legal certainty (although it still contains some open-textured formulations prone to interpretational divergences) but has very seldom been applied. It does not compensate for the legal uncertainty created by the principle-based approach.

Many stakeholders have criticised its exhaustive nature and its incapacity to quickly respond to new (types of) practices. Another criticism pertains to the level of detail and narrowness of the definitions of the practices on the list. A practice must exactly match a very detailed definition in order to be tackled on the basis of the list. This was, for example, not the case in the only court procedure based on the black list that could be retrieved from the national database Legifrance.fr.<sup>8</sup> The practices on the list are so precisely defined that they do not occur very often.

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

The exemption of art. 3(9) UCPD has been widely used in France to the satisfaction of enforcement authorities. The weight such contracts can bear on a consumer budget, and their complexity, amply justify a more protective approach.

<sup>5</sup> Supreme Court 17 June 2015, n° 14-11.437, ECLI:FR:CCASS:2015:C100451; ECLI:EU:C:2016:633, Case C-310/15, (Deroo-Blanquart), 7 September 2016; Supreme Court, 14 December 2016, n° 14-11.437 ECLI:FR:CCASS:2016:C101414. The legality of selling bundled software has been challenged and has given rise to a considerable amount of disputes in France over the last few years.

<sup>6</sup> ECLI:EU:C:2015:560, Case C-13/15, (Cdiscount), Order 8 September 2015.

<sup>7</sup> Picod, nr. 123; Calais-Auloy and Temple, nr. 93.

<sup>8</sup> Cass. Com., 26 February 2013, n° 12-12203.

The maximum harmonisation nature of the Directive is criticised by consumer organisations. National bans on unfair practices which offer more legal certainty and protection than the UCPD are welcomed by most stakeholders. There are benefits in terms of proof at the individual level but, more importantly, actions instigated by national supervisory authorities and consumer associations are easier and more effective when grounded on clear-cut bans. As indicated above, general clauses are considered to have caused legal insecurity. In this respect, the extensive interpretation of a 'commercial practice' by the European Commission (Guidance) and the CJEU was fiercely criticised by one stakeholder: the wider the definition, the narrower the scope of national legislative and enforcement actions.

However, as was indicated before, too narrowly defined rules also have their shortcomings. The Act 'Sapin 2'<sup>9</sup> introduced at the end of 2016 a provision (article L. 222-16-1) which outlaws aggressive advertising practices with regard to financial services such as Forex and binary options which are deemed dangerous for the consumer. This very precisely formulated provision has been fiercely criticised and is expected to be ineffective: the targeted rogue financial services providers, who are mainly situated in Cyprus, do not expressly use the forbidden terms in their ads.<sup>10</sup>

- 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 what 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?*]

There is uncertainty as to what constitutes a green claim. This definition problem has been discussed by different stakeholders<sup>11</sup> and has led to an official guidance document.<sup>12</sup> In 2015, the French Directorate-General for Competition, Consumer Affairs and Prevention of Fraud (DGCCRF) has led extensive investigations into misleading 'generalising' environmental claims.<sup>13</sup>

The DGCCRF has also investigated unfair selling tactics by solar and other energy efficiency companies.<sup>14</sup> More specifically, the doorstep selling tactics of photovoltaic panels companies have been deemed aggressive and misleading.

The fact that labels, such as the French RGE ('*Reconnu Garant de l'Environnement*') label, do not warrant the fairness of the commercial practices of its holders, has been openly criticised.<sup>15</sup>

In a few cases, environmental claims in the energy market have been challenged by environmental and consumer rights associations. The UCPD has for example successfully been applied in the Monsanto-case: the company was fined for misleading the public about the environmental impact of its flagship herbicide Roundup.<sup>16</sup>

<sup>9</sup> Loi n° 2016-1691 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, et la loi organique n° 2016-1690 relative à la compétence du Défenseur des droits pour l'orientation et la protection des lanceurs d'alerte.

<sup>10</sup> [http://www.lemonde.fr/idees/article/2016/05/25/loi-sapin-2-l-interdiction-des-publicites-sur-internet-pour-certains-produits-financiers-a-risques-d-une-totale-inefficacite\\_4926422\\_3232.html](http://www.lemonde.fr/idees/article/2016/05/25/loi-sapin-2-l-interdiction-des-publicites-sur-internet-pour-certains-produits-financiers-a-risques-d-une-totale-inefficacite_4926422_3232.html)

<sup>11</sup> [http://www.economie.gouv.fr/files/directions\\_services/cnc/avis/2010/151210rapport\\_allegations\\_environnementales.pdf](http://www.economie.gouv.fr/files/directions_services/cnc/avis/2010/151210rapport_allegations_environnementales.pdf)

<sup>12</sup> [http://www.developpement-durable.gouv.fr/IMG/pdf/guide\\_allegations\\_ok.pdf](http://www.developpement-durable.gouv.fr/IMG/pdf/guide_allegations_ok.pdf)

<sup>13</sup> <http://www.economie.gouv.fr/dgccrf/enquete-sur-allegations-environnementales-globalisantes>

<sup>14</sup> <http://www.economie.gouv.fr/dgccrf/energies-nouvelles-renouvelables>

<sup>15</sup> [http://www.economie.gouv.fr/files/files/directions\\_services/dgccrf/presse/communique/2015/CP-EnR151119.pdf](http://www.economie.gouv.fr/files/files/directions_services/dgccrf/presse/communique/2015/CP-EnR151119.pdf)

<sup>16</sup> Cass. Crim. 6 October 2009, n° 08-87757.

When challenging a green claim, it appears very difficult to substantiate the breach of the misleading clause. One stakeholder has indicated a problem of proof since a lot of the information given in the pre-contractual stage is provided orally.

- 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 your country rigidly?*]

The concept of the average consumer has been transposed into art. L. 121-1 C.conso. The most notorious advantage of this abstract concept is that a practice can be deemed unfair even if the interests of consumers have not actually been harmed.

The interpretation of the concept by French courts appears to be quite random. Although the Guidance document of the European Commission mentions that 'the median consumer's vulnerability pattern is similar to the EU-wide pattern',<sup>17</sup> stakeholders provided contrasting responses to the question whether the concept is applied rigidly. Some stakeholders indicate that the concept is applied in a flexible, rather protective way<sup>18</sup> whereas other stakeholders (mainly consumer organisations) consider the application to be rather strict.<sup>19</sup>

Enforcement bodies have admitted to avoid taking a demanding consumer image as a starting point of their investigations.

A recent decision of the *Cour de Cassation* might help get rid of the disparities: it considered the average consumer to be a highly objective concept, which does not take into account the subjective knowledge of the consumer in the case at hand.<sup>20</sup>

- 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 in your country recognised new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted)?*]

The vulnerable consumer concept has been transposed in art. L. 121-1(3) C.conso. There is a smooth transition between the consumer concepts under French law since courts tend to always take into account the target group of a commercial practice. The reference consumer depends on the object and content of the practice in question. The vulnerability of the consumer who is being targeted adds to the unfairness of some types of inertia- or doorstep-selling.

In individual cases, the abuse of weakness-provision is more often used. The '*abus de faiblesse*' laid down in art. L. 121-8 and L. 121-10 C.conso. relies on a concrete appreciation of the weakness of the consumer. This provision also plays a role in collective actions.<sup>21</sup> Consumer associations sometimes choose to act on both grounds.

In the financial sector, the national supervisory and regulatory authorities *Autorité des Marchés Financiers* (AMF) and *Autorité de Contrôle Prudentiel* (ACP) have initiated talks on the position of the vulnerable consumer, more specifically the aging consumer. They focus on the implications of this concept for the positive information duties of the sector-specific legislation (such as the duty of care of banks). The co-regulatory *Charte de l'inclusion bancaire et de prévention du surendettement*, aims at protecting vulnerable consumers.

<sup>17</sup> [http://ec.europa.eu/justice/consumer-marketing/files/ucp\\_guidance\\_en.pdf](http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf), p. 45 (footnote 111).

<sup>18</sup> Cf. <http://www.influencia.net/fr/actualites/in,observatoireinfluencia,publicitepratiquescommercialesde loyalesnotionconsommateurmoyen,3525.html> (29 May 2013).

<sup>19</sup> E.g. CA Paris, 25e ch. A, 16 November 2007, *Contrats, conc. consom.* 2008, comm. 55.

<sup>20</sup> Cass. Civ. 1ere, 22 January 2014, n° 12-20982.

<sup>21</sup> Cass. Crim., 18 March 2008, n° 07-82792.

There is, strictly speaking, no categorisation taking place in French case-law (which is based on a case-by-case approach) but some stakeholders nonetheless have identified new 'categories' of vulnerable consumers, such as a category of consumers with lesser means, and a category of isolated (i.e. lonely) consumers.

- 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?*]

There are few self- and co-regulatory initiatives focusing on commercial practices in France. The reason is that French legal culture – the reliance on rather strict rules and well-defined (positive) obligations – traditionally hinders such initiatives. Professionals are not spurred to take action by the lack of a solid legislative framework. Moreover, considerations of competition prevent traders from establishing codes. Finally, there is no approval scheme by the DGCCRF.

Current attempts to reach common positions or to devise some kind of charter have not been very successful according to business associations. Self-regulatory initiatives are generally more about the valorisation of good practices than the devising of new (more protective) rules.

The most successful auto-regulatory actions pertaining to commercial practices have been led by the French advertising self-regulatory organization (ARPP), which has devised numerous standards such as the digital Advertising and Marketing Communications Code.<sup>22</sup> One stakeholder pointed out that misleading practices and omissions occur despite the recommendations of the ARPP. Continuously evolving e-practices are difficult to keep up with.

Some co-regulation takes place within the framework of the *Conseil National de la Consommation* (CNC), a large platform where consumer and trade associations in different fields meet with government representatives. Within this framework, the co-regulatory *Comité consultatif du secteur financier* (CCSF) issues declarations and positions which can be translated into professional norms. In the field of telecom, there have been a few co-regulatory initiatives (*Fédération Française des Telecoms* in cooperation with the government) with regard to general terms of contract (GTC) (SIM-locking, termination of the contract, etc.).<sup>23</sup>

The financial sector presents some examples of self-regulation in the field of commercial practices. First there are codes of conduct which have been officially approved by the Ministry of Economic affairs.<sup>24</sup> Second, there are codes which have been approved by the ACP.<sup>25</sup> Both approval systems have only had limited success, according to stakeholders.

- 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?

<sup>22</sup> Calais-Auloy and Temple, nr. 91, see for example: [http://www.arpp-pub.org/IMG/pdf/Digital\\_Advertising\\_and\\_Marketing\\_Communications\\_Code.pdf](http://www.arpp-pub.org/IMG/pdf/Digital_Advertising_and_Marketing_Communications_Code.pdf)

<sup>23</sup> <http://pubminefi.diffusion.finances.gouv.fr/pub/document/18/9344.pdf>

<sup>24</sup> Cf. la charte de l'inclusion bancaire et de prévention du surendettement.

<sup>25</sup> Décision n° 2013-C-34 du 24 juin 2013 : approbation d'un code de bonne conduite relatif à l'information sur le relevé de compte du total mensuel des frais bancaires et du montant de l'autorisation de découvert à la demande de la Fédération bancaire française and Décision n° 2013-C-35 du 24 juin 2013 : approbation d'un code de bonne conduite relatif à la présentation des plaquettes tarifaires des banques suivant un sommaire-type et un extrait standard des tarifs à la demande de la Fédération bancaire française.



There is a lot of criticism of the exhaustive nature of the list from the perspective of consumer protection. This criticism is inextricably linked to the criticism on the full harmonisation nature of the Directive.

Several stakeholders have expressed the need to extend the list and/or to get rid of its exhaustive nature. According to one stakeholder, the modification mechanism should be kept very simple and should not give way to lengthy negotiations. The modification of the black list should according to some stakeholders not take place at the European level but be left to the MS since problems with commercial practices often are very much localised. For example, the regulation of sales is a predominantly French and Belgian issue. Some stakeholders would like to bring back the bans that were forced out of the *Code de la consommation*. The rapid digitalisation of the economy also strengthens the case for a modification of the list. A practice that could make it to the list according to one stakeholder is the practice consisting of hiding information on a website and making the information only accessible after several click-throughs.

One stakeholder – a public agency – has even suggested removing the list since no mechanism will ever be able to keep pace with actual developments.

- Are there other measures that could improve the effectiveness of the UCPD in establishing a high level of consumer protection in your country? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

France has a public authority that is specialised in informing the consumer and consumer associations: the INC.<sup>26</sup>

The (new) sanctioning mechanism tied to the sub-clauses of the UCPD under French law is considered very effective.<sup>27</sup> The recently enacted group action (art. L. 623-1 C.conso.), is also quoted as a useful addition to the arsenal of enforcement possibilities.

Some legal experts and stakeholders consider the enforcement system to be too far-reaching for it enables the DGCCRF to impose administrative fine of its own motion (without a court order).<sup>28</sup>

One consumer association suggested that the disgorgement of illegal profits should be made possible.

Another consumer association noticed that the use of harassment, coercion and undue influence often appears difficult to prove and that this problem of proof should be tackled more effectively.

### 1.1.2. Effectiveness of the PID in establishing 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;

All stakeholders consider that French consumers are effectively informed about the unit selling price and that traders are generally well-aware of their information duties and willing to abide by them. No major problems were mentioned as far as mandatory

<sup>26</sup> [http://www.conso.net/sites/default/files/pdf/INC\\_in\\_english.pdf](http://www.conso.net/sites/default/files/pdf/INC_in_english.pdf)

<sup>27</sup> N. Sauphanor-Brouillaud, 'Les sanctions des règles protectrices des consommateurs dans la loi relative à la consommation', *Revue des contrats* 2014/3, p. 471.

<sup>28</sup> See also : C. Minet, 'Loi Hamon : Le mieux est-il l'ennemi du bien ?', *Revue Lamy Droit des Affaires* 2014/93.

unit price indications are concerned. Regular and thorough inspections have been carried out by the DGCCRF in the recent years of economic downfall.

Prior to the PID, extensive and very detailed price indication regulation already existed in France. The PID has not been literally transposed.<sup>29</sup> France has enacted a long positive list of both food and non-food products to which the obligation to indicate the (measurement) unit price is applicable.

Moreover the obligation to indicate the price under the PID is coupled to the more specific information requirements laid down in the CRD (art. L. 112-3 and L. 112-4 C.conso.). Different rules work hand-in-hand as far as price indications are concerned. Problems related to price indications can also be addressed by the UCPD (price comparison, BOGOF).<sup>30</sup>

From the data provided by the DGCCRF it seems that consumers regularly complain about price information. One stakeholder indicated that the quality of the information pertaining to delivery costs sometimes constitute a problem. Another stakeholder pointed at problems with sales by lot.

The sanctions attached to the breach of all information duties regarding unit selling prices have recently been reinforced (art. L. 131-5 C.conso.).

- 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?

Under French law, there is an obligation to indicate the price per unit of measurement for a number of listed non-food products such as detergents.

Art. 4 of the loi Hamon<sup>31</sup> has introduced, on an experimental basis, a double price setting: during three years, from Jan 1<sup>st</sup> 2015 until Dec 31<sup>st</sup> 2017, sellers can opt to display both the unit price and the utility price for certain products. The introduction of the concept of the utility price can be explained by the transition from an economy of ownership to one of service functionality. This initiative has however been criticised for being very difficult to implement (what defines a product's utility and can this be measured in advance? What does the concept of '*économie de fonctionnalité*' entail?).<sup>32</sup> The initiative has had only very limited success, according to stakeholders.

- The effects of the regulatory choices/derogations allowed by the Directive and applied by Member States. [*Note: Key aspects to consider are: Is the derogation relevant? Do companies make use of it? Are there consumer complaints because of this? If so, approximately how many per year?*]

France has not made use of the derogation right under art. 6 PID. However, breaches of the PID rules by non-self-service retail outlets with a sales area not exceeding 120 m<sup>2</sup>, have been considered with a certain degree of forbearance, in line with legislation prior to the PID. Such outlets, where customers have to be advised and assisted by the seller, are relatively rare.

No complaints have been registered and, according to one stakeholder, this policy of tolerance and acquiescence should be continued as far as small local and mobile

<sup>29</sup> Consumer Law Compendium, p. 569,  
[http://ec.europa.eu/consumers/archive/cons\\_int/safe\\_shop/acquis/comp\\_analysis\\_en.pdf](http://ec.europa.eu/consumers/archive/cons_int/safe_shop/acquis/comp_analysis_en.pdf)

<sup>30</sup> Cass. Crim. 15 May 2012, n° 11-84125 (UFC/Entrepaticuliers.com).

<sup>31</sup> Loi n° 2014-344 du 17 mars 2014 relative à la consommation

<sup>32</sup> [http://www.economie.gouv.fr/files/files/directions\\_services/cnc/avis/2015/Rapport\\_sur\\_le\\_double\\_affiche\\_des\\_prix\\_de\\_vente\\_et\\_d\\_usage\\_des\\_biens\\_de\\_consommation.pdf](http://www.economie.gouv.fr/files/files/directions_services/cnc/avis/2015/Rapport_sur_le_double_affiche_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](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)

shops, mainly in rural areas, are concerned. The obligations resulting from the PID entail too much of a burden for those shops.

### 1.1.3. Effectiveness of the MCAD in providing protection for businesses

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

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

The scope of protection under the MCAD has been extended under French law. 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.).<sup>33</sup> These provisions, and the accompanying sanctions and enforcement mechanism 'transpose' the relevant MCAD provisions. The extension of the scope beyond the notion of 'advertising' is considered to provide better protection for businesses.

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

The principle-based approach to misleading advertising under the MCAD has been merged with the similar approach to misleading practices under the UCPD. There is no separate article dealing with misleading advertising in B2B-transactions in French law.

The principle-based approach to misleading practices of art. L. 121-2 C.conso. is viewed as quite effective. It was already into place long before the enactment of Directive 1984/450/EEC. In contrast to the general fairness-clause of art. 5 UCPD, French courts are very familiar with the misleading-clause and the concept of the average consumer who is traditionally defined as a '*bon père de famille*'.

An interesting development is the use of the misleading clause to combat human rights violations. Samsung world has been summoned to appear before a French court by Sherpa, a human rights defence group, and by trade union INDECOSA-CGT.<sup>34</sup> Samsung is accused of misleading the consumer about structural human rights violations.

- The effects of the minimum harmonisation provisions on misleading advertising; [Key aspects to consider are: Which national rules that go beyond the MCDA, 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)?]

National rules go beyond the MCDA. For instance, the misleading action provision and the black list of misleading practices of the UCPD applies to B2B-transactions (art. L. 121-2 and L. 121-4 C.conso.). They are considered to provide better protection for businesses since they are not restricted to advertising. The list has obviously advantages in terms of the burden of proof. This however can hardly be seen as 'gold plating' since the 'new' rules on misleading practices have not changed much to the existing situation: the rules in place on misleading advertising were already quite protective<sup>35</sup> and encompassed a wide range of commercial communications.<sup>36</sup> As for

<sup>33</sup> The provision transposing the misleading omission clause does not apply to B2B-transactions (art. L. 121-3 C.conso.).

<sup>34</sup> <http://www.humaniteinenglish.com/spip.php?article2947>

<sup>35</sup> See Piédelièvre, nr. 151

<sup>36</sup> Cass.crim., 19 February 2008, n° 07-83.858; Cass.crim., 11 December 2007, n° 07-82.903; CA Pau, 28 April 2005, JurisData n° 2005-270849

the black list, it has not had any noticeable impact yet. What is more, by merging the MCAD and UCPD clauses, the French legislator has not left much room for diverging applications of the misleading clause depending on the B2B or B2C nature of an advertisement. Although the *minimum* harmonisation MCAD provisions could, in theory, be interpreted more extensively and hence offer more protection than the *full* harmonisation UCPD rules, such a differentiation seems very unlikely. The 'old' misleading clause did not distinguish between B2C and B2B relations and courts are not used to make this distinction. Last but not least, the misleading omission clause (art. 7 UCPD) does not apply to B2B relationships. Given the very subtle difference between misleading actions and omissions, I cannot but wonder whether the protection of businesses against passive deception (the submission of incomplete information) might even have been reduced. Misleading omissions used to be covered by the 'old' misleading clause applicable to B2B-relations.<sup>37</sup>

Furthermore, traders can also invoke art. 1382 Code civil (unfair competition) to claim damages.

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

The criteria laid down in art. L. 122-1 C.conso. (the provision on comparative advertising) are not clear, according to one trade association, such as, for instance, the size/characteristics of the 'competitors' whose products are being compared: can a supermarket be compared with a hypermarket?

The full harmonisation clause is to some extent being circumvented by the introduction of contractual dispositions which fall outside the scope of the MCAD. The loi Hamon has enacted pre-contractual information duties pertaining to the online price comparison websites: art. L. 111-6 C.conso.

Art. L. 122-4 C.conso. forbids comparative advertising on packaging, travel tickets, means of payment or admission tickets. This prohibition is justified by the fact that such mediums are difficult to control. There is some doubt as to whether this rule is allowed by the Directive.<sup>38</sup> The same goes for art. L. 122-3 C.conso. which only allows comparisons between products that have the same '*appellation d'origine contrôlée*'.<sup>39</sup>

- 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;

The rules pertaining to comparative advertising are transposed in art. L. 122-1 – L. 122-7 and L. 132-25 C.conso (if the comparative ad is deemed illicit, the sanctions attached to the misleading practices apply). Their application has increased since the use of comparative advertising has increased in recent years.

The rules of the MCAD were deemed unable to deal with modern types of online comparative practices. Traders asked for the introduction of specific rules like the ones laid down in art. L. 111-5 ff C.conso by the loi Hamon in 2014.

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

Based on the available evidence and the interviews conducted for this country report, the rules are effective. The rules have however never been applied in a cross-border setting.

<sup>37</sup> Cass. crim., 28 sept. 1994, n° 92-84.302, Bull. crim., n° 308.

<sup>38</sup> Piédelièvre, nr. 138.

<sup>39</sup> Piédelièvre, nr. 141. ECLI:EU:C:2007:230, C-381/05 (De Landtsheer Emmanuel), para. 70.

A comparison between cross-border trade figures was deemed illicit in 1991.<sup>40</sup>

- Are there measures that could improve the effectiveness of the MCAD in providing protection for businesses (see also 1.1.6 below)? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

According to stakeholders, the effectiveness of the MCAD in providing protection for businesses could be enhanced if the full harmonisation clause relating to comparative advertising was removed.

#### 1.1.4. Effectiveness of current rules 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;

There are differences in the way the concept of the average consumer is being interpreted and applied but the interviewed trade associations do not think these differences in the interpretation of general clauses have had any impact on cross-border trade. The UCPD has not had any noticeable effect on cross-border trade since it is only a small part of the EU legislation relevant to traders and not the most relevant part. Moreover this legislation is considered very abstract and vague.

Clear-cut obligations as to the safety and conformity of products at both national and European level have a much larger impact on the decision to 'cross the border'. In that respect, brands such as IKEA or HEMA that have integrated chains of production have easier access to the internal market.

Cross-border trade is, according to one stakeholder, also seriously affected by 'gold plating', i.e. the implementation of additional (positive) duties at the time of the transposition of European directives (such as the obligation to inform the buyer about the availability of spare parts, which was introduced in the loi Hamon transposing the CRD).

Trade associations are proponents of European Regulations, of maximum harmonisation and of explicit, well-defined rules which they consider to be very effective in stimulating cross-border trade. If straightforward maximum rules cannot be agreed upon, they give preference to maximum rules which are less precise (like the ones in the UCPD). The possibility to fine-tune the interpretation of those rules at the European level is then indispensable according to one trade association.

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

No noticeable effects were mentioned during the interviews. The list is very detailed and the listed practices represent only a very small part of the large array of commercial practices.

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

<sup>40</sup> TGI Paris, 23 septembre 1991, Gaz. Pal. 1991, 2, pan. jurispr. 576 (Renault/Volkswagen). According to the advertisement, Renault sold twice as many cars in Germany as Volkswagen sold in France. The figures mentioned in the ad were accurate, but the ad hinted at the fact that they resulted from the inferior quality of Volkswagen cars. The court ruled that the ad did not meet the objectivity requirement.

cross-border trade. [*Do the national differences play a role in a business perspective? Have they caused problems?*]

No noticeable effects were mentioned during the interviews.

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;

Cf. the findings concerning the UCPD.

Art L. 122-1 ff C.conso. transposes the dispositions relating to comparative advertising. No noticeable effects were mentioned. Cross-border comparative advertising (between brands or shops in two different MS) is very uncommon.

- Whether the minimum harmonisation character of provisions on misleading advertising represents a barrier to cross-border trade;

Those provisions have been merged with the maximum provisions of the UCPD and do not exist separately. No noticeable effects were mentioned.

- 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;

Cross-border comparative advertising (between brands or shops in two different MS) is sparse.

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

Based on the available evidence and the interviews conducted for this country report, this is not the case.

#### 1.1.5. Interplay amongst UCPD information requirements according to Article 7(4) with the information requirements in the horizontal consumer law instruments

Regarding the information requirements according to Article 7(4) UCPD ("invitation to purchase") in the advertising stage, please analyse:

- The level of awareness of traders as regards information requirements at the advertising stage, as in particular demonstrated by their practical application; [*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?*]

Art. L. 121-3 C.conso. transposes art. 7(4) UCPD. The information requirements of the CRD are laid down in art. L. 111-1, L. 112-1 ff (price) C.conso.

The level of awareness of the information requirements is satisfactory according to consumer associations. The requirements are generally well implemented, even though there are some exceptions. Small traders appear to have more difficulties implementing new obligations. Members of trade associations are more aware of the requirements than non-members, according to different stakeholders.

There are limits to the overlap between the CRD and UCPD and sometimes the claimant has no choice but to found his claim on the more detailed duties of the CRD.



Art. L. 111-1(6) C.conso. regarding the information about the access to ADR is not covered by art. 7(4) UCPD. This information requirement is not always complied with, according to one stakeholder. Besides, art. 5 CRD, which is based on minimum harmonization, has led to additional information requirements (whose breach does not amount to a misleading omission in the sense of art. 7(4) UCPD).

The choice to apply the provisions from the CRD or the UCPD provisions (misleading omission) depends on the seriousness of the infraction, on the size of the trader and the extent of the practice and of the damage caused. The latter provisions require an impairment of the consumer's ability to make an informed decision. The breach of positive obligations from the CRD is much easier to prove and many stakeholders prefer to fall back on the CRD (and on sectoral legislation or the E-commerce directive). The UCPD is then used to further back up the claim.

What is more, the breach of the UCPD rules is sanctioned differently. The sanctions tied to the UCPD are much stricter (a UCPD constitutes a criminal offense<sup>41</sup>) than those attached to the CRD.

Different stakeholders have questioned the utility of information obligations. They tend to protect the trader and not so much the consumer-who cannot deal with the information overload. Furthermore, a lot of mandatory information is incorporated in the GTC, which is problematic from a viewpoint of transparency. Consumers do not read the fine print, according to stakeholders.

There is criticism from trade associations of the French tendency to 'gold plate', by adding new obligations to the already long list of European information duties: they point for example at the recently enacted obligation to inform customers about the availability of spare parts.

- 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?

One stakeholder criticised the particularly ineffective interplay (and possible contradiction) between the E-Commerce Directive and the open-textured UCPD. The E-Commerce Directive seems not fit to address recent developments regarding platforms.<sup>42</sup> The UCPD obliges such platforms to provide clear information. Hosting sites however do not bear any responsibility under the E-Commerce Directive and the UCPD does not offer a clear and concrete lead to create such responsibilities. The UCPD is considered too vague to deal with particular e-practices. To fill in the void, pre-contractual positive information obligations applicable to platforms, have been laid down in art. L. 111-7 C.conso. by the national legislator.

No overlaps or extra costs were mentioned during the interviews.

#### 1.1.6. Relevance for business-to-business transactions

Regarding the area of unfair commercial practices/marketing, please analyse:

- 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 cross-border trade;

The framework covering B2B unfair commercial practices entails an effective combination of hard and soft law at both European (cf. the principles of good practices

<sup>41</sup> See for example: Supreme Court, 13 January 2016, n° 14-84072, EUROCHALLENGES FRANCE c/ unknown

<sup>42</sup> Cf. the recent Guidance document of the Commission, p. 127.



in the food supply chain)<sup>43</sup> and national level (cf. the *Commission d'examen des pratiques commerciales*, cf. art. 440-1 *Code de commerce*).<sup>44</sup> The *Code de la consommation* for instance provides a certain level of protection: as was mentioned before, the provision pertaining to misleading practices (art. 6 UCPD) and the black list of misleading practices from the UCPD also apply to B2B relationships. Title IV, Book IV of the *Code de commerce* headed 'Transparency, restrictive competition practices and other prohibited practices', also contains many provisions such as art. L. 441-7 or art. L. 442-6(I), which provide a high level of protection to traders against different abusive commercial practices (cf. section 1.2.2 and 1.2.3 of this report). The protection laid down in Title IV has been strengthened in recent years.<sup>45</sup>

According to stakeholders, there is no need to extend the application scope of the provisions on aggressive practices, although one stakeholder noted that small businesses may suffer from specific commercial practices (such as 'acquisition' fraud with bogus invoices). Based on the available evidence and the interviews conducted for this country report, it is concluded that there are enough rules warranting fair B2B relationships and there is no need to extend B2C protection rules to B2B transactions.

The coverage of B2B practices is already very comprehensive and there is no need for additional rules from European origin. One stakeholder even questioned the need for the high amount of B2B protection rules pointing at MS where no such rules exist.

- 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;

All trade associations rejected the idea of an alignment and advocated a strict separation between the two legal regimes. The B2B relationship is, as opposed to the B2C relationship, not fundamentally imbalanced. B2C rules are not adapted to B2B transactions<sup>46</sup> and B2B relationships should be covered by their own set of rules (such as is the case now with the MCAD and the *Code de commerce*).

- 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 also cover unfair commercial practices during and after the transaction;

Based on the available evidence and the interviews conducted for this country report, it is concluded that businesses are well enough protected under French law at all stages of the contract by the *Code de la consommation* (art. L. 121-2 and L. 121-4 C.conso.) and the *Code de commerce*.

- Whether there is a need to have a black-list of practices in the business-to-business marketing area;

One trade association referred to the list established by the supply chain initiative.<sup>47</sup> If the protection is to be extended to B2B transactions at the European level, the stakeholder expressed their preference for a list of clear-cut bans. Another stakeholder

<sup>43</sup> Supply chain initiative, <http://www.supplychaininitiative.eu/about-initiative/principles-good-practice-vertical-relationships-food-supply-chain>

<sup>44</sup> [http://ec.europa.eu/internal\\_market/retail/docs/140711-study-utp-legal-framework\\_en.pdf](http://ec.europa.eu/internal_market/retail/docs/140711-study-utp-legal-framework_en.pdf)

<sup>45</sup> The rigidity of the protective provisions introduced by the loi Hamon has been criticised and more flexible provisions were introduced in 2015 by the loi Macron.

<sup>46</sup> The concept of the "bon père de famille" cannot for example be applied to a trader.

<sup>47</sup> [http://www.supplychaininitiative.eu/sites/default/files/b2b\\_principles\\_of\\_good\\_practice\\_in\\_the\\_food\\_supply\\_chain.pdf](http://www.supplychaininitiative.eu/sites/default/files/b2b_principles_of_good_practice_in_the_food_supply_chain.pdf)

however warned for the risk of reverse reasoning with black lists ('if it is not forbidden, it is allowed').

- What should be the enforcement cooperation mechanism in the business-to-business marketing area;

A preventive mechanism at the European level with more accurate notifications and information sharing is being preferred. One stakeholder mentioned the Technical Regulations Information System (TRIS). The introduction of a similar system could prevent creating barriers in the internal market before they materialize. Member States notify their legislative projects regarding commercial practices to the Commission which analyses these projects in the light of EU legislation.

- Whether there is a need to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive;

Based on the available evidence and the interviews conducted for this country report, it is concluded that businesses, the existing possibilities to claim damages under French civil law are seen to be sufficient and there is no need to tie new contractual remedies to the breaches of the MCAD.

- Whether there is a need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive.

According to one stakeholder, the rules on comparative advertising need to be clarified and updated. The French legislator already took some steps in adapting the rules to new developments such as the digitalisation of the economy by adopting specific rules as far as comparative websites are concerned (art. L.111-5 *Code de la consommation*).

#### 1.1.7. Relevance of contractual consequences of unfair commercial practices

Please analyse whether there are in your country:

- 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;

If an aggressive commercial practice leads to the conclusion of a contract, this contract is deemed null and void (art. L. 132-10 C.conso.).

Although contracts concluded under the influence of misleading practices are not expressly sanctioned in the *Code de la consommation*, it has been argued that such contracts can be deemed null and void as well in view of art. 6 of the Civil code (the misleading practice constitutes a breach of the '*ordre public de protection*').<sup>48</sup>

Be that as it may, unfair commercial practices are likely to lead to a vitiated consent, in which case, the contract is voidable (duress, undue influence, deceit or emotional distress).<sup>49</sup> It is up to the consumer to prove the vitiated consent.

- Any case law (enforcement decisions, court rulings) providing for such consequences;

<sup>48</sup> Calais-Auloy and Temple, no. 108.

<sup>49</sup> G. Chantepie, La détermination de sanctions effectives, proportionnées et dissuasives des pratiques commerciales déloyales, in E. Terryn & D. Voinot (eds), *Droit européen des pratiques commerciales déloyales: Evolution et perspectives* (2012), p. 86 ff.

The nullity of the contract concluded under the influence of an aggressive practice is seldom invoked by consumers. The *'abus de faiblesse'* – a national disposition that also leads to nullity – is more often used.

In the Doublô-case in which the Caisse d'Épargne has been accused of misleading advertisement<sup>50</sup>, the validity of the contracts concluded under the influence of the practice was not challenged. There were no contractual consequences. Consumers could however seek damages, since a misleading practice can be considered faulty.

- Whether there is, based on past experience in your country, a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

Contractual consequences are not always needed. Depending on the practice, a consumer may rather claim for compensation than annul the contract. Most stakeholders favour the possibility to seek compensation, even in case of trifle losses.

Different stakeholders – even consumer organisations – are a bit reluctant as to introducing a contractual remedy in case of a breach of the general fairness- or the misleading clause.

Such a sanction is only acceptable provided the decision to contract was actually materially impaired by the unfair or misleading practice. The question is whether all the information mentioned in the UCPD always has the same actual (causal) impact on the decision to conclude or renew a contract. Even if the information is considered material by the UCPD, it does not mean it actually influences the consumer's decisions.

A second 'condition' would be that a consumer does not use her contractual remedies in a manner which is incompatible with principles of civil law such as the principle of good faith. Recently, the abuse of consumer contractual rights has been reprimanded by the *Cour de Cassation*. It ruled that consumer can only cancel a life insurance contract on the basis of a breach of an information duty (art. L. 132-5-2 Code des assurances) provided he or she acts in good faith.<sup>51</sup>

One stakeholder suggested to award punitive damages to the consumer.

## 1.2. Contract conclusion and performance

### 1.2.1. Effectiveness of the current rules in establishing 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;

This approach is deemed quite effective by all stakeholders in view of the amount of case-law. Stakeholders stress the importance of the minimum harmonisation nature of the clause and commend its flexibility. It enables courts to tackle new terms and to take into consideration the concrete circumstances of the case.

The fairness-clause is applied in a rather consistent and objective way and there is a lot of (both national and European) jurisprudence available.<sup>52</sup> The general clause does

<sup>50</sup> <http://doublô.monde.free.fr/>

<sup>51</sup> Cass. civ. 2, 19 May 2016, n° 1512.767, ECLI:FR:CCASS:2016:C200776.

<sup>52</sup> Pavillon 2011.

not contain any reference to the principle of good faith in order to warrant a more objective interpretation of the fairness-clause.<sup>53</sup>

One stakeholder stressed that the intervention of a court is necessary to get rid of terms that are unfair under the general clause and that ADR bodies (*'médiateurs'*) do not apply the law (i.e. the general clause seems not fit for ADR). This goes at the expense of its effectiveness.

Trade federations such as the Medef have actively informed their members about the legislation on UCT.<sup>54</sup> Most compliance problems now occur in the field of digital services with new actors which are often operating from abroad (social media, internet providers, streaming services).

- 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 your MS? Does this work in practice or are there problems?*]

The indicative list is not considered to be very effective.<sup>55</sup> It only gives some examples of unfair terms and leaves the burden of proof on the consumer. The indicative list, which was attached as an Annex to the *Code de la consommation*, has had only little impact on the application of the general clause in the period before the introduction of the domestic grey and black lists. These lists however are to a large extent based on the European list (10 black terms and 8 grey terms also figure on the European list).

The terms listed in the similarly indicative recommendations by the *Commission des clauses abusives* (CCA) have had more impact in practical cases.<sup>56</sup>

- 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; [*Note: If a black/grey list exists in your country, key aspects to consider are: How does the list work in practice? Does it make a difference to have such a list?*]

Yes, the national lists represent a considerable advantage for consumer protection compared to the purely indicative list of the Directive.

In 2010, the *Code de la consommation* was amended to allow the creation by decree of a black list of contract terms which are unfair and automatically ineffective ('deemed not written') and a grey list of clauses that are presumed to be unfair, imposing a burden on a business to prove otherwise.<sup>57</sup> The black and grey lists are referred to in art. L. 212-1(4) and art. L. 212-1(5) respectively, and laid down in art. R. 212-1 and R. 212-2 C.conso, respectively. Some clauses are forbidden by the Code civil (e.g. the arbitration clause).<sup>58</sup>

The lists are relatively easy to enforce, both in individual and in collective (injunctive) procedures. Especially the black list confers significant protection upon the consumer and provides a high level of legal security to traders. One stakeholder argued in favour of a further extension of the black list.

The DGCCRF can order a trader to stop using black clauses without requiring a court decision. This injunction can be published. The DGCCRF can also impose an

<sup>53</sup> Picod, nr. 314.

<sup>54</sup> <http://www.medef.com/medef-corporate/publications/fiche-detaillee/categorie/2009/back/106/article/eviter-les-clauses-abusives-dans-les-contrats-de-consommation.html>

<sup>55</sup> Piédelièvre, nr. 459 a).

<sup>56</sup> Piédelièvre, nr. 463.

<sup>57</sup> Decree n° 2009-302 of 18 March 2009.

<sup>58</sup> Piédelièvre, nr. 471-472.

administrative fine on traders who make use of a clause which is black-listed (art. L. 241-2 C.conso.).

One stakeholder commended the combination of the lists and the general clause.

Another stakeholder pointed at the qualification problems that sometimes occur when a list is invoked. Discussions often arise as to the question whether the clause matches the definition on the list. This stakeholder pleaded for clear definitions.

- 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: In your country, have the effects of court decisions establishing the unfairness of an unfair term been extended to all contracts of the trader concerned or to the contracts of any other trader containing such a term? If so, how does this work in practice? What are the impacts on businesses? If there are no such effects of court decisions on unfair terms: what are the effects of this situation?]

Under French law, the qualified entities (the DGCCRF and consumer associations) are entitled to request before the French jurisdictions the deletion of an unlawful or abusive clause included by the seller in any contract or type of contract (intended to be) offered to consumers.

A qualified entity may also request 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 (art. L. 524-1(2) and (3), L. 621-2(2), L. 621-8(2) C.conso.). This article implements the *erga omnes* effect of art. 7 UCTD (cf. the Invitel-ruling of the CJEU).

It is too early to indicate the impact of the new articles. Traders have not yet complained about the *erga omnes* effect.

One stakeholder has questioned the effectiveness of this provision, for the *erga omnes* effect only affects identical – and not similar – contracts. A strict interpretation of this requirement could be easy to circumvent.

This stakeholder also pointed at the fact that the possibility to tackle terms in contracts which are no longer utilised (*pas en cours d'exécution*) created by the loi Hamon,<sup>59</sup> has been repelled on July 1<sup>st</sup> 2016. Lawsuits against unfair terms are useless when the disputed contract term is no longer proposed by the trader to the consumers (and this is regularly the case).

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

The contractual transparency requirements are seen as indispensable, meaningful and quite effective despite the lack of a clear-cut sanction applicable in collective actions. The transparency and visibility of GTC is as big a problem as their unfairness. One stakeholder stressed the importance of the use of the French language.

These requirements have been transposed into art. L. 211-1(1) C.conso. In case of a breach of the requirements, the *contra proferentem* rule applies in an individual B2C-dispute (art. L. 211-1(2) C.conso.).<sup>60</sup> A term in breach of the transparency requirement is not per se unfair. One stakeholder regrets the lack of a nullity sanction. However, intransparent and misleading terms happen to be found unfair when they

<sup>59</sup> Raymond, nr. 499.

<sup>60</sup> Cass. Civ. 1re 22 May 2008, no. 05-21822, Bull. civ. N° 145.

also cause a significant imbalance to the detriment of the consumer (but to be nullified they must be reviewed against the fairness clause).<sup>61</sup>

The breach of the transparency requirement is often invoked in combination with art. L. 212-1(3) so as to tackle terms relating to the main subject-matter of the contract which do not meet the transparency requirement. The *Tribunal de grande instance de Nîmes* recently referred preliminary questions to the CJEU about the transparency of core terms.<sup>62</sup>

- 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. [*Note: Question only relevant for MS that have put in place extensions of application of UCTD*]

France has extended the application of the Directive (art. L 212-1 C.conso.) to individually negotiated terms.

This extension is very important according to different stakeholders since it prevents discussions on the negotiated status of contract clauses and lightens the burden of proof placed on the consumer. The term 'non-negotiated' can be interpreted in different ways and a rigid reading of this requirement is detrimental to consumers. As a matter of fact, consumers are not capable of negotiating GTC.

- 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?*]

According to L. 241-1 C.conso., an unfair term is deemed 'not written'. Consumers are generally ignorant of the protection conferred upon them by the legislation on unfair terms. Collective enforcement by public authorities and associations (cf. the next section on injunctions), and the *ex officio* application are therefore indispensable.

The *ex officio* application of the fairness test is laid down in art. R. 632-1 C.conso. The first version of the article (2008) only spoke of a competence but later versions of the article (2014 and 2016) stress the compulsory nature of the *ex officio* application of the UCTD. The CJEU case-law has to a large extent helped shape the applicable law. A national court is now (in line with the Pannon-judgment) required 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.

The Cour de Cassation (the first civil chamber) has (after a long period of 'resistance'<sup>63</sup>) explicitly acknowledged the competence of national courts to apply the test of their own motion.<sup>64</sup> In practice, many lower courts<sup>65</sup> however do not have the time, the knowledge or the means to review contract terms of their own motion. Many

<sup>61</sup> Pavillon 2011, nr. 233. CA Paris 15 June 2001; TGI Niort 9 January 2006.

<sup>62</sup> ECLI:EU:C:2015:262, Case C-96/14 (Van Hove). The proceedings concerned an allegedly unfair contractual term in an insurance contract that includes the definition of 'total incapacity for work' for the purposes of that company's cover of repayments on mortgage loans taken out by Mr Van Hove.

<sup>63</sup> First the Cour has taken the stance that consumer protection rules ('*ordre public de protection*') may not be applied *ex officio* by French courts but only following a plea raised by the consumer. Then it has taken the stance that the consumer has to invoke and to prove the facts on the basis of which the court can apply the rule of its own motion (whereas according to the Pannon-ruling a court must proceed to review a term if it has available to it the legal and factual elements necessary for that task).

<sup>64</sup> Cass. Civ. 1re, 30 mai 2012, n° 11-12242.

<sup>65</sup> There are a few exceptions though, such as the 'specialised' courts in Paris and Grenoble.



stakeholders have pointed at the lack of legal training of the magistrates in the field of European consumer law. Again, the introduction of these legal provisions is too recent to assess their effect.

Administrative remedies are only open to the DGCCRF (that collects consumer complaints).

The sanction is not fit for the purpose of alternative – amicable – dispute settlement (ADR).

- In a forward looking perspective: Are there other measures that could improve the effectiveness of the UCTD in establishing a high level of consumer protection in your country? Would a graphical presentation model improve the readability and comprehension by consumers of the T&Cs? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

Regarding improvement measures, one stakeholder requested more European initiatives concerning pan-European GTC (car rentals). Another suggested the drafting of a European list of unfair terms based on the case-law of the MS.

More legal training of magistrates could help increase the effectiveness of the UCTD.

According to stakeholders, graphical presentation would improve the readability but not necessarily the comprehension by consumers of the very complex GTC since a graphical presentation in itself would not be sufficient. There would always be a need for an additional text to grasp the full meaning of the terms.

Regarding best practices, most stakeholders are very positive about the national grey and black lists of unfair terms.

French professionals and courts seek guidance in the very detailed recommendations of *the Commission des clauses abusives (CCA)*, a public *ad hoc* authority attached to the Minister in charge of Consumer Affairs that consists of a member of the national legal service, two legal or administrative magistrates or members of the Council of State, two entities qualified in contract law or technique, four professionals' representatives and four consumers' representatives. The CCA recommendations can be looked upon as a successful example of mixed public-private guidance.

One stakeholder pointed at the very formal information requirements in the Code des assurances which oblige the trader to place a 'key information box' at the top of the contract (art. A 132-8 and L. 132-5-2 *Code des assurances*).

### 1.2.2. Effectiveness of the current rules 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 disparities have an impact on cross-border trade; [*Key aspects to consider are: Do national differences in the application/implementation of the Directive play a role for businesses? Have these differences led to changes in their business strategy? Have these differences caused problems?*]

A comparative law study conducted by the present author a few years ago revealed noticeable differences in the way the different MS interpret the general clause.<sup>66</sup> The stakeholders confirmed those findings. The 'no show' clause that was seen as fair by a

<sup>66</sup> Pavillon 2011.



Belgian court<sup>67</sup> in the coordinated procedure against air carriers had for instance been deemed unfair by Austrian, German and Spanish courts<sup>68</sup>.

Diverging interpretations have a negative direct impact on cross-border trade in the sense that it adds to the high level of legal uncertainty that is created by general clauses, minimum harmonisation and the lack of harmonisation of contract law at the European level. From the point of view of consumer associations it makes the scarce and costly actions aimed at protecting the 'cross-border consumer' more risky.

However, many stakeholders – consumer organisations and enforcement authorities – have indicated that they attach much value to minimum harmonisation and to national protective measures such as the lists.

- 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;

There are no indications that the lists represent a barrier to cross-border trade.

- 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.

There are no indications that the extension of the application of the UCTD to negotiated terms represents a barrier to cross-border trade.

### 1.2.3. Relevance for business-to-business transactions

Regarding the area of contractual fairness and in relation to the Unfair Contract Terms Directive, please analyse:

- Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;

The rules on UCT laid down in the *Code de la consommation* apply the '*non-professionnel*', a legal entity acting for purposes which are outside his commercial activity (cf. art. L. 212-2 C.conso.).<sup>69</sup> In other circumstances, 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, irrespective of the size of the business. 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 their size).

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.

<sup>67</sup> Cess. Pr. Com. Namur 10 mars 2010 - TA c. Brussels Airlines para. 8.

<sup>68</sup> 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.

<sup>69</sup> Recent case-law of the Cour de Cassation (Cass. Civ. 1re, 23 June 2011, n° 10-30645 and Cass. Civ. 1re, 1 June 2016, n° 15-13236 ASSOCIATION SOCIETE PROTECTRICE DES ANIMAUX c/ unknown) has shown that this category is very broad. This broadness goes at the expense of the effectiveness of the UCTD since consumers may not invoke those rules against a large category of GTC-users.

What is more, the current revision of the *Code civil* (law of obligations)<sup>70</sup> 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.

It is very likely that art. L. 212-1 C.conso. constitutes a *lex specialis* in case of a B2C-transaction but this must be confirmed. Indeed, the *ex officio* application of art. 1171 Code civil seems problematic since the legislator has opted for 'relative' nullity at the aggrieved party's request.

- 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;

As opposed to the B2C relationship, the B2B relationship is not fundamentally imbalanced. And even if the relationship is imbalanced, this imbalance is not necessarily detrimental: each party can benefit from a business deal.

According to one stakeholder, a system of protection based on the significant imbalance seems appropriate for standard B2B agreements or in case a trader acts for purposes which are outside his commercial activity. As was explained before, such a system is already (being put) in place and there is no need for new rules.

The existence of three fairness-tests (including the European test) next to each other in French law is nonetheless considered a threat to legal certainty by some stakeholders.

The legal certainty of the contractual fairness provision laid down in the Code de commerce has been challenged before the French Constitutional Court. This Court however stressed the similarity between the imbalance-test of art. L. 212-1 C.conso. and art. L. 442-6(I)(2°) *Code de commerce*, and held that the former provision abided by the constitutional requirement of legal certainty.<sup>71</sup>

In any case, the extension of the scope of the UCTD should not have any impact on the current state of the law nor should it lessen the level of protection afforded to traders.

- 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;

The scope of the new article of the *Code civil* – its restriction to standard agreement forms – seems appropriate, although discussions could arise with regard to the non-negotiated nature of a clause.

One stakeholder suggested that in concrete cases, depending on the specificities of the B2B relation, the possibility to forbid negotiated terms could be useful, for instance if a trader is forced to "negotiate", i.e. to accept a contract term.

- 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;

<sup>70</sup> Ordonnance du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations.

<sup>71</sup> Conseil constitutionnel 13 January 2011 décision n° 2010-85 QPC, paras 3 – 4 and see Petites Affiches 13 April 2011, no. 73, p 17.

Art. L. 442-6(II) *Code de commerce* lists a few contract terms which are deemed void in a B2B transaction. Case law also offers many examples of unfair terms in B2B contracts.<sup>72</sup>

Otherwise, all stakeholders consider that the applicability of the general clause to B2B contracts largely suffices.

Furthermore, it can be expected that the civil courts will flesh out the general clause of the civil code with the lists from the *Code de la consommation*.

- Whether there is a need for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive;

One stakeholder questioned the value-added benefit of such an obligation. Problems in the B2B relationship do generally not pertain to a lack of transparency or misunderstanding but to the impossibility to negotiate and the intrinsic imbalance of the terms of contract.

Most stakeholders are reluctant as far as the introduction of new protective measures for businesses are concerned (including the consulted trade associations).

French law already contains many formal requirements mandating the transparency of B2B contracts.

- Whether an extension of the Unfair Contract Terms Directive to B2B transactions can bring benefits for cross-border trade;

There are no indications that an extension of the minimum UCTD would benefit cross-border trade or create a level-playing field (differences in the level of protection will remain).

According to all stakeholders, if the UCTD is to be extended, the directive should stick to its minimum harmonisation goal, in order to avoid a reduction of the level of protection in place. It should also specifically take into account the specificities of B2B transactions, in order to prevent a negative impact on commercial relationships. B2C and B2B relationships are fundamentally different in nature. One stakeholder reiterated its opposition to the extension of consumer rules to B2B relationships, which need their own set of rules.

- Whether the consequences of such an extension would have an effect on innovation by or market opportunities for SME providers/suppliers;

There are no indications that an extension of the UCTD would affect market opportunities.

- Whether the benefits of extending the scope to business-to-business transactions would exceed the negative consequences of such an extension.

Stakeholders rather hold on to the national legislation on B2B contract terms. Extending the scope of the minimum UCTD has no value-added whatsoever.

<sup>72</sup> E.g. asymmetric provisions on terms of payment, on price revision, on unilateral termination of a contract without notification or compensation.

### 1.3. Injunctions

#### 1.3.1. Effectiveness of the current rules in establishing a high level of consumer protection

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

- To what extent is the use of the injunction procedure in your country contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment?<sup>73</sup>

The injunctions procedure has been embedded in an already developed system of injunctions against unfair terms and is not limited to cross-border infractions.<sup>74</sup> The ID has been transposed by adding a (first) paragraph to the existing disposition in the *Code de la consommation* (the former art. L. 421-6 C.conso).

In the amended *Code de la consommation*, the 'European' injunction procedure and the injunction procedure specifically aimed at unfair terms have been laid down in two different articles of law (art. L. 421-6 has been divided into art. L. 621-7 and art. L. 621-8 C.conso.).

The use of the injunction procedure in France is widespread and very effective in the fight against unfair terms. The injunction procedure based on the ID has in practice mainly been used to tackle unfair terms.<sup>75</sup> The length of the procedure has been criticized: it takes years to obtain to decision that can be enforced.

The DGCCRF can also bring an action seeking an injunction against both domestic and traders from other MS. The latter procedure is however based on Regulation 2006/2004 (art. L. 524-1 and L. 524-2 C.conso.). The mechanism of mutual assistance established by the CPC Regulation has been preferred to cross-border procedures.

The DGCCRF itself is also competent to order the cessation of, and to fine the infringement of specific consumer rules.<sup>76</sup> These autonomous injunction competences are relatively new (2014) and their effectiveness cannot yet be measured. The first signs are promising.

- What measures in your national legislation on injunction procedure are considered to be particularly effective, if any: measures regarding the cost of the procedure, the 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?

The DGCCRF, as opposed to consumer organisations, does not need to be represented by a lawyer (*'dispense de ministère d'avocat'*, art. R. 525-3 C.conso.), which reduces the costs of a (public) injunction action. The representation costs consumer organisations have to bear are considered to be contra productive: these costs can run high and are not completely covered by an awarding of costs (art. 700 *Code de procédure civile*).

A regular injunction procedure is seen as lengthy, complex and expensive.

<sup>73</sup> Consumers' detriment should be understood as consumers' financial loss caused or that could have been caused by the infringements as defined by art. 1(2) of the Injunctions Directive.

<sup>74</sup> The injunction procedure in the *Code de la consommation* has seen the light of day with the enactment of the Loi n° 88-14 du 5 janvier 1988 relative aux actions en justice des associations agréées de consommateurs et à l'information des consommateurs.

<sup>75</sup> Raymond, nr. 974.

<sup>76</sup> The rules transposing the UCPD are however not part of these rules and concerning the UCTD, only art. L. 241-2 C.conso. regarding the black list of unfair terms entails an administrative fine.

A summary procedure exists (*'référé'*) in case an urgent court decision is needed (Art. 484-492 *Code de procédure civile*). This procedure lasts approximately two months but does not lead to a final decision (but to a *'ordonnance provisoire'*). This procedure is sometimes being used in case of a misleading practice.

The obligation to inform consumers by all appropriate means about the unfairness of contract terms (Art. L. 621-8(2) C.conso.) is considered a very effective 'sanction' (see para. 1.2.1). Traders fear negative publicity. For the same reason, art. L. 621-11(1) C.conso. (the publication of an injunction order in a newspaper or on a website<sup>77</sup>) is viewed as a particularly (even the most) effective measure: traders especially fear the obligation to publish the decision on their own website.

Art. L. 524-2, L. 621-2(1) and L. 621-8(1) C.conso. contain a sanction for non-compliance with the injunction order (the *'astreinte'* or penalty payment). This sanction increases the effectiveness of the injunction order.

The non-compliance with the injunction order may also lead to the imposition of very severe sanctions (see for example art. L. 132-9 C.conso. regarding misleading practices: the non-compliance with a court order is punishable by a prison term of two years and a fine of EUR 300 000).

Pecuniary sanctions are deemed ineffective by some stakeholders: even though fines have been raised in the loi Hamon, breaching the law still remains profitable for some (bigger) traders.

The *Cour de Cassation* has tied the injunction to an obligation to pay damages if the general interest has been breached.<sup>78</sup> These damages are not proportionate to the prejudice caused according to a stakeholder and they have no deterrent effect.

The French legislator has not transposed art. 5. In practice, a prior consultation often takes place in proceedings regarding unfair terms but when there is a blatant breach of consumer law; consultation does not make any sense according to one stakeholder.

The injunction order in itself is deemed effective (especially when coupled to a penalty payment and the obligation to publish it on a website). Its effects are mainly noticeable in the fight against unfair terms.

- Has your country extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunction Directive? If yes, what are the additional consumer rights covered?

The 'European' injunction procedure (which is open to European qualified entities) is laid down in art. L. 621-7 C.conso. This procedure is expressly confined to acts which are illicit in view of the pieces of EU legislation listed in the Annex I to the Injunction Directive.<sup>79</sup> There is no requirement that this illicitness constitutes a criminal offense. The provision explicitly refers to the list in the Annex. This raises the problem of the identifiability of those pieces of legislation since it is not always clear which provisions in French law transpose European Directives.

Interestingly, art. L. 621-8 C.conso. refers to both illicit and unfair clauses. The difference between these concepts is not clear (since an unfair term can be deemed illicit as well).

There is also an injunction procedure which is attached to a civil action to protect collective consumer interests in case of a collective prejudice. This action is only accessible for national entities. According to art. L. 621-2 C.conso., all the acts (*'agissements illicites'*) and clauses (*'clauses illicites'*) which are illicit on the basis of French law can be the object of this 'national' injunction procedure (such as an 'abus

<sup>77</sup> Cass. Civ. 1re 3 June 2015, n° 14-13193 (UFC/SFR).

<sup>78</sup> Cass. Civ. 1ère, 5 October 1999, Bull. civ. I, n° 260, Picod, nr. 633.

<sup>79</sup> Raymond, nr. 975.

de faiblesse' or a clause which is in breach of a legislative or reglementary provision). National associations thus have at their disposal different procedures and often invoke both provisions.

The injunction procedure reserved for the DGCCRF covers all acts and clauses which are deemed illicit on the basis of all national and European rules with regard to which the DGCCRF is competent (art. L. 511-5-L. 511-7 C.conso.).

- Analysis of the obstacles to the effective use of the injunction procedure, in particular by analysing which progress in removing obstacles has been made and/or new difficulties that have emerged in your country since 2012.

The obstacles to the effective use at the national level that were mentioned by the interviewees pertain to:

- The openness of clauses (and related problems in terms of proof);
- The length of the procedure;
- The costs of the procedure (legal assistance).

The obstacles to the effective use at the EU level that were mentioned by the interviewees pertain to:

- The costs of the procedure (legal assistance, translation, travel costs);
- Language problems (national entities want to be able to proceed in their own language);
- The applicable law/the choice of law (maximum harmonisation does not prevent diverging interpretations);
- Differences in procedural laws/complexity of the procedure/potential problems with the enforcement/execution of the ruling.<sup>80</sup>

Since 2012, the autonomous administrative injunctive competences of the DGCCRF at the national level have been enlarged.

No other measures were taken to reduce the above-mentioned obstacles.

- In a forward looking perspective: Should the coverage of the Injunctions Directive be extended (by including additional legislation into Annex I to the Directive)? If so, which EU legislation should be included? Are there other measures that could improve the effectiveness of the ID in establishing a high level of consumer protection? Should the scope of the Injunctions Directive be extended to the protection of collective business' interests? Are there best practices in your country that could be relevant for other countries and considered as model for the injunction procedure at EU level?

The limited scope of art. L. 621-7 C.conso. has been severely criticised by different stakeholders.

According to consumer associations, the European procedure should be extended to all the directives which have an impact on the position of the consumer, including for example Intellectual Property- and Privacy-directives (so as to combat commercial practices and unfair clauses in social media-agreements).<sup>81</sup> The list is seen as an

<sup>80</sup> The complexity of a cross-border action is well-illustrated by the joint action by the Centre Européen de la Consommation and the Union féminine civique et sociale, association française de défense des consommateurs against the german Commerzbank : [http://www.cec-zev.eu/fileadmin/user\\_upload/cec-zev/PDF/documentation/etudes/Etude\\_action\\_de\\_groupe.pdf](http://www.cec-zev.eu/fileadmin/user_upload/cec-zev/PDF/documentation/etudes/Etude_action_de_groupe.pdf)

<sup>81</sup> [http://www.lemonde.fr/technologies/article/2014/03/25/donnees-personnelles-l-ufc-assigne-twitter-facebook-et-google-pour-clauses-abusives\\_4389172\\_651865.html](http://www.lemonde.fr/technologies/article/2014/03/25/donnees-personnelles-l-ufc-assigne-twitter-facebook-et-google-pour-clauses-abusives_4389172_651865.html)



undesirable restriction. The legal provisions and the relation between the different actions under French and European law should be clarified.

According to a national supervisory and regulatory authority, the coverage of the ID should be extended in line with the coverage of Regulation 2006/2004. This regulation is currently being revised and an extension of its scope to a large number of directives and regulations has been announced.<sup>82</sup> The stakeholder in question strongly supported the idea that the coverage of both pieces of EU legislation should be aligned.

The ID should not be extended to the protection of collective business' interests. The extension of the scope of injunction procedures should, according to all stakeholders, be left to national MS to decide on.

The recently enacted class action procedure was quoted as an example of a good practice (art. L. 623-2 ff C.conso.).

### 1.3.2. 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:

- How effective is the injunction procedure in addressing infringements originating in another EU country?

Domestic injunctions are widespread, but the procedure has not yet been used by French qualified entities to address infringements originating in another EU country, either in France or in the trader's jurisdiction (ad a) and b)). UFC has once brought a procedure before a Swiss court, but without success.<sup>83</sup>

As far as c) is concerned, there has been some transnational cooperation between qualified entities. 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 concerned airlines' general conditions of carriage and was brought before a Belgian court. Some terms were regarded as unfair and three airlines were compelled to stop using these terms. This well-coordinated cross-border action does however not formally qualify as cross-border litigation under the ID.

Ad c) also pertains to the cooperation network provided for by Regulation 2006/2004. As was indicated before, the DGCCRF favours this type of cross-border enforcement. No cross-border injunction procedure has ever been instigated by the DGCCRF for the reasons mentioned above (costs, complexity, uncertainty etc.).

- How effective is it to address infringements originating in another EU country that qualified entities in your country are enabled to seek injunctions in the other Member State (Article 4 of the Injunctions Directive)?

See the above-mentioned. N/A.

- In a forward looking perspective: Are there non-legislative or/and legislative measures that could improve the effectiveness of the injunction procedure in addressing infringements originating in another EU country? Are there best

<sup>82</sup> Including for instance the Services directive 2006/123/CE; Regulation No 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air; Regulation No 1371/2007 on rail passengers' rights and obligations and Directive 2014/92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features.

<sup>83</sup> [http://ec.europa.eu/consumers/enforcement/documents/study\\_on\\_injunctions\\_directive\\_final\\_report-18\\_12\\_2011\\_en.pdf](http://ec.europa.eu/consumers/enforcement/documents/study_on_injunctions_directive_final_report-18_12_2011_en.pdf), p. 69.



practices in your country that could be relevant for other EU countries and could be considered as a model for the injunction procedure at EU level?

Different stakeholders praised the CPC network.

One stakeholder complained about the lack of coordination between the ID and Regulation 2006/2004. The ID should follow the idea laid down in the regulation that a procedure instigated by a competent authority/legal entity within the jurisdiction where the trader is established is most effective. It was suggested that there is also some unhealthy competition going on between the two pieces of legislation. Some MS favour the ID and some MS prefer acting upon mutual assistance requests addressed to them through the CPC Network. A sole instrument would be more effective. This stakeholder commended the plans to increase the role of the EC in the new CPC Regulation.<sup>84</sup>

Further measures that could enhance the level of consumer protection at EU level and the cross-border use of the procedure relate to a better definition of the procedural rules applicable to injunction procedures in different MS.<sup>85</sup> In one MS the competent court shall be the court where the defendant is established, whereas in another MS it shall be the court where the claimant resides.

A better coordination at EU level of the (preventive) controls on the commercialisation of financial products by free services providers was suggested by the AMF (pointing at the binary options scam).

No best practices were mentioned during the interviews.

### 1.3.3. Interplay between the Injunctions Directive and other enforcement instruments of consumer law

#### Please analyse:

- Is the injunction procedure as designed by the Injunctions Directive regulated separately in your country (in a separate legal act or as a separate procedure regulated within the same legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (UCPD, UCTD and by the Consumer Rights Directive)?

The injunction procedure laid down in art. L. 621-7 C.conso. and in art. L. 524-1 ff C.conso. (DGCCRF) pertain to all those directives and make no distinction as to the (European) source of the illicitness.

The domestic civil action of art. L. 621-1 ff. C.conso. also constitutes a legal basis to enforce the consumer law directives.

- If these procedures are regulated separately: What are the main differences between them? How is the coherence between these procedures ensured? If these procedures are regulated in a single legal act (possibly as a single procedure): In what way do these procedures (or this procedure) go beyond measures foreseen by the Injunctions Directive?

There are a few differences between the national and the 'European' procedure: the non-French entities on the Commission list have only access to the latter procedure. National qualified entities have access to both the domestic and the 'European' procedure.

<sup>84</sup> [http://ec.europa.eu/consumers/consumer\\_rights/unfair-trade/docs/cpc-revision-proposal\\_en.pdf](http://ec.europa.eu/consumers/consumer_rights/unfair-trade/docs/cpc-revision-proposal_en.pdf)

<sup>85</sup> Cf. ECLI:EU:C:2013:800, Case C-413/12 (Asociación de Consumidores Independientes de Castilla y León).

The 'European' procedure is restricted to the rules transposing the listed directives (and does not pertain to domestic consumer law).

## 1.4. Cross-cutting issues

### 1.4.1. Cost and benefits of the directives covered by the study

- To what extent is there evidence for benefits for consumers stemming from the protection provided by both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of benefits for consumers from the protection against unfair commercial practices and unfair standard terms in contracts; [*Note: a relevant aspect in this context is whether the costs for consumers in exercising their rights under these directives are limiting these benefits or not.*]

French consumers were already well protected under existing national laws against UCT and UCP. Nowadays, the consumer is better protected by the minimum rules stemming from the UCTD than by the maximum rules on UCP.

The general clauses are praised for their large scope and for their flexibility which allows enforcers and consumer associations to tackle many types of terms and practices, especially when traders try to circumvent clear-cut rules. General clauses act as a 'safety net'.

The Directives (especially the clear-cut rules such as the misleading omission or the black list of unfair terms) are also particularly effective in preventing the use of unfair practices and terms. Their effectiveness is guaranteed by the strict sanctions and far-reaching injunctive powers of the DGCCRF.

The benefits of these Directives are limited not so much by the costs for consumers in exercising their rights under them (there are many procedures available which are easily accessible in terms of costs)<sup>86</sup> but more by their lack of knowledge of these rights. Some stakeholders stressed the need to inform consumers more effectively about their rights. The vagueness and the abstractness of the rules however make them difficult to grasp.

According to a consumer association the directives have not had any repercussions on the prices and (potential) costs were not passed on to the consumer.

- To what extent is there evidence for benefits for traders stemming from both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of creating a level playing field for honest traders by providing a legal basis to eliminate or at least constrain dishonest market practices, such as the use of unfair standard terms in contracts or unfair commercial practices, including through the application of the Injunctions Directive;

There might be benefits for bigger companies insofar as the number of bans has decreased under the influence of the UCPD. A trade association however pointed at the fact that good practices were not lost and that the level of consumer protection did not drastically drop. Rogue traders were already banned from the domestic market by the old rules.

The effect of the UCPD is not clear since many new (positive) rules have seen the light of day since 2005 (the CRD and loi Hamon). Many stakeholders have criticised the (hasty<sup>87</sup>) legislative changes that have occurred in recent years. They aspire to a period of legislative stability or to a simplification/reduction of the rules. Trade

<sup>86</sup> One stakeholder stressed the importance of the recently introduced class action.

<sup>87</sup> One stakeholder pointed at the introduction of rules on planned obsolescence and the extension of the legal guarantee. Both are currently being discussed at the European level.

associations argue in favour of maximum harmonisation since it does not allow for additional national legislation and increases the consistency of the rules.

There is unfortunately no quantitative evidence available.

- What are costs for traders due to the need to respect the requirements under the directives covered by the study? [*Note: Such as costs of research, legal advice and compliance as well as the amount of time necessary to comply with the directives*]

More regulation, especially formal rules, entails more costs. However, one stakeholder noted that traders are only required to provide information they already possess. This was called into question by a business association that indicated that some sellers depend on their suppliers/distributors to obtain mandatory information (and sometimes information is lost).

Traders are generally willing to adapt to new rules and to bear the costs associated with their implementation.

The level of legal uncertainty stemming from the use of general clauses (mainly the UCPD), however, is considered to be problematic. The benefits of a more liberal approach seem to be mainly<sup>88</sup> accessible to those companies which can afford legal advice and are member of trade associations. Different stakeholders doubt the benefits of a level playing field for small and medium businesses, which encounter problems dealing with the legal uncertainty. One stakeholder pointed at the costs of the diverging (and changing) interpretations of general clauses at the national and European level.

The ID appears to have had no impact at all in France since an effective domestic procedure was already in place.

- What are the costs involved in the public enforcement of these rules?

The legal certainty that was lost with the disappearance of positive bans under French law in the field of commercial practices has increased the costs of investigations for public authorities: more evidence is needed and the discussions arising with traders prolong those investigations. Means are lacking to effectively enforce general clauses. One stakeholder specifically pointed at the problematic lack of means of national enforcement authorities.

- Are there indications that the directives covered by the study are not implemented in your country in a cost-effective manner?

The UCPD has not been implemented in a cost-effective manner. The implementation process has been a long and uncertain one and was only recently<sup>89</sup> completed, after several bans on commercial practices had to be removed from the *Code de la consommation*. There is a lot of uncertainty as regards the correct transposition and interpretation of this full harmonisation directive.

The implementation of the other directives under scrutiny has been cost-effective (there are no indications for the contrary).

- Could the costs for implementing and enforcing the rules of the directives covered by the study be reduced without lowering the level of protection for consumers? If so, how?

<sup>88</sup> One respondent mentioned that even larger businesses are seeking for legal advice.

<sup>89</sup> Abrogation de l'arrêté du 31 décembre 2008 relatif aux annonces de réduction de prix à l'égard du consommateur

The costs of implementation of minimum directives are lower and these directives allow for a higher level of consumer protection. So there is no contradiction as far as minimum harmonisation is concerned.

As far as full harmonisation is concerned, stakeholders have criticised the extensive and continuously expanding interpretation of the UCPD by the European Commission (Guidance) and the CJEU and pointed at the lack of clarity of the general clauses. The costs of implementation could be reduced by the introduction of better-defined positively formulated rules that do not give (too much) way to diverging interpretations.

One trade association has given a detailed account of the costly changes incurred by the very detailed European Commission Guidance document (which for instance suggests that the marketplace can be considered a 'trader').<sup>90</sup>

A consumer association indicated that more should be done to reduce the costs of injunction actions for consumer associations, by facilitating access to public files and records of the DGCCRF and by alleviating their burden of proof. In this respect, it suggested that the CE Marking should be better controlled at the European level (like the NF marking). Reliable marking brings benefits in terms of evidence.

#### 1.4.2. Interplay with EU sector-specific consumer protection legislation

Regarding the interplay of the horizontal EU consumer legislation [mainly UCPD and UCTD] with EU sector-specific consumer protection legislation in the areas of electronic communications, passenger transport, energy and consumer financial services, please:

- Analyse the levels of awareness of the requirements of the horizontal EU consumer legislation (mainly UCPD and UCTD) of businesses and consumers and the specific public enforcement bodies in the relevant sectors, as in particular demonstrated by their practical application; [*Note: Key question here is: Are UCPD and UCTD applied in practice by national authorities and courts as a legal basis to combat unfair commercial practices and unfair standard terms in contracts in the regulated sectors?*]

Businesses in the regulated sectors are aware of the applicability of the general requirements concerning contract terms and commercial practices. These requirements are unfortunately not always complied with as shows enforcement practice.

The UCTD is regularly applied by the DGCCRF and courts as a legal basis to tackle unfair standard terms in contracts in the regulated sectors, notably in the areas of electronic communications<sup>91</sup>, energy<sup>92</sup> and consumer financial services<sup>93</sup>.

In the same way, the UCPD is used as a legal basis to combat unfair commercial practices in the regulated sectors. In the energy sector, the photovoltaic panels scam has been tackled by means of the dispositions transposing the UCPD. In the financial

<sup>90</sup> Guidance document, p. 127.

<sup>91</sup> <https://www.quechoisir.org/action-ufc-que-choisir-sfr-lourdement-condamne-pour-de-nombreuses-clauses-abusives-n14023/>; [http://www.economie.gouv.fr/files/files/directions\\_services/dgccrf/presse/communiqu/2015/cp-demarchage-agressif-telephonie-24-09-2015.pdf](http://www.economie.gouv.fr/files/files/directions_services/dgccrf/presse/communiqu/2015/cp-demarchage-agressif-telephonie-24-09-2015.pdf); <http://www.leparisien.fr/economie/free-somme-par-la-justice-de-supprimer-plusieurs-clauses-abusives-29-03-2016-5670029.php>

<sup>92</sup> Recommandation n° 2014-01 relative aux contrats proposés par les fournisseurs de gaz et d'électricité ; <http://lci.tf1.fr/economie/consommation/electricite-gaz-31-clauses-abusives-dans-les-contrats-8560541.html>, UFC Que choisir has instigated different injunction procedures against energy companies EDF-GDF, Energie Direct and Eni ; <http://www.economie.gouv.fr/dgccrf/contrats-fourriture-delectricite-et-gaz-naturel>

<sup>93</sup> Cass. Civ. 1ere 23 January 2013, n° 10-21177 and 10-22815. Recommandation n°05-02 relative aux conventions de compte de dépôt (BOCCRF 20/09/2005).

sector, the DGCCRF has tackled unfair (doorstep-selling) practices of insurance companies, more specifically the breach of information duties and aggressive practices.<sup>94</sup>

The level of awareness among consumers is low. The INC has the official task of informing consumers about their rights under both directives regardless of the sector. Recently the INC has warned the 'financial consumer' about misleading advertising for forex and binary trading options.<sup>95</sup>

The dissemination of information also takes place at the sectoral level: the ARCEP (French Telecommunications Regulatory Authority) for example informs consumers about their rights (including their rights under both directives) by means of a website: telecom-infoconso.fr.

- Specify whether in your country the same authority is responsible for the enforcement of the horizontal EU consumer law 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 UCPD/UCTD in the regulated sectors?]

A distinction must be made between the rules transposing the general directives into the *Code de la consommation*, the rules transposing sector-specific directives into the *Code de la consommation* and the rules transposing sector-specific directives into sectoral legislation.

The DGCCRF has exclusive supervisory and enforcement competences with regard to the rules transposing the general directives and the sector-specific directives into the *Code de la consommation*, irrespective of the sector.<sup>96</sup> The DGCCRF has a clear overview of the interplay of general and sectoral legislation laid down in the *Code de la consommation*. Specialised sectoral units within the authority assess sectoral problems themselves.

Sectoral authorities have no competences regarding the enforcement of the *Code de la consommation*, not even the sectoral rules.<sup>97</sup>

The ARCEP has no regulatory or enforcement powers whatsoever concerning the two Directives under scrutiny. Its competences are limited to the *Code des Postes et des Télécommunications* which does not refer to the *Code de la consommation*. Consumer rules relating to electronic communications have been transposed into the *Code de la consommation* and are enforced by the DGCCRF (art. L. 224-26 ff and art. L. 224-43 ff. C.conso). ARCEP and DGCCRF maintain narrow (though informal) contact with each other when the latter authority carries out investigations within the sector or prepares regulatory texts. They exchange public information. They also cooperate within the CNC (*Conseil national de la consommation*) when it discusses telecom issues. ARCEP finally deals with consumer complaints (without being formally obliged to do so) and redirects consumer towards consumer associations, the DGCCRF or ADR.

Beside the DGCCRF, two sectoral authorities are indirectly responsible for the enforcement of the rules transposing the general and sector-specific directives in the field of financial services in the *Code de la consommation*. The AMF is in charge of monitoring financial markets. Its competences are similar to those of the ACP which monitors the activity of banks and insurance companies. According to art. 612-1(II)(3) *Code monétaire et financier*, it 'shall verify the adequacy of the means and procedures that said entities implement in order to comply with Book I of the Consumer Code

<sup>94</sup> <http://www.economie.gouv.fr/dgccrf/demarchage-et-vente-a-distance-dassurances>

<sup>95</sup> <http://www.conso.net/content/forex-attention-danger>

<sup>96</sup> <http://www.economie.gouv.fr/dgccrf/Consommation/Consommation-par-secteur>.

<sup>97</sup> The Commission de Regulation de l'Energie has for instance indicated that is not competent as regards the UCPD and UCTD and could not answer the questions.

(old)', (which contains the rules transposing the UCPD and UCTD). Both authorities do not control directly the abidance by the rules transposing those directives. They only have direct competences as far as sectoral regulation is concerned (art. 612-1(I)(2) *Code monétaire et financier*) and do not enforce the UCPD and UCTD rules directly.

The ACP issues recommendations concerning good commercial practices which should be taken into account by financial services providers (art. L. 612-29-1 *Code monétaire et financier*). These recommendations constitute soft law<sup>98</sup> but refer to hard law, including the UCPD and the UCTD.<sup>99</sup>

AMF and ACP work closely together. Both authorities control, investigate and sanction the conduct of financial service providers. They cooperate in a '*pôle commun*' in order to fine-tune their interpretation of general clauses such as the misleading clause and issue statements together.

Coordination with the DGCCRF occurs in case of a blatant disregard of general consumer rules and when there is a need to exchange information. The cooperation with the DGCCRF is not formalised. It takes place on a regular basis but does not go further than *ad hoc* contacts on concrete cases (Forex/binary options) and joint guidelines.<sup>100</sup>

- Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning contractual fairness, 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.?*]

There is no sectoral equivalent for the UCTD.

In the field of consumer credit, lenders must abide by a great variety of formal requirements. The breach of these requirements constitutes a formal 'irregularity' and leads to the loss of the right to interest. For years, courts were not entitled to apply this sanction *ex officio* but used the fairness-test to bypass this prohibition, deeming a term deviating from a model contract unfair. This circuitous route is no longer needed since all the remedies and sanctions laid down the Code de la consommation may be raised *ex officio*.<sup>101</sup>

In the field of commercial practices, rules tend to overlap each other. One stakeholder spoke of a '*mille-feuille*' of provisions. When compared with the breach of sectoral rules, the breach of the UCPD rules is seen as more difficult to prove. The breach of sectoral rules does not fall within the scope of tort law.

In the financial sector, overlap exists between the general misleading clause of the UCPD and art. L. 533-12(1) *Code monétaire et financier* which states that 'all the information, including communications of a promotional nature, that is sent to clients, including potential clients, by an investment service provider, shall have a content which is accurate, clear and not misleading'.<sup>102</sup> There is also overlap between art. L. 132-27 *Code des assurances* and the misleading clause (more specifically art. 7(2) UCPD).

Sectoral regulation, which is based on both European and national legislation, is very fragmented and complex. Most rules have a limited scope of application. Furthermore,

<sup>98</sup> Conseil d'Etat 20 June 2016, N° 384297, ECLI:FR:CECHR:2016:384297.20160620

<sup>99</sup> Cf. Recommandation sur la commercialisation des contrats d'assurance vie liés au financement en prévision d'obsèques 2011-R-04 du 15 juin 2011 which refers twice to recommendations of the CCA.

<sup>100</sup> <http://www.economie.gouv.fr/dgccrf/arnaques-financieres-en-ligne-lamf-parquet-paris-dgccrf-et-lacpr-se-mobilisent>

<sup>101</sup> The Cour de Cassation took the stance that the sanction attached to the unfairness-test did not apply to formal irregularities which are sanctioned by the loss of the right to interests and condemned this circuitous route: Cass. Civ. 1ère 23 November 2004, n° 03-11411, Bull. civ. 2004 I, no. 287

<sup>102</sup> Cf. art. 314-10 à 314-17 règlement général de l'AMF.



the many legislative amendments of the last years have had a negative impact on the coherence of the rules;<sup>103</sup> see for instance the rules regarding the doorstep-selling of financial and insurance products (art. L. 222-1 – 222-18 C.conso., art. L. 341-1 ff *Code monétaire et financier*, art. 112-9 *Code des assurances*, art. L. 222-18 *Code de la mutualité* which reproduces the old provisions of the *Code de la consommation*). The question arises whether all types of products are being covered by a protective rule.

In general, general rules (including national rules such as the '*abus de faiblesse*') and sector-specific rules do not interfere and complete each other quite well. Sectoral rules from European and domestic origin are generally more precise and contain positive obligations. Such rules are preferred above general clauses by both enforcers and traders. Based on the interviews, traders largely abide by the sector-specific rules.

- What are the benefits of the complementary application of the UCPD and UCTD in the regulated sectors? What are the costs due to the complementary application with the sectoral EU consumer protection legislation?

As far as commercial practices are concerned, enforcement bodies have different options at their disposal. The complementary application offers some flexibility. However, the benefits of the complementarity are somehow limited in view of the restricted competences of sectoral authorities.

The ACP stressed that it cannot apply the UCPD and UCTD directly. The fact that the above-mentioned art. L. 132-27 *Code des assurances* only applies to life insurance contracts is therefore seen as a problem since the ACP cannot directly fall back on the misleading clause of the UCPD if the information given in for instance a car insurance contract is considered misleading. The ACP also mentioned art. 17(1) Directive 2016/97 on insurance distribution. This article, which is formulated positively, provides the authority with the competence to tackle unfair practices in the insurance sector (even if it is not competent to act upon art. 5 UCPD).

Enforcement bodies prefer to apply the sector-specific rules which are geared towards the peculiar practices of the sector. They are more detailed and constitute a solid basis of action.

No quantitative information is available concerning the costs due to the 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.

As long as there is no conflicting overlap there is no need for clarification. Contradictions between the general and the sectoral rules are scarce. Sometimes sectoral rules provide more protection to the consumer than the general rules.

Sectoral rules are given precedence over general rules (*lex specialis*) by enforcement bodies and traders in a sector focus primarily on sectoral legislation.

#### 1.4.3. Relevance of consumer law directives for consumer-to-business transactions

- Please analyse the need and potential for the application of the consumer law directives (mainly UCPD and UCTD) to consumer-to-business (C2B) relations. This concerns situations where the consumer sells goods or provides services to a trader

<sup>103</sup> Sectoral legislation on commercial practices in the financial sector is currently being extended to address new types of e-practices and dangerous practices (cf. the loi Sapin II).



(e.g. where the consumer sells gold jewellery to a trader or supplies digital content to business against remuneration).

Most stakeholders indicate that in many C2B transactions the consumer is in a weaker position than the professional party, irrespective of the consumer being the seller. If such an imbalance is the case, it is according to most stakeholders very desirable and also very likely that consumer law (including the UCTD and UCPD) will apply.

As a matter of fact, specific legal dispositions have recently been enacted regarding the sale of precious metal by the consumer (art. L. 224-96 ff, L. 242-34 ff and R. 224-4 C.conso.).<sup>104</sup>

The regulation of the C2C relationship within the sharing economy is considered a more pressing issue.

#### 1.4.4. Specific protection for vulnerable consumers

Please analyse:

- Whether the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined in the consumer law directives and relevant jurisprudence, and as applied by national authorities and courts in your country, continue to be valid and fit for purpose.

The concepts of 'consumer', 'vulnerable consumer' and 'average consumer' as currently defined in the consumer law directives and relevant jurisprudence are considered to be valid and fit for purpose. They provide some much needed flexibility without jeopardising the harmonisation goals of the directives. More guidance would be much appreciated though, since the interpretation of these concepts still diverges at both the national and the European level.<sup>105</sup>

- To what extent the existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers and whether, based on the experiences in your country, specific provisions should be introduced in other directives concerned, in particular the Unfair Contract Terms Directive.

The fact that the '*abus de faiblesse*' provision has been maintained in the *Code de la consommation* might indicate that there is need for a more adequate tool to protect vulnerable consumers in concrete circumstances. The unfairness-test of the UCPD is considered to be too abstract in that respect.

Based on the experiences in France, there is no need to introduce specific provisions protecting the vulnerable consumer in the UCTD. In the financial sector, regulation (including self-regulation)<sup>106</sup> contains different provisions which aim at protecting the vulnerable consumer.<sup>106</sup>

When it comes to the transparency and the content of general terms of contract, all consumers are vulnerable. Consumers do not read GTC. It is doubtful whether the application of 'reasonably well-informed and reasonably observant and circumspect' consumer concept by the CJEU<sup>107</sup> in the context of the UCTD is valid and fit for purpose.

<sup>104</sup> [http://www.economie.gouv.fr/files/files/directions\\_services/dgccrf/documentation/fiches\\_pratiques/fiches/rachat-d-or-metiaux-precieux.pdf](http://www.economie.gouv.fr/files/files/directions_services/dgccrf/documentation/fiches_pratiques/fiches/rachat-d-or-metiaux-precieux.pdf)

<sup>105</sup> B. Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive*, Springer 2015.

<sup>106</sup> Cf. la Charte sur l'inclusion bancaire et de prévention de surendettement.

<sup>107</sup> ECLI:EU:C:2014:282, Case C-26/13, (Kásler és Káslerné Rábai), 30 April 2014, para. 74.

#### 1.4.5. EU added value

- Overall, would you consider that protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in your country since the implementation of the UCPD and the UCTD in national legislation?

Concerning the UCPD, the level of protection of consumers against UCP has slightly decreased with the disappearance of several bans on commercial practices and the high level of legal uncertainty created by the general clause. Some previously forbidden practices are no longer controlled by the DGCCRF. The black list is not perceived as an effective tool and does not match the 'needs' of enforcement authorities.

Regarding the UCTD, the answer to this question is more ambivalent: legislation regarding unfair terms (and the injunction procedure) was already in place but the further extension of this legislation (the coming about of the lists) and the case-law of the CJEU (regarding the *ex officio* application) have increased the level of consumer protection during the years.

- Overall, would you consider that the information of consumers regarding unit prices has improved since the implementation of the PID in national legislation?

No, detailed information requirements regarding prices per measurement units already existed in France (since 1987). Nothing has changed after the PID has been transposed into French law.

- Overall, would you consider that the protection of businesses against unfair marketing in your country has improved since the implementation of the MCAD in national legislation?

Comparative advertising was already strictly regulated under French law (until 1992 it was even forbidden) but this regulation was considered to be too strict and to disregard the benefits of comparative advertising. The implementation of the MCAD has stimulated competition without jeopardising the protection of businesses.

- Overall, would you consider that it has become easier for businesses in your country to directly trade cross-border to final consumers located in other EU countries in recent years? Has it become easier for consumers in your country to directly purchase cross-border from traders located in other EU countries?

It has become easier for French businesses to directly trade cross-border to final consumers located in other EU countries in recent years, thanks to the internet, the single currency, harmonised conformity and safety rules.

For consumers, it has become easier to purchase cross-border thanks again to the internet, the single currency and maybe a better knowledge of English. The tackling of geo-blocking will further facilitate cross-border trade provided that websites adapt to local culture and language.

- To what extent are these improvements, if any, due to the mentioned directives?

As far as the consumer is concerned improvements are not related to the mentioned directives. Most stakeholders doubt whether consumers take their legal rights into consideration when they make the decision to purchase something abroad. Consumers for instance are generally considered to not read GTC.

As far as traders are concerned, it is at least very doubtful whether these Directives have played a facilitating role. Their concepts are considered too vague and too abstract. Clear-cut and concrete rules such as the harmonisation of the delivery and the withdrawal period have had some impact, for they pertain to concrete aspects of

the selling process. Such univocal rules provide legal certainty (and capture the attention of consumers).

According to the stakeholders, key considerations for both traders and consumers when crossing the border are:

- Language issues (translation costs);
- Distance and travel costs;
- Adaptation (of the products) to the local culture and taste.

Traders also take into consideration the amount and the level of complexity of clear-cut European and domestic regulation, such as:

- Domestic information duties (think of the obligation to provide information on the availability of spare parts in France, which discourages foreign traders to access the French market according to one stakeholder);
- Domestic product conformity and safety rules (certificates, labels).

## Annex

## A. Transposition fact sheet

**Table 1: Fact sheet on transposition of directives in Member States' law – France**

Directive	Transposition legislation (National law, Article)	Comments	Specific provisions going beyond minimum harmonisation requirements/use of exemptions	Included in national legislation	Comments
<b>Directive 93/13/EEC on unfair terms in consumer contracts</b>	Art. L. 212-1 C.conso. (general clause) <sup>108</sup> Art. L. 241-1 – L. 241-2 C.conso. (sanctions)		'Black list' of terms considered unfair in all circumstances	Yes <i>Art. R. 212-1, R. 212-3 et R. 212-4 C.conso.</i>	Art. R. 212-3 et R. 212-4 relate to the exceptions.
	Art. R. 212-1 – R. 212-2 C.conso. (list)		'Grey list' of terms which may be considered unfair	Yes <i>Art. R. 241-2, R. 241-3 et R. 241-4 C.conso.</i>	Idem.
	Art. L. 211-1 C.conso. (transparency requirement)		Extensions of the application of Directive to individually negotiated terms	Yes <i>Art. L. 212-1 (6) C.conso.</i>	
	Art. L. 621-7 and L. 621-8 C.conso. (injunction procedure)		Extensions of the application of Directive to the adequacy of the price and the main subject-matter	No <i>Art. L. 212-1 (3) C.conso.</i>	
<b>Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in</b>	Art. L. 121-1 C.conso. (general clause)		Provisions regarding financial services going beyond minimum harmonisation requirements	Yes <i>See Annex 3 Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU</i>	

<sup>108</sup> Loi n° 95-96 du 1er février 1995 concernant les clauses abusives et la présentation des contrats et régissant diverses activités d'ordre économique et commercial.

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<b>the internal market</b>	Art. L. 121-2 – L. 121-5 C.conso. (misleading practices) L. 132-1 – L. 132-9 C.conso. (sanctions)		Provisions regarding immovable going beyond minimum harmonisation requirements	Yes	<i>See Annex 3 Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU – French report</i>	
	Art. L. 121-6 – L. 121-7 C.conso. (aggressive practices) L. 132-10 – L. 132-12 C.conso. (sanctions)		Application of UCPD to B2B transactions	Yes	<i>Art. L. 121.2 C.conso. (misleading practices) and L. 121-4 C.conso.(black list misleading practices)</i>	Only partially: art. L. 121-5 C.conso.
<b>Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers</b>	Arrêté du 3 décembre 1987 relatif à l'information du consommateur sur les prix		Extension of the application to other sectors (e.g. for immovable property)	Yes	<i>L. 112-2 C.conso.</i>	Extension to service providers. (France did not make use of Art. 3(1))
	Arrêté du 16 novembre 1999 relatif à la publicité, à l'égard du consommateur, des prix de vente à l'unité de mesure de certains produits préemballés		Use of specific regulatory choices/derogations: - 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	Yes	- <i>Annexe to Arrêté du 16 novembre 1999</i>  - <i>Art. 6 Arrêté du 3 décembre 1987</i>	
	Art. L. 112-1 - L. 112-2 C.conso.					

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<b>Directive 2006/114/EC concerning misleading and comparative advertising</b>	Art. L. 121-2 C.conso				
	Art. L. 122-1 – L. 122-7 and L. 135-25 C.conso.				
<b>Directive 2009/22/EC on injunctions for the protection of consumers' interests</b>	Ordonnance no 2001-741 du 23 août 2001				
	Art. L. 621-7 and L. 621-8 C.conso.				

**Table 2: Fact sheet on Injunctions Directive – France**

Issue	Answer	Comments
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)?	- No, single procedure	<i>Art. L. 621-7 in combination with art. L. 621-8 C.conso.</i>
Who is entitled to bring an action seeking an injunction?	- Designated public bodies - Specified consumer associations	<i>The competence of the DGCCRF to bring an action seeking an injunction is based on Regulation 2006/2004, not on the ID.</i>
Is the injunction procedure a court or an administrative procedure? If your country legislation foresees both forms of the procedure, please explain in the comments column for which infringements the court or administrative procedure is foreseen	- Both forms of procedure	<i>An action seeking an injunction on the basis of the ID can be brought before a civil court (art. L. 621-7 C.conso.). The national injunction procedure tied to civil actions carried out in the collective interest of consumers (a prejudice is required: L. 621-1 C.conso.) can be brought before a civil or a criminal court. Art. L. 621-2 C.conso. does not stem from the Directive and goes back to 1988. The DGCCRF has administrative injunctive powers.</i>
Who bears the costs of an injunction procedure? If qualified entities (or some of their categories e.g. consumer organisations are entitled to an exemption of some/all cost related to the procedure please explain the characteristic of such exemption in the comments column.	- The costs are as a rule borne by the losing party	<i>Art. 700 Code de procédure civile («condamnation aux dépens»).</i> <i>Not all the costs will however be covered.</i>
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?	- Yes, scope of application extended to cover areas of consumer law that are not part of Annex I of the Directive	<i>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<sup>109</sup> organisations.</i>

<sup>109</sup> <http://www.conso.net/content/les-associations-de-consommateurs>



<p>Is protection of business' interests covered by the injunctions procedure?</p> <p>If scope of application extended to the protection of business' interests, please provide details in the comments column regarding type of business' interests covered by the injunctions procedure</p>	- Yes	<p><i>Indirectly, the procedure pertains to the C.conso. (including those provisions which apply to B2B such as the misleading practices).</i></p> <p><i>The injunctive powers of the DGCCRF also concern Title IV of the Code de commerce (re the fairness of B2B transactions): art. L. 465-1 Code de commerce.</i></p>
<p>Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations</p>	- No	
<p>Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID)</p>	- No	
<p>Has your Member State taken specific measures regarding the prior consultation (Article 5 of the Injunctions Directive)?</p>	- No such requirement	
<p>Does the national legislation provide for measures ensuring summary procedure?</p> <p>Please specify main characteristics of the procedure (subject matter/time limits) in the comments column.</p>	- Yes	<p><i>There is a general procedure ('référé') for when an urgent decision from a judge is needed; this can be used by a consumer association in order to stop an infringement.</i></p> <p><i>Approx. two months.</i></p> <p><i>Art. 484-492 Code de procédure civil.</i></p>
<p>Are there sanctions for non-compliance with the injunction order (Article 2(1) of the Injunctions Directive)?</p> <p>If sanctions in form of penalty or fine foreseen please specify in the comments column to who exactly should they be paid</p>	- Yes, penalty of a fine for each day of non-compliance	<p><i>To the public purse ('astreintes')</i></p>
<p>Has your Member State taken specific measures regarding the publication of the decision and/or the publication of a corrective statement?</p>	- Yes	<p><i>L. 621-11 C.conso.</i></p>
<p>Is it possible to claim within the injunction procedure for sanctions for the infringement?</p>	- No	
<p>Can an action for the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to other beneficiary be brought within the injunction procedure?</p>	- No	
<p>Can an action for damages to be paid to the qualified entity or the public purse be brought within the injunction procedure?</p>	- Yes	<p><i>It is actually the other way around in art. L. 621-2 C.conso. an injunction procedure can be brought within an action for damages.</i></p> <p><i>The damages are paid to the qualified entity.</i></p>

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Can an action for damages or redress to be paid to the consumers concerned be brought within the injunction procedure?	- No	<i>Not within the procedure but a separate action de groupe can be started.</i>
Can individual consumers base their individual claims for damages/remedies on the injunctions order?	- No	
Can the qualified entity claim other measures beyond the injunction, e.g. evidence of compliance with the judgment?	- No	
Are the effects of individual injunctions orders extended to the future infringements and/or same or similar illegal practices (of other traders)?	- Yes	<i>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.</i>

## B. Data tables

### *Number of B2C disputes*

Please indicate how many B2C disputes have been decided in your country on the basis of consumer law directives covered by this study (UCPD, UCTD, PID) as a proportion of the total number of B2C disputes decided on the basis of other national consumer legislation (based on statistics, or based on estimates by enforcement authorities and other stakeholders, where this is not the available).

**Table 3: B2C disputes decided on the basis of consumer law directives covered by this study in comparison with total B2C disputes decided on the basis of other legislation (most recent year for which data is available = 2015)**

Year	Type of data	Total number of B2C disputes (no. of cases)	Share of B2C disputes decided on basis of...					Comment
			UCPD	UCTD	PID*	other EU consumer protection legislation (e.g. CRD, sectoral)	national consumer legislation not based on EU directives	
2015	Statistics of the DGCCRF	5800 investigations	28.1%	5%	30.3%	12.2%	24.4%	100%
			2802	495	3022	1208	2433	9960

Note: This data was provided by the DGCCRF (national enforcement body) and is based on the investigations (“enquêtes et contrôles”, which often apply different Directives) it carried out in 2015 after complaints from consumers. \*Including legal guarantees Sales Directive, information duties pertaining to the price from the CRD.

### *Costs of obtaining redress for a hypothetical case of invoking unfairness of a standard contract term*

- Please estimate the costs, including time, for consumers in obtaining redress when invoking the unfairness, and thereby the non-binding character of standard contract terms in a contract they concluded. Please provide the estimate for the hypothetical example below, focusing on costs (and needed time) of a lower court procedure and the use of ADR or other relevant procedure (if applicable).<sup>110</sup>

<sup>110</sup> For the hypothetical example it is assumed that both the provider and the consumer are located in your country.

**Table 4: Estimate of costs for consumers in obtaining redress when invoking the unfairness of standard contract terms in a contract they concluded (for the hypothetical example provided in the box below)**

Redress mechanism	Estimated court fees (national currency)	Estimated lawyer's fees (national currency)	Other costs, if any (national currency)	Estimated time involved for consumer (hours)	Comments
<b>Lower court procedure</b>	EUR 0 E-procedure <sup>111</sup> (via internet): EUR 39.90-89.90	n/a	n/a	Impossible to estimate, depends on knowledge, literacy, perseverance and experience of consumer. No time needed in case court tests term of its own motion in the course of a procedure. (the procedure itself lasts approximately one month)	The consumer may have to bring in a bailiff
<b>ADR or other relevant procedure</b>	EUR 0	n/a	n/a	Impossible to estimate, depends on knowledge, literacy, perseverance and experience of consumer. (the procedure itself lasts 90 days)	

Notes: Lower court procedure: Juge de proximité (is going to be integrated into the tribunaux d'instance on January 1<sup>st</sup> 2017); ADR: Médiateur de la consommation. In both procedures it is possible to be assisted by a lawyer, however few consumers choose to do so.

<sup>111</sup> <https://www.demanderjustice.com/>

**Hypothetical example: Terms which inappropriately exclude/limit consumers' rights to compensation**

*A consumer went on a package holiday with a friend to Kenya for which they paid € 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 €5,000 (€4,000 for the cost of the package and €1,000 for lost time and enjoyment). The tour operator agreed to compensate them €1,000 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/unfair-contract-terms/index\\_en.htm](http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-contract-terms/index_en.htm)]*

- Please estimate how often court and ADR procedures are used in your country for invoking the unfairness, and thereby the non-binding character of standard contract terms (i.e. the number of cases per year)?

No reliable data available. It is very unlikely that ADR procedures are being used to invoke the unfairness and thereby the non-binding character of GTC, since ADR bodies ('*médiateurs*') do not apply the law.

## C. Interviews conducted and literature reviewed

**Table 5: Interviews conducted for this study**

Organisation	Stakeholder type	Date
EEC-France	European Consumer Centre	20/6/2016
Association Consommation, Logement, Cadre de Vie (CLCV)	National consumer organisation	22/6/2016
Autorité des Marchés financiers (AMF)	National supervisory and regulatory authority	24/6/2016
Fédération du Commerce et de la Distribution (FCD) 2 interviews	Business association	27/6/2016 15/7/2016
Union Française des Consommateurs - Que Choisir (UFC)	National consumer organisation	29/6/2016
Institut national de la Consommation (INC)/Commission des clauses abusives (CCA)	National authority	4/7/2016
Autorité de Contrôle Prudentiel (ACP)	National supervisory and regulatory authority	6/7/2016
Direction générale de la concurrence, de la consommation et de la répression des fraudes (DGCCRF) 2 interviews	National supervisory and regulatory authority	11/7/2016  Written answers received on 19/7/2016
Autorité de régulation des communications électroniques et des postes (ARCEP)	National supervisory and regulatory authority	12/7/2016
Fédération des industries électriques, électroniques et de communication (FIEEC)	Business association	18/7/2016

**Table 6: Literature reviewed for country report**

Author/Source	Year	Title of publication
J. Calais-Auloy & H. Temple	2015	Droit de la consommation
Y. Picod	2015	Droit de la consommation
G. Raymond	2014	Droit de la consommation
C. Pavillon	2011	Open normen in het Europees consumentenrecht: de oneerlijkheidsnorm in vergelijkend perspectief
N. Sauphanor-Brouillaud	2014	'Les sanctions des règles protectrices des consommateurs dans la loi relative à la consommation', Revue des contrats 2014/3, p. 471.
C. Minet	2014	'Loi Hamon : Le mieux est-il l'ennemi du bien ?', Revue Lamy Droit des Affaires 2014/93.
S. Piédelièvre	2014	Droit de la consommation
E. Terryn & D. Voinot (eds)	2012	Droit européen des pratiques commerciales déloyales: Evolution et perspectives



# 1. Study to support the Fitness Check of EU Consumer law – Country report GERMANY

## 1.1. Unfair commercial practices and marketing

### 1.1.1. Effectiveness of the UCPD in establishing a high level of consumer protection

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

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

The German law on unfair competition has a long history, as the first Act against unfair competition dates back to 1896.<sup>1</sup> The second code against unfair competition – dating from 1909 – remained in force until 2004.<sup>2</sup> It was characterised by a broad general clause, whose application led to a considerable amount of case law and consequently established categories of unfair commercial practices.<sup>3</sup> This general clause is one of the main reasons for the UWG having maintained its structure for nearly a hundred years. In practice, this approach was well recognized since it allows a great flexibility when adapting to new developments.<sup>4</sup> It has proven to be an essential tool to properly adjudicate new unfair commercial practices. Thus the principle-based approach was and still is assessed as effectively preserving fair competition. Despite the existence of established case law, the German legislature decided to pass a new Act against unfair competition in 2004, in which the established case law was codified while maintaining a general clause.<sup>5</sup> Hence, it is fair to state that the principle-based approach has been part of the German law against unfair competition since its beginnings. The UCPD did cause some deviation from this principle, especially since the latest amendment of the German Act against Unfair Competition in December 2015, which became necessary due to critique from part of the European Commission with regard to the implementation of the UCPD.<sup>6</sup> Due to the fact that the principle-based approach was always a significant part of German Unfair Competition law, stakeholders did not report any problems with it.

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

Most of the unfair commercial practices listed in in the black list were already prohibited in German unfair competition law before the transposition of the UCPD. Therefore, the actual effect of the UCPD blacklist should be assessed as negligible,<sup>7</sup> a view also supported by most stakeholders.<sup>8</sup> It should be added however, that there

<sup>1</sup> Act against Unfair Competition (“Gesetz gegen den unlauteren Wettbewerb”, UWG), Imperial Law Gazette (RGBl.) I 1986, p. 145.

<sup>2</sup> Imperial Law Gazette (RGBl.) I 1909, p. 499, as to its importance see *Köhler*, “Einleitung UWG”, rec 2.3 seqq. in: *Köhler/Bornkamm* (2016).

<sup>3</sup> Cf. for further references regarding the application of the general clause in Germany prior to the UCPD, *Beater* (2011), p. 376 seqq.

<sup>4</sup> Cf. e.g. *Peukert* “§ 3 UWG”, rec. 23 in: *Großkommentar UWG* (2014); *Sosnitza* “§ 3 UWG”, rec. 1, 13 in: *Münchener Kommentar* (2014); *Wirtz* “§ 3 UWG”, rec. 30 in: *Götting/Nordemann* (2016).

<sup>5</sup> Federal Law Gazette (BGBl.) I 2004, p. 1414, most recently amended by Art. 4 of the Act of 17.02.2016, Federal Law Gazette (BGBl.) I, p. 233, 235.

<sup>6</sup> *Ohly GRUR* 2016, 3, 4.

<sup>7</sup> *Scherer WRP* 2011, 393, 400.

<sup>8</sup> According to the “Wettbewerbszentrale” – one of the stakeholders – only 2% of their cases dealt with the “black list”; cf. also *Wettbewerbszentrale* (2015), Jahresbericht (Annual Report) 2015, p. 103.

has been a slightly negative assessment of the black list in legal literature,<sup>9</sup> as the commercial practices address very specific situations, which might not be relevant in all Member States – again a view which was supported by stakeholders. For example one stakeholder – a consumer organization – complained that it is in practice hardly ever possible to proceed against bait-and-switch offers under the black list (Sec. 3 para. 3 with No. 5 Annex I UWG), since the provision does not prohibit as such an inadequate supply, but rather the misleading and insufficient advertisement. Thus phrases, as ‘while stock lasts’, are enough to legitimate bait-and-switch offers, which is why this kind of unfair commercial practices is emerging in practice.

Only one stakeholder pointed out that the black list led to an increase in legal certainty. Also in the daily practice of stakeholders, the black list plays only a minor role.

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

It seems that there are no statutes in Germany imposing more restrictive regulations with regard to financial services or immovable property (i.e. more restrictive than the UCPD).<sup>10</sup> Further, it should be noted that especially in the field of financial services the EU legislature introduced provisions that supercede the UCPD as *leges speciales* under Art. 3 para. 4 UCPD.<sup>11</sup>

- 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 what 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 German law regarding misleading environmental claims has not profoundly changed due to the Directive. Environmental advertising has always been scrutinised by German courts. However, due to the need to adapt to the European model of the average consumer (cf. below), German law had to accept changes. The prior German model of the average consumer was more protective. Hence, environmental advertising was only allowed under strict limitations.<sup>12</sup> To date, the law only allows environmental advertising under limited circumstances due to the complexity of environmental correlations and the mostly limited knowledge of customers on the one hand, and the strong emotional component of such advertisement on the other hand.<sup>13</sup> In general, claims about food being ‘organic’ as an absolute measurement are allowed only under strict scrutiny, whereas more comparative advertising (‘more’ organic) are more likely to be regarded as fair.<sup>14</sup> Advertising regarding the support of environmental goals (e.g. the protection of parts of rainforest with a certain percentage of the price asked for the advertised product) is admissible as long as a company fulfils the promises made in the advertisement.<sup>15</sup> Environmental claims always need to be correct and relevant in the context; this relevance is especially

<sup>9</sup> Cf. *Beater* (2011), p. 264 (considered black list as containment (“Fremdkörper”) in the UWG); *Fritzsche/Peifer*, “§ 3 UWG” rec. 693 in: *Großkommentar UWG* (2013); *Scherer WRP* 2011, 392; *Schöttle WRP* 2009, 673.

<sup>10</sup> Cf. legislators’ explanation to the statute implementing the UCPD into the German UWG, Bundestag-Drucksache. 16/10145, p. 14); however, there are some, at least implicit, regulations in this area, such as Sec. 39 para. 1 *Kreditwesengesetz* (Banking Act) that impose restrictions on using the term “bank”, cf. in this regard *Fischer* “Sec. 39 KWG”, rec. 3 in: *Boos/Fischer/Schulte-Mattler* (2012).

<sup>11</sup> Cf. for a comprehensive analysis *Rott* (2011), p. 136 seqq.

<sup>12</sup> *Roller ZUR* 2014, 211, 212 ff.

<sup>13</sup> *Sosnitza* “§ 5 UWG”, rec. 301 in: *Ohly/Sosnitza* (2016).

<sup>14</sup> *Sosnitza* “§ 5 UWG”, rec. 302 in: *Ohly/Sosnitza* (2016).

<sup>15</sup> Cf. BGH 26.10.2006, Az. I ZR 97/04 (*Regenwaldprojekt II*); cf. also *Roller ZUR* 2014, 211, 214 seq.

important if an environmental label is used.<sup>16</sup>

Closely related to misleading practice regarding environmental claims are practices in the energy market. For example, generally known information does not need to be given to consumers, e.g. that green power does not derive directly from renewable resources.<sup>17</sup> However, claims like 'hair drying against nuclear power' or 'ironing for health' have been treated by courts as misleading commercial practices, based on the reasoning that the claims suggest that the companies in question are not delivering nuclear electricity, although they actually do.<sup>18</sup>

One stakeholder reported that it has to deal with numerous cases in the area of environmental claims and also cases in the area of energy.<sup>19</sup> It stressed that the current legal system in Germany is fit to deal with such claims. This view was backed by other stakeholders. Only one other stakeholder expressed the opinion that sometimes environmental claims are too vague in order to be regarded as unfair under the UWG.<sup>20</sup>

- 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 your country rigidly?*]

Historically, German law had always provided for a high level of consumer protection. The consumer model applied was based on an uncritical and superficial consumer. A misleading rate of 10-15% was deemed sufficient in order to regard a commercial practice as misleading.<sup>21</sup> This interpretation had to change due to the CJEU's definition of the average consumer as 'reasonably well-informed and reasonably observant and circumspect'.<sup>22</sup> Hence, EU law focuses on informing the consumer, presuming the consumer will comprehend the given information and act accordingly.<sup>23</sup> German courts are thus obliged to apply the concept of the 'average consumer' and stakeholders did not report any problems with this concept.

- 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 in your country recognised new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted)?*]

The concept of the vulnerable consumer has been codified in Sec. 3 para. 4 cl. 1 UWG. The categories are identical to Art. 5 para. 3 UCPD. However, these categories had already been established in the jurisprudence of German courts before the UCPD. German law interprets Art. 5 para. 3 UCPD rather narrowly: The advertisement must be targeting this group specifically, based on the logic that otherwise all mass advertising would be illegal.<sup>24</sup> So far, no additional groups of vulnerable consumers

<sup>16</sup> *Sosnitza* "§ 5 UWG", rec. 301 in: Ohly/Sosnitza (2016).

<sup>17</sup> OLG Karlsruhe 10.12.2008, Az. 6 U 140/08, GRUR-RR 2009, 144, 146 (100% Ökostrom); *Sosnitza* "§ 5 UWG", rec. 307 in: Ohly/Sosnitza (2016).

<sup>18</sup> LG Hamburg 10.11.1999, Az. 315 O 773/99, ZUR 2000, 338 (although this dates from 1999, it seems unlikely that the court would have decided otherwise under the current law); cf. also *Roller* ZUR 2014, 211, 213 seq.

<sup>19</sup> For example see <http://www.vzbv.de/pressemitteilung/vzbv-mahnt-care-energy-management-ab>, which dealt with an incorrect online energy fee calculator.

<sup>20</sup> However, legal literature does not support this view, cf. *Birk* GRUR 2011, 198, 202 with further references and also *Augenhofer* (2015) in: Kobel/Kellezi/Killpatrick (eds.), p. 514.

<sup>21</sup> *Beater* (2011), p. 425; *Emmerich* (2016), p. 191 seq.

<sup>22</sup> ECLI:EU:C:1998:369 (*Gut Springheide*).

<sup>23</sup> *Lettl* GRUR 2004, 449, 453; cf. also *Weatherill* (2013), p. 101.

<sup>24</sup> *Köhler* "§ 3 UWG", rec. 5.18 seqq. in: *Köhler/Bornkamm* (2016); *Gerecke* NJW 2015, 3185; *Alexander* WRP 2014, 1010-1016.

have been recognised by German courts, nor did stakeholders see a need for such additional consumer groups.

- 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?*]

Self-regulation does not play an important role in Germany.<sup>25</sup> Rather, it is regarded critically: It is said it can be (mis)used to influence the judicial review of unfair commercial practices. In addition, codes of self-regulation might be considered as problematic under antitrust law.<sup>26</sup> If self-regulation is mentioned in a misleading way in a commercial practice, it is deemed unfair under Sec. 5 UWG.<sup>27</sup> The most influential self-regulation organisation in Germany is the *Wettbewerbszentrale zur Bekämpfung unlauteren Wettbewerbs* – a private organisation that according to its statutes promotes the enforcement of unfair competition law by pursuing unfair commercial practices.<sup>28</sup> Further examples of self-regulation include the German Werberat, FSM (*Freiwillige Selbstkontrolle Multimedia e.V.*), FSF (*Freiwillige Selbstkontrolle Fernsehen e.V.*), FSK (*Freiwillige Selbstkontrolle der Filmwirtschaft e.V.*), *Selbstregulierung in der Informationswirtschaft e.V.* and the Deutsche Corporate Governance Kodex.<sup>29</sup> However, self-regulation through these later named bodies is limited to, for example, the protection of youth or the prevention of disrespectful or indecent advertising in the case of the Werberat.<sup>30</sup>

- 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?

There is some general mistrust of the black list in German literature because it is feared that a black list implies that all commercial practices not included in the list are legal.<sup>31</sup> In general, the list seems to be problematic with regard to certain terms used which need to be interpreted (e.g. the term 'child').<sup>32</sup> Moreover, the gravity of the behaviour listed in the black lists differs quite considerably.<sup>33</sup> With regard to some examples enumerated in the black list, the German translation of the Directive is regarded as flawed (e.g. No. 8 does not include after-sales services in the German translation), with the result that German law needs to rely on Sec. 5a paras. 1, 2, 3 No. 4 UWG.<sup>34</sup>

Stakeholders were against adding more unfair commercial practices to the black list. In the event that the European Commission opts for adding more commercial practices to the list, stakeholders wish to enact a mechanism allowing quick changes of the list.

<sup>25</sup> Cf. therefore and for a more comprehensive analysis of self-regulation in Europe after the UCPD *Augenhofer* (2010), p. 19.

<sup>26</sup> *Sosnitzer* "§ 3 UWG", rec. 62 in: *Münchener Kommentar UWG* (2014).

<sup>27</sup> *Buck-Heeb/Dieckmann* (2010), p. 96.

<sup>28</sup> It is considered as a "business organisation" under Sec. 8 para. 3 no. 2 UWG and therefore has standing in court in competition law procedures. For further information see <<https://www.wettbewerbszentrale.de/de/institution/profil/auftrag/>> (accessed on the 21.08.2016).

<sup>29</sup> Cf. *Hoeren* BB 2008, 1182, 1187.

<sup>30</sup> Cf. also *Augenhofer* (2010), p. 19 seqq.

<sup>31</sup> Cf. *Scherer* NJW 2009, 324, 325.

<sup>32</sup> *Schöttle* WRP 2009, 673 ff.

<sup>33</sup> *Hoeren* BB 2008, 1182, 1187.

<sup>34</sup> *Scherer* NJW 2009, 324, 327.

- Are there other measures that could improve the effectiveness of the UCPD in establishing a high level of consumer protection in your country? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

Stakeholders did not report any need to change the UCPD, nor do German court decisions or literature support such conclusions.

### 1.1.2. Effectiveness of the PID in establishing 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;

Consumers in Germany are usually aware of the unit selling price and effectively informed about it. Since the statute regulating nominal quantities for pre-packed products (Sec. 1 Act on Quantities of Prepacked Goods<sup>35</sup>) has been abandoned (due to liberalisation of prepacking under Directive 2007/45/EC),<sup>36</sup> some discussion has taken place with regard to the size of the letters stating the unit selling price.<sup>37</sup> Stakeholders reported that a standardisation committee is currently working on a DIN-Norm indicating proper sizes for different products and different versions of advertising.

The PID is transposed into German law in Art. 2 of the Act on Price Indication,<sup>38</sup> which also contains provisions on price indications beyond the PID's scope. Price indication rules are enforced by general unfair competition law. They are commonly considered as market behaviour rules (*Marktverhaltensregel*) under Sec. 3a UWG.<sup>39</sup> Further it is generally acknowledged that infringements of price indication rules may also constitute a misleading commercial practice in terms of Sec. 5 para. 1 cl. 2 No. 1 UWG or Sec. 5a para. 2, 3 No. 3 UWG (misleading omissions).<sup>40</sup> Lastly, the infringement of the PAngV's provisions may constitute an administrative offence in the event of intentional or negligent infringement under Sec. 10 PAngV. This also includes a violation of the indication of the unit selling price (Sec. 10 para. 1 no. 7 PAngV). Price indication rules and general unfair competition law exist in a complementary and not mutually exclusive relationship. Additionally, commercial practices outside the scope of the German PAngV and the PID and related to the indication of a price (so-called *Preisschlagwörter*), might be considered misleading under Sec. 5 and Sec. 5a UWG.<sup>41</sup>

German courts tend to emphasise the necessity of the price per unit measure, as it makes products comparable and hence enhances the capability of consumers to make a rational decision. This approach can be seen in the jurisprudence of the High Court of Justice as well as several Higher Regional Courts.<sup>42</sup> In a very recent decision the High Court of Justice further emphasised this approach: The ruling holds that traders on digital platforms can be held liable for infringing price indication rules as a principal offender, even if they do not have a decisive influence on the final arrangement of the

<sup>35</sup> "Fertigpackungsverordnung", Federal Law Gazette (BGBl.) I,1994, p. 451, recently amended by Art. 2 Act of 15.02.2016, Federal Law Gazette (BGBl.) I 2015, p. 201.

<sup>36</sup> Cf. *Jacobi* WRP 2010, 1217.

<sup>37</sup> Cf. BGH 07.03.2013, Az. I ZR 30/12, GRUR 2013, 850.

<sup>38</sup> "Preisangabenverordnung (PAngV)", Federal Law Gazette (BGBl.) I 2002, p. 4197, recently amended by Act of 11.03.2016, Federal Law Gazette (BGBl.) I 2016, p. 396.

<sup>39</sup> Cf. *Weidert/Völker* "§ 2 PAngV", rec. 18 in: *Harte-Bavendamm/Henning-Bodewig* (2013).

<sup>40</sup> *Weidert*, "§ 5 UWG", rec. 23 in: *Harte-Bavendamm/Henning-Bodewig* (2013).

<sup>41</sup> *Nordemann* "§ 5 UWG", rec. 2.63 in: *Götting/Nordemann* (2016); *Schünemann* "Einleitung UWG", rec. 25 seq. in: *Großkommentar UWG* (2014).

<sup>42</sup> Cf. BGH 31.10.2013, Az. I ZR 139/12, GRUR 2014, 576 rec. 20 (*2 Flaschen GRATIS*); BGH 07.04.2011, Az. I ZR 34/09, GRUR 2011, 742 (*Leistungspaket im Preisvergleich*); OLG Köln 22.02.2002, Az. 6 U 152/01, GRUR-RR 2002, 304, 305 (*Sprudelwasserpreis*); OLG Koblenz 25.04.2006, Az. 4 U 1219/05, GRUR-RR 2007, 23 (*Grundpreisangabe*).



offer.<sup>43</sup> This judgment might strengthen price clarity also in the digital platform economy.

- 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?

German law already knows this kind of price indication for products such as household detergent, pursuant to Sec. 2 para. 4 cl. 1 PAngV, 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 therefore that the utility of these products varies broadly and the relation to a weight does not provide consumers with comprehensible information.<sup>44</sup> This view was also supported by one stakeholder.

Other stakeholders expressed concern that measurement units provide a very unreliable tool of information as, for instance, 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.

- The effects of the regulatory choices/derogations allowed by the Directive and applied by Member States. [*Key aspects to consider are: Is the derogation relevant? Do companies make use of it? Are there consumer complaints because of this? If so, approximately how many per year?*]

The German legislature implemented the derogation for small businesses (Article 6 PID) in Sec. 9 para. 4 No. 3 PAngV. The German legislature, deviating from the wording of the Directive, used the terms 'small direct salesman' and 'small retailer'. These terms have been subject to some discussion in literature.<sup>45</sup> The intention of the German legislature was to protect mom-and-pop-stores as well as direct sales at farms.<sup>46</sup> In order to restrict the scope of this exception and avoid any quantitative criteria (as suggested by Art. 6 PID), legislators introduced the criterion of a 'distribution by attendance' ('*Warenausgabe überwiegend im Wege der Bedienung*'). This criterion is not persuasive since also mom-and-pop-stores are commonly self-service markets and thus are not protected by this exception.<sup>47</sup>

However, stakeholders did not report any problems with this derogation in practice, despite the fact that it is used by small businesses.

### 1.1.3. Effectiveness of the MCAD in providing protection for businesses

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

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

As noted above, Germany has a long history of regulating unfair competition law and its goal was, originally, to protect competitors. Hence, the MCDA did not lead to any additional protection in B2B relations, with the exception that comparative advertising was restricted before 1997. Therefore, there is no problem under German law with the

<sup>43</sup> BGH 03.04.2016, Az. I ZR 110/15.

<sup>44</sup> *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).

<sup>45</sup> *Sosnitza* "§ 9 PAngV", rec. 16 in: Zipfel/Rathke (2015); *Völker* "§ 9 PAngV" rec. 48 in: Völker (2002).

<sup>46</sup> Cf. Bundestags-Drucksache No.180/00, p. 32.

<sup>47</sup> Cf. also *Weidert/Völker* "§ 9 PAngV", rec. 26 in: Harte-Bavendamm/Henning-Bodewig (2013).

scope of the MCAD. Stakeholders did not express a wish to change the scope of the MCAD in the future.

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

The principle-based approach complies with the German tradition of a 'general clause', as described above.

- The effects of the minimum harmonisation provisions on misleading advertising; [*Key aspects to consider are: 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)?*]

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.<sup>48</sup> 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.<sup>49</sup>

In the view of the interviewed stakeholders there is no need to change the minimum harmonisation approach of the MCAD.

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

Before the transposition of Directive 97/55/EC, comparative advertising was generally prohibited in Germany and the BGH only allowed comparative advertising under very narrow circumstances.<sup>50</sup> Therefore, an enhancement of market transparency was expected with the transposition.<sup>51</sup> However, in practice comparative advertising is still barely used in Germany, and hence stakeholders hardly ever have to deal with comparative advertising.

- 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;

Neither stakeholders nor academic authors have reported cases in which 'modern types of marketing' should be considered as unfair, but are not covered by the MCAD or the respective German provisions.<sup>52</sup> One stakeholder mentioned that in its view, websites comparing, for example, product prices, should be excluded from the rules governing comparative advertising, as a third party (i.e. the website) is involved.

<sup>48</sup> Köhler GRUR 2013, 761, 765.

<sup>49</sup> Bornkamm "§ 5 UWG" rec. 2.23 seq. in: Köhler/Bornkamm (2016).

<sup>50</sup> Cf. Augenhofer (2005) 20 Tul. Eur. & Civ. L.F. 2005, 110.

<sup>51</sup> Beater (2011) p. 325; Scherer WRP 2001, 89.

<sup>52</sup> For academic views on the implementation of the MCAD with regard to comparative advertising cf. e.g. Alexander (2016), p. 325; Plaß NJW 2000, 3161; Sack WRP 2001, 327.



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

In Germany, comparative and misleading advertisement is traditionally enforced by competitors and business associations.<sup>53</sup> However, some commentators argue that different enforcement systems in Member States prevent the development of a harmonised enforcement framework.<sup>54</sup> One stakeholder – which is not a ‘qualified entity’ under the ID but allowed to bring injunctions under German law – reported problems when jurisdiction lies outside Germany. Two other stakeholders mentioned ‘directory scams’ (*‘Adressbuchschwindel’*) and that with regard to this kind of unfair commercial practice criminal law is relevant, which does not fall under the competence of the EU.

- Are there measures that could improve the effectiveness of the MCAD in providing protection for businesses (see also 1.1.6 below)? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

From an academic standpoint the MCAD and UCPD need to be aligned. It is hard to understand why misleading commercial practices in B2C relations and advertising in B2B relations are governed by a whole set of different rules; and why misleading advertising is minimally harmonised while the UCPD and B2B comparative advertising involve full harmonisation. However, in practice the law of unfair competition works very well, due to its long history in Germany, and the fact that German rules for B2B and B2C relations are more aligned than under European law.<sup>55</sup>

Stakeholders did not report any need for changes of the current system. One stakeholder suggested that the German enforcement system should become a model for all European countries.

#### 1.1.4. Effectiveness of current rules 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;

Stakeholders did not report examples dealing with a disparate understanding of the principles. Most stakeholders noted that factors outside law – e.g. language problems, costs for postage services – are also affecting cross-border trade. Some stakeholders wish that the guidelines for the UCPD published by the European Commission were available in German, and most stakeholders expressed a need to reduce (or at least harmonise) the information duties under the different directives.

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

Stakeholders did not report any effect of the black list on the free movement of goods and services.

<sup>53</sup> Cf. Sec. 8-14 UWG and Köhler, “Einleitung UWG”, rec. 2.41 in: Köhler/Bornkamm (2016).

<sup>54</sup> Glöckner “Einleitung B”, rec. 466 in: Harte-Bavendamm/Henning-Bodewig (2013).

<sup>55</sup> *van Eek/Czernik* GRUR Int. 2016, 539, 546; for the experiences and implications of the UCPD’s application to businesses cf. *Hoeren* WRP 2009, 789, 794.

- Whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade. [*Do the national differences play a role in a business perspective? Have they caused problems?*]

Stakeholders did not report any cases thereof.

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;

It is referred to the answer given above with regard to the UCPD (1.1.4, question one).

- Whether the minimum harmonisation character of provisions on misleading advertising represents a barrier to cross-border trade;

Stakeholders did not indicate any relevant cases.

- 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;

In the view of the stakeholders, this is the case.

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

In the view of stakeholders – given the fact that in the framework of the UCPD, consumers do not have legal standing anyway – the lack of a cross-border enforcement mechanism does not constitute a barrier to cross-border trade.

Some stakeholders liked the idea of an informal exchange between enforcement agencies in order to foster cross-border enforcement.

#### 1.1.5. Interplay amongst UCPD information requirements according to Article 7(4) with the information requirements in the horizontal consumer law instruments

Regarding the information requirements according to Article 7(4) UCPD ("invitation to purchase") in the advertising stage, please analyse:

- The level of awareness of traders as regards information requirements at the advertising stage, as in particular demonstrated by their practical application; [*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?*]
- 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?

Stakeholders asserted that traders are quite aware of these information requirements. However, stakeholders regard the information requirements in European consumer law as overwhelming. It has also been noted that the information requirements under the different directives should be coordinated properly. The view of stakeholders is in

line with legal literature that suggests the current mass of information requirements are not providing sustainable consumer protection.<sup>56</sup>

Overlaps pertaining to the Services Directive and the E-commerce Directive exist especially with regard to Art. 5 E-commerce Directive und Art. 22 para. 1 Services Directive. In the view of one stakeholder, Art. 7 para. 4 UCPD should remain in force despite all the information requirements set out in the CRD, as the information requirements under the UCPD play a role in the early stages of a pre-contractual relationship.

#### 1.1.6. Relevance for business-to-business transactions

Regarding the area of unfair commercial practices/marketing, please analyse:

- 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 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;
- 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 also cover unfair commercial practices during and after the transaction;
- Whether there is a need to have a black-list of practices in the business-to-business marketing area;
- What should be the enforcement cooperation mechanism in the business-to-business marketing area;
- Whether there is a need to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive;
- Whether there is a need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive.

From a theoretical perspective, a harmonised law in every Member State might promote cross-border trade. However, stakeholders were quite concerned about the notion that the European Commission plans to further harmonise this area. They explicitly said that – in their view – there is no need to harmonise Unfair Commercial Practices Law with regard to B2B transactions. Consequently, the need for a 'black list' was denied, as was also the need for either enforcement cooperation mechanisms or the adoption of new rules concerning comparative advertisement.

#### 1.1.7. Relevance of contractual consequences of unfair commercial practices

Please analyse whether there are in your country:

- 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;
- Any case law (enforcement decisions, court rulings) providing for such consequences;
- Whether there is, based on past experience in your country, a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

German contract law offers a range of interfaces with the law of unfair commercial practices,<sup>57</sup> although there is no general principle that an unfair commercial practice

<sup>56</sup> Cf. *Link* "§ 5 UWG", rec. 36 in: *Juris Praxiskommentar UWG* (2013).

(irrespective of whether pre-contractual or occurring during the conduct of the contract) constitutes either a breach of contractual duties or automatically triggers the avoidance of the contract or damages.

German law used to provide a provision that enabled purchasers to rescind the contract, if this contract was concluded under the influence of misleading advertisement and this advertisement was essential for the conclusion. This right was codified in Sec. 13a UWG and was in effect from 01.01.1987 until 02.07.2004.<sup>58</sup> The legislature's explanatory notes accompanying the 2004 amendment of the UWG emphasised that this provision did not have any effect in practice and therefore should be abolished.<sup>59</sup> The legislature insofar complied with the demands in German legal literature where this right to rescind was similarly considered redundant.<sup>60</sup>

### 1. Unlawfulness and unconscionability (*'Gesetzes- und Sittenwidrigkeit'*)

Sec. 134 German Civil Code<sup>61</sup> declares as void any contract which violates a statutory provision. This rule appears to be fitting for infringements of unfair competition law. However, Sec. 134 BGB requires that the content of a contract be a violation of statutory provisions and not only the circumstances under which the contract was concluded. It is regularly the case that the content of a contract concluded subsequent to unfair commercial practices does not infringe statutory provisions.<sup>62</sup> However contracts that intend to infringe unfair competition law might be void due to unlawfulness.<sup>63</sup>

In addition, contracts concluded under the influence of unfair commercial practices are not generally considered as unconscionable under Sec. 138 BGB. Again, the provision intends to prohibit contracts with unconscionable content, but not contracts that are concluded under circumstances that are considered as 'unfair'.<sup>64</sup> This view, which was also repeatedly supported by the Courts, is based on the structural system of the BGB. In respect of the guiding principle of private autonomy, contracts should only be automatically void under very narrow circumstances. As far as contract conclusion is concerned, the governing provisions are Sec. 119 and Sec. 123 BGB, which only cause avoidance if one party rescinds.<sup>65</sup>

Nevertheless the German High Court of Justice did find contracts to be void in particular cases. This is especially the case where the unfair commercial practice spills over into the concluded contract or the contract does not comply with general principles of the legal system.<sup>66</sup> This was concluded, for instance, in the establishment of a promotional pyramid scheme (*'Schneeballsysteme'*)<sup>67</sup> or behaving unconscionably in addition to intentional deception over the payout of winnings.<sup>68</sup>

### 2. Warranty Rights (*'Gewährleistungsrecht'*)

<sup>57</sup> Cf. *Alexander* WRP 2012, 515.

<sup>58</sup> Cf. Act against Unfair Competition of 03.07.2004, Federal Law Gazette (BGBl.) I 2004, 1414.

<sup>59</sup> Bundestags-Drucksache No. 15/1487, p. 14.

<sup>60</sup> See for a summary *Alexander* (2002), p. 280.

<sup>61</sup> "Bürgerliches Gesetzbuch (BGB)", Federal Law Gazette (BGBl.) 2002 I, p. 42, recently amended by Art. 3 Act of 24.05.2016, Federal Law Gazette I 2016, p. 1190.

<sup>62</sup> *Arnold* "§ 134 BGB", rec. 69 in: *Erman* (2014); *Seibl/Sack* "§ 134 BGB", rec. 304 in: *Staudinger* (2011); *Augenhofer* WRP 2006, 169, 173; *Köhler* JZ 2010, 767, 769, *Sack* GRUR 2004, 625, 626.

<sup>63</sup> *Sack* GRUR 2004, 625, 626.

<sup>64</sup> This is the strongly prevailing opinion in German law, cf. only *Köhler* "§ 3 UWG", rec. 10.5 in: *Köhler/Bornkamm* (2016).

<sup>65</sup> BGH 25.01.1990, Az. I ZR 19/87, NJW 1991, 287; BGH 14.05.1998, Az. I ZR 10/96, GRUR 1998, 945, 946 (*Co-Verlagsvereinbarung*); see also *Armbrüster* "§ 138 BGB", rec. 1 in: *Münchener Kommentar BGB* (2015); *Seibl/Sack* "§ 134 BGB", rec. 5 in: *Staudinger* (2011).

<sup>66</sup> BGH 14.05.1998, Az. I ZR 10/96, GRUR 1998, 945, 946 (*Co-Verlagsvereinbarung*).

<sup>67</sup> BGH 22.04.1997, Az. XI ZR 191/96, WRP 1997, 783, 784 (*Sittenwidriges Schneeballsystem*).

<sup>68</sup> BGH 29.06.2005, Az. VIII ZR 299/04, NJW 2005, 2991; in this judgment the BGH was slightly more open towards the idea that an infringement of the UWG leads to avoidance of the contract in terms of Sec. 138 BGB; however, other decisions do not indicate such a change yet, cf. also *Nasall* NJW 2006, 127.

Furthermore, pre-contractual commercial practices may play a role in determining whether a good is fit for purpose pursuant to § 434 BGB. Advertising will in particular be considered in determining whether a good satisfies the intended fit for purpose requirement found under Sec. 434 para. 1 cl. 2 (which transposes Art. 3 Sales Directive). In case of non-conformity, this triggers warranty rights according to Sec. 437 BGB, which include the right to demand repair or replacement (*'Nachbesserung'* or *'Nachlieferung'*) in the first place, and further to reduce the price or to revoke the contract if the defect is not merely minor.<sup>69</sup> Nevertheless the circumstances of every single case need to be examined in order to determine whether a misleading advertisement or any other misleading commercial practice may exist.

### 3. Law of Mistake (*'Irrtumsrecht'*)

Sec. 119 BGB enables a contractual party to avoid the contract if it was mistaken about the declarations content or had no intention whatsoever of making a declaration with this content. Thus Sec. 119 para. 1 BGB offers two possibilities: Either there was a mistake in declaration (*'Erklärungsirrtum'*, Sec. 119 para. 1 cl. 1 BGB), e.g. a typing error (writing '100' instead of '10' in an order) or misspeaking, or there was a mistake regarding the meaning of the declaration (*'Inhaltsirrtum'*, Sec. 119 para. 1 cl. 2 BGB). So at a first glance, this appears to fit perfectly with situations of misleading commercial practices. However, it is acknowledged in German legal literature that Sec. 119 para. 1 BGB does not apply to the decision-making process of the party itself but rather to a divergence between declaration and intent. So Sec. 119 para. 1 does not include errors regarding the parties' motives, the price or the value of a good.

Though there have been attempts to apply Sec. 119 para. 1 BGB also to errors concerning the conformity of goods, this has not yet prevailed.<sup>70</sup> Nevertheless, Sec. 119 para. 2 BGB states that errors with regard to 'essential characteristics' (*'verkehrs wesentliche Eigenschaften'*) are able to constitute a mistake in terms of Sec. 119 para. 1 BGB. Though it is highly disputed which characteristics are 'essential' in terms of Sec. 119 para. 2 BGB,<sup>71</sup> it is acknowledged that a misleading advertisement may establish such an essential characteristic. Therefore, it has been suggested to consider the catalogue of necessary information in Art. 7 para. 4 UCPD (Sec. 5a para. 3 UWG) as essential characteristics in terms of Sec. 119 II BGB.<sup>72</sup> However, the scope in terms of a contractual remedy for breaching unfair commercial practices law, remains narrow.<sup>73</sup>

Sec. 123 BGB gives a party the right to rescind a contract if the party was intentionally deceived or put under duress. Generally, a misleading commercial practice is able to constitute deception under Sec. 123 para. 1 BGB.<sup>74</sup> But as deception in terms of Sec. 123 para. 1 BGB requires intent, it does not grant a sound protection against, for example, negligently misleading advertisements or other misleading commercials.<sup>75</sup> Some scholars argue that Sec. 123 para. 1 BGB should be applicable analogously in situations of negligence.<sup>76</sup> The same applies to duress under § 123 para. 1 BGB. Although it is basically possible that an aggressive commercial

<sup>69</sup> Cf. for a comprehensive study of this topic *Augenhofer* (2002); further also *Augenhofer* WRP 2006, 169, 174; *Sack* GRUR 2004, 625, 627.

<sup>70</sup> *Singer* "§ 119 BGB", rec. 47 in: *Staudinger* (2012).

<sup>71</sup> Cf. *Arnold* "§ 119 BGB", rec. 36 in: *Erman* (2014).

<sup>72</sup> Cf. *Alexander* (2016) in: *Augenhofer/Alexander* (eds.), p. 159.

<sup>73</sup> *Armbrüster* "§ 119 BGB", rec. 1 in: *Münchener Kommentar BGB* (2015); *Arnold* "§ 119 BGB", rec. 22 in: *Erman* (2014); *Hefermehl* "§ 119 BGB", rec. 51 in: *Soergl* (1999); *Mansel* "§ 119 BGB", rec. 1 in: *Jauernig* (2015); *Brox/Walker* (2014) rec. 407; for a slightly higher importance due to a more extensive interpretation *Augenhofer* WRP 2006, 169, 173 and *Sack* GRUR 2004, 625, 626.

<sup>74</sup> Cf. *Armbrüster* "§ 123 BGB" rec. 93" in: *Münchener Kommentar BGB* (2015).

<sup>75</sup> *Weiler* WRP 2003, 423, 426.

<sup>76</sup> Cf. *Canaris* AcP 2000, 273; *Weiler* WRP 2003, 423, 427; critically *Fleischer* (2001), p. 432; *Schwarze* (2001), p. 310.

practice constitutes 'duress' in terms of Sec. 123 para. 1 BGB, the requirements of those two rules are not identical.

#### 4. The principle of culpa in contrahendo (pre-contractual liability)

In addition, it is discussed whether the principles of pre-contractual liability ('*culpa in contrahendo*', Sec. 241 para. 2, 311 para. 2 BGB) are applicable to pre-contractual unfair commercial practices.<sup>77</sup> The details of such application are highly disputed among German legal scholars, since this legal institute needs to be harmonised with Sec. 123 BGB and Secs. 434, 437 BGB. However, there are good arguments to apply Secs. 241 II, 311 II BGB in cases of intentional or negligent unfair commercial practices.<sup>78</sup>

Overall, German law tries to draw a clear line between contract law and unfair competition law as according to both the prevailing view in German legal literature and the High Court of Justice, unfair competition law protects collective interests of consumers or more generally purchasers on a fair competition, but not the interests of an individual consumer. This view was also supported by the stakeholders interviewed for this study.

## 1.2. Contract conclusion and performance

### 1.2.1. Effectiveness of the current rules in establishing 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;

In German law the questions dealt with in the UCTD are regulated in Sec. 305 et seq. of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB). It has to be noted that Germany has a long history of regulating standard contract terms, first in a single act, the so-called AGBG (*Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen*, Act Regarding the Regulation of the Law Governing Standard Contract Terms)<sup>79</sup> which was enacted in 1976, whose provisions were incorporated into the BGB with the so-called '*Schuldrechtsmodernisierungsgesetz*' in 2001. The AGBG was seen by some authors as highly influential for the UCTD, even though the UCTD is significantly less far reaching (cf. below with regard to the black/grey list). Hence, it did not require much to implement the UCTD into German law.<sup>80</sup> Most notably, previous to the transposition of the Directive, German unfair contract terms law did not cover B2C contract terms which were intended only for non-recurrent use on one occasion. Equally, the Directive now makes it necessary to take into account concurrent circumstances surrounding the entering of the contract when applying Sec. 307 BGB (the general clause) to B2C contracts.<sup>81</sup>

The general view in German literature, as well as among stakeholders, is that the overall effectiveness of the UCTD – and its German equivalent – is quite positive also due to the fact that Germany has long history of a principle-based approach. However, it has been noted in literature that the German unfair contract terms law's impact in preventing unfair terms varies from industry to industry and appears to be more

<sup>77</sup> Cf. for a comprehensive summary Alexander (2002), p. 134 seqq.

<sup>78</sup> Alexander (2002) p. 140 and 145; Augenhofer WRP 2006, 169, 175; Köhler GRUR 2003, 265, 268; Leistner (2007) p. 1073; Sack GRUR 2004, 625, 630.

<sup>79</sup> Federal Law Gazette (BGBl.) 1976 I, p. 3317.

<sup>80</sup> Cf. Ulmer/Habersack, "Einl", rec. 92 in: Ulmer/Brandner/Hensen (2016).

<sup>81</sup> Schwerdtfeger DStR 1997, 499.

substantial with regard to larger corporations having their own legal departments.<sup>82</sup> Yet the relative success appears to be owed only to a very limited extent to the implementation of the Directive.<sup>83</sup> It was also noted by one of the stakeholders that a principle-based approach to unfair standard terms is the only possible approach in lieu of a (partly) harmonised European private law and a consequently different national understanding of the (un)fairness of terms.

- 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 your MS? Does this work in practice or are there problems?*]

The terms on the indicative list overlap to a certain extent with the terms on the black/grey list in Sec. 308/Sec. 309 BGB. This affects the use of the indicative list in practice. The indicative list can firstly be relevant in connection with the application of Sec. 308 and Sec. 309 BGB (black/grey list) by the courts, in cases where there is some interpretative leeway under German Law as to whether the particular clause is actually void or not. Furthermore, for terms covered by the indicative list but not by Sec. 308 or Sec. 309 BGB, the list is used in the context of the general clause (Sec. 307 para. 1 BGB). In both cases the indicative list is said to create a rebuttable presumption or at least an indication that the particular term is unfair.<sup>84</sup> If, however, a term is undoubtedly void under Sec. 308 or Sec. 309 BGB, the indicative list is irrelevant for interpretation, as both articles then constitute more stringent provisions within the meaning of Art. 8 UCTD.<sup>85</sup> As well, with regard to practical problems it seems that to a certain extent, the vague nature of the term 'indicative' has led to some uncertainty as to how to apply the list in a particular context.<sup>86</sup> However, none of the stakeholders experienced any problems with the indicative list of the UCTD in practice, as Sec. 308 and 309 BGB in combination with the general clause (Sec. 307 BGB) provide for an efficient legal framework.

- 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; [*Note: If a black/grey list exists in your country, key aspects to consider are: How does the list work in practice? Does it make a difference to have such a list?*]

There exists a black/grey list in Sec. 308 and Sec. 309 BGB which is applicable to all B2C transactions, but in general not to B2B transactions pursuant to Sec. 310 para. 1 BGB (however, Secs. 308 and 309 might serve as an indication for the unfairness of terms in B2B contracts<sup>87</sup>). The clauses in Sec. 309 BGB are invalid without any room for evaluation (though some of the terms used in the clauses might need interpretation themselves), whereas under Sec. 308 BGB it depends on the judgment of the court whether the term in question is valid or not.<sup>88</sup> Additionally, both Sec. 308 and Sec. 309 BGB are used in connection with the general clause in Sec. 307 para. 1 BGB to assess whether terms similar to the terms on the lists, but not covered by

<sup>82</sup> Basedow "vor § 305", rec. 15 in: Münchener Kommentar BGB (2016); Ulmer/Habersack "Einl", rec. 80 in: Ulmer/Brandner/Hensen (2016); Graf von Westphalen NJW 2013, 961, 966.

<sup>83</sup> Ulmer/Schäfer "§ 310", rec. 48 in: Ulmer/Brandner/Hensen (2016); Graf von Westphalen NJW 2013, 961, 966.

<sup>84</sup> Fuchs "vor § 307", rec. 23 in: Ulmer/Brandner/Hensen (2016); Schmidt "308 Nr. 1", rec. 5 in: Ulmer/Brandner/Hensen (2016); Wurmnest "§ 308", rec. 12 in: Münchener Kommentar BGB (2016); particulars disputed.

<sup>85</sup> Wurmnest "§ 308", rec. 12 in: Münchener Kommentar BGB (2016).

<sup>86</sup> See the overview by Pfeiffer "Art. 3", rec. 75 seq. in: Wolf/Lindacher/Pfeiffer (2013).

<sup>87</sup> Ulmer/Schäfer "§ 310", rec. 27 in: Ulmer/Brandner/Hensen (2016). In addition, Sec. 308 No. 1a and No. 1b BGB, which were introduced in 2014 in order to transpose Directive 2011/7/EU into German Law, are also applicable in the context of B2B contracts, cf. Sec. 310 para. 1 BGB.

<sup>88</sup> Fuchs "vor § 307", rec. 7 in: Ulmer/Brandner/Hensen (2016).



them, are unfair or not.<sup>89</sup> It appears that the use of a black/grey list has the advantage of helping practitioners and the courts to decide more easily whether a particular term is unfair or not, and that it thus provides for legal certainty. However, the majority of court decisions concern cases where the general clause was applied, as the term in question was not covered by the black/grey list.<sup>90</sup> It is debatable whether fewer cases concerning the black/grey list came up because of the steering effect of the list or simply because the list is rather fragmentary.<sup>91</sup>

In the view of one stakeholder, the German BGB does not contain a grey list and a black list but rather two black lists, as is it only up to the judge to decide whether a term is unfair or not without having leeway with regard to the legal consequences.

- 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: In your country, have the effects of court decisions establishing the unfairness of an unfair term been extended to all contracts of the trader concerned or to the contracts of any other trader containing such a term? If so, how does this work in practice? What are the impacts on businesses? If there are no such effects of court decisions on unfair terms: what are the effects of this situation?*]

Under German Law, court decisions – no matter whether brought to court by an individual party, following an injunction under Sec. 1 Injunctions Act,<sup>92</sup> or brought by an organisation with standing under Sec. 3 UKlaG – have effect primarily *inter partes* (Sec. 325 para. 1 ZPO<sup>93</sup> (*Zivilprozessordnung*, Civil Procedure Code).<sup>94</sup> If, however, the user continues to use the unfair term despite an injunction having been granted, it is possible for other contracting parties to invoke the decision of the court from the previous injunction proceedings against the user in subsequent proceedings. This leads to the result that the term in question has to be regarded as non-binding (Sec. 11 UKlaG). There is some disagreement between academic scholars whether the provision is sufficient to fulfil the requirements of Art. 7 para. 1 of the UCTD in the light of the CJEU decision in 'Invitel',<sup>95</sup> as the customer has to invoke the decision first. It seems that so far neither of the two positions has gained the upper hand.<sup>96</sup> In any event, Sec. 11 UKlaG has been of little practical relevance so far.<sup>97</sup>

Generally, both the injunctions procedure (Sec. 1 seqq. UKlaG) as well as claims by individuals are said to have quite a positive impact on reducing the use of unfair terms in practice,<sup>98</sup> although not all expectations with regard to the injunction procedure

<sup>89</sup> Cf. *Ulmer/Habersack* "Einl", rec. 71 in: *Ulmer/Brandner/Hensen* (2016).

<sup>90</sup> *Pfeiffer* "Einl.", rec. 43 in: *Wolf/Lindacher/Pfeiffer* (2013).

<sup>91</sup> *Pfeiffer* "Einl.", rec. 43 in: *Wolf/Lindacher/Pfeiffer* (2013); *Ulmer/Habersack* "Einl", rec. 71 in: *Ulmer/Brandner/Hensen* (2016).

<sup>92</sup> "Unterlassungsklagengesetz (UKlaG)", Federal Law Gazette (BGBl.) 2002 I, p. 3422, 4346, recently amended by Art. 3 Act of 11.04.2016 (Federal Law Gazette I 2016, p. 720).

<sup>93</sup> Federal Law Gazette (BGBl.) 2005 I, p. 3202, recently amended by Art. 2 Act of 05.07.2016 (Federal Law Gazette I 2016, p. 1578).

<sup>94</sup> See also *Witt* "§ 11 UKlaG", rec. 6, in *Ulmer/Brandner/Hensen* (2016).

<sup>95</sup> ECLI:EU:C:2012:242 (*Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*).

<sup>96</sup> In favour of accordance with EU law: *Köhler*, "§ 11 UKlaG", rec. 1 in: *Köhler/Bornkamm* (2016); *Schlosser* "§ 11 UKlaG", rec. 4 in: *Staudinger* (2013); *Witt* "§ 11 UKlaG", rec. 2a in: *Ulmer/Brandner/Hensen* (2016); *Lindacher* EWiR 2012, 677, 678; against accordance with EU Law: *Micklitz* "§ 11 UKlaG", rec. 2. in: *Münchener Kommentar ZPO* (2013); *Stadler* (2015) in: *Meller-Hannich/Haertlein et. al. (eds.)*, p. 481, 495; *Halfmeier*, (2015) p. 168.

<sup>97</sup> *Micklitz* "§ 11 UKlaG", rec. 2. in: *Münchener Kommentar ZPO* (2013).

<sup>98</sup> *Pfeiffer* "Einl.", rec. 46 in: *Wolf/Lindacher/Pfeiffer* (2013); *Ulmer/Habersack* "Einl.", rec. 72 seq., 84 in: *Ulmer/Brandner/Hensen* (2016).

have been fulfilled so far.<sup>99</sup> In this regard, especially consumer organisations call for the introduction of group actions as an additional measure. They argue that it is impossible under current German Law to help a large group of consumers who each suffered only minor damages because of the same unfair contract term, as individual proceedings are too costly and time-consuming.<sup>100</sup> On the other hand, industry interest groups such as the BDI (*Bundesverband der Deutschen Industrie*) consider the current system sufficient and argue that group actions create the danger of abuse at the expense of businesses.<sup>101</sup> The Ministry for Justice and Consumer Protection said that it is considering the introduction of group actions or model proceedings as an option, but so far no concrete proposal has been published.<sup>102</sup>

As an alternative to the introduction of group actions, scholars have been discussing whether – in addition to injunctions under Sec. 1 UKlaG – consumer interest groups could bring forward a claim for remedial action (*Folgenbeseitigungsanspruch*) under Sec. 8 UWG.<sup>103</sup> However, a prerequisite for this would be that the use of unfair contract terms always (or at least under certain circumstances) also constitutes an illegal commercial practice, which is highly contested in academia and by the judiciary.<sup>104</sup> Ultimately, clarification on claims to remedial action under Sec. 8 UWG following the use of unfair contract terms can only be provided by a decision of the High Court of Justice (BGH).

Aside from the discussions around group actions, claims to remedial action and the application of Sec. 11 UKlaG, it appears that there are no other attempts to extend the effect of court decisions to parties outside the scope of Sec. 325 ZPO.

Stakeholders have not reported any particular problems with regard to the current legal situation in Germany. Rather, it was noted that court decisions *de facto* also protect other consumers, even if they are – *de iure* – only binding *inter partes*. One stakeholder pointed out that in cease and desist letters (*Unterlassungserklärungen*), businesses have to commit to refraining from using an unfair term against all customers.

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

Prior to the adoption of the Directive, the transparency requirement was not codified in German Unfair Contract Terms Law but was accepted and applied by the courts at least since the late 1980s.<sup>105</sup> In reaction to the CJEU decision *Commission v. Netherlands*,<sup>106</sup> the contractual transparency requirement was then codified in Sec. 307 para. 1, cl. 2. BGB in 2001.<sup>107</sup> In addition to Sec. 307 para. 1 cl. 2 BGB, Sec. 305 para. 2 BGB, Sec. 305c para. 1 and para. 2 BGB, also to a certain extent deal with questions regarding the transparency of contract terms, yet these provisions are primarily relevant for the question as to whether standard contract terms become part of the contract at all – a question which is not dealt with in the UCTD. While no material change of the law was intended when the transparency requirement was

<sup>99</sup> *Ulmer/Habersack* "Einl.", rec. 86 in *Ulmer/Brandner/Hensen* (2016); *Witt* "Vorb. v. § 1 UKlaG", rec. 8 in: *Ulmer/Brandner/Hensen* (2016).

<sup>100</sup> *vzbv* (Verbraucherzentrale Bundesverband), „Positionspapier, Lücken im kollektiven Rechtsschutz endlich schließen“ (2015), available at [http://www.vzbv.de/sites/default/files/downloads/kollektiver\\_rechtsschutz-poitionspapier-vzbv-2015.pdf](http://www.vzbv.de/sites/default/files/downloads/kollektiver_rechtsschutz-poitionspapier-vzbv-2015.pdf); see also *Halfmeier* (2015) p. 34 seq.

<sup>101</sup> <http://bdi.eu/artikel/news/missbrauchsgefahr-durch-sammelklagen-verhindern/>.

<sup>102</sup> [https://www.bmjv.de/SharedDocs/Reden/DE/2015/09282015\\_StBillen\\_vzbv.html](https://www.bmjv.de/SharedDocs/Reden/DE/2015/09282015_StBillen_vzbv.html).

<sup>103</sup> For an overview on the discussion with further references see *Bunte ZIP* 2016, 956.

<sup>104</sup> Against a claim for remedial action because of unfair contract terms under Sec. 8 UWG: OLG Stuttgart 07.08.2015, Az. U 107/14, ZIP 2016, 927 seq.; *Bunte ZIP* 2016, 956 seq.; in favour of a claim for remedial action because of unfair contract terms under Sec. 8 UWG: LG Leipzig 10.12.2015, Az. 05 O 1239/15, VuR 2016, 109 seq.; *Reich* VuR 2014, 247, 248; *Rott* VuR 2016, 112 seq.

<sup>105</sup> BGH 17.01.1989, Az. XI ZR 54/88, BGHZ 106, 259; BGH 24.11.1988, Az. III ZR 188/87, BGHZ 106, 42.

<sup>106</sup> ECLI:EU:C:2001:257 (*Commission of the European Communities v. Kingdom of the Netherlands*).

<sup>107</sup> Cf. *Fuchs* "§ 307", rec. 323 seq. in: *Ulmer/Brandner/Hensen* (2016).

codified in Sec. 307 para. 1 cl. 2 BGB,<sup>108</sup> some scholars argue that the codification is of importance as it underlines that the transparency requirement applies equally to all types of contracts.<sup>109</sup> In general, it appears that the transparency requirement plays quite an important role for courts in reviewing standard contract terms. In practice, courts seem to apply the transparency requirement strictly with regard to price transparency in particular, especially in relation to terms that allow one party to adjust the originally agreed price or add extra fees under unclear circumstances or with completely unpredictable results.<sup>110</sup>

- 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. [*Note: Question only relevant for MS that have put in place extensions of application of UCTD*]

In Germany, the Directive applies neither to individually negotiated terms nor to terms on the adequacy of the price or the main subject matter of the contract (see Sec. 307 para. 3 cl. 1 BGB, Sec. 305 para. 1 BGB, Sec. 310 para. 2 BGB). Problems with price adequacy and problems with regard to the main subject matter of the contract are rather questions of general civil law, cf. sec. 134, 138 BGB. However, terms regarding the price or the performance can be invalid if they are not transparent (Sec. 307 para. 3 cl. 2 BGB read in conjunction with paras. 1 cl. 1 and 2 BGB).<sup>111</sup> Cf. also the answer to the previous question.

- 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?*]

Neither the stakeholders' responses nor court decisions or literature report any problems with regard to the legal consequence envisaged by the UCTD. There are no administrative remedies under German law for consumers in this area, and the German court system provides for a quite active role for judges in all areas of civil law.

- In a forward looking perspective: Are there other measures that could improve the effectiveness of the UCTD in establishing a high level of consumer protection in your country? Would a graphical presentation model improve the readability and comprehension by consumers of the T&Cs? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

Stakeholders did not report any need for a change to the UCTD. In a newspaper article, the current German Minister of Justice and Consumer Protection, Heiko Maas, argued that pictograms could make otherwise lengthy and (for laymen) incomprehensible standard contract terms more accessible, which could improve consumer protection (in particular data protection) in the context of online shopping and social networking.<sup>112</sup> However, considering the amount of content in typical standard terms, this seems only viable with regard to the most important clauses of each contract. Moreover, defining the most important clauses would also not seem an

<sup>108</sup> *Fuchs* "§ 307", rec. 324 in: Ulmer/Brandner/Hensen (2016).

<sup>109</sup> *Thüsing* "Transparenzgebot", rec. 1 in: Graf von Westphalen/Thüsing (2016) with further references.

<sup>110</sup> *Fuchs* "§ 307", rec. 336 in: Ulmer/Brandner/Hensen (2016); *Pfeiffer*, "§ 307", rec. 236 in: Wolf/Lindacher/Pfeiffer (2013).

<sup>111</sup> *Fuchs* "vor § 307", rec. 40 in: Ulmer/Brandner/Hensen (2016).

<sup>112</sup> Heiko Maas, Die Gefahr steckt im Detail, Frankfurter Rundschau, 09.10.2015 available at <http://www.fr-online.de/freiheit/gastbeitrag-die-gefahr-steckt-im-detail,31839204,32123826.html>.

easy task, as each consumer may consider different clauses to be important or not depending on the circumstance of the particular sale or the consumer's particular background and needs. Another idea for improving the accessibility and comprehensibility of standard contract terms concerns the use of software for 'text and pattern analysis' of online standard terms to show, for instance, hidden costs and to deal with the problem that consumers usually do not bother to read standard terms when agreeing to a contract.<sup>113</sup> However, this approach works only with clear and simple terms that do not require 'legal assessment', and of course such software cannot provide legal advice either.<sup>114</sup> Stakeholders, however, expressed serious doubts whether a graphical presentation model could work in practice, as information contained in standard contract terms is far too complex to be displayed graphically.

Finally, it is noteworthy that the working group for consumer contract law at the German Ministry of Justice and Consumer Protection discussed whether it would be advisable to introduce 'seals' certifying fair standard contract terms. The group concluded, however, that the current regime is sufficient and that it would be very hard to review standard contract terms countrywide and in a timely fashion.<sup>115</sup>

### 1.2.2. Effectiveness of the current rules 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 disparities have an impact on cross-border trade; [*Key aspects to consider are: Do national differences in the application/implementation of the Directive play a role for businesses? Have these differences led to changes in their business strategy? Have these differences caused problems?*]

Some scholars argue that the general problem is that the CJEU is – with the exception of its very early ruling '*Freiburger Kommunalbauten*'<sup>116</sup> – refraining from declaring terms invalid in a particular case. Instead the court is leaving the ultimate decision whether a particular term is unfair or not to the national court. As a consequence, it is difficult to develop uniform European standards for unfair terms.<sup>117</sup> Other scholars criticise the fact that a Directive was used as the tool to harmonise the law of the Member States, but in rather broad terms and with sometimes not ideal means of transposition, and that this has all led to quite different standards in various Member States. Instead, the use of a Regulation could have prevented differing standards by creating a unified law of unfair contract terms.<sup>118</sup> Contrary to the position highlighting the lack of uniform standards, others argue that it would be impossible to establish such standards at the current stage of European contract law in any event.<sup>119</sup> The latter view was also expressed by one of the stakeholders. In any event, despite the slightly different wording Sec. 307 para. 1 BGB and Art. 3 para. 1 of the Directive are

<sup>113</sup> Boos VuR 2014, 47 seq.

<sup>114</sup> Boos VuR 2014, 47, 48 seq. The method as well does not guarantee that the result will always be fully correct or exhaustive, *ibid.* 53.

<sup>115</sup> Abschlussbericht der Arbeitsgruppe Verbrauchervertragsrecht beim Bundesministerium für Justiz und für Verbraucherschutz (2016), p. 20 available at [http://www.bmjv.de/SharedDocs/Downloads/DE/StudienUntersuchungenFachbuecher/Verbrauchervertragsrecht\\_Abschlussbericht\\_AG.html](http://www.bmjv.de/SharedDocs/Downloads/DE/StudienUntersuchungenFachbuecher/Verbrauchervertragsrecht_Abschlussbericht_AG.html).

<sup>116</sup> ECLI:EU:C:2004:209 (*Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger Hofstetter and Ulrike Hofstetter*).

<sup>117</sup> See e.g. Basedow "vor § 305", rec. 43-47 in: Münchener Kommentar BGB (2016); Graf v. Westphalen NJW 2013, 961, 966.

<sup>118</sup> Zaccaria ZEuP 2016, 159, 166.

<sup>119</sup> Schlosser "vor § 305", rec. 14 in: Staudinger (2013).

considered to be largely congruent.<sup>120</sup> Generally, the stakeholders interviewed did not report any particular problems caused by the current approach either.

- 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;

So far no evidence was found nor were problems reported by stakeholders.

- 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.

So far no evidence was found. Some argue, however, that extension of unfair contract terms law to B2B contracts is a disadvantage for Germany as a trading place.<sup>121</sup> However, one has to keep in mind that 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.

### 1.2.3. Relevance for business-to-business transactions

Regarding the area of contractual fairness and in relation to the Unfair Contract Terms Directive, please analyse:

- Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;
- 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;

As pointed out previously, Germany already reviews standard contract terms in B2B relations and hence no need was reported to further strengthen supervision in order to protect SMEs or micro enterprises. Sec. 307 BGB – which is based on good faith – does not cause any particular problems with regard to B2B relations.

- 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;

Stakeholders advocated against such a widening of the scope of B2B protection.

- 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;

Stakeholders did not respond to this question. However, whether a term in a B2B relationship is unfair or not is more difficult to determine than in B2C relationships because neither one of the parties is in a weaker bargaining position per se. This is why it is inevitable that the individual situation of the contracting parties will be taken into account in each case.

<sup>120</sup> Coester "§ 308", rec. 105 seq. in: Staudinger (2013); Fuchs "§ 307", rec. 397 in: Ulmer/Brandner/Hensen (2016).

<sup>121</sup> E.g. Müller BB 2013, 1355, see also below.



- Whether there is a need for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive;

Such a rule already exists under Sec. 307 para. 1 BGB.

- Whether an extension of the Unfair Contract Terms Directive to B2B transactions can bring benefits for cross-border trade;

No evidence available. However, stakeholders state that other than legal barriers also influence a company's decision whether or not to engage in cross-border trade.

- Whether the consequences of such an extension would have an effect on innovation by or market opportunities for SME providers/suppliers;

No evidence available.

- Whether the benefits of extending the scope to business-to-business transactions would exceed the negative consequences of such an extension.

No evidence available.

### 1.3. Injunctions

#### 1.3.1. Effectiveness of the current rules in establishing a high level of consumer protection

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

- To what extent is the use of the injunction procedure in your country contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment?<sup>122</sup>

The Injunctions Directive is transposed into German law partly by the UKlaG and partly by the UWG. However, it should be noted that prior to the transposition of the Directive, injunction procedures were already possible under the so-called AGBG (*Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen*, Act Regarding the Regulation of the Law Governing Standard Contract Terms) and the UWG, and that the existing rules were only moderately modified during the transposition process.<sup>123</sup> The UKlaG and the UWG allow qualified entities (consumer organisations), certain business associations and the Chambers of Industry, Commerce and Trade to initiate injunction procedures.<sup>124</sup> Consumer organisations must be registered by the Federal Office of Administration (*Bundesverwaltungsamt*) or the European Commission.<sup>125</sup> Public authorities as well as individual consumers have no *locus standi*.<sup>126</sup> The proceedings under the UKlaG concern infringements of the rules on standard contract terms and various other consumer protection laws.<sup>127</sup>

<sup>122</sup> Consumers' detriment should be understood as the consumers' financial loss that was caused or that could have been caused by the infringements as defined by article 1(2) of the Injunctions Directive.

<sup>123</sup> Witt "Vorb. v. § 1 UKlaG", rec. 1, 6 in: Ulmer/Brandner/Hensen (2016); Köhler (2012), in: Augenhofer (ed.), p. 63 seq. The rules previously covered in the AGBG were moved completely to the UKlaG.

<sup>124</sup> Cf. Sec. 3 UKlaG and Sec. 8 para. 3 UWG.

<sup>125</sup> For more details on this requirement: Köhler/Feddersen "§ 8 UWG", rec. 3.54 seqq. in: Köhler/Bornkamm (2016); Bergmann/Goldmann "8 UWG", rec. 367 seqq., in: Harte-Bavendamm/Henning-Bodewig (2013); Greger NJW 2000, 2457, 2459 seq.

<sup>126</sup> See Micklitz "Vorbemerkung zu den §§ 1ff.", rec. 19 in: Münchener Kommentar ZPO (2013).

<sup>127</sup> Cf. Sec. 1 and Sec. 2 UKlaG. With regard to the other consumer laws covered see the answer below to the question in respect of Annex I of the Injunction Directive.

The proceedings under the UWG concern commercial practices which are prohibited pursuant to Secs. 3 und 7 UWG. However, while court decisions following a claim under Sec. 1 UKlaG have an effect only with regard to future misbehaviour, Sec. 2 UKlaG and Sec. 8 UWG also allow for a claim to remedial action (*'Beseitigungsanspruch'*).<sup>128</sup>

Stakeholders consider the UKlaG and the UWG provisions on injunction proceedings as very useful in practice. Both have been very successful so far with regard to reducing the number of infringements of consumer protection rules. However, since injunction procedures had already existed prior to the Injunction Directive, the particular impact of the Directive is difficult to determine.

- What measures in your national legislation on injunction procedure are considered to be particularly effective, if any: measures regarding the cost of the procedure, the 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?

Generally, stakeholders considered all of these measures as very helpful. In particular, corrective statements and interim injunctions (*'Einstweilige Verfügungen'*)<sup>129</sup> were said to be very effective.

- Has your country extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunction Directive? If yes, what are the additional consumer rights covered?

Yes, Sec. 2 UKlaG allows for an injunction procedure in the event of a violation of any consumer protection law (*'Verbraucherschutzgesetz'*), meaning any provision whose main purpose is the protection of consumers.<sup>130</sup> Sec. 2 para. 2 UKlaG contains various examples of such laws, including those transposing the Directives listed in Annex I of the Injunction Directive.<sup>131</sup> Not covered by the Annex, but listed in Sec. 2 para. 2 UKlaG as further examples, are in particular laws regarding consumer data protection (Sec. 2 para. 2 No. 11) and laws regarding the unauthorised offering of legal advice (Sec. 2 para. 2 No. 8).

- Analysis of the obstacles to the effective use of the injunction procedure, in particular by analysing which progress in removing obstacles has been made and/or new difficulties that have emerged in your country since 2012.

Some German scholars have assessed the role of consumer organisations in injunction proceedings positively.<sup>132</sup> However, the scope of the term 'qualified entities' is rather limited, which makes the injunction procedure less effective.<sup>133</sup> In particular, the requirements for consumer organisations as set out in Sec. 4 para. 2 UKlaG have been perceived as too strict.<sup>134</sup> This is even more the case since these entities have the greatest interest in bringing forward consumer protection cases.<sup>135</sup> Moreover, there is no genuine procedural law regarding infringement.<sup>136</sup> Sec. 5 UKlaG merely refers to the general German procedural law (ZPO). Another shortcoming is the lack of

<sup>128</sup> See in this regard also below 1.3.3. and above 1.2.1.

<sup>129</sup> Cf. Sec. 5 UKlaG read in conjunction with Sec. 935, 940 ZPO.

<sup>130</sup> Walker "§ 2 UKlaG", rec. 3 in: Walker (2016).

<sup>131</sup> With the exception of No. 5 of the annex of Directive 2009/22/EC, which is covered by Sec. 1 UKlaG, and No. 11 of the annex, which is covered by Sec. 8 UWG.

<sup>132</sup> Köhler (2012), in: Augenhöfer (ed.), p. 64.

<sup>133</sup> See Micklitz "Vorbemerkung zu den §§ 1ff.", rec. 18 seq. in: Münchener Kommentar ZPO (2013).

<sup>134</sup> See Micklitz "Vorbemerkung zu den §§ 1ff.", rec. 18 in: Münchener Kommentar ZPO (2013).

<sup>135</sup> See Micklitz "Vorbemerkung zu den §§ 1ff.", rec. 18 in: Münchener Kommentar ZPO (2013).

<sup>136</sup> See Micklitz "Vorbemerkung zu den §§ 1ff.", rec. 21 in: Münchener Kommentar ZPO (2013).



transparency due to the absence of an electronic register of injunction procedures<sup>137</sup> – a statement which was supported by one of the interviewed stakeholders. Generally, stakeholders assess the current state of the law as quite positive, besides the general problem of how to finance injunctions brought by consumer organisations.

- In a forward looking perspective: Should the coverage of the Injunctions Directive be extended (by including additional legislation into Annex I to the Directive)? If so, which EU legislation should be included? Are there other measures that could improve the effectiveness of the ID in establishing a high level of consumer protection? Should the scope of the Injunctions Directive be extended to the protection of collective business' interests? Are there best practices in your country that could be relevant for other countries and considered as model for the injunction procedure at EU level?

Generally, stakeholders are very content with the scope of the Injunctions Directive and have not expressed any wish to extend the coverage, e.g. to B2B relationships.

### 1.3.2. 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:

- How effective is the injunction procedure in addressing infringements originating in another EU country?
- How effective is it to address infringements originating in another EU country that qualified entities in your country are enabled to seek injunctions in the other Member State (Article 4 of the Injunctions Directive)?
- In a forward looking perspective: Are there non-legislative or/and legislative measures that could improve the effectiveness of the injunction procedure in addressing infringements originating in another EU country? Are there best practices in your country that could be relevant for other EU countries and could be considered as a model for the injunction procedure at EU level?

In Germany, injunction actions against traders from other EU countries are governed by Sec. 4a UKlaG. This provision allows proceedings by qualified entities against traders from other EU Member States who do not comply with consumer law. The provision does not deal with the applicable law. The applicable law is determined in accordance with general EU law principles (Art. 2 para. 2 of the Regulation 2006/2004<sup>138</sup>, Regulation 44/2001<sup>139</sup> and the Rome I and II Regulations<sup>140</sup>). However, scholars have assessed the success of transnational injunctions as rather poor.<sup>141</sup> The main reason is that they are not used frequently.<sup>142</sup> Moreover, the legal differences among Member States are often perceived as an obstacle to the Internal Market.<sup>143</sup>

Stakeholders also reported various problems with transnational injunctions. These problems concern, inter alia, the delivery of documents, language barriers, bad translations and the issue of who to mandate with representation. Furthermore, it is problematic that from country to country there are varying expectations on the results

<sup>137</sup> Halfmeier (2015), p. 165 seq.

<sup>138</sup> Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.

<sup>139</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>140</sup> Regulation (EC) of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations and Regulation (EC) of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.

<sup>141</sup> See e.g. Stadler VuR 2010, 83, 84.

<sup>142</sup> See e.g. Stadler VuR 2010, 83, 84.

<sup>143</sup> Doralt/Nietner AcP 2015, 855.

of the application of the substantive law. In addition, public authorities in other countries are sometimes reluctant to apply foreign law. Stakeholders also suggested that these issues could be tackled during the process of the revision of Regulation 2006/2004 regarding the cooperation between EU countries for consumer protection.

### 1.3.3. Interplay between the Injunctions Directive and other enforcement instruments of consumer law

Please analyse:

- Is the injunction procedure as designed by the Injunctions Directive regulated separately in your country (in a separate legal act or as a separate procedure regulated within the same legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (UCPD, UCTD and by the Consumer Rights Directive)?

Sec. 8 UWG serves as transposition of both the Injunction Directive and of Art. 11 of the UCPD. Secs. 1, 3 seq. UKlaG serve as transposition both of the Injunction Directive and of Art. 7 of the UCTD. Secs. 2, 3 seq. UKlaG serve as a transposition of both the Injunction Directive and Art. 23 of the Consumer Rights Directive.

- If these procedures are regulated separately: What are the main differences between them? How is the coherence between these procedures ensured? If these procedures are regulated in a single legal act (possibly as a single procedure): In what way do these procedures (or this procedure) go beyond measures foreseen by the Injunctions Directive?

Firstly, Sec. 8 UWG and Sec. 3 UKlaG are different with regard to standing, as claims under the UWG can also be brought by competitors. Secondly, under Sec. 3 para. 2 No. 1 UKlaG, consumer organisations cannot bring forward claims with regard to unfair contract terms (Sec. 1 UKlaG) when these terms concern a B2B relationship. Conversely, there are no restrictions on consumer organisations with regard to the UWG. Thirdly, Sec. 8 para. 4 UWG prohibits a claim for an injunction if its enforcement would be improper, while Sec. 2 para. 3 UKlaG, which previously contained a provision similar to Sec. 8 para. 4 UWG, was revoked in 2016. Finally, Sec. 8 UWG and Sec. 2 UKlaG constitute a claim for remedial action (*'Folgenbeseitigungsanspruch'*), whereas it is contested in cases regarding unfair contract terms whether or not the claimant can bring a claim for remedial action.<sup>144</sup>

## 1.4. Cross-cutting issues

### 1.4.1. Cost and benefits of the directives covered by the study

- To what extent is there evidence for benefits for consumers stemming from the protection provided by both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of benefits for consumers from the protection against unfair commercial practices and unfair standard terms in contracts; [*Note: a relevant aspect in this context is whether the costs for consumers in exercising their rights under these directives are limiting these benefits or not.*]

With regard to substantive law, consumers are rather well protected in the mentioned area. This is, however, not true with regard to procedural rights: In Germany, infringements of both UCTD and UCPD are enforced by individuals or private organisations before civil law courts. It is well observed that consumers may have a rational disinterest in exercising their rights. This is firstly due to the fact that a court

<sup>144</sup> See for an overview on the issue with further references *Bunte* ZIP 2016, 956 seq.

procedure triggers costs while the outcome of the process is uncertain. For example, where a consumer's claim is dismissed by the court, he has to bear his costs of the court proceeding as well as those of the opposing party (Sec. 91 ZPO). There exist some measures to counter this problem: For instance, parties before a local court (which is competent for claims up to EUR 5000 pursuant to Sec. 23 para. 1 GVG) are not compelled to be represented by a lawyer (Sec. 78 para. 1 ZPO). In order not to undermine their chances to win the case without legal assistance, the court is obliged to give reasonable hints to parties and prevent them, for example, from failing to comply with formal requirements (Sec. 139 ZPO).<sup>145</sup> Further there is a special court procedure for small claims up to EUR 600 under Sec. 495a ZPO, which also has the effect of creating reduced costs. For those persons in special financial need, there is the possibility to apply for state aid ('*Prozesskostenhilfe*', Sec. 114 seqq. ZPO). One has also to note the new ADR-procedure in this regard.<sup>146</sup> However, it is too early to know whether or not it will contribute to an efficient enforcement of consumer law. Further the notion of the Federal Ministry of Justice and Consumer, mentioned above, to introduce collective claims in the Civil Procedure Act is noteworthy.

- To what extent is there evidence for benefits for traders stemming from both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of creating a level playing field for honest traders by providing a legal basis to eliminate or at least constrain dishonest market practices, such as the use of unfair standard terms in contracts or unfair commercial practices, including through the application of the Injunctions Directive;

In general, any form of harmonisation has benefits for traders because it leads to (some) legal certainty. This makes it easier for traders to trade across borders, saving legal costs, avoiding changes of practice etc. However, this only applies if traders can rely on a certain level of harmonisation, i.e. that there is actually legal certainty and not a profoundly different interpretation among the courts or an (undue) interrelation of the harmonised consumer rules with the foreign legal system in question. However, it has to be noted that other factors – outside the law – have an important impact on cross-border trade as well, e.g. language barriers.

- What are costs for traders due to the need to respect the requirements under the directives covered by the study? [*Note: Such as costs of research, legal advice and compliance as well as the amount of time necessary to comply with the directives*]

Stakeholders were mostly concerned by the compliance costs caused by the multitude of information obligations.

- What are the costs involved in the public enforcement of these rules?

Generally the German enforcement system is focused – with regard to UCPD and UCTD – on private enforcement, rather than public enforcement. However public costs occur if public enforcement is understood in a broader sense, including e.g. costs for consumer information or consumer education. Due to Regulation (EC) No. 2006/2004, the Federal Office of Justice (*Bundesamt für Justiz*) is the central link for the Consumer Protection Cooperation Network (CPC), which triggers at least administrative costs to a certain extend. Other costs in this context were not mentioned by the relevant stakeholders. Apart from these costs, it should be considered that the German government spends money on the education of

<sup>145</sup> *Kocher* (2012) in: Tamm/Tonner, p. 1347 with further references and a discussion of the highly controversial issue regarding the degree to which the court is obliged to compensate a party's lack of proficiency in conducting court procedures.

<sup>146</sup> Act on the Transposition of the Alternative Dispute Resolution Directive and the Online Dispute Resolution Regulation in Consumer Matters, Federal Law Gazette (BGBl.) I, p. 254, transposing Directive 2013/11/EU and Regulation (EU) No. 524/2013.

consumers and is the main financier of consumer organisations (e.g. the 'Verbraucherzentrale Bundesverband').<sup>147</sup>

- Are there indications that the directives covered by the study are not implemented in your country in a cost-effective manner?
- Could the costs for implementing and enforcing the rules of the directives covered by the study be reduced without lowering the level of protection for consumers? If so, how?

There are no indications that the transposition of the concerned Directive is cost-inefficient. Further, stakeholders did not provide any ideas on how to reduce costs while maintaining the level of protection.

#### 1.4.2. Interplay with EU sector-specific consumer protection legislation

Regarding the interplay of the horizontal EU consumer legislation [mainly UCPD and UCTD] with EU sector-specific consumer protection legislation in the areas of electronic communications, passenger transport, energy and consumer financial services, please:

- Analyse the levels of awareness of the requirements of the horizontal EU consumer legislation (mainly UCPD and UCTD) of businesses and consumers and the specific public enforcement bodies in the relevant sectors, as in particular demonstrated by their practical application; [*Key question here is: Are UCPD and UCTD applied in practice by national authorities and courts as a legal basis to combat unfair commercial practices and unfair standard terms in contracts in the regulated sectors?*]
- Specify whether in your country the same authority is responsible for the enforcement of the horizontal EU consumer law 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 UCPD/UCTD in the regulated sectors, as specified in the previous bullet?*]
- Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning contractual fairness, 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 and UCTD in the regulated sectors? What are the costs due to the 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.

The UCPD and UCTD – or more correctly the national laws implementing the Directives – are applied by German civil courts, while the application of sector specific rules might fall in the competence of special authorities. Courts as well as authorities are well aware of the different sector specific provisions. There exists not a formal but an informal cooperation. The greatest overlap between the different rules exists with regard to information requirements. It does not seem that a major change is required. However, information duties under the different Directives should be aligned in the view of stakeholders.

<sup>147</sup> For example the "Verbraucherzentrale Bundesverband" received for the Financial Year 2014/2015 approximately EUR 9.5 Mio. by the Ministry of Justice and Consumer Protection, excluding further project-specific grants.

#### 1.4.3. Relevance of consumer law directives for consumer-to-business transactions

- Please analyse the need and potential for the application of the consumer law directives (mainly UCPD and UCTD) to 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).

As mentioned before, stakeholders are opposed to expanding the scope of the UCTD as well as the UCPD. As far as C2B relations are concerned, current rules already provide some protection: If – a jeweller, for instance – uses unfair trading terms on the supply-side against consumers, the UCTD and the transposing law applies, since the scope is not limited to terms for ‘purchases’. Moreover, it is hardly supposable that a consumer would choose to use contract terms pursuant to Sec. 310 para. 1 clause 1 BGB, since the purpose of such contract terms (avoiding costs by using the template of terms for many transactions) does not fit usual consumer behaviour. The same pertains to the UCPD: A consumer usually does not ‘advertise’, nor does he conduct commercial practices in terms of the UCPD or the MCAD. In order to stick with the mentioned example: A jeweller that advertises a willingness to pay a fair market price for items such as gold-jewellery is already subject to the UWG and to the UCPD. What is a minor issue in legal literature is the question whether private persons should be held liable for ‘testimonials’ that are considered as unfair commercial practices.<sup>148</sup> However, this does not pertain to the specific role of a private person as a consumer.

#### 1.4.4. Specific protection for vulnerable consumers

Please analyse:

- Whether the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined in the consumer law directives and relevant jurisprudence, and as applied by national authorities and courts in your country, continue to be valid and fit for purpose.
- To what extent the existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers and whether, based on the experiences in your country, specific provisions should be introduced in other directives concerned, in particular the Unfair Contract Terms Directive.

The concept is considered to be valid and is applied by courts and recognised among authorities and government bodies. Insofar, it is referred to the answers given above under 1.1.1, questions five and six. Especially regarding financial services, German courts do not apply a different concept of ‘consumer’.<sup>149</sup> The rules laid down in the Directive appear to be adequate and there is – according to stakeholder feedback – no need for further amendments.

#### 1.4.5. EU added value

- Overall, would you consider that protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in your country since the implementation of the UCPD and the UCTD in national legislation?

See answers given under 1.1 and 1.2. Since the provisions governing these areas already existed in German law previously, it is not possible to assess whether there has been an improvement.

<sup>148</sup> Cf. with further references *Henning-Bodewig* GRUR 2013, 26

<sup>149</sup> Cf. *Rott* (2011), p. 136.

- Overall, would you consider that the information of consumers regarding unit prices has improved since the implementation of the PID in national legislation?

Requirements to indicate unit prices have been introduced in German law by the PID and have therefore contributed in promoting price clarity for consumers.<sup>150</sup> However price indication rules did also exist before the implementation of the PID in German law and especially in context with the provision on nominal quantities of pre-packed goods provided a high level of consumer protection. Insofar, it is again difficult to say whether there has been an improvement that is only due to the implementation of the PID.

- Overall, would you consider that the protection of businesses against unfair marketing in your country has improved since the implementation of the MCAD in national legislation?

See answers given under 1.1.3. The protection of businesses has always been the main focus of German unfair competition law, which leads to the assumption that the MCAD did not bring any substantial improvements, but rather a decrease since comparative advertisement is admissible to a broader extent. While comparative advertisement may promote a rational consumer decision, it deteriorates business protection.

- Overall, would you consider that it has become easier for businesses in your country to directly trade cross-border to final consumers located in other EU countries in recent years? Has it become easier for consumers in your country to directly purchase cross-border from traders located in other EU countries?

Principally yes. However, all stakeholders noted that the decision by both consumers and businesses as to whether they will engage in cross-border transactions is also influenced by factors outside the legal environment.

- To what extent are these improvements, if any, due to the mentioned directives?

All the areas covered in the directives were already regulated in Germany prior to the enactment of the directives. Hence the directives did not lead to significant improvement, as discussed above.

<sup>150</sup> Sosnitzka "Einführung PAnGV", rec. 7 in: Ohly/Sosnitzka (2016).

## Annex

## A. Transposition fact sheet

**Table 1: Fact sheet on transposition of directives in Member States' law – Germany**

Directive	Transposition legislation (National law, Article)	Comments	Specific provisions going beyond minimum harmonisation requirements/use of exemptions	Included in national legislation		Comments
<b>Directive 93/13/EEC on unfair terms in consumer contracts</b>	Gesetz zur Modernisierung des Schuldrechts 2001, 29.11.2001, BGBl. 2001, p. 3138, Art. 1	Before Directive 93/13/EEC there was the AGB-Gesetz (Unfair Contract Terms Act) from 1977. It was slightly modified with the "Gesetz zur Änderung des AGB-Gesetzes und der Insolvenzordnung" (19.07.1996, BGBl 1996 I p. 1013) to implement the Directive.	'Black list' of terms considered unfair in all circumstances	Yes	Sec. 309 BGB	
	Gesetz zur Modernisierung des Schuldrechts 2001, 29.11.2001, BGBl. 2001, p. 3138, Art. 1		'Grey list' of terms which may be considered unfair	Yes	Sec. 308 BGB	
	Gesetz zur Modernisierung des Schuldrechts 2001, 29.11.2001, BGBl. 2001, p. 3138, Art. 1		Extensions of the application of Directive to individually negotiated terms	No	-	<i>Sec. 305 para. 1 and 305 b BGB state that individually negotiated terms are not subject to review.</i>



	Gesetz zur Modernisierung des Schuldrechts 2001, 29.11.2001, BGBl. 2001, p. 3138, Art. 1		Extensions of the application of Directive terms on the adequacy of the price and the main subject-matter	No	Sec. 307 para. 3 BGB	<i>It has been argued though that Sec. 307 para. 3 is slightly narrower than Art 4 para 2 of the Directive.</i> <sup>151</sup>
	Gesetz zur Modernisierung des Schuldrechts 2001, 29.11.2001, BGBl. 2001, p. 3138, Art. 1		Application of certain unfair contract terms provisions to b2b relationships	Yes	Sec. 310 para. 1 BGB	
<b>Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market</b>	Zweites Gesetz zur Änderung des Gesetzes gegen unlauteren Wettbewerb, 02.12.2015, BGBl. 2015, p. 2158 (UWG Novelle 2015)	The first attempt to implement the Directive was with the Erstes Gesetz zur Änderung des Gesetzes gegen den unlauteren Wettbewerb, 22.12.2008, BGBl. 2008, p. 2949 (UWG Novelle 2008)	Provisions regarding financial services going beyond minimum harmonisation requirements	No		
	Zweites Gesetz zur Änderung des Gesetzes gegen unlauteren Wettbewerb, 02.12.2015, BGBl. 2015, p. 2158		Provisions regarding immovable property going beyond minimum harmonisation requirements	No		
	Erstes Gesetz zur Änderung des Gesetzes gegen den unlauteren Wettbewerb, 22.12.2008, BGBl. 2008, p.2949 (UWG Novelle 2008)		Application of UCPD to B2B transactions	Yes	The UWG is generally applicable to B2B transactions, since there is no specific provision that limits the scope to B2C transactions.	<i>Exceptions are Sec. 3 para. 3 UWG with the Annex (Black List), Sec. 5a para. 3 UWG.</i>

<sup>151</sup> Basedow, "§ 305 BGB" rec. 19 in: Münchener Kommentar BGB (2016).

<b>Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers</b>	Verordnung zur Änderung der Preisangaben- und der Fertigpackungsverordnung 28.07.2000; BGBl. I 2000, p. 1238		Extension of the application to other sectors (e.g. for immovable property)	Yes		
	Verordnung zur Änderung der Preisangaben- und der Fertigpackungsverordnung 28.07.2000; BGBl. I 2000, p. 1238		Use of specific regulatory choices/derogations	Yes	Sec. 9 para. 4 PAngV regulates the derogation set out in Art. 6 PID	
<b>Directive 2006/114/EC concerning misleading and comparative advertising</b>	Gesetz über den unlauteren Wettbewerb vom 03.07.2004, BGBl. 2004 I, p. 1414		Misleading commercial practices		Sec. 5 UWG transposes Art. 3 MCAD	
	Gesetz über den unlauteren Wettbewerb vom 03.07.2004, BGBl. 2004 I, p. 1414		Comparative advertisement		Sec. 6 UWG transposes Art. 5 MCAD	
<b>Directive 2009/22/EC on injunctions for the protection of consumers' interests</b>	Gesetz zur Änderung des EG-Verbraucherschutzdurchsetzungsgesetzes und zur Änderung des Unterlassungsklagen-gesetz, 06.02.2012, BGBl. 2012 I, p.146					

**Table 2: Fact sheet on Injunctions Directive – GERMANY**

Issue	Answer	Comments
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)?	- Yes, separate procedures in separate legal acts	<i>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.</i>
Who is entitled to bring an action seeking an injunction?	- Designated public bodies - Specified consumer associations - business organisations	<i>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.</i>
Is the injunction procedure a court or an administrative procedure?  If your country legislation foresees both forms of the procedure, please explain in the comments column for which infringements the court or administrative procedure is foreseen	- Court procedure	
Who bears the costs of an injunction procedure?  If qualified entities (or some of their categories e.g. consumer organisations) are entitled to an exemption of some/all cost related to the procedure please explain the characteristic of such exemption in the comments column.	- The costs are in general borne by the losing party	<i>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.</i>
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?	Yes.	<i>According to Sec. 2 para. 2 No. 11 UKlaG, the scope is extended to infringements of Directive 95/46/EG. Please note that from the German perspective all listed elements under Sec. 2 para. 2 UKlaG are considered as consumer law.</i>

<p>Is protection of business' interests covered by the injunctions procedure? If scope of application extended to the protection of business' interests, please provide details in the comments column regarding type of business' interests covered by the injunctions procedure</p>	<p>Yes, partly with regard to the UCPD</p>	<p><i>The UKlaG aims at protecting consumers. However, since businesses might use the same (unfair) terms which are – under Sec. 310 para. 1 BGB – in some cases also considered unfair in contracts with a business, they also benefit from the procedure.</i></p> <p><i>However, pursuant to Sec. 8 para. 3 No. 2 UWG every competitor is entitled to seek an injunction of unfair commercial practices. But please note that this provision was already part of the UWG prior to the Injunction Directive.</i></p>
<p>Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations</p>	<p>Yes.</p>	<p><i>This is the general rule in German civil procedure (Secs. 59, 60 and – by analogy – 260 ZPO), which is applicable pursuant to Sec. 5 UKlaG.</i></p>
<p>Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID)</p>	<p>Yes.</p>	<p><i>This procedure is not explicitly set out in UKlaG, but is rather a result of Sec. 93 ZPO. If the defendant does immediately acknowledge the claim (“sofortiges Anerkenntnis”), the claimant has to bear the costs, regardless whether the claim was substantial or not, if the defendant has not given cause for the action brought. That is why the claimant usually seeks the defendant to sign a cease and desist declaration (“Unterlassungserklärung”) before he brings the claim to court.</i></p> <p><i>Moreover, there can be a conciliation hearing, but that is in general not obligatory (exceptions are due to § 15a EGZPO).</i></p>
<p>Has your Member State taken specific measures regarding the prior consultation (Article 5 of the Injunctions Directive)?</p>	<p>- Yes, requirement for party seeking injunction to consult with the defendant</p>	<p><i>See comment above.</i></p>
<p>Does the national legislation provide for measures ensuring summary procedure? Please specify main characteristics of the procedure (subject matter/time limits) in the comments column.</p>	<p>Yes.</p>	<p><i>Yes, the burden of proof is facilitated with regard to preliminary injunctions pursuant to Sec. 5 UKlaG and Sec. 12 para. 2 UWG. Under the general provisions regarding preliminary injunctions in Sec. 935 et seq., the claimant has to credibly show that he has a claim and that – without the preliminary injunction – the enforcement of the claim might be endangered (time limit). However, due to Sec. 5 UKlaG and Sec. 12 para. 2 UWG there is a rebuttable presumption that the claim is urgent. There are no restrictions regarding the subject matter.</i></p>
<p>Are there sanctions for non-compliance with the injunction order (Article 2(1) of the Injunctions Directive)? If sanctions in form of penalty or fine foreseen please specify in the comments column to who exactly should they be paid</p>	<p>- Yes, contractual penalty clause</p>	<p><i>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.</i></p>

Has your Member State taken specific measures regarding the publication of the decision and/or the publication of a corrective statement?	- Yes	<i>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.</i>
Is it possible to claim within the injunction procedure for sanctions for the infringement?	No.	<i>The UKlaG does not include any claims for sanctions; these result only from a cease and desist declaration with a penalty clause and cannot be claimed in advance. The same applies to the UWG. An exception is provided by the fines prescribed by Sec. 890 ZPO (see above).</i>
Can an action for the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to other beneficiary be brought within the injunction procedure?	Yes.	<i>An action for restitution of profits to the public purse can only be brought in cases of the infringements of unfair competition law. The right is codified in Sec. 10 UWG. But only business organisations, regulatory bodies and qualified entities (Sec. 10 para. 1 with Sec. 8 para. 3 Nos. 2-4 UWG) are entitled to make such a claim. Pursuant to Sec. 260 ZPO, claims might be combined if they pertain to the same defendant, the same court is competent and the subject matter is the same ("kumulative Klagehäufung"). Insofar, both actions could be brought before court together in order to save costs. But please mind that this is not a specific feature of the injunction procedure but is rather possible under general civil procedure rules.</i>
Can an action for damages to be paid to the qualified entity or the public purse be brought within the injunction procedure?	No.	<i>There is no action for damages because damages can only be claimed by competitors under Sec. 9 UWG.</i>
Can an action for damages or redress to be paid to the consumers concerned be brought within the injunction procedure?	No.	<i>However, an action for skimming of profits can be brought under Sec. 10 para. 1 UWG with the limitation that payment is made to the national budget. Other than that, the consumers themselves have to claim damages under the general rules of the German Civil Code.</i>
Can individual consumers base their individual claims for damages/remedies on the injunctions order?	Yes.	<i>Yes, with regard to the validity of the provision: Pursuant to Art. 11 UKlaG, the provision in question is void if the individual consumer objects. That also applies to contracts that were concluded before the injunction order.</i>
Can the qualified entity claim other measures beyond the injunction, e.g. evidence of compliance with the judgment?	No.	
Are the effects of individual injunctions orders extended to the future infringements and/or same or similar illegal practices (of other traders)?	Yes.	<i>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.</i>

## B. Data tables

*Number of B2C disputes*

Please indicate how many B2C disputes have been decided in your country on the basis of consumer law directives covered by this study (UCPD, UCTD, PID) as a proportion of the total number of B2C disputes decided on the basis of other national consumer legislation (based on statistics, or based on estimates by enforcement authorities and other stakeholders, where this is not the available).

**Table 3: B2C disputes decided on the basis of consumer law directives covered by this study in comparison with total B2C disputes decided on the basis of other legislation (most recent year for which data is available)**

Year	Type of data	Total number of B2C disputes (number of cases)	Share of B2C disputes decided on basis of ...					Comments
			UCPD	UCTD	PID	other EU consumer protection legislation (e.g. CRD, Sales Directive, sectoral legislation)	national consumer legislation not based on EU directives	

Note: Data is not available in this regard.

*Costs of obtaining redress for a hypothetical case of invoking unfairness of a standard contract term*

- Please estimate the costs, including time, for consumers in obtaining redress when invoking the unfairness, and thereby the non-binding character of standard contract terms in a contract they concluded. Please provide the estimate for the hypothetical example below, focusing on costs (and needed time) of a lower court procedure and the use of ADR or other relevant procedure (if applicable).<sup>152</sup>

<sup>152</sup> For the hypothetical example it is assumed that both the provider and the consumer are located in your country.

**Table 4: Estimate of costs for consumers in obtaining redress when invoking the unfairness of standard contract terms in a contract they concluded (for the hypothetical example provided in the box below)**

Redress mechanism	Estimated court fees (national currency)	Estimated lawyer's fees (national currency)	Other costs, if any (national currency)	Estimated time involved for consumer (hours)	Comments
<b>Lower court procedure</b>	EUR 438*	EUR 925**	EUR 925***	Information is not available	The costs mainly depend on the following two variables: - value of the matter in dispute ("Streitgegenstand") - losing or winning In the example set out below, the matter in dispute is valued at EUR 5000, which causes the district court ("Amtsgericht") to be competent at first instance (Sec. 23 para. 1 GVG). However, court fees and fees for legal assistance are the same, regardless whether the district court or Regional Court ("Landgericht") is competent at first instance.
<b>ADR or other relevant procedure</b>	EUR 0	EUR 0	EUR 30	Information is not available	Pursuant to Sec. 23 I and Sec. 31 para. 3 Act on Alternative Dispute Resolution in Consumer Matters, in general no fees arise for consumers, unless the consumer's claim appears to be abusive. Legal assistance is not compelled.

Notes: \* Court fees and attorney fees are regulated by the Act on Fees for Legal Assistance (Rechtsanwaltsvergütungsgesetz, RVG)<sup>153</sup>; \*\*Attorney fees may vary slightly since it is possible to impose additional fees for special conduct; further it should be noted that in this instance representation by a lawyer is not compelled under Sec. 78 Sec. 1 ZPO; \*\*\*In the event the suit is dismissed, the claimant has to bear the other party's attorney fees pursuant to Sec. 91 para. 1 ZPO.

<sup>153</sup> Federal Law Gazette (BGBl.) I 2004, p. 718, 788, recently amended by Art. 5 Act of 24.5.2016, Federal Law Gazette (BGBl.) I 2016, p. 1190



**Hypothetical example: Terms which inappropriately exclude/limit consumers' rights to compensation**

*A consumer went on a package holiday with a friend to Kenya for which they paid € 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 €5,000 (€4,000 for the cost of the package and €1,000 for lost time and enjoyment). The tour operator agreed to compensate them €1,000 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/unfair-contract-terms/index\\_en.htm](http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-contract-terms/index_en.htm)]*

- Please estimate how often court and ADR procedures are used in your country for invoking the unfairness, and thereby the non-binding character of standard contract terms (i.e. the number of cases per year)?

Stakeholders were not able to provide substantive data.

## C. Interviews conducted and literature reviewed

**Table 5: Interviews conducted for this study**

Organisation	Stakeholder type	Date
<b>BMWi (Federal Ministry for Economic Affairs and Energy)</b>	Ministry	06.07.2016
<b>Vzbv (Federation of German Consumer Organisations)</b>	Consumer organisation	11.07.2016
<b>BMJV (Federal Ministry of Justice and Consumer Protection)</b>	Ministry	14.07.2016
<b>BMJV (Federal Ministry of Justice and Consumer Protection)</b>	Ministry	28.07.2016
<b>BEVH (German E-Commerce and Distance Selling Trade Association)</b>	Business organisation	29.07.2016
<b>Wettbewerbszentrale (Centre for Protection against Unfair Competition)</b>	Self-regulatory institution for the enforcement of the Act against Unfair Competition	09.08.2016
<b>DIHK (Association of German Chambers of Commerce and Industry)</b>	German central organisation for 79 Chambers of Commerce and Industry	09.08.2016
<b>Söp (German Conciliation Body for Public Transport)</b>	Consumer organisation/Arbitration agency	09.08.2016
<b>Bundesnetzagentur (Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway)</b>	National regulatory authority	10.08.2016
<b>BaFin (Federal Financial Supervisory Authority)</b>	National regulatory authority	10.08.2016
<b>Luftfahrt-Bundesamt (Federal Aviation Office)</b>	National regulatory authority	-
<b>Bankenfachverband (Organisation for credit banks)</b>	Business Organisation	-

**Table 6: Literature reviewed for country report**

Author/Source	Year	Title of publication
Alexander	2010	“Die ‘Schwarze Liste’ der UGP-Richtlinie und ihre Umsetzung in Deutschland und Österreich”, GRUR Int. (Gewerblicher Rechtsschutz und Urheberrecht International), p. 1025.
Alexander	2016	“Wettbewerbsrecht”, Cologne.
Alexander	2012	“Vertragsrecht und Lauterkeitsrecht unter dem Einfluss der Richtlinie 2005/29/EG über unlautere Geschäftspraktiken“ WRP (Wettbewerb in Recht und Praxis), p. 515.
Alexander	2014	“Fachliche Sorgfalt und Gewinnspielwerbung gegenüber Kindern“ WRP (Wettbewerb in Recht und Praxis), p. 1010.
Alexander	2016	“Lauterkeitsrecht, Vertragsrecht, Verbraucherschutzrecht: Zur systematischen Einordnung des UWG unter dem Einfluss der UGP-RL“ in: Alexander/Augenhofer, 10 Jahre UGP-Richtlinie, Tübingen, p. 145.
Alexander	2002	“Vertrag und unlauterer Wettbewerb”, Berlin.
Augenhofer	2006	“Individualrechtliche Ansprüche des Verbrauchers bei unlauterem Wettbewerbsverhalten des Unternehmers“ WRP (Wettbewerb in Recht und Praxis) p. 169.
Augenhofer	2002	“Gewährleistung und Werbung. Das neue Gewährleistungsrecht für Werbeaussagen“, Vienna.
Augenhofer	2005	“Comparative Advertisement in Europe: The Preliminary Ruling in Pippig vs. Hartlauer and Open Questions after 1997 Directive“ Tul. Eur. & Civ. L.F. (Tulane European and Civil Law Forum), p. 110.
Augenhofer	2010	“State of play of the implementation of the provisions on advertising in the unfair commercial practices legislation” (Study for the Policy Department A of the European Parliament), Brussels.
Augenhofer	2015	"German Report" in: Kobel/Kellezi/Killpatrick (eds.): Antitrust in Groceries Sector & Liability Issues in Relation to Competition to Corporate Social Responsibilities, Berlin, p. 507.
Beater	2011	“Unlauterer Wettbewerb”, Tübingen.
Birk	2011	“Wann enthält eine Werbung ein ‚Angebot‘?“ GRUR (Gewerblicher Rechtsschutz und Urheberrecht), p. 198.
Boos	2014	“Nutzungsunterstützung durch automatisierte Auswertung einzelner standardisierter Vertragsbedingungen“, VuR (Verbraucher und Recht), p. 47.
Boos/Fischer/Schulte-Mattler (eds.)	2012	“Kommentar zumKreditwesengesetz“, 4 <sup>th</sup> edition, Munich.
Brox/Walker	2014	“Allgemeiner Teil des Bürgerlichen Gesetzbuches“, 38 <sup>th</sup> edition, Munich.
Buck-Heeb/Dieckmann	2010	“Selbstregulierung im Privatrecht“, Tübingen.
Bunte	2016	“Folgenbeseitigungsanspruch nach dem UWG bei unzulässigen AGB-Klauseln?“, ZIP (Zeitschrift für Wirtschaftsrecht), p. 956.
Canaris	2000	“Wandlungen des Schuldvertragsrechts – Tendenzen zu seiner Materialisierung AcP (Archiv für die civilistische Praxis), p. 273.
Doralt/Nietner	2015	“Verbrauchervertragsrecht und Rechtswahl“, AcP (Archiv für die civilistische Praxis), p. 855.

Emmerich	2016	“Unlauterer Wettbewerb”, 10 <sup>th</sup> edition, Munich.
Erman	2014	“Handkommentar zum Bürgerlichen Gesetzbuch”, 14 <sup>th</sup> edition, Cologne.
Fleischer	2001	“Informationsasymmetrie im Vertragsrecht”, Munich.
Gerecke	2015	“Werbung gegenüber Kindern und Jugendlichen” NJW (Neue Juristische Wochenschrift), p. 3185.
Götting/Nordemann (eds.)	2016	“UWG Handkommentar“, 3 <sup>rd</sup> edition, Baden-Baden.
Graf von Westphalen	2013	“Verbraucherschutz nach zwei Jahrzehnten Klauselrichtlinie“, NJW (Neue Juristische Wochenschrift), p. 961.
Graf von Westphalen/Thüsing (eds.)	2016	“Vertragsrecht und AGB-Klauselwerke“, 38 <sup>th</sup> edition, Munich.
Greger	2000	“Neue Regeln für die Verbandsklage im Verbraucherschutz- und Wettbewerbsrecht“, NJW (Neue Juristische Wochenschrift), p. 2457.
Großkommentar UWG	2014	“Großkommentar UWG“, 2 <sup>nd</sup> edition, Berlin.
Halfmeier	2015	“50 Jahre Verbandsklage, Möglichkeiten und Grenzen Kollektiver Rechtsschutz-instrumente: Bilanz und Handlungsbedarf, Gutachten im Auftrag des Verbraucherzentrale Bundesverband e.V.“, Berlin.
Harte-Bavendamm/Henning-Bodewig	2013	“Gesetz gegen den unlauteren Wettbewerb (UWG), Kommentar“, 3 <sup>rd</sup> edition, Munich
Henning-Bodewig	2013	“Haften Privatpersonen nach dem UWG?“ GRUR (Gewerblicher Rechtsschutz und Urheberrecht), p. 26.
Hoeren	2008	“Das neue UWG – der Regierungsentwurf im Überblick“, BB (Betriebs-Berater), p. 1182.
Hoeren	2009	“Das neue UWG und dessen Auswirkungen auf den B2B-Bereich“, WRP (Wettbewerb in Recht und Praxis), p. 789.
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Münchener Kommentar BGB	2016	“Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 2, Schuldrecht – Allgemeiner Teil“, 7 <sup>th</sup> edition, Munich.
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Rott	2016	“Anmerkung zu LG Leipzig, Urt. v. 10.12.2015, Az. 05 O 1239/15: Auskunfts- und Rückzahlungspflicht der Bank bei rechtswidrigen Maßnahmen und Ankündigungen im Zusammenhang mit Kontopfändungen“, VuR (Verbraucher und Recht), p. 112.
Rott	2011	“Country Report Germany“ in: Civic Consulting (eds.): Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU.
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Staudinger	2013	"J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, §§ 305-310, UKlaG (Recht der Allgemeinen Geschäftsbedingungen)", Berlin.
Streinz	2014	“Verbraucherleitbild – Existenz? Wandel? Differenzierungen?” in Möstl (ed.): Verbraucherinformation im Wandel, Bayreuth.
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van Eek/Czernik	2016	“Dutch and German application of the UCP Directive on competing businesses“, GRUR Int. (Gewerblicher Rechtsschutz und Urheberrecht International), p. 3161
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Walker	2016	“Unterlassungsklagengesetz, Kommentar“, Baden-Baden
Weatherill	2013	“EU Consumer Law and Policy“, Cheltenham.
Weiler	2003	“Ein lauterkeitsrechtliches Vertragslösungsrecht des Verbrauchers?“ WRP 2003, 423, 426.
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## 1. Study to support the Fitness Check of EU Consumer law – Country report GREECE

### 1.1. Unfair commercial practices and marketing

#### 1.1.1. Effectiveness of the UCPD in establishing a high level of consumer protection

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

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

UCPD has been transposed into Greek law by N 3587/2007 which amended N 2251/1994. N 3587/2007 brought significant changes to 2251/1994 which is the main piece of Greek consumer legislation. N. 2251/1994 incorporates the majority of EU consumer law Directive in its text under different parts and headings. The UCPD has been transposed almost verbatim. The way EU consumer law Directives have been transposed in Greek law has been critiqued also in the literature, as no effort is made to codify the legislation or organise it in a systematic way and the transposition of the UCPD has not been an exception to that rule.<sup>1</sup>

Prior to the transposition of the UCPD, there was no Greek law regulating unfair commercial practices with the broad scope of the UCPD, while there were rules on advertising on 2251/1994 which transposed previous EU Directives, specifically Directive 84/450/EU on misleading advertising, Directive 97/55/EU for comparative advertising and Directive 89/552.

The UCPD broadened the scope of application by catching a broad range of practices taking place before, during and after a transactional decision. Also, it introduced provisions on aggressive commercial practices for the first time in Greek consumer law. However, it reduced the scope of application because it introduced a narrower concept of the consumer. This caused a level of concern, as the general definition of consumer in Greek law is very broad. A consumer is:<sup>2</sup>

'every natural or legal person or unions of entities without a legal personality who constitute the target group of products or services offered in the market and who use products or services being their end user. A consumer is also: aa) every target group of promotional activities, bb) every physical or legal entity who gives a guarantee in favour of the consumer on condition that they do not act in the context of their professional or business activity.'

There were fears that e.g. professionals would not be able to benefit from the protection of consumer law leaving what was considered to be a gap in protection, as they may still be in a position of grave imbalance of power vis-à-vis the trader.<sup>3</sup>

A representative of the Ministry stated that they receive a low number of complaints relating to unfair commercial practices. However, that can only be an approximate estimate, as no statistical evidence is held for the complaints received. This could point to either an effective application of the law, meaning unfair practices are not a major problem in the market, or to the exact opposite. It is difficult to draw conclusions. Similarly, the statistics presented by the Greek Consumer Ombudsman that is responsible for ADR, unfair practices form a small number of their case load at 6.1% in their 2015 report.

<sup>1</sup> Deloyka-Igglei, *Δικαιο του Καταναλωτή Ενωσησικό και Ελληνικό*, [2014] Εκδόσεις Σάκκουλα, 26-27

<sup>2</sup> N.2251/94, art.1 par.4(a)

<sup>3</sup> Aleksandridou, "Ο τροποποιημένος νόμος για την προστασία του καταναλωτή από την σκοπιά ενός εμπορικόλογου" [2007], 55 ΝοΒ 7, 1493, 1497

The effectiveness of the UCPD can be demonstrated also by a brief comparison to the attitudes towards the UCTD. Stakeholders were a lot more comfortable and confident in discussing the application of the UCTD, which may be attributed to the fact that the UCTD has been applied for longer and there is already a robust body of case law on its application. Contrary to that, not many cases concerning unfair practices have appeared in court as can be drawn from interviews with consumer organisation representatives. There is no available data on how many cases are brought to court either as representative actions or as actions of individual consumers.

Representatives of consumer organisations have pointed out that judges in Greece are not very accustomed to dealing with cases relating to unfair practices or even consumer law in general. This has the effect that abstract terms used in the Directive may be interpreted in a manner consistent with the civil law. Therein lies the danger of a stricter interpretation of the terms, making it more difficult for an action to be accepted.

The representatives of the Consumer Ombudsman favoured the principle-based approach of the UCPD, as it allows the flexibility for the inclusion of cases that were not originally considered by the legislator. Business associations were in general warier of the principle-based approach that might allow gold-plating, yet they did not have specific problems to report that stemmed from the Directive. A representative of a consumer organisation criticised the broad concepts employed in the general clause of art.5 and particularly the concept of 'material distortion of economic behaviour' included in the Directive, as it is difficult to define what amounts to material distortion.

While problems with unfair practices continue to exist that was not attributed to the legal framework itself by the interviewees, which was deemed satisfactory in general, but to the enforcement of the law.

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

The black list has been incorporated in N. 2251/94 not as a unified list, as it is in Annex I of the UCPD, but as two separate articles, art.9στ for misleading practices, and art.9 η for aggressive practices.

Consumer organisations as well as authorities recognised the benefits of the existence of the black list. It simplifies the application of the law and there is no need to go through the hurdle of proving the effect of the practice on the average consumer. Business associations were also positive to the existence of the black list which was seen as a vehicle to ensure legal certainty, which is in general desirable for businesses.

In the literature there have been criticisms of the black list, as it still requires the use of abstract legal terms e.g. 'reasonable grounds' in point 5 of Annex I, which undermine the goal of achieving legal certainty.<sup>4</sup>

The main benefit of the blacklist as stated by many interviewees is the fact that they do not have to go through additional hurdles to prove that a practice is unfair. However, the Ministry has on occasion used multiple legal bases when administering fines that could be based solely on the black list. It appears that using a supplementary legal basis is seen as a way of fortifying the administrative decision against scrutiny in a court, something that may be undermining the purpose of the black list, which is eliminating the hurdles in proving a practice is unfair. The same practice of using multiple legal bases where the blacklist would have sufficed can also be seen in court decisions.<sup>5</sup>

<sup>4</sup> Marinou, 'Από το ελληνικό στο κοινοτικό δίκαιο του αθέμιτου ανταγωνισμού-προβλήματα εφαρμογής της μαύρης λίστας της οδηγίας 2005/29 για τις αθέμιτες εμπορικές πρακτικές', [2011] ΔΕΕ, 877,881

<sup>5</sup> See Decision no. 4196/2013 ΔιοικΕφαθ where not only point 3 of Annex I was invoked but also art.6 UCPD

The Consumer Ombudsman also considers that the black list aids the understanding of consumers of unfair practices. Consumers may not be aware of the structure of the legislation of unfair practices, however when informed on a specific practice, e.g. via a campaign, there is a positive and immediate response, at least from the consumers sophisticated enough to engage with e.g. a social media campaign.

With regard to the application of the black list in specific cases, the following examples were mentioned by the Ministry:

Employing art.9στ (δ) of N.2251/94 (point 4 of Annex I UCPD) to catch cases of companies making non verifiable claims about their products such as energy saving devices (see also below on environmental claims); art.9στ (κστ) of N.2251/94 (point 17 of Annex I UCPD) for products such as 'energy bracelets' claiming to cure rheumatisms and ozone devices proclaiming the benefits of drinking water with ozone to cure illnesses.

The Greek market has been flooded with cheaply made products often making unverifiable claims that now take up a lot of TV air time, which they would not be able to afford in pre-crisis times and are often sponsored by celebrities making it easier for consumers to be misled.

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

The Greek legislator did not make use of the minimum harmonisation clauses for financial services and immovable property when transposing the UCPD. Stakeholders view the minimum harmonisation clauses as positive, given the particularities of these two sectors. However, no stakeholder had any experience with immovable property which traditionally falls outside the scope of Greek consumer law. In transactions in the sector of immovable property, consumers are not considered to require the heightened protection granted by consumer law, as they enter these transactions after careful weighing.

Financial services form a large part of the workload of consumer organisations and authorities alike and there is a multitude of legislation for consumers of financial services. However, the focus is on the over indebted consumers rather than unfair practices, where the standard of the UCPD applies.

Representatives of consumer associations have also reiterated their preference for minimum harmonisation and its benefits for consumers.

- 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 what 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?*]

This does not appear to be a major problem. The stakeholders interviewed expressed the opinion that Greek consumers may be less interested in products labelling themselves as green and more focused on prices or costs effectiveness. The financial crisis has also had a role to play in consumers focus on price rather than other characteristics of products. For example, consumer organisation representatives mentioned they dealt with cases of misleading claims of devices claiming to significantly reduce energy consumption. The assessment of the consumer organisation was that consumers were more interested in reducing their electricity bills rather than the environmentally friendly aspect of the product. There were some incidents mentioned that can be divided into two broad categories.

In relation to the energy market, the market is in the process of being opened up to competition with about 90% of the market being held by the formerly public DEH. However, there have been incidents with misleading advertising relating to claims of producing 'green energy'. Consumers requested more information from the regulator

as they were unfamiliar with the term 'green energy' and what it meant for them. Regulator was able to deal with the practices effectively, as it was clear any such advertising would be misleading. It is technically impossible to receive any green energy certification in Greece at the moment as all providers receive energy from a common 'pot' and it is impossible to distinguish where the energy came from.

The second category relates to misleading claims from telemarketing products. As mentioned above, the Greek market in the last years has seen a large increase in the advertising of poor quality, low price products, mostly marketed via the use of telemarketing. These products were either devices that claimed to assist in reducing energy bills or for example gadgets that claimed to be environmentally friendly replacements to laundry detergents.

The problems identified in relation to these products were related also to product safety rules. There were difficulties on behalf of regulators in proving the claims made to be misleading, as it required an ad hoc committee for the testing of the product to be formed. Article 9στ (δ) of N.2251/94 was used to catch such environmental claims as there is no specific practice in the black list on misleading environmental claims. The use of the blacklist for these issues led to them being quickly resolved, sometimes within 6 months.

Finally, consumer organisation representatives pointed out some issues in the fuel market where some companies were making claims of selling bio-diesel fuel which were difficult to verify as the criteria for labelling a fuel as bio-diesel were not transparent.

In general, this is not a significant problem and does not generate a large number of consumer complaints. However, this could be attributed to what appears to be a low interest on 'green' products and services on behalf of Greek consumers.

- 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 your country rigidly?*]

The average consumer is a concept that both authorities and courts seem to be relatively unfamiliar with. One of the reasons for that, according to stakeholders, could be the fact that there are limited cases relating to unfair practices, especially in comparison to e.g. unfair contract terms.

There is a need to contrast the average consumer to the general definition of consumer employed in Greek consumer law. N.2251/94 employs a very general definition of consumer.<sup>6</sup> This broad definition of consumer has generated a number of issues highlighted in the literature as it is broad enough to grant the heightened protection of consumer to everyone, even large companies. There has been a coordinated effort in the case law and in the literature to limit and qualify this general concept mostly via the use of AK281 on abuse of right.<sup>7</sup> In comparison to that, the 'average consumer' is viewed in the literature as a relatively problem-free *stricto sensu* consumer.

The concept of the average consumer does not appear to be applied in a rigid manner. Often it may be co-related to the level of expertise and knowledge the average consumers is expected to exhibit in relation to the product or service. For example, a representative of the Ministry mentioned that for the purpose of administering a fine they considered the average consumer would find a claim that a device can turn water into fuel misleading. A level of scientific knowledge higher than that of the average consumer would be required to be able to not fall prey to that practice. This reveals a

<sup>6</sup> N.2251/1994, art.1 par.4 (a)

<sup>7</sup> For a thorough review of the debate see Perakis 'Article 1 N.2251/94' in Aleksandridou (ed) *Δίκαιο Προστασίας Καταναλωτή: Ελληνικό- Κοινωνικό*, (Νομική Βιβλιοθήκη 2008), 51-56

tendency to be more protective of the consumer, one that is also reflected in the general definition of consumer employed in Greek consumer law.

However the law is not always favourable to consumers. Level of education is also an important criterion taken into account by the courts when assessing the standard of the consumer. In a case concerning charges for excessive mobile phone data usage, the court took into account the fact that the consumer was a computer engineer for assessing whether he had taken reasonable measures to avoid the charges. If a more sophisticated consumer could not avoid the charges, then the average mobile phone user could not have either.<sup>8</sup> Consumer ombudsman and consumer organisations mentioned that in cases with Swiss franc loans where many of the affected consumers were doctors there was a reluctance to accept that they had been misled because of their high level of education. Also, in a case concerning advertising of medical equipment in a specialised journal, the Court found that the audience of this magazine had a high level of knowledge in this market and that they would not readily accept the claims made in an advertisement without further research.<sup>9</sup>

Business associations also believed that there is a disparity between the Greek average consumer and the average consumer of e.g. a central European country in how well-informed they are and how active they are in seeking out information. They also pointed out the disparities between consumers based on age, i.e. that older consumers are a lot less informed than the younger ones. Greek consumers fail to live up to the high standard implied for the average consumer in rec.18 UCPD. The Ministry agrees that there is a great divide between young and older consumers making it more difficult to assess what the average consumer would be capable of. In this case age is also connected to technological illiteracy as one of the main reasons older consumers are considered to be worse off is because they are often not able to use new technologies effectively.

- 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 in your country recognised new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted)?*]

The UCPD sets out three criteria for vulnerability: age, mental or physical infirmity and credulity.<sup>10</sup> Out of these, the criterion of age is the most widely employed in Greece. As mentioned also in the above question, interviewees expressed the view that elderly consumers often find themselves in a vulnerable position. That is often co-related with their lack of familiarity with modern technologies meaning they have difficulties in e.g. using the internet to find information or file a complaint with a trader. This could be owed also to the fact that these technological advancements, such as e-commerce have been less pervasive in Greece where it is only in the last years that there has been a significant rise, meaning elderly consumers may be unfamiliar with them.

On the other side of the age spectrum, the protection of young consumers is also of great importance. So much so, that there is an article for the protection of the mental health of minors in 2251, one that extends also to their moral development.<sup>11</sup> The criterion of 'credulity' is the most problematic one, as there is no clarity as to its meaning and when it should be applied. As a result it is not used and many interviewees pointed out that it is problematic as its meaning is not clear and may create confusion with related civil law concepts governing the rules on legal capacity.

In the last years, in light of the financial crisis there have been many legislative initiatives for the protection of vulnerable consumers. The most notable is N.3869/2010 for over-indebted households, which has generated a great influx of cases both for courts, consumer associations, and relevant authorities. However it

<sup>8</sup> Decision no. 1488/2013, EipAθ

<sup>9</sup> Decision number 2130/2013 EφAθ

<sup>10</sup> UCPD, art.5.3

<sup>11</sup> N.2251/94, art.7α



needs to be pointed out that this legislation is not related to the vulnerability of consumers to unfair practices. It uses income and social criteria. The financial crisis has created the rise of a vulnerable consumer whose vulnerability is caused by the impact of the financial crisis.

Another example would be that of the 'vulnerable customer' in the electricity market where specific categories of vulnerable consumers, with very specific criteria are included in the law.<sup>12</sup> These criteria range from income criteria for low-income consumers and the long-term unemployed, age for elderly consumers as well as disability. Another category of vulnerable consumer designed especially for the energy market is that of the inhabitant of a small island (one of less than 3.100 inhabitants) due to the special needs of the area in electricity.<sup>13</sup>

Consumer organisations and regulators were positive towards these initiatives for vulnerable consumers, as they tend to offer concrete rights to consumers. In their view, consumers are informed about these provisions and make use of them.

- 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?*]

There have been many initiatives both of self- and co-regulation, both sectoral and co-sectoral with various degrees of success. One example that has been mentioned by several interviewees as a successful one is that of SEE, the Council for Control of Communication. It is the council that enforces the code of advertisers, which is cross-sectoral. The code is based on the ICC code of advertising and marketing communication practice. According to several interviewees, this code is working well and the council is active in enforcing the code and its decisions are complied with by the members.

An example of a code that was not successful was that of the slimming institutes/beauty parlours, as reported by consumer associations. A few years ago, many of these institutes engaged in aggressive practices, targeting primarily women and making them sign contracts for several thousand euros. The code did little to help with these practices as the businesses would easily switch from members to non-members of the code. Eventually legislative intervention was required to put an end to these practices.

Co-regulation initiatives are also frequently used, usually initiated by independent authorities. For example, the telecommunications and post regulator EETT employs a code in telecommunications. This code was mentioned by a representative of the consumer ombudsman as one that was helpful in resolving the issues that had been created with unfair practices in the telecommunications industry at a time when the market was being opened to competition. Consumer organisations argued that there is a degree of hesitation on behalf of the banks in enforcing the co-regulatory code for banks for non-performing private loans, which results in reduced protection for consumers.<sup>14</sup>

A consumer organisation representative pointed out that having too many sectoral codes does little to help consumers who may not be aware of their existence, or they may not be enforced so rigidly, preferring hard law over self-regulation initiatives.

- 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

<sup>12</sup> ΥΑ Αριθ. Δ5-ΗΛ/Β/Φ.1.21/οικ. 12112 Κατηγορίες, κριτήρια και διαδικασία ένταξης Πελατών στους Ευάλωτους Πελάτες ηλεκτρικής ενέργειας

<sup>13</sup> ΥΑ Αριθ. Δ5-ΗΛ/Β/Φ.1.21/οικ. 12112, art.2 (α), (γ), (στ), (η)

<sup>14</sup> Ν.4224/2013, art.1 par.2

there be a mechanism for subsequent inclusion of new practices into the UCPD black list to respond to new developments?

The majority of interviewees were positive about the idea of a mechanism for revising the blacklist, as new practices may emerge that require modification. However, when prompted only few could produce concrete examples of a practice they would like to see included in the black list. More specifically, a representative of the Ministry suggested that a practice that could be included would be that of making misleading claims about a product that blatantly go against current scientific knowledge and capabilities such as misleading claims that a device can turn water into fuel (there were cases featuring these kind of products). Another suggestion by representative of consumer organisation was including practices relating to promotional activities where there are problems relating to price transparency, e.g. 2-for-1 offers, claims of 20% cheaper etc.

Representatives of authorities pointed to the importance of new challenges as a result of new technologies and the internet, such as online targeted ads and that as commercial practices become more globalised, any effort to combat them should be coordinated at the EU level. Business associations also expressed the view that e-commerce has created issues that should be taken into account when revising the black list.

In contrast, consumer organisations have stated their preference for minimum harmonisation and Member States being able to add and remove practices to the list. Furthermore, it was pointed out by consumer organisations that the modification of the black list should be done within a limited timeframe to allow for the practices to be up to date with the latest marketing techniques, rather than a process with a lengthy procedure that might mean some practices may already be obsolete by the time they are included in the list.

- Are there other measures that could improve the effectiveness of the UCPD in establishing a high level of consumer protection in your country? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

A consumer association representative suggested that further guidance by the Commission is required for the application of the UCPD and especially the concept of the average consumer.<sup>15</sup> Another suggestion was that of offering the possibility of claiming damages/compensation for violations of unfair practices on an EU level and clarifying how these damages would be proven and calculated.

A further suggestion that would be welcomed by the Consumer Ombudsman as well as consumer associations, would be the use of a black list and white list for traders, where the list would be public and searchable and would act as a deterrent for traders and would allow consumers to be informed on whether traders are using unfair practices.

No best practices were identified.

### 1.1.2. Effectiveness of the PID in establishing 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;

The general consensus amongst interviewees was that this is a Directive that is working well and is not causing particular problems. Few consumer complaints are

<sup>15</sup> A Commission Staff Working Document on Guidance for the application of the UCPD has been recently published. [http://ec.europa.eu/justice/consumer-marketing/files/ucp\\_guidance\\_en.pdf](http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf) (Accessed September 2016)



received over this issue. Any complaints may revolve around the issue of presentation of the price. Perhaps the price tag is not in an obvious place or perhaps the unit price is displayed in a much smaller font size making it difficult to spot. The general view was that consumers do make use of the unit price as it is their only way to effectively compare prices, however it is not easy to tell how many consumers are in fact informed about it.

The interviewees were more concerned with other pricing techniques that create a problem in the market. Issues are caused by promotional material of super markets advertising their offers with claims such as 'now 20% cheaper' without specifying how that is calculated. Another problem was caused by shops failing to display prices at their window or misrepresenting prices during sales. However, these issues relate to price transparency and misleading pricing and are caught by the UCPD rather than the PID.

- 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?

Opinions were divided on the issue. Some of the interviewees believed that performance units would facilitate comparison for consumers. Others believed that a performance unit is subjective and to the extent that it is decided by the producer (e.g. in the detergent example the manufacturer would define how much product is needed for a wash load), it can create confusion. A representative of the Ministry also pointed out that a performance unit could create confusion in promotional activities e.g. when extra product is offered. A consumer organisation representative found the crucial point was that all traders used the same measurement unit, regardless of which one it is.

- The effects of the regulatory choices/derogations allowed by the Directive and applied by Member States. [*Key aspects to consider are: Is the derogation relevant? Do companies make use of it? Are there consumer complaints because of this? If so, approximately how many per year?*]

Greece is one of the countries that has made use of the derogations for small businesses from the requirement to indicate the unit price. This is something that according to the assessment of the interviewees is working well and is not causing particular problems. In Greece there are many very small businesses, such as mini-markets that make use of the derogation. Representatives of consumer associations are not against this derogation as they recognise that the requirement to indicate unit price would create a high cost for many very small, family businesses. On the other hand, representative of a business association pointed out that with the use of new technologies it may become easier for small businesses to comply with the law at a smaller cost which may eliminate the need for derogation.

### 1.1.3. Effectiveness of the MCAD in providing protection for businesses

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

- 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 has been transposed in Greek law in the following manner: the articles on comparative advertising are found in art.9 par.2-4 of N.2251/94. Misleading advertising is covered by art. 9δ and 9ε of N.2251/94. Different concepts of consumer are in place in N.2251/94. For article 9 the general definition applies which is: 'Consumer: every physical or legal entity or unions of entities without a legal

personality who constitute the target group of products or services offered in the market and who use products or services being their end user. A consumer is also: aa) every target group of promotional activities, bb) every physical or legal entity who gives a guarantee in favour of the consumer on condition that they do not act in the context of their professional or business activity.'

That is a very broad definition that appears to grant the status of consumer to almost everyone and definitely covers traders and professionals for the purposes of the MCAD. On the other hand, for art.9 δ and 9ε which transpose art.6 and 7 UCPD in Greek law, the more restrictive definition of consumer of the Directive applies which includes only the consumer as a natural person who is acting for purposes which are outside their trade, business, craft or profession.<sup>16</sup>

The transposition of the Directive in Greek law has created a number of problems. Especially for misleading advertising it is not clear whether traders can directly invoke art.9δ και 9 ε in court for their protection. Representatives of the Ministry have stated that they do accept complaints from professionals on advertising. These could either be from small businesses or professionals that wish to be protected or from businesses who report consumer law violations viewing it more as a tool to stop competitors. They do accept these complaints and have on occasion taken action where there was a violation, yet would not want to see an increase in complaints from businesses as the scope of their service is already very broad.

Business organisation representatives said that traders might and have in the past invoked N.2251/94 in court but mostly apply competition law or the general law of sales and obligations for misleading advertising. They consider that to be a lot easier and faster for administration of justice, since via the use of private law they can get an injunction more easily in order to stop the practice. Businesses may apply N.2251/94 by analogy and not directly. One business organisation representative expressed the view that it is sufficient for the framework to be limited to advertising.

The lack of clarity around whether businesses can in fact use these provisions has led to them not being widely used by businesses. There appears to be a low visibility of the provisions as being there for the protection of businesses given that they are included in the legislation for consumer protection. That problem is even more acute for misleading advertising.

These problems in the transposition of the Directive have also been highlighted in the literature where it has been advocated that the provisions of the MCAD should have been transposed in N.146/1914 on unfair competition, instead of 2251/94 on consumer protection and article 9 of N.2251/94 abolished in light of the UCPD.<sup>17</sup>

Given the issues highlighted above, the application of the MCAD cannot be said to have been effective.

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

Please refer to the answer above.

- The effects of the minimum harmonisation provisions on misleading advertising; [*Key aspects to consider are: 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)?*]

<sup>16</sup> See N.2251/94 art.9 a (α)

<sup>17</sup> Apostoloroulos, 'Αθέμιτη συγκριτική διαφήμιση χωρίς καν σύγκριση; Επιταγή φιλελευθεροποίησης της συγκριτικής διαφήμισης υπό το πρίσμα του κοινοτικού δικαίου', [2006] ΣΤ ΧρΙΔ, 29,30; Vasilopoulos, 'Συγκριτική διαφήμιση και αθέμιτες εμπορικές πρακτικές' in Douvliis and Mpolos (eds) *Δίκαιο Προστασίας Καταναλωτών*, (Εκδόσεις Σάκκουλα 2008), 633

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. There is no extension of the UCPD in B2B transactions, which is also causing the issue with misleading advertising highlighted above.

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

Prior to the introduction of the Directive, comparative advertising was forbidden in Greek law. Greek courts were cautious about allowing comparative advertising in exceptional circumstances.<sup>18</sup> The introduction of full harmonisation provisions on comparative advertising has brought a significant shift in that attitude as comparative advertising is now allowed provided it conforms with certain conditions and full harmonisation means the courts cannot enforce stricter standards that would limit comparative advertising further. However, in the context of the code of advertisers, there has been the critique that they adhere to a stricter standard for comparative advertising than that of the MCAD, meaning they limit this type of advertising further.<sup>19</sup> Greek law also regulates comparative tests/trials which are considered a key aspect of comparative advertising which is not covered by the Directive.<sup>20</sup> The same is true for art.9.2 (δ) of N.2251/94 which regulates derogatory statements and personal comparisons.

- 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;

Representatives of a business association have stated that comparative advertising is not frequently employed in Greece and therefore no particular issues have been identified in this field. They attributed this to the characteristics of the Greek market which is comprised mainly of small and very small businesses who are unlikely to engage in comparative advertising. Similarly, the Ministry has informed us that there has been only one case of comparative advertising where a fine has been administered. Comparative advertising does not appear to cause any particular problems, yet that may stand to change in the future as marketing practices develop.

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

Please refer to answer in first bullet point.

- Are there measures that could improve the effectiveness of the MCAD in providing protection for businesses (see also 1.1.6 below)? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

No specific measures were identified.

<sup>18</sup> Apostolopoulos, 'Αθέμιτη συγκριτική διαφήμιση χωρίς καν σύγκριση; Επιταγή φιλελευθεροποίησης της συγκριτικής διαφήμισης υπό το πρίσμα του κοινοτικού δικαίου', [2006] ΣΤ ΧρΙΔ, 29, 31

<sup>19</sup> See Greek Code of Advertisement, art.11; Apostolopoulos, 'Αθέμιτη συγκριτική διαφήμιση χωρίς καν σύγκριση; Επιταγή φιλελευθεροποίησης της συγκριτικής διαφήμισης υπό το πρίσμα του κοινοτικού δικαίου', [2006] ΣΤ ΧρΙΔ, 29,32

<sup>20</sup> N.2251/94, art.9, par.4

#### 1.1.4. Effectiveness of current rules 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;

It is important to mention that Greek businesses do not engage in cross-border trade as much as perhaps other Member States. This is something that has been highlighted in interviews with business associations and can also be seen in external reports.<sup>21</sup> There are many factors contributing to that, some of which relate to the structure of the Greek market, made up primarily of small family businesses, the impact of the financial crisis, and isolating the role of the legal framework is an arduous task. Therefore, any remarks made on cross-border trade are of limited use. This is true for all parts of the questionnaire relating to cross-border trade.

Business associations did not report specific problems to in relation to cross-border trade. A business association representative considered that there may be issues with services, especially for older consumers, given the language barrier. It was mentioned that Greek businesses currently engage in cross-border trade primarily through e-commerce. E-commerce traders had to adjust to legislation, yet there were no particular difficulties reported or cases where a foreign authority had to intervene.

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

Please refer to answer above.

- Whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade. [*Do the national differences play a role in a business perspective? Have they caused problems?*]

Please refer to answer above.

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;

Business associations had little, if any, experience with employing the MCAD, let alone in cross-border transactions. They highlighted that participation of Greek businesses in cross-border trade is limited, something which is supported also by the external evidence presented above. Yet, as a business association representative pointed out, if there were any issues with cross-border advertising they would be more inclined to turn to competition law rather than consumer law to resolve any problems.

A cross-border cooperation mechanism between national authorities was considered a good step. That being said business associations did not have specific experience coming from their members of problems arising in practice that would benefit.

<sup>21</sup> See for example the OECD Economic Survey for Greece (March 2016) available online at <http://www.oecd.org/eco/surveys/GRC%202016%20Overview%20EN.pdf> (Accessed September 2016)

- Whether the minimum harmonisation character of provisions on misleading advertising represents a barrier to cross-border trade;

Please refer to answer above.

- 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;

Please refer to answer above.

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

Please refer to answer above.

#### 1.1.5. Interplay amongst UCPD information requirements according to Article 7(4) with the information requirements in the horizontal consumer law instruments

Regarding the information requirements according to Article 7(4) UCPD ("invitation to purchase") in the advertising stage, please analyse:

- The level of awareness of traders as regards information requirements at the advertising stage, as in particular demonstrated by their practical application; [*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?*]

Traders provide some of the information required by art. 7(4) UCPD, namely the ones included in 7(4)(a), (b) and (c) UCPD. It is extremely rare, if ever, that a trader provides the information included in 7(4) (d) and (e) on complaints procedure and information on the right to withdrawal or cancellation. If that information is provided then it would be in the form of small print briefly appearing during an advertisement. Interviewees from government authorities and business associations believed that it is not the role of advertising to provide such detailed information such as right to withdrawal so early on, but rather its role is to attract the consumer.

Consumer associations were in favour of keeping both the information requirements under UCPD and CRD as they cover distinct stages and if one were abolished then the level of protection for consumers would drop. Representatives of the Ministry and the Consumer Ombudsman were in favour of abolishing the informational requirements under art.7 (4) to the degree there is overlap, so as to simplify both legislation and its enforcement. The same view, favouring abolishment was expressed also by business associations.

- 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?

No added information. Please refer to answer above.

#### 1.1.6. Relevance for business-to-business transactions

Regarding the area of unfair commercial practices/marketing, please analyse:

- 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 cross-border trade;

It has also been argued that a way to extend the scope of the UCPD to B2B transactions would be to remove the criterion of 'professional diligence' in the general clause and leave only that of 'material distortion of the economic behaviour' not only of the consumer but of any actor in the market, including businesses.<sup>22</sup>

A business association representative was positive to the idea as that would strengthen protection for businesses and would increase their legal artillery against other businesses. Another business association disagreed with the idea of expanding the UCPD or the MCAD as B2B transactions were in their view better regulated by private law and having a uniform regime would fail to take into account the differences between business and consumers e.g. they considered businesses to be a lot better informed than consumers, even small businesses.

- 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;

In the literature it has been argued that an alignment of B2B and B2C regimes would be beneficial also for ensuring fair competition within businesses.<sup>23</sup> The argument is that having a practice be judged under different criteria and different legislation depending on whether the claim is brought by a consumer or a business creates legal uncertainty. Having a legislative intervention to align the two regimes would mean relieving judges of that task.

The Ministry was in theory not opposed to an extension of protection for B2B relations yet what would be highly undesirable for them would be to be responsible for the enforcement of both types of transactions as that would be a huge burden for them and would ultimately mean enforcement standards would suffer.

Please refer also to the answer above.

- 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 also cover unfair commercial practices during and after the transaction;

Nothing further to add.

- Whether there is a need to have a black-list of practices in the business-to-business marketing area;

In the literature it has been argued that the black list of the UCPD could be applied to B2B relations by analogy. In that case, with the current regime, it would be no more than an indication of unfairness.<sup>24</sup> However, that can be an indication that the idea of a blacklist in B2B relations will not be viewed unfavourably.

A representative of a business association was positive to the idea of such a black list, provided there would be adequate consultation in order to identify which practices should be included.

<sup>22</sup> Mpechri- Kehagioglou, 'Η οδηγία 2005/29 για τις αθέμιτες εμπορικές πρακτικές: Ο νομικός μηχανισμός λειτουργίας της και οι δυσλειτουργίες του κατά την εφαρμογή της οδηγίας', [2012] ΕΕμπΔ 17, 34

<sup>23</sup> Kalamprouka-Giannopoulou, 'Νομολογιακά δεδομένα περί αθέμιτων εμπορικών πρακτικών', [2014] 5 ΔΕΕ 479, 490-491

<sup>24</sup> Marinos, 'Από το ελληνικό στο κοινοτικό δίκαιο του αθέμιτου ανταγωνισμού-προβλήματα εφαρμογής της μαύρης λίστας της οδηγίας 2005/29 για τις αθέμιτες εμπορικές πρακτικές', [2011] ΔΕΕ, 877, 883



- What should be the enforcement cooperation mechanism in the business-to-business marketing area;

Business associations' representatives were not positive to the idea of a single enforcement authority on a European level which they believed might be more bureaucratic but would be open to the idea of cross-border cooperation of authorities.

- Whether there is a need to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive;

Nothing further to add.

- Whether there is a need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive.

No such need was identified by the interviewees yet as analysed above the rules of MCAD in Greece are employed more for the benefit of consumers rather than traders.

#### 1.1.7. Relevance of contractual consequences of unfair commercial practices

Please analyse whether there are in your country:

- 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;

There are no such provisions currently in place. Consumers would have to rely on the general clauses of the law of obligations, particularly art.281, 288 of the Civil Code.

- Any case law (enforcement decisions, court rulings) providing for such consequences;

No specific examples to report. There is not a lot of case law on unfair practices.

- Whether there is, based on past experience in your country, a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

Consumer organisations expressed the view that linking the use of unfair commercial practices to contractual consequences would result in a higher level of protection for consumers and could potentially act as a deterrent for businesses. If this were to be out in force, a reversal of the burden of proof would also make it easier for consumers to seek protection in court.

Business associations on the other hand feared that contractual consequences could create a wave of claims made against businesses that could often be unfounded. Given that consumers do not easily decide to take action against a company, it is doubtful whether such a surge in legal action would indeed occur, even if the UCPD would have such contractual consequences.

## 1.2. Contract conclusion and performance

### 1.2.1. Effectiveness of the current rules in establishing 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;



In Greece unfair terms in consumer contracts were first regulated with art.22-26 of N. 1961/1991. UCTD was transposed a short while later with the current N.2251/94. The general perception is that the UCTD is working quite well. The general clause in particular, allows consumer associations, which are the ones mainly dealing with unfair terms when filing class actions, to pursue cases based on a broad range of unfair terms. There has also been a robust body of case law that has developed on unfair terms, mostly in the sectors of financial services and telecoms.<sup>25</sup>

- 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 your MS? Does this work in practice or are there problems?*]

The list of unfair terms, which in Greece is a black list, is viewed as one that specifies the general clause. The case law has developed three guiding principles for the terms included in the list: a) the principle of transparency, b) the principle of prohibiting the trader to define the obligations in an absolute manner and c) the principle of prohibiting traders from getting consumers to give up their legal rights against the trader without good reason.

- 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; [*Note: If a black/grey list exists in your country, key aspects to consider are: How does the list work in practice? Does it make a difference to have such a list?*]

There is a black list in place.<sup>26</sup> The black list does increase the level of protection and makes it easier to enforce the law, according to the assessment of the interviewees. The advantages of a blacklist are appreciated also in the case law for offering a safe direction to judges and increasing legal certainty.<sup>27</sup> However, a representative of a consumer organisation pointed out that because of the frequent use of the black list, courts may be less receptive to a term that does not neatly fall within one of the terms listed in the black list. That being said according to the case law it is possible to bring an action using both the general clause as well as the black list.<sup>28</sup>

- 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: In your country, have the effects of court decisions establishing the unfairness of an unfair term been extended to all contracts of the trader concerned or to the contracts of any other trader containing such a term? If so, how does this work in practice? What are the impacts on businesses? If there are no such effects of court decisions on unfair terms: what are the effects of this situation?*]

Individual consumer actions are not extended to other cases. In collective actions (injunctions) filed by consumer associations, the situation is different. 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. This provision has been heavily criticised in the literature and the prevailing view is that it should be

<sup>25</sup> For analysis of the recent case law see Dellios, *Γενικοί Όροι Συναλλαγών*, (2<sup>nd</sup> ed Εκδόσεις Σάκκουλα 2013), 457-569

<sup>26</sup> N.2251/94, art.7 par.2

<sup>27</sup> See for example, Εφαθ 5101/2011, ΝοΒ 2011, 2139; Εφαθ 2386/2006, ΧρΙΔ 2007, 613 as quoted in Dellios *Γενικοί Όροι Συναλλαγών*, (2<sup>nd</sup> ed Εκδόσεις Σάκκουλα 2013), 294, note 823

<sup>28</sup> Dellios, *Γενικοί Όροι Συναλλαγών*, (2<sup>nd</sup> ed Εκδόσεις Σάκκουλα 2013), 295

interpreted restrictively so as not to contravene with the general rules on 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* principle to all traders via the mechanism of art.10 par.21 of N.2251/94. 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.

The extension of the effect of the decision is a powerful tool for ensuring compliance of traders and for protecting consumers and it is very effective in the majority of cases. However, there were reported incidents when the traders would include a term found to be unfair with minor changes. This meant there was a need for another collective action against the 'new' term. Business associations did not identify any particular negative effects as a result of this extension of *res judicata*. That could be explained by the fact there have not been so many Ministerial Decisions extending the *res judicata*.

The Consumer Ombudsman stated that even in ADR procedures, when referring to related court decisions, especially when they are irrevocable, it facilitates their work significantly in achieving the cooperation and compliance of the trader.

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

Opinions of interviewees on the issue were divided with consumer associations on the one hand claiming that traders are often not well-informed on contractual transparency requirements, leading to a range of violations of the UCTD, and business associations on the other hand, claiming that at least medium and large enterprises are well-informed of their obligations. This however may be contrasted to the fact that it is large enterprises such as banks that generate the vast amount of case law on unfair terms. This case law on banking terms could also be attributed to the fact that these are high value contracts that consumer organisations and consumers are more likely to pursue in court.

It was pointed out by representatives of the Consumer Ombudsman that especially the businesses engaging in e-commerce (which represent a relatively small but increasing segment of businesses) are more pro-active about conforming to their legal requirements in this area (e.g. what should be included in their terms and conditions and how their website should be structured)

The principle of transparency is at the core of unfair contract terms law in Greece and Greek case law has on several occasions elaborated on how that principle is to be interpreted and applied. In fact, a representative of a consumer association suggested that elevating the status of the principle of transparency in EU law would facilitate the application of the law in the Member States, especially in the field of financial services.

It has also been added in the law that presenting the terms in Greek is a mandatory requirement even for terms of international transactions that are applied in the Greek market.<sup>29</sup> Case law has also included unexpected or surprise terms as terms that contravene the principle of transparency, as predictability of terms is considered to be an element of transparency.<sup>30</sup> This covers for example, terms that define how the price and other additional expenses for the consumer are being calculated.

The principle of transparency as a guiding principle in the law seems to be working quite efficiently. It is featured often in the black list of practices where many terms are to be considered unfair as contravening the principle of transparency, creating what

<sup>29</sup> N.2251/94, art.2 par.2

<sup>30</sup> See ΟΛΣΤΕ 1210/2010, Ελληνική 2010, 1148, 1158 as quoted in Dellios *Γενικοί Όροι Συμβολαίων*, (2<sup>nd</sup> ed Εκδόσεις Σάκκουλα 2013), 213, note 532

the theory has named as a quasi-presumption of unfairness for intransparent contract terms.<sup>31</sup> Contractual transparency is one of the most quoted and applied forms of reasoning for finding a contract term to be unfair.

- 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. [*Note: Question only relevant for MS that have put in place extensions of application of UCTD*]

No such extension has been made.

- 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?*]

The term not being binding is an effective sanction, according to stakeholders, however consumer associations highlighted that there are also other issues that may arise. It is not only about rendering a term not binding, but also about what replaces the unfair term. Courts replace the term by interpreting the contract according to the principles of good faith, as per the general principles of civil law. While one representative of a consumer association stated that this interpretation of the contract works well in correcting the previous imbalance of power, another expressed the concern that sometimes the new terms are not too far removed from the unfair ones.

In relation to national courts taking on an active role, the consensus among stakeholders was that that is not the case. National courts wait for an action to be filed. A few exceptions to that general rule were mentioned. Where there is a criminal law dimension to the violation, public prosecutors did pursue cases ex officio. In addition to that, in some cases the judges took initiative in invoking unfairness ex officio when an action was brought that was not well-founded.

The possibility of further guidance by the CJEU, using the mechanism of reference for preliminary ruling, was viewed in a positive light by stakeholders, especially by consumer organisations. That being said, there is as mentioned above a developed body of case law on unfair terms, unlike e.g. unfair practices.

Other avenues open to consumers besides resorting to the court system would be either to use the ADR procedure provided by the Consumer Ombudsman or to file a complaint to the General Secretariat for Consumer Protection. However, such a complaint can only result in a fine for the company. In general, the General Secretariat is cautious about enforcing the UCTD, a task that they consider is best handled by the courts.

- In a forward looking perspective: Are there other measures that could improve the effectiveness of the UCTD in establishing a high level of consumer protection in your country? Would a graphical presentation model improve the readability and comprehension by consumers of the T&Cs? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

A measure that was identified as positive by several interviewees was the power granted to the Minister of Development to publish a decision that turns the irrevocable court decision on a collective action by a consumer association into law, thus making it binding for all traders and essentially adding it to the blacklist of unfair terms.<sup>32</sup>

<sup>31</sup> Dellios *Γενικοί Όροι Συναλλαγών*, (2<sup>nd</sup> ed Εκδόσεις Σάκκουλα 2013), 212

<sup>32</sup> N.2251/94, art.10 par.21

Another suggestion was that of extending the scope of protection to professionals, going beyond the *stricto sensu* consumer usually employed in EU Directives, as the Greek legislator has done by adopting a broader definition of consumer.

The idea of a graphical representation model got mixed responses. Some interviewees expressed their concern that a graphical presentation model could mean that consumers would not take the terms seriously or that the graphics might create further ambiguity of the terms as they may be interpreted differently by individual consumers as aesthetics come into play. Other consumer associations were open to the idea of such a model but prioritised the presentation of the terms in a clear, concise manner with language that is easy to understand. One regulator representative was positive to the idea of graphical representation for helping consumers understand more technical concepts and terms they now have difficulty comprehending and business association representatives believed such a model could aid consumers' understanding of the terms.

#### 1.2.2. Effectiveness of the current rules 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 disparities have an impact on cross-border trade; [*Key aspects to consider are: Do national differences in the application/implementation of the Directive play a role for businesses? Have these differences led to changes in their business strategy? Have these differences caused problems?*]

A business association representative considered the UCTD to be effective in combating the ambiguities that may be created by unfair terms especially in the e-commerce market which is the sector most active in cross-border trade which as stated also above is limited in Greece.

- 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;

To the extent that there may be disparities between the lists, business associations considered that could pose a barrier to cross-border trade. However, there was no practical experience with any issues arising in that context.

- 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.

Nothing further to add.

#### 1.2.3. Relevance for business-to-business transactions

Regarding the area of contractual fairness and in relation to the Unfair Contract Terms Directive, please analyse:

- Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;

Business association representatives think there is a need to protect especially SME's and micro enterprises. As mentioned, these types of businesses make up the majority of the Greek market. A representative of a business association was positive about

introducing the measures listed below as a way to enhance competition between businesses.

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 (a) 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. The definition has been criticised as overly broad in the literature and there has been a debate over the mechanism to be employed on narrowing the concept. Yet, even those in favour of a narrower concept recognise that small businesses and professionals may often need the protection granted to consumers as there is a significant inequality of bargaining power and often these categories have no specialised knowledge to assist them.<sup>33</sup> For example, in a case in the court of first instance where investment products were sold to a professional, a doctor, the Court acknowledged that the fact that even though he was a professional he had no specialised knowledge in the area of investment products and found the term to be unfair.<sup>34</sup>

- 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;

Please refer to answer above.

- 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;

Please refer to answer above.

- 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;

Please refer to answer above.

- Whether there is a need for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive;

Please refer to answer above.

- Whether an extension of the Unfair Contract Terms Directive to B2B transactions can bring benefits for cross-border trade;

A business association representative expressed doubts as to whether there would be benefits at all.

- Whether the consequences of such an extension would have an effect on innovation by or market opportunities for SME providers/suppliers;

Nothing further to add.

<sup>33</sup> See Perakis, 'Article 1 N.2251/94' in Aleksandridou (ed) *Δίκαιο Προστασίας Καταναλωτή: Ελληνικό-Κοινοτικό*, (Νομική Βιβλιοθήκη 2008), 50; Deloyka-Igglesi, *Δίκαιο του Καταναλωτή Ενωσησικό και Ελληνικό*, (Εκδόσεις Σάκκουλα 2014), 34

<sup>34</sup> Decision no. 35/2015 Πρωτ/Λαρ

- Whether the benefits of extending the scope to business-to-business transactions would exceed the negative consequences of such an extension.

Nothing further to add.

### 1.3. Injunctions

#### 1.3.1. Effectiveness of the current rules in establishing a high level of consumer protection

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

- To what extent is the use of the injunction procedure in your country contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment?<sup>35</sup>

The injunction procedure in Greece is a representative action for the protection of the collective interests of consumers by consumer associations. It is viewed as an effective tool for acknowledging violations and since this is a collective action one that is far more effective than claims made by individual consumers.<sup>36</sup>

The injunction procedure has enabled consumer associations to be quite active in this respect and have been successful in many injunctions. The data provided by an consumer association that has been the most active in injunctions show that they have filed a total of 57 collective actions during their years of operation, with 50 of them, the vast majority, having been successful.

However, there are not many consumer associations in Greece that have the resources and expertise to pursue injunction orders. In fact, that task is reserved for only a couple of consumer associations who have notable action to show in this field. The smaller regional consumer associations face many barriers and it is clear they do not have the financial and human resources to pursue an injunction order.

Consumer associations have pointed out the problems in the enforcement of consumer law and how in their view collective actions are a powerful tool, notwithstanding the problems faced in their use. Government authorities had little to comment on the injunction procedure as it is not something they deal with.

- What measures in your national legislation on injunction procedure are considered to be particularly effective, if any: measures regarding the cost of the procedure, the 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?

1) The cost of the procedure is considered to be a high one, one that many consumer associations struggle to cover since they are funded by their members. That is the case especially when the damage to the consumer is of low monetary value.

2) With regard to the summary procedure, injunctions are included within the voluntary jurisdiction procedure of the Civil Procedure Code.<sup>37</sup> That is considered quite efficient as it is easier to get a date for a court hearing and the judgements are issued a lot faster than the ordinary procedure. A representative of a consumer association estimated it would take approximately 6 months for the first hearing and about 3-5 years for the decision to be made irrevocable. In Greece administration of justice is slow and cumbersome and this timeframe is considered efficient.

<sup>35</sup> 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.

<sup>36</sup> Deloyka-Iglesi, *Δικαιο του Καταναλωτή Ενωσησικό και Ελληνικό*, [2014] Εκδόσεις Σάκκουλα, 321

<sup>37</sup> N.2251/94, art.10, par.20



3) With regard to publication of the decision and publication of a corrective statement: There are no specific measures in place for the publication of the decision and the general rules apply. As for the corrective statement, consumer association representatives mentioned that even though they request such a statement to be made, the court rarely grants that request.

4) With regard to sanctions for non-compliance of the trader. This could be a potentially powerful tool to ensure compliance as it is possible to request the temporary enforcement of the injunction order.<sup>38</sup> 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.<sup>39</sup> However, according to consumer organisations courts are very hesitant to grant temporary enforcement and therefore these measures are not applied in practice.

5) With regard to prior consultation, no specific measures have been enacted. One consumer association said they do attempt to consult with the trader before filing an action on a voluntary basis. On the other hand, another consumer association representative claimed that it there is little reason to introduce prior consultation as that would only cause further delays to the process. It is important to note that in Greek legal culture the mechanism of prior consultation is not widespread and is often treated with a level of suspicion by lawyers.

6) With regard to the effects of the judgement, according to art.10 par. 20 N.2251/94 it is extended to all even if they were not parties to the trial. The provision has been subject to critique as it appears to be in conflict with the general rules on res judicata which should only apply for those that were parties to the trial.<sup>40</sup> The dominant view is that the provision should be interpreted correctively to mean that third parties can invoke the favourable res judicata in a different trial but the court is not obliged to follow it.<sup>41</sup>

- Has your country extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunction Directive? If yes, what are the additional consumer rights covered?

The scope has been extended and the list is only indicative.<sup>42</sup> Any consumer law provision can provide a basis for an injunction and certainly it is extended to all articles of N.2251/94, which is the main piece of consumer protection legislation. What is also interesting is that the Greek law has extended the possible requests beyond that of cessation or prohibition of an infringement. More specifically the other possibilities allowed under Greek law are the following: 1) pecuniary compensation due to moral damages, 2) preliminary injunction to secure the demand either to cessation or compensation and 3) The recognition of the right to rectify the loss incurred by consumers due to the illegal behaviour.<sup>43</sup>

An interesting recent case that points to the judges being more receptive to the extension of the Injunction procedure is the following: Consumer associations were able to file an injunction under art.10 par.16 of N.2251/94 to request that consumers would not be obliged to pay a tax included in their electricity bill (issued by DEI the formerly state-owned provider controlling 90-95% of the market).<sup>44</sup> Art.2 of N.2251/94 has also been extended to terms of public companies by the case law.<sup>45</sup>

<sup>38</sup> N.2251/94, art.10 par.20

<sup>39</sup> ΚΠολΔ, art.947

<sup>40</sup> Art.20Σ in conjunction with art.106 ΚΠολΔ

<sup>41</sup> Apalagaki, 'Άρθρο 10 Ν 2251/1994' in Aleksandridou (ed), *Δίκαιο Προστασίας Καταναλωτή Ελληνικό-Κοινοτικό*, (Νομική Βιβλιοθήκη 2008), 574-576

<sup>42</sup> N.2251/94, art.10 par.16(α)

<sup>43</sup> N.2251/94, art.10 par.16 (β), (γ), (δ)

<sup>44</sup> 1101/2012 ΠολΠρΑθ Τμήμα Εκουσίας Δικαιοδοσίας, 293/2014 ΑΠ

<sup>45</sup> See ΑΠ 7/2011, ΧρΙΔ 2012 45



- Analysis of the obstacles to the effective use of the injunction procedure, in particular by analysing which progress in removing obstacles has been made and/or new difficulties that have emerged in your country since 2012.

There have been no changes since 2012 and no action has been taken to remove obstacles.

However, the following obstacles were pointed out by consumer associations in the interviews:

- The six-month deadline to file the injunction, which is quite limiting.<sup>46</sup> Consumer associations may not always have the resources to closely monitor the market so as to be aware of the violations and be prepared to file the injunction within the space of six months.
- High cost of procedure. It was suggested that if injunctions are to be supported and facilitated as an enforcement mechanism then an effort should be made to reduce the costs for consumer associations. For example, court fees could be reduced or abolished. Another cost is that for expert witnesses to give their opinion, which could be reduced or partially covered by the state.
- In the cases where the injunction is requested together with pecuniary compensation due to moral damages, part of such damages is awarded to the state for the education and protection of the consumer. Consumer associations would like 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. However, reservations to this approach have been expressed in the literature as it is undesirable that collective action becomes a vehicle for consumer associations to make a profit out of.<sup>47</sup>

Another potential obstacle for injunctions is the fact that consumer associations may be penalised if found to have filed an action for pecuniary compensation due to moral damage which was unfounded. If an action for pecuniary compensation is rejected as unfounded, the trader can file an action for compensation or damages against the consumer association.<sup>48</sup> If the consumer association repeatedly has actions for compensation rejected, it may be dissolved.<sup>49</sup> The fear of such penalties could act as a deterrent for consumer associations to file for collective action. While it is understandable for the legislator to wish to discourage unfounded actions, the penalty of dissolving the association has been criticised as disproportionate.<sup>50</sup>

All of the obstacles highlighted relate to two main categories. One is the problem of consumer associations lacking funding and the other is the Greek civil procedure rules applied. The fact that no special measures are taken to facilitate injunctions on a civil procedure level, other than their inclusion in the special voluntary jurisdiction process creates barriers for collective actions.

<sup>46</sup> N.2251/94, art.10 par.18

<sup>47</sup> Ραπανικολαου, "Σκέψεις πάνω στον νέο νόμο (ν. 3587/2007) για την προστασία των καταναλωτών", [2008] ΕΛΛΔνη 660, 668

<sup>48</sup> N.2251/94, art.10 par.23

<sup>49</sup> N.2251/94, art.10 par.29

<sup>50</sup> Αραλαγάκι, "Άρθρο 10 Ν 2251/1994" in Aleksandridou (ed), *Δίκαιο Προστασίας Καταναλωτή Ελληνικό-Κοινοτικό*, (Νομική Βιβλιοθήκη 2008), 578

- In a forward looking perspective: Should the coverage of the Injunctions Directive be extended (by including additional legislation into Annex I to the Directive)? If so, which EU legislation should be included? Are there other measures that could improve the effectiveness of the ID in establishing a high level of consumer protection? Should the scope of the Injunctions Directive be extended to the protection of collective business' interests? Are there best practices in your country that could be relevant for other countries and considered as model for the injunction procedure at EU level?

There is not an urgent need to extend the coverage of the ID in Greece as it is already possible to bring an injunction for any violation of consumer legislation.<sup>51</sup>

A suggestion made by a consumer association representative would be to extend the scope of the ID also to the newest Directives on financial services, such as the Mortgage Credit Directive. The financial services sector, primarily banking and insurance have generated a large number of injunctions in Greece. The sector continues to be a cause of concern with recent collective actions taken against banks for unfair terms and unfair practices in Swiss franc loans. Consumer associations welcome the EU Directives on financial services for ensuring a higher level of protection for consumers and would like to be able to bring injunctions on the basis of that legislation.

The extension of the ID for collective interests of businesses was viewed favourably by consumer associations, as one that would bring also competition law under the scope of the ID. A business association representative was also positive to the idea of the ID being extended to collective business' interests, especially in the area of unfair practices. Another business association expressed fears the Injunction Procedure might be ill-suited for the protection of the interests of businesses and may end up making enforcement less efficient.

Consumer associations were far more concerned with actions for damages rather than injunctions. They see this as key in their role of ensuring redress for consumers and for collective action to be able to have a deterrent effect. They would welcome the introduction on an EU level, of an action for damages or compensation.

### 1.3.2. 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:

- How effective is the injunction procedure in addressing infringements originating in another EU country?

There is no experience in injunctions being used to address cross-border violations. The consumer associations interviewed represented the largest ones in Greece and the only ones that have been active in pursuing collective actions. However, they face significant obstacles that prevent them from exercising any of the options listed above. Consumer associations face a lack of funds and personnel that make the exercise of such actions prohibitive. Please note that N.2251/94 regulates consumer associations and their funding sources.<sup>52</sup> Most consumer associations are funded through the subscriptions of their members and do not have the resources for such cross-border actions.

The list of qualified entities compiled by Greece includes regional consumer associations that are in no position to take on such action on a national level, let alone for a cross-border violation. Qualified entities also include regional chambers of commerce as well as chambers of tradesmen. From the interviews and out of the

<sup>51</sup> N.2251/94, art.10 par.16a

<sup>52</sup> N.2251/94, art.10 par.6

information available it appears that these chambers have never exercised their right to file an injunction.

Consumer associations welcomed the right to exercise the above options, as qualifying entities. However, at the moment there is no motivation for them to pursue such action as they would hardly be able to recuperate their expenses, if not incur debt. In order to encourage qualified entities to make use of the options available the following options would be helpful: either funding consumer associations to file such actions, and/or allowing them to recuperate their expenses through damages awarded to them.

- How effective is it to address infringements originating in another EU country that qualified entities in your country are enabled to seek injunctions in the other Member State (Article 4 of the Injunctions Directive)?

See the answer above.

- In a forward looking perspective: Are there non-legislative or/and legislative measures that could improve the effectiveness of the injunction procedure in addressing infringements originating in another EU country? Are there best practices in your country that could be relevant for other EU countries and could be considered as a model for the injunction procedure at EU level?

See the answer above.

### 1.3.3. Interplay between the Injunctions Directive and other enforcement instruments of consumer law

Please analyse:

- Is the injunction procedure as designed by the Injunctions Directive regulated separately in your country (in a separate legal act or as a separate procedure regulated within the same legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (UCPD, UCTD and by the Consumer Rights Directive)?

The Injunctions Directive has been incorporated in art.10 of N.2251/94. It is incorporated in a single piece of legislation (N.2251/94) for all Directives mentioned above. Article 90 of N.2251/94, sets out the possible sanctions, yet that is part of the same piece of legislation. There is no equivalent article on sanctions for the UCTD. Art.10 of N.2251/94 envisions a representative action where certain consumer organisations can protect the collective interests of consumers in court. Injunctions are brought as part of the voluntary jurisdiction of the Civil Procedure Code.<sup>53</sup>

- If these procedures are regulated separately: What are the main differences between them? How is the coherence between these procedures ensured? If these procedures are regulated in a single legal act (possibly as a single procedure): In what way do these procedures (or this procedure) go beyond measures foreseen by the Injunctions Directive?

As mentioned above, these procedures are regulated in a single legal act, namely N.2251/94 and in a single procedure, namely the voluntary jurisdiction of the Greek Civil Procedure Code. 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.<sup>54</sup> It should

<sup>53</sup> ΚΠολΔ, art. 739-866

<sup>54</sup> N.2251/94, art.10 par. 16 (β), (γ), (δ)

be noted that only injunction and pecuniary compensation for moral damages are exercised under the voluntary jurisdiction procedure.

## 1.4. Cross-cutting issues

### 1.4.1. Cost and benefits of the directives covered by the study

- To what extent is there evidence for benefits for consumers stemming from the protection provided by both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of benefits for consumers from the protection against unfair commercial practices and unfair standard terms in contracts; [*Note: a relevant aspect in this context is whether the costs for consumers in exercising their rights under these directives are limiting these benefits or not.*]

It is difficult to define, let alone quantify the benefits for consumers.

Representatives of the Ministry believe the legislative framework is sufficient and has reaped benefits for consumers. According to the Consumer Ombudsman there have been benefits for consumers in the field of redress more so than in deterrence of bad behaviour by traders. There is no cost for consumers to access ADR.

The same is true for the helpline of the General Secretariat for Consumers. However, in that helpline consumers cannot get redress as they can only report a violation and the Ministry can decide whether or not it is required to take action in the form of administering fines against the trader. They are however able to receive advice.

Sectoral regulators such as the EETT for telecommunications and post and RAE for energy have their own complaints procedure which is also free of charge. However, if the consumer goes to court to enforce their rights the cost is quite high and there is little incentive to do so.

The more sophisticated consumers, usually younger ones, are better informed about their rights and make better use of internal complaints procedures of traders.

- To what extent is there evidence for benefits for traders stemming from both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of creating a level playing field for honest traders by providing a legal basis to eliminate or at least constrain dishonest market practices, such as the use of unfair standard terms in contracts or unfair commercial practices, including through the application of the Injunctions Directive;

The general view expressed by authorities was that the Directives has been helpful in encouraging fair competition amongst traders. The same view was expressed by business associations' representatives stating that to the extent that the Directives help boost competition and establish a level playing field there are benefits for traders and consumers.

- What are costs for traders due to the need to respect the requirements under the directives covered by the study? [*Note: Such as costs of research, legal advice and compliance as well as the amount of time necessary to comply with the directives*]

A representative of the business association stated that they do not have such data available, as that would require them to conduct research specifically on the topic. Another representative mentioned they had not received any complaints from their members relating to a high cost of compliance. Compliance is viewed as a normal cost of doing business.

Representatives of the Ministry pointed out that they believe the cost for traders to be quite low as they can easily access all the information they need through their website. Also, the Ministry often receives questions from traders on compliance and

they offer this guidance free of charge. It was also pointed out by the Ministry that recently traders unions have started to be more active in helping out their members to comply with consumer legislation. For example, a union may offer guidance on the type of information that need to be provided in a website or model contract terms free for their members to use. Such initiatives are welcome and mean that even small enterprises that do not have the same resources to devote to compliance as large businesses can conform to the law in a cost-effective manner. Assessing to what extent traders do indeed comply or make use of these alternatives is difficult.

- What are the costs involved in the public enforcement of these rules?

There is no such information available. The General Secretariat for Consumer Protection is chronically underfunded and has limited resources, something that can obviously have an impact on the efficiency of the service. The independent authorities, which include the sectoral regulators such as RAE for energy and EETT for telecommunications and post produce annual reports on their activities which includes their budgets and operating costs.<sup>55</sup> However, these reports do not answer the question of enforcement costs for these authorities, especially when they also have a range of non-consumer-related activities.

The data provided by the Consumer Ombudsman in their Annual Report are particularly interesting, given that this is an independent authority dealing exclusively with consumer issues, even if it is only in the context of ADR. According to the evidence included in their report 699.100€ have been returned to consumers as a result of their actions and showing they do in fact operate in a cost efficient manner.<sup>56</sup>

- Are there indications that the directives covered by the study are not implemented in your country in a cost-effective manner?

It is difficult to make any assessment on cost-effectiveness. There are some issues with the way the Directives have been implemented that have been highlighted above, e.g. in the case of the MCAD, yet the interviewees did not make specific remarks on cost-effectiveness.

- Could the costs for implementing and enforcing the rules of the directives covered by the study be reduced without lowering the level of protection for consumers? If so, how?

It was suggested that existing legislation could be further simplified and codified. This was a suggestion coming both from business associations as well as consumer associations and authorities. The same criticism has been made in the literature on how a more systematic approach needs to be taken when transposing EU Directives.<sup>57</sup> Of course any codification would also have a cost, but the simplification of the legislation could bring benefits that outweigh potential costs and would be beneficial for consumers, traders and authorities.

A process for reviewing N.2251/94 is currently in place. Greece, as part of its commitments deriving from the third economic adjustment programme, has to align its legislation with the OECD toolkit. As part of that alignment and for the promotion of e-commerce a review of N.2251/94 is under way. One of the recommendations of the OECD is the simplification of consumer legislation and the introduction of a single

<sup>55</sup> See for example the RAE 2014 Annual Report section 9.2.2 available online at <http://www.rae.gr/site/file/system/docs/ActionReports/2014> and the EETT 2015 Annual Report section 1.5.4 available online at [http://www.eett.gr/opencms/export/sites/default/EETT/library\\_videos/Proceedings/PDFs/2015.pdf](http://www.eett.gr/opencms/export/sites/default/EETT/library_videos/Proceedings/PDFs/2015.pdf) (Accessed September 2016)

<sup>56</sup> See Consumer Ombudsman 2015 Annual Report, p.73 available online at <http://www.synigoroskatanaloti.gr/docs/StK-Annual-Report-2015.pdf> (Accessed September 2016)

<sup>57</sup> Deloyka-Iglesi, *Δίκαιο του Καταναλωτή Ενωσιακό και Ελληνικό*, [2014] Εκδόσεις Σάκκουλα, 26-27

definition for consumer and producer. As indicated before this is not the case under the current framework.

#### 1.4.2. Interplay with EU sector-specific consumer protection legislation

Regarding the interplay of the horizontal EU consumer legislation [mainly UCPD and UCTD] with EU sector-specific consumer protection legislation in the areas of electronic communications, passenger transport, energy and consumer financial services, please:

- Analyse the levels of awareness of the requirements of the horizontal EU consumer legislation (mainly UCPD and UCTD) of businesses and consumers and the specific public enforcement bodies in the relevant sectors, as in particular demonstrated by their practical application; [*Key question here is: Are UCPD and UCTD applied in practice by national authorities and courts as a legal basis to combat unfair commercial practices and unfair standard terms in contracts in the regulated sectors?*]

UCPD and UCTD are being applied in the sectors in question. National sectoral authorities first seek to apply sectoral legislation as the *lex specialis* and then if there are gaps they will turn to the horizontal legislation as *lex generalis*. As mentioned above many sectoral regulators also enforce their own code of conduct on the businesses they supervise which may go beyond what is prescribed in the Directives.

As for the courts, the two Directives are very frequently and successfully applied in the context of these sectors. As mentioned above, the vast majority of the Greek case law on unfair contract terms comes from the field of financial services and secondly from electronic communications. However, it is difficult to draw conclusions for all these different sectors grouped together as they differ significantly. For example, the energy market in Greece is still monopolistic meaning that few issues arise as there is e.g. very little advertising. Other markets such as financial services are a lot more mature.

- Specify whether in your country the same authority is responsible for the enforcement of the horizontal EU consumer law 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 UCPD/UCTD in the regulated sectors, as specified in the previous bullet?*]

There are different authorities responsible. The General Secretariat for Consumer Protection, part of the Ministry of Development is the authority with the most general responsibilities as they enforce the whole spectrum of consumer law. Representatives of the Ministry stated that the fact that the scope of their responsibilities is so broad it means they are often overwhelmed.

The regulated sectors mentioned above have their own regulatory authorities usually in the form of independent authorities. In electronic communications it is EETT, in passenger transport the Ministry of Infrastructure, Transport and Networks and the RAS for railways, for energy sector it is RAE and for financial services the Bank of Greece has some responsibilities on consumer issues.

There is informal cooperation between the different authorities, usually in the form of one of the sectoral authorities liaising with the General Secretariat of the Consumer Ombudsman (another independent authority) and vice versa. However, there is no institutionalised cooperation between them. The authorities consulted expressed the view that cooperation is generally functioning well, in spite of the lack of institutionalised framework. There are limits to what each regulator considers to be in their responsibilities but to the degree there is overlap between the Secretariat General and the sectoral regulators, these limits are based on informal cooperation. For example, representatives from the Ministry stated that they have not had incidents



where they referred a case to a different authority and it was sent back to them. Conversely, representatives from consumer authorities stated that often this referral from authority to authority can be time-consuming and frustrating for consumers.

- Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning contractual fairness, 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.?*]

Representatives of a sectoral regulator stated that they do not face particular problems arising from the complementary application. They viewed the horizontal legislation as a safety net that (even though not used very frequently) was useful to catch cases not included in sectoral legislation and should remain in place.

Consumer association representatives pointed out that the different concepts employed by sectoral and horizontal legislation e.g. on the terms consumer and trader may create confusion when it comes to applying the law.

There was an incident of potential conflict between sectoral and horizontal legislation in the field of telecommunications that was mentioned. EETT would allow the unilateral modification of contract terms when a certain form of notification was adhered to. While this is not directly in conflict with the black list of unfair contract terms<sup>58</sup> it created a problem in practice as the Ministry wanted to stop the practice of unilateral modification which was compliant with the EETT standards. The same issue arose also with the Consumer Ombudsman and EETT.

There has also been a trend in the case law where decisions on fines administered by the General Secretariat were rejected in the court which decided that they should have been administered by the sectoral regulator, EETT as this was in the telecommunications sector. The justification was that where there is sectoral legislation in place that should be the basis instead of N.2251/94. This is not yet an established trend in the case law and it remains to be seen how it will develop.

These examples show that there is a need for the clarification of the interplay between horizontal and sector-specific legislation that would allow for a more efficient application. This was also the view of the Ministry and consumer organisations provided that it does not result in a lower level of protection for consumers.

- What are the benefits of the complementary application of the UCPD and UCTD in the regulated sectors? What are the costs due to the complementary application with the sectoral EU consumer protection legislation?

Please refer to the answer above.

- Assess any need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law.

Please refer to the answer above.

<sup>58</sup> See N.2251/94, art.2 par.7 (e)



#### 1.4.3. Relevance of consumer law directives for consumer-to-business transactions

- Please analyse the need and potential for the application of the consumer law directives (mainly UCPD and UCTD) to 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).

As it is not specified how the extension would work, two scenarios have to be examined: first the extension of the Directives above to C2B transactions to the benefit of the trader, and second, to the benefit of the consumer. The first scenario was found to be highly undesirable by the interviewees, as the trader, even in C2B relations is still the stronger party, who is in no need of a heightened level of protection.

For consumers, there was a far more positive reaction in extending the application. It was recognised that there is currently a gap in protection for C2B transactions. For example, a consumer in a C2B transaction would have no access to ADR. Some interviewees from the Ministry and consumer organisations argued that some instances of C2B relations such as the sale of gold could already be brought under the scope of consumer law via analogy.

It should be noted that at some point around 2010-2011 there was a huge increase of such shops that resulted in an increase in consumer complaints. The wave of complaints stopped around 2012, not due to any action taken but rather because consumer interest in the service dropped. Besides this surge of complaints and issues around sale of gold, there have been few other issues concerning C2B relations.

#### 1.4.4. Specific protection for vulnerable consumers

Please analyse:

- Whether the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined in the consumer law directives and relevant jurisprudence, and as applied by national authorities and courts in your country, continue to be valid and fit for purpose.

As mentioned above, different concepts of the consumer apply in the context of N.2251/94 where the Greek legislator applies abroad concept of the consumer where not forced to do otherwise due to EU Directives. The existence of many different concepts of the consumer in different Directives was criticised by the interviewees as inefficient and in the literature.<sup>59</sup> A consumer representative suggested a horizontal piece of EU legislation that would set out all the main terms and framework that would then be applied in all sectors.

The average consumer concept has not been yet been clarified in the case law in an efficient manner due to the relatively few cases on unfair practices and appears to not be employed by regulators either. In the literature, there has not been a great deal of commentary on the average consumer, at least not that goes beyond a critique of it being an unrealistic standard that probably does not correspond to 'actual consumer' behaviour.<sup>60</sup>

The vulnerable consumer is not so frequently featured in EU Directives with the notable exception of the UCPD. Requirements such as that the vulnerability must be foreseeable to the trader, make the application of the vulnerable consumer standard more difficult. The limited criteria for vulnerability, notably the exclusion of any income or social criteria, were also pointed out as being important omissions.

<sup>59</sup> Aleksandridou, 'Ο τροποποιημένος νόμος για την προστασία του καταναλωτή από την σκοπιά ενός εμπορικόλογου' [2007], 55 ΝοΒ 7, 1493, 1498

<sup>60</sup> Delouka-Iglesi, *Δίκαιο του καταναλωτή ενωσιακό και ελληνικό*, (Εκδόσεις Σάκκουλα 2014), 295

- To what extent the existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers and whether, based on the experiences in your country, specific provisions should be introduced in other directives concerned, in particular the Unfair Contract Terms Directive.

See also above for vulnerable consumers. Interviewees did not mention any particular group of vulnerable consumers they were not able to help. Yet, the majority of the problems relating to vulnerable consumers related to financial services for which Greece was able to take measures to protect consumers. Perhaps introducing the concept of the vulnerable consumer, with socio-economic criteria in the Directives on financial services, such as the Consumer Credit Directive and the Mortgage Credit Directive would be a step forward in increasing the level of protection.

In relation to the UCTD, some stakeholders were negative about introducing a 'vulnerable consumer' concept in the UCTD. Consumer associations representatives held that there would in fact be a decrease in the level of protection as judges would then hold a higher standard for the 'average consumer'. Please note that the average consumer concept is not applicable in the UCTD in Greece. Consumer ombudsman representatives argued that whether a term is unfair or not should be judged against a more objective standard of fairness, regardless of the consumer in question. Both vulnerable and non-vulnerable consumers should be protected from unfair terms.

#### 1.4.5. EU added value

- Overall, would you consider that protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in your country since the implementation of the UCPD and the UCTD in national legislation?

Yes, all interviewees unanimously agreed that the two directives did significantly improve the level of protection for consumers, regardless of whatever problems there are with the Directives as pointed out above. As is pointed out also in the literature, Greek consumer law largely owes its existence to EU law and is made up almost entirely of EU directives.<sup>61</sup> If the two Directives had not been introduced, consumers would only have the protection of private law.

Prior to the introduction of the UCPD, unfair practices in Greece were caught by article 9 of 2251/94 for misleading and unfair advertising.<sup>62</sup> However, that article was limited to advertising and did not have the broad scope of the UCPD in relation to unfair practices.

Prior to the introduction of the UCTD, unfair contract terms were regulated by N.1961/91, art. 22-26. That law was quickly replaced by the current N.2251/94, which also transposed UCTD in art.2. The short-lived N.1961/91 meant that the current rich Greek case law and literature on unfair contract terms were built on the basis of the UCTD.

- Overall, would you consider that the information of consumers regarding unit prices has improved since the implementation of the PID in national legislation?

Yes, as there was no legislation previously in Greece regarding unit prices. The consensus amongst the interviewees was that this is a piece of legislation that is working well and can be characterised as a success. There is no empirical evidence of how much consumers have been making use of the unit price information. However, the controls conducted by the relevant authorities reveal that there is a high level of compliance.

<sup>61</sup> Aleksandridou, *Δίκαιο Προστασίας Καταναλωτή*, (Νομική Βιβλιοθήκη 2008), 8

<sup>62</sup> Delouka-Iglesii, *Δίκαιο του καταναλωτή ενωσιακό και ελληνικό*, (Εκδόσεις Σάκκουλα 2014), 250

- Overall, would you consider that the protection of businesses against unfair marketing in your country has improved since the implementation of the MCAD in national legislation?

As explained above, there have been issues with how the MCAD has been transposed in Greek law, even when the broad concept of consumer adopted in Greek consumer law is taken into account. This is a Directive that has had little impact on the protection of businesses, which are in theory able to benefit from the protection of consumer law, where the general definition of consumer in Greek law applies. The transposition of the MCAD has created uncertainty as to its field of application and whether businesses can benefit from it and it does not seem to be of little use.

- Overall, would you consider that it has become easier for businesses in your country to directly trade cross-border to final consumers located in other EU countries in recent years? Has it become easier for consumers in your country to directly purchase cross-border from traders located in other EU countries?

There has been an increase in the last years in consumers making cross-border purchases, especially as e-commerce has become more pervasive and widely used, at least with the younger segment of consumer population (even though it remains at levels far lower than in other EU Member States). Whether there has been a similar effect for businesses is difficult to assess. It is important to note the effect that capital controls imposed in Greece in 2015 have had on consumption habits. Capital controls make it difficult if not impossible for consumers to make online purchases and limit their offline purchases as well. Similarly, businesses have also been severely impacted as they may face problems with payments and their reputation has suffered a blow.

- To what extent are these improvements, if any, due to the mentioned directives?

It is difficult to assess to what extent the current situation can be attributed to the mentioned directives as there a range of factors are influencing it. The existence of a harmonised legislative framework is positive and contributes to the confidence of consumers in cross-border transactions. However, it is difficult to assess the extent of the influence of the legal framework.

For businesses, there are certain characteristics of the Greek market that influence cross-border trade. Greece is a relatively isolated south-eastern state with few large businesses and even large Greek businesses are not very active in cross-border trade. These factors along with the effects of the financial crisis may account for the relative lack of cross-border trade of Greek businesses, with the legal framework being one amongst many factors and perhaps not the decisive one.

## Annex

## A. Transposition fact sheet

**Table 1: Fact sheet on transposition of directives in Member States' law – GREECE**

Directive	Transposition legislation (National law, Article)	Comments	Specific provisions going beyond minimum harmonisation requirements/use of exemptions	Included in national legislation	Comments
<b>Directive 93/13/EEC on unfair terms in consumer contracts</b>	N.2251/1994, art.2		'Black list' of terms considered unfair in all circumstances	Yes	N.2251/94 Article 2.7
			'Grey list' of terms which may be considered unfair	No	
			Extensions of the application of Directive to individually negotiated terms	No	
			Extensions of the application of Directive terms on the adequacy of the price and the main subject-matter	No	
<b>Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market</b>	N.2251/94, art.9α – 9θ		Provisions regarding financial services going beyond minimum harmonisation requirements	No	
			Provisions regarding immovable going beyond minimum harmonisation requirements	No	

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			Application of UCPD to B2B transactions	No		
Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers	KYA Z1-404		Extension of the application to other sectors (e.g. for immovable property)	No		
			Use of specific regulatory choices/derogations	Yes	Article 3.3 (a) and (b), 5, 6 KYA Z1-404	<p><i>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).</i></p> <p><i>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.</i></p> <p><i>The derogation of art. 6 PID for small businesses has been used in art.6 KYA Z1-404.</i></p>
Directive 2006/114/EC concerning misleading and comparative advertising	N.2251/94, art.9					
	N.2251/94, art.9δ, 9ε					
Directive 2009/22/EC on injunctions for the protection of consumers' interests	N.2251/94, art.10 par.30					
	N.2251/94, art.10 par.16, ββ), εε), θθ)					

**Table 2: Fact sheet on Injunctions Directive – Greece**

Issue	Answer	Comments
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)?	- No, single procedure in a single legal act <sup>63</sup>	<i>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.</i>
Who is entitled to bring an action seeking an injunction?	- Specified consumer associations <sup>64</sup>	<i>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. <sup>65</sup></i>
Is the injunction procedure a court or an administrative procedure?  If your country legislation foresees both forms of the procedure, please explain in the comments column for which infringements the court or administrative procedure is foreseen	- Court procedure <sup>66</sup>	
Who bears the costs of an injunction procedure?  If qualified entities (or some of their categories e.g. consumer organisations are entitled to an exemption of some/all cost related to the procedure please explain the characteristic of such exemption in the comments column.	- The costs are as a rule borne by the losing party <sup>67</sup>	
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?	- Yes, scope of application extended to cover consumer law in general <sup>68</sup>	<i>The list provided in art.10.16(α) is purely indicative, yet it includes also violations of Directive 2013/11/EU in case u and Reg. 524/2013 in case κκ</i>

<sup>63</sup> N.2251/94, art.10 par.16<sup>64</sup> N.2251/94, art.10 par.16<sup>65</sup> N.2251/94, art.10 par.17<sup>66</sup> N.2251/94, art.10 par.19<sup>67</sup> ΚΠολΔ, art.176<sup>68</sup> N.2251/94, art.10 par.16(α)

Is protection of business' interests covered by the injunctions procedure? If scope of application extended to the protection of business' interests, please provide details in the comments column regarding type of business' interests covered by the injunctions procedure	- No	
Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations	- Yes	<i>Injunction action can be brought against suppliers' unions<sup>69</sup></i>
Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID)	- No	<i>If yes, please provide details</i>
Has your Member State taken specific measures regarding the prior consultation (Article 5 of the Injunctions Directive)?	- No such requirement	
Does the national legislation provide for measures ensuring summary procedure? Please specify main characteristics of the procedure (subject matter/time limits) in the comments column.	- Yes	<i>The procedure used for the injunctions is that of voluntary jurisdiction, which is considered a lot shorter.<sup>70</sup> The same provision states that the trial date should be set at the earliest day possible, however it is doubtful that can ensure a shorter process.</i>
Are there sanctions for non-compliance with the injunction order (Article 2(1) of the Injunctions Directive)? If sanctions in form of penalty or fine foreseen please specify in the comments column to who exactly should they be paid	- Yes, other sanction	<i>It is possible to request the temporary enforcement of the injunction order.<sup>71</sup> 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.<sup>72</sup> The penalty would be paid to the plaintiff, the consumer organisation.</i>
Has your Member State taken specific measures regarding the publication of the decision and/or the publication of a corrective statement?	- No <sup>73</sup>	<i>Law only states that suitable publication of the decision or corrective statement can be order with no further qualifications</i>
Is it possible to claim within the injunction procedure for sanctions for the infringement?	- Yes and no	<i>The request for pecuniary compensation for moral damages that can be brought within the injunction procedure is a type of sanction.<sup>74</sup></i>
Can an action for the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to other beneficiary be brought within the injunction procedure?	-No	

<sup>69</sup> N.2251/94, art.10 par.16 (α)

<sup>70</sup> N.2251/94, art.10 par. 20

<sup>71</sup> N.2251/94, art.10 par.20

<sup>72</sup> ΚΠολΔ, art.947

<sup>73</sup> N.2251/94, art.10 par.16 (α)

<sup>74</sup> N.2251/94, art.10 par.16 (β)



Can an action for damages to be paid to the qualified entity or the public purse be brought within the injunction procedure?	- Yes	<i>It is possible for the consumer organisation to ask for pecuniary compensation for moral damages.<sup>75</sup> This compensation is provided only once for the same violation. It is distributed in the following manner: a) thirty-five per cent (35%) to the plaintiff consumers union, b) thirty-five per cent (35%) to consumers unions of second degree and c) thirty per cent (30%) to the State Budget.<sup>76</sup></i>
Can an action for damages or redress to be paid to the consumers concerned be brought within the injunction procedure?	- No	
Can individual consumers base their individual claims for damages/remedies on the injunctions order?	- Yes <sup>77</sup>	<i>If there is an irrevocable judgement that recognises the right to damages, individual consumers can follow the following process: Notify their claim for damages to the trader in writing with supporting evidence. Should the trader not respond to the notification after 30 days, consumer can request a court order for payment.<sup>78</sup></i>
Can the qualified entity claim other measures beyond the injunction, e.g. evidence of compliance with the judgment?	- Yes	<i>For defective products, the qualified entity can request their seizure, withdrawal or destruction.<sup>79</sup></i>
Are the effects of individual injunction orders extended to the future infringements and/or same or similar illegal practices (of other traders)?	- Yes and no <sup>80</sup>	<i>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.</i>

<sup>75</sup> N.2251/94, art.10 par.16 (β)

<sup>76</sup> N.2251/94, art.10 par.22

<sup>77</sup> N.2251/94, art.10 par.20

<sup>78</sup> N.2251/94, art.10 par.20

<sup>79</sup> N.2251/94, art.10 par.16 (α)

<sup>80</sup> N.2251/94, art.10 par.20, par.21

## B. Data tables

### *Number of B2C disputes*

Please indicate how many B2C disputes have been decided in your country on the basis of consumer law directives covered by this study (UCPD, UCTD, PID) as a proportion of the total number of B2C disputes decided on the basis of other national consumer legislation (based on statistics, or based on estimates by enforcement authorities and other stakeholders, where this is not the available).

**Table 3: B2C disputes decided on the basis of consumer law directives covered by this study in comparison with total B2C disputes decided on the basis of other legislation (most recent year for which data is available)**

Year	Type of data	Total number of B2C disputes (number of cases)	Share of B2C disputes decided on basis of ...					Comments
			UCPD	UCTD	PID	other EU consumer protection legislation (e.g. CRD, Sales Directive, sectoral legislation)	national consumer legislation not based on EU directives	
2015	Administrative fine decision	34 decisions	42%	15%	0%	45 %	33%	

There is no data available on court cases, as the only data collected on court cases refers to the total number of cases per degree of jurisdiction with no reference to the type of case or to the legal basis. Information is however available for administrative fine decisions. Note that percentages do not add up to a 100% as many of these fines were administered using several different legal bases and grouping together several violations of the same trader. If the decisions made solely on e.g. the UCPD would be presented, then there would be a distortion of how much the provisions are being employed.

### *Costs of obtaining redress for a hypothetical case of invoking unfairness of a standard contract term*

- Please estimate the costs, including time, for consumers in obtaining redress when invoking the unfairness, and thereby the non-binding character of standard contract terms in a contract they concluded. Please provide the estimate for the hypothetical example below, focusing on costs (and needed time) of a lower court procedure and the use of ADR or other relevant procedure (if applicable).<sup>81</sup>

<sup>81</sup> For the hypothetical example it is assumed that both the provider and the consumer are located in your country.

**Table 4: Estimate of costs for consumers in obtaining redress when invoking the unfairness of standard contract terms in a contract they concluded (for the hypothetical example provided in the box below)**

Redress mechanism	Estimated court fees (national currency)	Estimated lawyer's fees (national currency)	Other costs, if any (national currency)	Estimated time involved for consumer (hours)	Comments
<b>Lower court procedure</b>	EUR 48.96	Representation by lawyer is not mandatory when using the small claims procedure. If used: EUR 105.76 minimum for court appearance fees (taxes included)  Legal research: EUR 80/hour minimum +24% VAT	EUR 45 + 24% VAT = EUR 55.80 minimum for serving the decision to the trader. The cost goes up according to how many kilometres away the seat of the trader is from the centre of the city where the action was filed. (here calculated for Athens)  EUR 60-70 (for copies, stamps for the special construction of Courts and Prisons etc)	N/A	
<b>ADR or other relevant procedure</b>	EUR 0.00	No representation by lawyers		Time spent by consumer e.g. collecting evidence or attending settlement meeting cannot be calculated.	

**Hypothetical example: Terms which inappropriately exclude/limit consumers' rights to compensation**

*A consumer went on a package holiday with a friend to Kenya for which they paid € 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 €5,000 (€4,000 for the cost of the package and €1,000 for lost time and enjoyment). The tour operator agreed to compensate them €1,000 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/unfair-contract-terms/index\\_en.htm](http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-contract-terms/index_en.htm)]*

- Please estimate how often court and ADR procedures are used in your country for invoking the unfairness, and thereby the non-binding character of standard contract terms (i.e. the number of cases per year)?

There is no data available for court cases.

As for ADR procedures, the Consumer Ombudsman, though it provides extensive statistics it does not include unfair contract terms in them. It does deal with unfair terms, as it can be seen in the following cases quoted in their Annual Report for 2015:

Unfair terms on expenses in bank loans,<sup>82</sup> unfair terms in insurance contracts that reversed burden of proof and only left a very short deadline for the consumer to exercise their right,<sup>83</sup> unfair terms in gym/slimming institute contracts relating on the right to cancel,<sup>84</sup> unfair terms relating to concert cancellations,<sup>85</sup> unfair terms in contract for transport of pupils to kindergarten,<sup>86</sup> unfair terms on unilateral modification of terms in the telecommunications sector.<sup>87</sup>

However, the Consumer Ombudsman can only issue recommendations towards traders and does not have the power to enforce the non-binding character of the term.

<sup>82</sup> Consumer Ombudsman Annual Report 2015, available online at <http://www.synigoroskatanaloti.gr/docs/StK-Annual-Report-2015.pdf> (Accessed September 2016) p.87

<sup>83</sup> Consumer Ombudsman Annual Report 2015, p.91

<sup>84</sup> Consumer Ombudsman Annual Report 2015, p.103

<sup>85</sup> Consumer Ombudsman Annual Report 2015, p.132

<sup>86</sup> Consumer Ombudsman Annual Report 2015, p.142

<sup>87</sup> Consumer Ombudsman Annual Report 2015, p.148

## C. Interviews conducted and literature reviewed

**Table 5: Interviews conducted for this study**

Organisation	Stakeholder type	Date
<b>EKPOIZO</b>	Consumer organisation	21.07.2016
		28.07.2016
<b>KEPKA</b>	Consumer organisation	22.07.2016
<b>Consumer Ombudsman</b>	European Consumer Centre	25.07.2016
<b>RAE</b>	National regulatory authority	26.07.2016
<b>SEV</b>	Business association	27.07.2016
<b>General Secretariat for Consumer Protection</b>	Ministry	28.07.2016
		29.07.2016
<b>INKA</b>	Consumer organisation	29.07.2016
<b>ESEE</b>	Business association	04.08.2016
<b>ESR</b>	National regulatory authority	29.08.2016 An ESR Representative submitted written remarks on the questionnaire which were supplemented by phone communication. ESR has limited authority on the application of the Directives, focusing only on covert advertising in TV and radio

**Table 6: Literature reviewed for country report**

Author/Source	Year	Title of publication
Aleksandridou	2007	Aleksandridou, “Ο τροποποιημένος νόμος για την προστασία του καταναλωτή από την σκοπιά ενός εμπορικόλογου” [2007], 55 ΝοΒ 7, 1493, 1497
Aleksandridou	2008	Aleksandridou, <i>Δίκαιο Προστασίας Καταναλωτή Ελληνικό- Κοινοτικό</i> , (Νομική Βιβλιοθήκη 2008)
Apalagaki	2008	Apalagaki, “Άρθρο 10 Ν 2251/1994” in Aleksandridou (ed), <i>Δίκαιο Προστασίας Καταναλωτή</i> , (Νομική Βιβλιοθήκη 2008)
Apostolopoulos	2006	Apostolopoulos, ‘Αθέμιτη συγκριτική διαφήμιση χωρίς καν σύγκριση; Επιταγή φιλελευθεροποίησης της συγκριτικής διαφήμισης υπό το πρίσμα του κοινοτικού δικαίου’, [2006] ΣΤ ΧρίΔ, 29
Dellios	2013	Dellios, <i>Γενικοί Όροι Συναλλαγών</i> , (2 <sup>nd</sup> ed Εκδόσεις Σάκκουλα 2013)
Deloyka-Igglesi	2014	Deloyka-Igglesi, <i>Δίκαιο του Καταναλωτή Ενωσιακό και Ελληνικό</i> , (Εκδόσεις Σάκκουλα 2014)
Kalamrouka-Giannopoulou	2014	Kalamrouka-Giannopoulou, ‘Νομολογιακά δεδομένα περί αθέμιτων εμπορικών πρακτικών’, [2014] 5 ΔΕΕ 479
Marinos	2011	Marinos, ‘Από το ελληνικό στο κοινοτικό δίκαιο του αθέμιτου ανταγωνισμού-προβλήματα εφαρμογής της μαύρης λίστας της οδηγίας 2005/29 για τις αθέμιτες εμπορικές πρακτικές’, [2011] ΔΕΕ 877
Mpechri-Kehagioglou	2012	Mpechri-Kehagioglou, ‘Η οδηγία 2005/29 για τις αθέμιτες εμπορικές πρακτικές: Ο νομικός μηχανισμός λειτουργίας της και οι δυσλειτουργίες του κατά την εφαρμογή της οδηγίας’, [2012] ΕΕμπΔ 17
Papanikolaou	2008	Papanikolaou, “Σκέψεις πάνω στον νέο νόμο (ν. 3587/2007) για την προστασία των καταναλωτών”, [2008] ΕλλΔνη 660
Perakis	2008	Perakis ‘Article 1 Ν.2251/94’ in Aleksandridou (ed) <i>Δίκαιο Προστασίας Καταναλωτή: Ελληνικό- Κοινοτικό</i> , (Νομική Βιβλιοθήκη 2008)
Vasilopoulos	2008	Vasilopoulos, ‘Συγκριτική διαφήμιση και αθέμιτες εμπορικές πρακτικές’ in Dounlis and Mpolos (eds) <i>Δίκαιο Προστασίας Καταναλωτών</i> , (Εκδόσεις Σάκκουλα 2008)

## 1. Study to support the Fitness Check of EU Consumer law – Country report HUNGARY

### 1.1. Unfair commercial practices and marketing

#### 1.1.1. Effectiveness of the UCPD in establishing a high level of consumer protection

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

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

The UCPD is implemented into Act XLVII of 2008.<sup>1</sup> Article 5 paragraph 1 is implemented into Section 3 paragraph 1, and Article 5 paragraph 2 in Section 3 paragraph 2. The enforcement of Act XLVII of 2008 is the responsibility of public authorities, consumer protection associations and consumers. Enforcement of the act is primarily administrative. Section 10 gives a leading role in enforcement to the National Consumer Protection Authority (Nemzeti Fogyasztóvédelmi Hatóság), also empowering the Competition Authority (Gazdasági Versenyhivatal) and the Hungarian National Bank (Magyar Nemzeti Bank).

Under Section 15, public enforcement however does not take away consumers' rights to take private court actions.

Article 5 paragraphs 1 and 2 containing the principle based approach seem to work well in practice.

According to stakeholders, the principle based approach works well in practice. Public authorities asserted that this approach is useful in embracing commercial practices that are not named on the black list (going as far as considering unnecessary the revision of the black list). The principle based approach is flexible and able to embrace new and emerging practices. A stakeholder highlighted that the general prohibition is easy to remember and it is generally known to large businesses. There was even an opinion that the legislator should focus on adopting general clauses instead of mass-producing specific rules, the number of which became unmanageable. Stakeholders did not raise any problems in interpreting the content of general clauses.

The general acceptance of the principle based approach can be explained by its historical roots. The use of general clauses in the area of unfair commercial practices has a long history. The predecessors of Act XLVII of 2008 contained general clauses prohibiting commercial practices capable of misleading consumers. The general legislative technique was in line with the UCPD's; a general prohibition was followed by specific prohibitions.<sup>2</sup>

Although the principle based approach is a generally welcomed approach, it is rarely applied in the practice of the public authorities. For example, around 70% of decisions of the Consumer Protection Authority involve misleading or aggressive commercial practices (Articles 6 and 7); 25% black list (Annex I) and only 5% Article 5. Indeed, although a considerable number of court decisions involve Section 3, it has been mainly used in conjunction with specific prohibitions of misleading commercial practices in Sections 6 and 7 (implementing Articles 6 and 7 of the UCPD). Practice seems to be more comfortable with the general prohibition in section 3 paragraphs 1

<sup>1</sup> 2008. évi XLVII. törvény a fogyasztókkal szembeni tisztességtelen kereskedelmi gyakorlat tilalmáról.

<sup>2</sup> Section 1 of Act V of 1923 on unfair competition, contained a general clause on the prohibition of conducting business in an unfair manner or against good morals. See the Act at: <http://1000ev.hu/index.php?a=3&param=7545>; Section 11 paragraph 1 contained a general prohibition on misleading commercial practices. Section 11 paragraph 2 contained named misleading commercial practices. See Act LXXXVI of 1990 on prohibition of unfair market conduct at <http://mkogy.jogtar.hu/?page=show&docid=99000086.TV> (repealed by Act LVII of 1996). See for detailed overview: József Sárai, Gábor Szoboszlay (see literature review at the end of the document).



(implementing Article 5 paragraph 1), only a few judgments involved Section 3 paragraph 2 (implementing Article 5 paragraph 2 of the UCPD).<sup>3</sup> Typically courts are giving a 'factual' meaning to general clauses i.e. connecting the facts of the case to the applicable provision of the law, without drawing general conclusions, without establishing principles.

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

Annex I of the UCPD is implemented into an Annex attached to Act XLVII of 2008.

A representative of a business highlighted that although the practices were considered to be unethical before the implementation of the UCPD, incorporating these into a statute and empowering public authorities for their enforcement made their application easier. It raised the level of consumer protection, and brought benefits for businesses by providing a level playing field.

Stakeholders were of the opinion that businesses do try to avoid practices that are on the black list. Even if they use some of the practices, stakeholders agreed that the black list is very easy to apply in practice. As stated above, in the practice of (at least some) authorities in enforcing the provisions of the UCPD, the black list plays a dominant role.

The relevant authorities reported that the most common black listed practices are those in points 4, 5, 7, 9, 11, 14, 17, 20, 26, 28 and 31 of the UCPD Annex I.

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

Article 3 paragraph 9 is implemented by Section 1 paragraph 4 of Act XLVII of 2008, allowing for more stringent sector specific information rules.

Sector specific rules in the area of financial services provide for more stringent regulation than the UCPD provides. For example, Act CCXXXVII of 2013 on credit institutions and financial undertakings<sup>4</sup> provides for an obligation on financial firms in terms of the provision of pre-contractual information, publication and supply of standard terms and conditions, and periodic information during the duration of the contract. Act CLXII of 2009 on consumer credit<sup>5</sup> implementing Directive 2008/48 on consumer credit also includes more stringent information provisions 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 what 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?*]

It is difficult to estimate the effectiveness and practical benefits of the UCPD in tackling misleading environmental claims/practices. So far there has been one example of successful application of the UCPD to tackle misleading environmental claims. The Competition Authority has decided that 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, is an unfair commercial practice within the meaning of Section 3 paragraph 1 of Act XLVII of 2008.<sup>6</sup>

<sup>3</sup> Conclusions are based on available case law in the database of court decisions Döntvénytár/Új Jogtár as available closing with 15 October 2016.

<sup>4</sup> 2013. évi CCXXXVII. törvény a hitelintézetekről és a pénzügyi vállalkozásokról.

<sup>5</sup> 2009. évi CLXII. törvény a fogyasztónak nyújtott hitelről.

<sup>6</sup> Competition Authority, decision no. VJ-104/2012.

Stakeholders generally highlighted that consumer complaints involving environmental claims are very rare, due to the lack of environmental sensitivity of consumers. It has been emphasized by a government official that no complaint has been filed to any of the competent public authorities following the well-known Volkswagen scandal. In general, therefore environmental matters do not influence consumer decision making. Environmental claims are only capable of influencing consumer decision making by being connected to price claims, given that Hungarian consumers are price sensitive.

Stakeholders also noted that given the emergence of advertisements with environmental appeals, the importance of unfair commercial practices in policing environmental claims may increase in the future.

- 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 your country rigidly?*]

In implementing Article 5 paragraph 2 of the UCPD, Section 4 paragraph 1 of Act XLVII of 2008 went beyond the wording of the UCPD. Taking into account Recital 18 of the UCPD and the case-law of the CJEU,<sup>7</sup> Section 4 paragraph 1 omitted any reference to the notion of 'average consumer.' Instead, it defined the standard of a consumer behaviour to which the commercial practice should be adjusted.<sup>8</sup> It explains that a fairness of a commercial practice should be estimated based on the behaviour of a consumer that is reasonably informed, and has been reasonably observant and circumspect in relation to the particular commercial practice, and taking into account the linguistic, cultural and social aspects of a product. According to the Metropolitan Court of Appeal, without referring to the notion of an average consumer, the provision determines the characteristics of such a consumer. The average consumer standard is determined by an average person, a person 'from the street', an average shopper and does not refer to people at the very ends of the spectrum such as those that are extremely knowledgeable or mentally disadvantaged.<sup>9</sup> Thus without using the notion of 'average consumer' Section 4 paragraph 1 refers to such a consumer.<sup>10</sup> Similarly, according to the Competition Authority, the average consumer is someone who is not at either of the two ends of the spectrum. The law is not aimed at protecting consumers who are uninformed, or entirely unobservant, or those consumers that are unable to read and write, or that abuse their rights; nor can the average consumer standard be applied to those consumers that have expert knowledge or those that are business partners.<sup>11</sup>

Stakeholders noted that there are no problems in interpreting the concept of average consumer, problems rather occur in deciding on when a consumer is reasonably informed, observant and circumspect. At the start of the application of this statute, businesses placed high expectations towards average consumers, expecting them to read and carefully scrutinize the content of every communication, but courts and public authorities developed a more protective approach towards consumers.

The concept of an average consumer is primarily shaped by the practice of the Competition Authority.<sup>12</sup> According to the Competition Authority a reasonably informed consumer is not expected to check the validity or truthfulness of information in commercial communication. A reasonably behaving consumer trusts the content of a

<sup>7</sup> Explanatory notes on Section 4 paragraph 1, available in Új Jogtár.

<sup>8</sup> Gellén (see literature review at the end of the document).

<sup>9</sup> Fővárosi Ítéltábla, decision no. 2.Kf.27.171/2012/4.

<sup>10</sup> József Zavodnjik, Commentary on Section 4 paragraph 1 (see literature review at the end of the document).

<sup>11</sup> Competition Authority, decision no. VJ-102/2014.

<sup>12</sup> Court decisions normally confirm the Competition Authority's rulings.

commercial communication,<sup>13</sup> including advertisements,<sup>14</sup> and takes into account the ordinary meaning of words.<sup>15</sup> A reasonably observant consumer cannot be expected to investigate the accuracy of the content of a message. On the contrary, according to the Competition Authority the function of advertisements is to remedy information asymmetries between consumers and businesses in cost effective manner and to enable the consumer to accept the information provided by the business, regardless of the form of communication.<sup>16</sup> The Metropolitan Court of Appeal agrees with this approach, finding that a reasonable consumer is not suspicious and tends to trust that the received information is valid and accurate. A reasonably acting consumer is not obliged to research the accuracy of the content of the message, unless the sender of the message draws his or her attention to that, or there is strong reference to such an obligation in the text of the message.<sup>17</sup>

As a general rule, a reasonably observant and circumspect consumer is not a rational decision maker.<sup>18</sup> The complex process of consumer decision making is influenced by many factors including emotions and therefore it cannot be a purely rational process.<sup>19</sup> In shaping their marketing practices businesses do play on both consumer rationality and emotions.<sup>20</sup> In addition, consumers usually behave in a 'situation based' manner, i.e. depending on the product, market or commercial communication; the same consumer may act differently in different situations.<sup>21</sup> However, even a rational consumer can be misled.<sup>22</sup>

The Competition Authority emphasized the consumer-centered approach in applying the test. The content of the commercial communication, product labelling and their marketing should be looked at with the eyes of consumers, the business' intention and interpretation of the communication is irrelevant.<sup>23</sup>

If a commercial communication is directed towards a group of consumers, under Section 4 paragraph 1 the fairness of a commercial practice will be measured in regard to an average member of that group. The Competition Authority confirmed that even above average informed consumers can be misled by commercial communications, if they are unable to supplement or modify the information received.<sup>24</sup> This group is in a better position to evaluate the information communicated and therefore a higher than average standard applies to it. The Competition Authority also defined groups, for example, potentially pregnant women, women consciously trying to get pregnant. The characteristics of this state of (pre)pregnancy is that the process of decision making is fast as women wish to know whether or not they are pregnant as soon as possible. The group is heterogenic, consisting of women of different age, material status, pregnancy related intentions, biological risks, etc. However, this group of women has the same pregnancy test related information background as the rest of the population, without having socialized knowledge on these tests.<sup>25</sup> Therefore, the same standards are applicable as to the average consumer.

<sup>13</sup> For example decisions of the Competition Authority no.: VJ-7/2015, VJ -89/2014, VJ-51/2014, VJ-49/2014, VJ-33/2014, VJ-28/2014, VJ -17/2014, VJ-8/2014, VJ-75/2013.

<sup>14</sup> For example decisions of the Competition Authority no.: VJ-45/2014, VJ-41/2014, VJ-35/2014, also VJ-6/2004. Note that the Competition Authority worked with the standard of an average consumer even before the implementation of the UCPD and therefore its earlier points of views remain relevant.

<sup>15</sup> Competition Authority, decision no. Vj-8/2011.

<sup>16</sup> Competition Authority, decision no. VJ-84/2009.

<sup>17</sup> Fővárosi Ítéltábla, decision no. 2.Kf.27.171/2012/4. The Kúria has confirmed this standpoint in decisions no. Kfv.II.37.191/2013/8, and Kfv.VIII.37.083/2014/8. See also Kfv.III.37.404/2014/5

<sup>18</sup> Competition Authority, decision no. VJ -154/2009 and VJ-3/2010.

<sup>19</sup> Metropolitan Court of Appeal (Fővárosi Ítéltábla), decision no. 2.Kf.27.231/2011/9 (VJ-154/2009)

<sup>20</sup> József Zavodnjik, Fogyasztók és kísérletek (see literature review at the end of the document)

<sup>21</sup> Competition Authority, decision no. VJ-54/2011.

<sup>22</sup> Metropolitan Court (Fővárosi Bíróság), decision no. 2K.35.796/201/6 (Vj-45/2010).

<sup>23</sup> Competition Authority, decision no. VJ-72/2003.

<sup>24</sup> Competition Authority, decision no. VJ-12/2009.

<sup>25</sup> Competition Authority, decision no. VJ-81/2011, VJ-41/2012; confirmed by Metropolitan Court (Fővárosi Törvényszék) in decision no. 2.Kf.650.207/2013/6.

According to the president of the Competition Authority the concept of average consumer is capable to evolve and adjust to circumstances. The characteristics of an average consumer are market dependent and may be different in different markets (for example in case of a classical investment product or a more specific investment product). A particular consumer credit group may become more knowledgeable about the typical characteristics of certain products, and these changes influence the picture of an average consumer. For example, in VJ-78/2012 the Competition Authority has decided that in a loyalty contract for a mobile phone the essential conditions for providing the loyalty statement are known to consumers, in particular due to the provider's extensive information campaign in this aspect. It follows that the absence of information in advertisements on the necessity of providing loyalty statements or on the loyalty character of contracts is not considered to be an unfair commercial practice, given that it did not induce consumers into transactional decisions they would have not made otherwise.<sup>26</sup>

The concept of average consumer and the general prohibition of an unfair commercial practice have been used to cover legal gaps. For example, in case of the so called 'Hungarian product' ('Magyar termék') the Competition Authority has observed the fairness of a commercial practice from the perspective of the average consumer. The Competition Authority has noticed that consumers' perception of a Hungarian product goes beyond product characteristics. It includes aspects that go into societal values and benefits such as using Hungarian labour and Hungarian materials in the process of production, etc. Based on a survey measuring consumer perceptions of the characteristics of Hungarian products, the Competition Authority has created an image of the average consumer on this market and measured the businesses' commercial communication against that image.<sup>27</sup>

Based on the above evidence it can be concluded that concept of the average consumer is not applied rigidly. The Competition Authority has a key role in shaping the content of Section 4 paragraph 1. The content of a reasonably well informed, observant and circumspect consumer standard is developed on a case by case basis, adjusting the concept to a particular life situation (a stakeholder asserted that a sort of 'situation based approach' is dominant in the practice of the Competition Authority).

- 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 in your country recognised new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted)?*]

Article 5 paragraph 3 of the UCPD is implemented in Section 4 paragraph 2 of Act XLVII of 2008, adopting the phrase 'mental or physical infirmity, age or credulity'. Overall, stakeholders noted that these rules are satisfactory in providing a high level of consumer protection as they leave room for taking into account individual life circumstances.<sup>28</sup>

The Competition Authority has generally noted that vulnerability is a sort of situation of need that may occur for example because a consumer is unhealthy, unbalanced, does not have the necessary material resources, experience or knowledge in the given field or a consumer that has (subjectively or objectively) no choice.<sup>29</sup>

Vulnerability towards marketing messages can be relative and partial. A highly educated ill person can be susceptible to healing messages; an entirely healthy and rational consumer that avoids gambling can be vulnerable due to his or her material situation to messages marketing financial products that appear favourable; a gambler may be susceptible to messages inducing gambling.<sup>30</sup>

<sup>26</sup> Miklós Juhász, p. 92 (see literature review at the end of the document).

<sup>27</sup> Ibid. See also Competition Authority, decision no. VJ-17/2011, VJ-21/2011, VJ-88/2010.

<sup>28</sup> See also Klára Gellén.

<sup>29</sup> Competition Authority, decision no. VJ -102/2014.

<sup>30</sup> Ibid.

Expectations in relation to an average consumer are equally applicable to vulnerable consumers. A vulnerable consumer cannot be expected to check or doubt the validity or truthfulness of information in commercial communication, or to investigate the accuracy of a content of a message.<sup>31</sup>

The Competition Authority has recognized ill consumers as a special group of vulnerable consumers. Consumers suffering from serious illness are more vulnerable than average consumers to commercial communication advertising products with healing effects to their illness. These consumers often interpret the communication in a way to support their hope for healing. The decision making process of ill consumers is distorted by their lack of information and experience with the product. Thus commercial communication on the effects of healing products must be clear, precise, without leaving room for diverging interpretation.<sup>32</sup>

In terms of financial services and products, the Competition Authority does not recognize the users of financial services and products, poor or indebted consumers as a special, vulnerable group. However, it does take into account the susceptibility of these consumers to marketing communications.<sup>33</sup> Cases involving financial services and products mostly arose in regard to consumer credit groups (as explained below). The commercial communication of consumer credit groups usually targeted financially vulnerable consumers, those that had bad credit rating or were indebted. In one case that involved the omission of material information by a credit institution the Competition Authority considered that consumers with bad credit rating were particularly susceptible to a specific offer.<sup>34</sup> Recognizing this however, the Competition Authority has estimated the fairness of a communication by taking the average consumer as a benchmark,<sup>35</sup> adjusting therefore the standard of average consumer to the special situation of financial services and products. Although consumers of financial services are considered to be average consumers, it cannot be expected from an average consumer to have expert knowledge in the field. Also, a lower level of awareness, information about a service or a product is acceptable compared to average consumers consuming other products, given the special relationship of trust between the financial firm and a consumer.<sup>36</sup>

In approaching vulnerability, the authorities start from the concept of an average consumer, and if a commercial practice involves a vulnerable consumer, this factor is taken into account in determining the appropriate sanction, i.e. a commercial practice becomes sanctionable because it is being addressed to a vulnerable person or the sanction becomes higher. Some stakeholders were of the opinion that vulnerability is not approached properly, signalling a need for further developing the categories of vulnerability.

- 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?*]

Self-regulation in the form of codes of conduct are common, however, stakeholders emphasized that their usefulness is limited in the over-regulated environment. Codes of conduct only make sense if they can provide added value to primary and secondary law, i.e. if they are able to provide additional protection for consumers. However, in practice codes of conduct usually repeat and explain the primary and secondary law that is in force.

<sup>31</sup> Competition Authority, decision no. Vj-17/2015.

<sup>32</sup> Competition Authority, decision no. VJ-99/102, VJ-83/2013.

<sup>33</sup> Competition Authority, e.g. decision no Vj-5/2011/63 and 5/2011/73.

<sup>34</sup> Competition Authority, decision no. Vj-5/2011/73.

<sup>35</sup> Competition Authority, decision no. Vj- 5/2011/63, Vj-5/2011/73.

<sup>36</sup> Competition Authority, decision no. Vj- 58/28/2009; Krisztina Grimm, Izabella Szoboszlai, p. 17 (see literature review at the end of the document).

There is also little information on the effectiveness of these codes given that their breach would be primarily sanctioned within an internal disciplinary procedure. According to a representative of businesses, codes of conducts adopted by businesses fail to protect consumers due to cultural factors. In Hungary, businesses strive to achieve short term gains if necessary even by resorting to unethical behaviour, whereas their counterparts in some other Member States care more about their reputation and long term sustainability. This societal problem cannot be solved by ethical codes, but would require an institutional overhaul, with increasing the role of consumer protection organizations in disciplining business behaviour. Nevertheless, it has also been said that Hungarian business entities increasingly realize the long term benefits of ethical behaviour. Businesses intending to stay longer on the market respect the rules, and are 'customer friendly'.<sup>37</sup> In particular, large businesses do care about their reputation as they realize reputational damage is difficult to repair (but around 99% of businesses in Hungary are small or medium sized).

There are successful examples of self-regulation by associations of businesses. Self-regulation has been used in the past to cover legal gaps. Many of these rules have been later incorporated into primary and/or secondary law. The most well-known example is the Code of Conduct on Principles of Fair Conduct of Financial Organizations Engaged in Retail Lending adopted in 2010<sup>38</sup> by the Association of Hungarian Banks.<sup>39</sup> It was a temporary solution that has later influenced legislative changes aiming to induce ethical lending practices, and increase consumer confidence. Initially, part of the Code was copied into Government Decree 275/2010 on the Conditions of Unilateral Modification of Interest Rate Defined in the Contract<sup>40</sup>; later larger parts of it influenced the Act LXXVIII of 2014.<sup>41</sup> The revised code (as of 2015) is comprised of those provisions that have not become part of primary or secondary law. A breach of the code is actionable as an unfair commercial practice, and can be sanctioned by the supervisor under Section 6 paragraph 2 subparagraph b of Act XLVII of 2008. The sanctioning power has been used in practice. For example, according to a stakeholder, a firm was fined because it failed to respect the provisions of the Code that mandated firms to offer repayment options for customers in payment difficulties. According to a stakeholder the primary advantage of the Code was however not a possibility of sanction but foreseeing good practices that have gradually built into the behaviour of financial firms.

Apart from adopting codes of conduct, business associations have other ways to prevent unethical behaviour. A government official highlighted the important work of the Hungarian Marketing Society (Magyar Reklámszövetség), which acts as a filter for eliminating unethical advertisements from the market. Businesses frequently turn to the society, asking their opinion on compliance of a particular advertisement with the society's ethical code. This practice is capable of eliminating unethical advertisements before they reach consumers.

The ethical behaviour of businesses is motivated by the Consumer Protection Authority's Certification System of Consumer Friendly Business (Fogyasztóbarát Vállalkozás Tanúsítási Rendszer). The system aims to publicize businesses that place customer satisfaction and confidence at the heart of their operation. Businesses that are awarded the certificate made efforts to address customer satisfaction in various innovative ways, beyond simply complying with primary and secondary law. The certificate is awarded in several categories, such as customer friendly customer services, or socially responsible business. Certificates are awarded following an application and based on detailed rules of procedure developed by the Authority.

<sup>37</sup> Krisztina Grimm, Izabella Szoboszlai, p. 24.

<sup>38</sup> Magatartási Kódex a lakosság részére hitelt nyújtó pénzügyi szervezetek ügyfelekkel szembeni tisztességes magatartásáról.

<sup>39</sup> See the text of the current Code at <http://www.bankszovetseg.hu/hasznos-informaciok/aktualizalt-magatartasi-kodex>.

<sup>40</sup> 275/2010. (XII. 15.) Korm. Rendelet a szerződésekben előírt kamat egyoldalú módosításának feltételeiről.

<sup>41</sup> 2014. évi LXXVII törvény az egyes fogyasztói kölcsönszerződések devizanemének módosulásával és a kamatszabályokkal kapcsolatos kérdések rendezéséről.



Certificates are issued for the period of 2-3 years and can be withdrawn should the circumstances change in satisfying the applicable criteria.<sup>42</sup> The list of consumer friendly businesses is published on the Authorities website.<sup>43</sup> Having a look at the list however one may wonder about the success of the system. The certificate is currently held by 11 businesses, and some holding the certificate from 2014. This may suggest that there are not many business entities that focus on consumer satisfaction and confidence or the system of certification is simply unknown in business circles.

The other, perhaps more effective way of inducing ethical behaviour is by the use of online customer reviews. According to a representative of a consumer protection organization traders take these reviews seriously. Thus ethical behaviour is becoming increasingly important with the popularization of online trade (i.e. so called web shops) in Hungary, and the increased use of price comparison websites such as [olcsobbat.hu](http://olcsobbat.hu) or [arkep.hu](http://arkep.hu).

The National Media and Infocommunications Authority operates a Media and Infocommunications Ombudsman that is in charge of observing ethical behaviour of market participants. The Ombudsman acts upon consumer complaints, and ends its investigations with recommendations. According to a government official, these are respected by those entities that joined the scheme. The latest recommendation includes the Ombudsman's reaction onto a number of complaints about loyalty contracts, and relates to taking into account ethical issues in the conclusion of loyalty contracts and in complaint handling related to these contracts.<sup>44</sup>

- 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?

Stakeholders agreed that the black list requires occasional updates. A general suggestion is to keep the list updated in the light of emerging developments in e-commerce transactions.

Stakeholders suggested the expansion of the black list to include new commercial practices commonly appearing in Hungary and the amendment of the list to reflect emerging developments.

The black list could be used to ban the creation of consumer credit groups (fogyasztói csoport). Consumer credit groups are created and operated for pulling together resources to purchase a fairly expensive product, for example, a car. Consumers, members of a group are obliged to pay monthly contributions in fixed instalments. Members are called for general meeting when one member, selected randomly, gets an opportunity to purchase the desired product. Based on the Hungarian experience, businesses that organize and operate consumer credit groups specially target vulnerable consumers, consumers with a bad credit rating. Using marketing techniques, they create a false impression about the provision of credit whereas in reality the consumers' chance of getting the product is entirely dependent on luck. Frequently consumers end up waiting years to be selected, regularly paying monthly fixed instalments getting even deeper into financial despair. In addition, consumers are obliged to pay monthly instalments until the product is fully paid off, even after the product has been purchased. From 1 January 2014, the creation of consumer credit groups is subject to a general ban in Hungary (Section 16/B paragraph 1 of Act CLV of 1997 on Consumer Protection).<sup>45</sup> The operation of groups created prior this

<sup>42</sup> See the rules at: <http://www.nfh.hu/node/7844>

<sup>43</sup> See <http://www.nfh.hu/fogyasztobarat-vallalkozasok>

<sup>44</sup> See the latest recommendation at: [http://mediaeshirkozlesibiztos.hu/dokumentum/170121/meltanyossagi\\_ajanlas\\_media\\_es\\_hirkozlesi\\_biztos.pdf](http://mediaeshirkozlesibiztos.hu/dokumentum/170121/meltanyossagi_ajanlas_media_es_hirkozlesi_biztos.pdf)

<sup>45</sup> 1997. évi CLV törvény a fogyasztóvédelemről.



date is subject to detailed rules now laid down in Gov. Decree 530/2013 on Consumer Groups.<sup>46</sup>

Sales promotions (termékbemutatók) or some aspects of them could be banned. While the implementation of the Consumer Rights Directive (implemented into Government Decree 45/2014)<sup>47</sup> provided some level of protection for consumers for contracts concluded off premises, these rules do not provide sufficient safeguards against detriment caused by sales promotions. One problem in Hungary was that these rules applied for sale promotions held off premises, but once promotions were held regularly at a location, e.g. every Saturday, these premises were considered business and the new rules became inapplicable. To remedy this, Hungary introduced more stringent rules specially targeting sales promotions, effective from December 2015.<sup>48</sup> For example, holding any sales promotions is subject to advanced notice, giving thereby an opportunity for the relevant public authority to be present and control the information provided to consumers. However, these new rules did not address every issue. A stakeholder highlighted that sales promotions targeting ill consumers create a visual environment suggesting that a medical health check is taking place whereas the examination is not performed by a doctor of medicine and therefore the health check cannot be medical.

The black list could also be used to ban the change of the terms and conditions of promotional sales while the duration of the promotion. This ban could follow the decision of the Competition Authority that has considered such a change to be an unfair commercial practice, when a company changed the terms and conditions of collecting and exchanging promotional stamps.<sup>49</sup> Another problem in Hungary is disproportionately high charges. A commercial practice imposing disproportionately high charges compared to the service provided should be black listed.

Businesses are commonly trying to increase their sales volume by creating a false impression that the product is on sale, indicating the price difference (the new and the old price) or the percentage of discount, whereas in reality the product was never placed on the market at a higher price, even more so, sometimes the product was previously sold at a lower than the 'sales price'.<sup>50</sup> The black list could be used to ban these false sales promotions. In terms of the amendment, a public authority suggested to modify point 21 of Annex I by deleting reference to 'marketing material' as this reference unnecessarily restricts the application of this ban. Another stakeholder suggested Point 20 of Annex I should be amended to reflect the modern trend of 'paying' for the service with personal data.

- Are there other measures that could improve the effectiveness of the UCPD in establishing a high level of consumer protection in your country? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

The effectiveness of the UCPD in providing a high level of protection (according to the interviewed stakeholders) could be improved by:

<sup>46</sup> 530/2013. (XII. 30.) Korm. Rendelet a fogyasztói csoportokról. Prior to adopting these rules the Competition Authority has commission research and conducted an information campaign on consumer credit groups, see [http://www.nedoljonbe.hu/ne\\_doljon\\_be/kutatasi-eredmenyek](http://www.nedoljonbe.hu/ne_doljon_be/kutatasi-eredmenyek). It has also delivered several decisions involving these groups, see for example: Vj- 71/2011.

<sup>47</sup> 45/2014. (II. 26.) Korm. Rendelet a fogyasztó és a vállalkozó közötti szerződések részletes szabályairól.

<sup>48</sup> See the rules at: <http://www.nfh.hu/node/65>

<sup>49</sup> Competition Authority, decision no Vj-64/2015/41.

<sup>50</sup> For example, the Kúria case considered that stating the product is on promotional sale whereas it is soled for its original price (that id double the false promotional price) is a misleading commercial practice. to be an unfair commercial practice. Kúria, decision no. Kfv.II.37.684/2013/2 (also reported in KGD no. 2015.98).

- Strengthening the enforcement i.e. by raising the capacity of consumer protection organizations and increasing the usage of public interest actions for addressing mass disputes;
- Minimizing the overlaps between the UCPD and the sector specific regulation;
- Attributing a more active role to consumer protection organizations in monitoring non-compliance with the law, by following, analysing and summarizing the most frequently occurring black listed practices (having an effect of informing consumers and disciplining businesses);
- Tackling promotional sales. Consumers are lured into buying promotional products ending up with very expensive products in the end (for example, mobile phones that cost HUF 1 or 0 [less than EUR 0.01]).<sup>51</sup> This problem could be tackled by informing consumers on the full price of the product by including the full price at least into the contract, but preferably also before the contract is concluded (by analogy to indicating the APR in financial services transactions).

There are several practices that could be useful for other Member States:

- The practice of using mystery shopping. Mystery or sample shopping has proved very useful in the practice of Hungarian public authorities.<sup>52</sup> According to a representative of a sector specific authority, mystery shopping is the only way to prove that consumers have been misinformed, i.e. that oral information amounts to an unfair commercial practice. This power enables the authorities to eliminate unfair commercial practices more effectively. It not only enables them to spot irregularities in commercial communications but also to obtain necessary evidence for the subsequent process. For example, in protecting consumers at sales promotions government officials have recorded the information provided during the promotion and used this as solid evidence in the later process. This is a valuable tool given the mentioned evidentiary problems with commercial practices. The practice of mystery shopping has now increased businesses' compliance with the rules and increased their pro-active initiative. They now preventively turn to enforcement authorities seeking their opinion about the conformity of their commercial communication (i.e. information) with the applicable rules;
- The practice of providing informal opinions on legal matters. Some public authorities can give informal opinions on whether certain actions or information comply with the primary and secondary law. The opinion is free of charge and is purely of interpretative, or advisory nature, i.e. it cannot be used as evidence in administrative or judicial process;
- Seeking undertakings instead of imposing formal sanctions, concluding 'public contracts' (hatósági szerződés). Several authorities, such as the Competition Authority and the Media and Infocommunications Authority are empowered to seek undertakings from businesses instead of imposing formal sanctions, i.e. fines. With this agreement, the business undertakes a commitment to change its practice, with the authority specifying the practices that need to be changed. The authorities consider this as an efficient tool for changing business practices long term, in sustainable manner;
- The practice of operating a Consumer protection rapporteur (Fogyasztóvédelmi referens). This role is mandatory from 2013 for large businesses based on Section 17/D of Act CLV of 1997. The rapporteur is an expert in the field of operation of the company and is additionally educated on consumer protection matters.<sup>53</sup> Its

<sup>51</sup> See also Vj-90/2008 where the Competition Authority considered the advertising of a 'free bank account' a misleading commercial practice given that it was conditions upon the minimum use of 6 months and the maintenance of an extremely large balance (HUF 3 000 000 [approx. EUR 9 687]) or a monthly income of minimum HUF 150 000 [EUR 484].

<sup>52</sup> Mystery shopping is a widely used enforcement tool of public authorities. It is even amongst the tools of the Hungarian National Bank.

<sup>53</sup> Explanatory notes on Section 17/D of Act CLV of 1997 in Új Jogtár.

role is to make sure the company is up to date with the regulatory developments, transfers this knowledge onto other employees and to be a point of contact with public authorities, ADR bodies and others having a consumer protection competence. The stakeholders considered this new role useful for positively shaping business practices;

- Stakeholders welcomed the Competition Authority's flexible approach to the notion of an average consumer – the sort of 'situation based' approach described above.

### 1.1.2. Effectiveness of the PID in establishing 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;

The PID is implemented into Section 14 of Act CLV of 1997 and in Decree 4/2009 on detailed rules on the indication of prices and unit prices of products, and fees for services.<sup>54</sup>

According to stakeholders, the PID works well in practice and consumers are effectively informed about unit selling prices (although a stakeholder notes that consumers frequently ignore the unit selling price).

Occasionally, there are problems such as the size of unit selling price indication that is difficult to see, or failure to indicate the unit selling price all together. 'Borderline products' (such as toilet paper) are problematic where businesses fail to realize the need for indicating the unit selling price. In practice there was also an issue about the indication of unit selling prices which products containing a gift i.e. the volume of the product was increased by a certain amount that was gifted. For example, in case of coffee the gifted units increased the overall weight of the product, and in the case of dishwasher capsules, the number of available units within the package. According to Kúria, in such situations the unit selling price is to be calculated by reference to the entire package (including the gifted part) as only such calculation will enable consumers to compare prices.<sup>55</sup> 4/2009 Decree is currently under revision: efforts are being taken to equalize the size of the letters indicating the size of eggs and their unit price.

- 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?

Stakeholders agreed that indicating the unit price per performance measurement is not necessary. Some considered this as a matter of free competition between the businesses. Others highlighted the area of 'borderline products', problematic products from the aspect of unit price, for which it would be difficult to join the unit price with its performance measurement such as toilet paper.

- The effects of the regulatory choices/derogations allowed by the Directive and applied by Member States. [*Key aspects to consider are: Is the derogation relevant? Do companies make use of it? Are there consumer complaints because of this? If so, approximately how many per year?*]

<sup>54</sup> 4/2009. (I. 30.) NFGM-SZMM együttes rendelet a termékek eladási ára és egységára, továbbá a szolgáltatások díja feltüntetésének részletes szabályairól.

<sup>55</sup> Kúria, Decision no Kfv. VI. 37.052/2011/7( also reported as principled court decision – elvi bírósági döntés (EBH) no 2012. K.16):

This derogation is not applicable for Hungary.

### 1.1.3. Effectiveness of the MCAD in providing protection for businesses

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

- 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 is implemented into Act LVII of 1996 on the prohibition of unfair market conduct and restriction of competition<sup>56</sup> that is enforced by the Competition Authority. The scope of protection provided is broader than misleading and comparative advertising. Act LVII of 1996 also contains rules unfair commercial practices more generally, rules similar to Act XLVII of 2008 implementing the UCPD. The Hungarian implementation of MCAD applies to 'business practice' more generally, that is according to a stakeholder, based on the term 'commercial practice' in the UCPD. This allows investigation of a wider range of issues than advertising, and this broader mandate works well in practice.

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

According to a stakeholder, the principle based approach works well in practice given that it allows the authority to tackle a broad range and different kinds of commercial practices.

- The effects of the minimum harmonisation provisions on misleading advertising; [*Key aspects to consider are: 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)?*]

As mentioned above, the MCAD has been implemented in a way to allow the investigation of a broader range of issues than advertisements. Act LVII of 1996 applies to any 'business practice' following the term 'commercial practice' in the UCPD. Therefore, although the application of the UCPD has not been extended to B2B transactions, the provisions of Act LVII of 1996 have been inspired by the UCPD. Section 8 paragraph 1 contains a general prohibition of misleading business partners. Paragraphs 2 specifies what amounts to a misleading 'business practice' referring to both misleading actions and omissions in a very similar fashion to Sections 6 and 7 of Act XLVII of 2008 implementing Articles 6 and 7 of the UCPD.

In addition, as will be explained below, Section 10/A paragraph 2 of act LVII of 1996 contains a reference to the 'average business' similar to Section 4 paragraph 1 of Act XLVII of 2008 (implementing of the average consumer concept from the UCPD).

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

According to a stakeholder, the framework is effective as it also covers modern types of advertisements. However, it could be reconsidered whether there is a need for the definition of 'misleading advertising' and the criteria for determining misleading advertising in MCAD when such behaviours are already covered by the UCPD.

<sup>56</sup> 1996. évi LVII. törvény a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról.

- 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;

According to a stakeholder, comparative advertising rules provide an effective framework for modern types of marketing.

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

Stakeholders agreed that the current rules on enforcement are effective, in particular because they did not negatively affect cross-border transactions. It is suggested though that there is a need for strengthening cross-border cooperation between enforcement authorities.

- Are there measures that could improve the effectiveness of the MCAD in providing protection for businesses (see also 1.1.6 below)? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

Stakeholders asserted that businesses would be better protected by a differentiated approach within the businesses community, providing a higher level of protection for small and medium sized businesses (a thorough research would be needed to draw exact lines). This could be done by bringing closer the rules on advertising in MCAD to unfair commercial practices in the UCPD to protect vulnerable businesses.

A stakeholder also suggested the example of Hungary could be followed by extending the scope of MCAD beyond advertisements.

Stakeholders also mentioned that cooperative between enforcement authorities the EU should be strengthened.

#### 1.1.4. Effectiveness of current rules 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;
- The effects of the uniform black list of unfair commercial practices annexed to this directive on the free movement of goods and services;
- Whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade. [*Do the national differences play a role in a business perspective? Have they caused problems?*]

Based on the interviews it can be concluded that Hungarian businesses have negligible experience with the internal market.

Relevant stakeholders asserted that Hungarian businesses go very rarely abroad. Due to their low capitalization, language, and other barriers, they have little access to foreign markets. Those that go abroad primarily target the German market. The more developed consumer protection culture coupled with strong enforcement have 'disciplined' Hungarian businesses, forcing them to change their business strategies, operational models, or even to withdraw from the German market. This assessment however relates to traditional, offline trade whereby Hungarian companies establish their daughter business in the other Member State, conducting domestic trade in the host state.

There is an increasing number of online shops, because of transportation costs most of them target domestic buyers, and for the time being, do not market their products and services EU wide. Stakeholders had no knowledge of any problems.

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

Hungarian businesses have very little experience with the internal market (as explained above). Similar to the UCTD, the effectiveness of MCAD in eliminating obstacles to the internal market cannot be estimated.

#### 1.1.5. Interplay amongst UCPD information requirements according to Article 7(4) with the information requirements in the horizontal consumer law instruments

Regarding the information requirements according to Article 7(4) UCPD ("invitation to purchase") in the advertising stage, please analyse:

- The level of awareness of traders as regards information requirements at the advertising stage, as in particular demonstrated by their practical application; [*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?*]

According to stakeholders, large businesses that advertise frequently and follow the legal developments carefully are aware of these rules. There are frequent problems with online or web-shops (operated by small and medium sized businesses). According to a government official, the Consumer Protection Authority in 80% of cases finds that there has been an infringement of information provisions and in 54% of cases the infringement is addressed upon the Authority's finding. In order to facilitate compliance, the Consumer Protection Authority has developed an Exemplary online shop (Mintawebáruház).<sup>57</sup> This shop serves to inform and educate consumers and businesses by showing the key consumer protection rules. The sample shop looks like a real online shop, without an actual possibility to make a purchase

A sectoral authority highlighted that in regard to information provision they primarily control the compliance with (the many) sector specific rules and the requirements of UCPD are less relevant for their practice.

- 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?

Public authorities did not mention any additional costs. Businesses with effective management in place transfer compliance costs onto consumer (as explained below).

<sup>57</sup> See the Exemplary online shop at: <http://mintawebaruhaz.nfh.hu/hu/>



#### 1.1.6. Relevance for business-to-business transactions

Regarding the area of unfair commercial practices/marketing, please analyse:

- 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 cross-border trade;

As mentioned above, Hungary already applies the equivalent of some consumer protection rules in a B2B context. Act LVII of 1996 contains (implementing the MCAD) very similar rules to those in Act XLVII of 2008 (implementing the UCPD). Section 8 paragraph 1 contains a general prohibition of misleading business partners in economic competition. Paragraphs 2 specifies what amounts to a misleading 'business practice' referring to both misleading actions and omissions in a very similar fashion to Sections 6 and 7 of Act XLVII of 2008 implementing Articles 6 and 7 of the UCPD. According to a stakeholder, the general clause allows for the prohibition of aggressive business or commercial practice, whereas misleading commercial practices are regulated in more detail.

Section 10/A paragraph 2 of act LVII of 1996 contains a reference to the 'average business' that is similar to Section 4 paragraph 1 of Act XLVII of 2008 (implementing of the average consumer concept from the UCPD). This section provides that in evaluating a business practice the standard of a reasonably well informed, observant and circumspect business should be taken into account. In comparing the standard of an 'average consumer' and an 'average business', the Competition Authority expects a higher degree of awareness and circumspection from businesses than from consumers.<sup>58</sup> The level of expectation however depends on the market in which the infringement has occurred. The highest level of awareness is expected from the business in regard to a business practice on the market on which it usually operates. In deciding on whether the business practice is misleading, the Competition Authority also takes into account the size of the business (a lower level of awareness is required from small and medium sized businesses than large businesses; but the threshold of expectation is higher than towards consumers), its resources available for obtaining information and the power relationship between the businesses in the given transaction.

Comparing the rules applicable to B2B (implementing the MCAD) and to B2C (implementing the UCPD), it can be noted that there are no black listed practices available for B2B transactions and no reversal of burden of proof in front of the Competition Authority.

There is no available evidence about the effect of these rules on 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;

Although many of the rules in Act LVII of 1996 are similar to the rules of the UCPD, representatives of businesses are generally against of the extension of consumer protection rules to the B2B context. They have highlighted that different rules should be applicable in B2B and B2C contexts, with the former giving primacy to free competition. Small and medium sized businesses could be protected by helping them in enforcing their rights.

- The appropriate scope of the protection in B2B transactions – whether the protection should cover only the pre-contractual stage (i.e. misleading or

<sup>58</sup> Competition Authority, decision no. Vj-30/2003.



aggressive marketing) or should also cover unfair commercial practices during and after the transaction;

According to a stakeholder, the current rules are applicable both before and after the contract has been concluded.

- Whether there is a need to have a black-list of practices in the business-to-business marketing area;

According to stakeholders, the black list could be useful even without differentiating between businesses of different size.

- What should be the enforcement cooperation mechanism in the business-to-business marketing area;

Stakeholders were not convinced about extending the operation of the Regulation 2006/2004, but did not come up with alternatives. This may be due to their lack of experience with cross-border disputes. So far for example the Competition Authority has been approached only once through Regulation 2006/2004.

- Whether there is a need to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive;

According to stakeholders, there could be a need to develop contractual consequences for misleading and comparative advertising. However, this would require systemic changes in Hungary. 'Core' contractual matters, such as contractual consequences are regulated in the Civil Code<sup>59</sup> and can only be enforced by courts, whereas the MCAD is currently enforced by the Competition Authority. A sharp distinction is made between administrative and civil protection of consumers.

- Whether there is a need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive.

Stakeholders had no suggestions on whether there is a need to adapt the rules on comparative advertising.

#### 1.1.7. Relevance of contractual consequences of unfair commercial practices

Please analyse whether there are in your country:

- 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;

Contractual consequences are available for unfair commercial practice in Hungary. Although unfair commercial practices are primarily enforced by public authorities, commercial practices may also be subject to private law actions.

First, under Section 15 paragraph 1 of Act XLVII of 2008, public enforcement does not take away consumers' right to take private court actions. Therefore, an injured consumer can commence a court action against the business that has resorted to an unfair commercial practice. Contractual consequences are available under the general rules of the Civil Code.

Second, unfair commercial practices may be subject to collective court actions. Compensation or specific performance is available in public interest actions (as explained below).

<sup>59</sup> Ferenc Szilágyi (see literature review at the end of the document).

The Civil Code foresees a general duty of cooperation and information between the contractual parties, under Section 6:62. Parties are obliged to mutually cooperate and this includes informing each other about circumstances that are important for their relationship, during negotiations, at the time of contract conclusion, during the duration of the contract and after ending the contract.<sup>60</sup> The breach of this obligation is sanctionable under the general rules of contract (provided the contract has been concluded), or general rules of tort (provided the contract has not been concluded, i.e. breach of information obligations during negotiations). This principle based approach is supplemented by sector specific rules on information provisions.

An illegal contract, or a contract that breaches mandatory provisions of law, is void under Section 6:95 of the Civil Code (*tilos szerződés*). Given that information provisions are normally mandatory, any breach of these would trigger the operation of Section 6:95

Contracts concluded due to misrepresentation (*megettévesztés*) or duress (*jogellenes fenyegetés*) are avoidable under Section 6:91 of the Civil Code.

Immoral contracts (*jóerkölcsbe ütköző szerződés*, Section 6:96 of the Civil Code) and usury contracts (*uzsorás szerződés*, Section 6:97 of the Civil Code) are void, while contracts with manifest disadvantage (*feltűnő értékaránytalanság*, Section 6:98 of the Civil Code) are avoidable.

An administrative process cannot end with contractual consequences, as explained.

- Any case law (enforcement decisions, court rulings) providing for such consequences;

No case law is available, as individual claims are almost non-existent, and collective actions ending with damages compensation or specific performance are very rare. Enforcement decisions of administrative authorities cannot attribute contractual consequences to unfair commercial practices.

- Whether there is, based on past experience in your country, a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

As mentioned above, contractual consequences are already available in Hungary for unfair commercial practices.

Stakeholders asserted that developing contractual consequences raised a range of procedural issues, the most important of which is the evidentiary problem. It is very difficult to prove oral information. Recognizing this, Section 15 of Act XLVII of 2008 transferred the burden of proof onto the business that used the commercial communication in question. Nevertheless, individual claims are almost non-existent in practice.

Collective actions commenced by consumer organizations are also rare. To these organizations the general rules on the burden of proof apply, and they have no resources to collect consumer complaints to be able to prove that a commercial practice has taken place.

It seems therefore that public authorities are the best placed to overcome the evidentiary burden. Apart from having resources to collect individual consumer complaints, public authorities also perform mystery shopping. This includes attending for example a sales promotion and recording the information that has been provided to consumers. However, upon establishing that an infringement has occurred, public authorities are only able to commence collective actions. Contractual consequences could not be attributed to administrative processes conducted by public authorities, i.e. damages compensation or specific performance would not be available, due to

<sup>60</sup> Mutual information provision is only one form of mutual cooperation. Commentary on Section 6:62 in Commentary on the Civil Code (see literature review at the end of the document).

systemic divisions of public and private enforcement. The award of contractual consequences is in the exclusive competence of courts in Hungary.

A stakeholder suggested that consumers would benefit from contractual consequences in administrative processes. They could use the possibility to rescind or modify the contract that has been concluded as a result of an unfair commercial practice. This would however raise a range of practical problems. For example, it would be difficult to determine which consumers were affected by a particular commercial communication, and it would be challenging to rescind the contract when it has already been performed, or to return what has been received in due performance of the contract when it is not possible to do so. In such cases consumers could be awarded damages as compensation, however, these are not available in administrative actions. The problem is in a systemic division of public and private enforcement, as mentioned above.

## 1.2. Contract conclusion and performance

### 1.2.1. Effectiveness of the current rules in establishing 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;

Before answering the questions, it should be noted that the majority of the interviewed stakeholders had limited experience in applying the unfair contract terms rules, as the enforcement of the UCTD is in the exclusive competence of courts in Hungary. Their experience extends to commencing and conducting court actions for the protection of collective interests of consumers.<sup>61</sup> In addition, the practice of courts has been largely shaped by the recent, foreign currency loans crisis. Finally, the report now discusses the provisions of the Act V of 2013 on the Civil Code of Hungary<sup>62</sup> that overtook the regulation of unfair contract terms from Act VI of 1959 on the Civil Code of Hungary<sup>63</sup> with minor changes, and therefore the earlier case-law remains relevant.<sup>64</sup>

The interviews with stakeholders and the literature suggest that the principles based approach works well in practice.

A stakeholder has particularly noted that in the aftermath of the Hungarian foreign currency denominated loans crisis, the principles of civil law, including the principles of good faith and significant imbalance are better respected by financial firms than before. Previously, economic competition and the absence of societal focus on these principles have placed them in the background of firms' operation.

The principle based approach in defining contractual rights and obligations has a tradition in Hungary. Section 4 paragraph 1 of Act IV of 1959 contained a general obligation of good faith and mutual cooperation in performance of contracts (this duty is now in Section 1:3 of Act V of 2013). In fact, the principle based approach is dominant throughout the Civil Code.<sup>65</sup>

<sup>61</sup> For example, the National Bank of Hungary and the Consumer Protection Authority have powers to scrutinise unfair terms, this operation will necessarily involve the application of the unfair contract terms rules of the Civil Code. However, they are unable to bring final judgments on the fairness of the rules. Should the authorities suspect the systemic use of an unfair term, they can only commence a collective court action, or use this power to negotiate with businesses to change their terms, as explained below.

<sup>62</sup> 2013. évi V. törvény a Polgári Törvénykönyvről.

<sup>63</sup> 1959. évi IV. törvény a Polgári Törvénykönyvről.

<sup>64</sup> See also Commentary on Section 6:102 in Commentary on the Civil Code (see literature review at the end of the document).

<sup>65</sup> Introduction in Commentary on the Civil Code (see literature review at the end of the document).

In regard to the above provision, the Hungarian Constitutional Court has succinctly summarized the attitude towards general clauses. It has considered general clauses necessary and useful because they are able to solve the tension between the static nature of the law in force and the changing nature of life situations that it intends to regulate. It went as far as considering general clauses more suitable for legal certainty than creating a closed list of situations intended to be regulated.<sup>66</sup>

General clauses remain important in over-regulated areas of financial services and products, given that these only cover the most important rights of consumers and, in the aftermath of the mortgage loans crisis, addressed those terms that were the most problematic; they are however unable to effectively regulate every possible contractual term that would infringe consumers' interests.<sup>67</sup>

Article 3 paragraph 1 is implemented into Section 6:102 paragraph 1. Although the importance of general clauses is universally accepted, there seem to be inconsistencies in interpreting the relationship of the two general clauses within the test of fairness. Historically, legal theory and practice agreed that the requirement of good faith and significant imbalance is one, objective criteria, the lack of good faith being determined by significant imbalance.<sup>68</sup> This means that from the more possible interpretations of the UCTD, the most common approach in Hungary is the option where good faith is not an independent criterion within the test of fairness; but good faith and significant imbalance are one, integrated criteria. Consequently, significant imbalance will also automatically trigger the violation of good faith, or in other words, it is sufficient to show the term causes significant imbalance in the parties' rights and obligations for it to be considered unfair.<sup>69</sup> More recently however, under the influence of the CJEU in C-415/11 the Metropolitan Court of Appeal considered significant imbalance and good faith to be separate criterias.<sup>70</sup> The implications of this approach are that both good faith and significant imbalance have to be proved separately, and this adds an extra element of uncertainty in the application of this complex test.

- 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 your MS? Does this work in practice or are there problems?*]
- 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; [*Note: If a black/grey list exists in your country, key aspects to consider are: How does the list work in practice? Does it make a difference to have such a list?*]

In Hungary, the indicative list is implemented as a black (Section 6:104, paragraph 1 of the Civil Code) and a grey list (Section 6:104, paragraph 2 of the Civil Code). Both

<sup>66</sup> Hungarian Constitutional Court, decision no. 801/B/2002, points 3.1. and 3.2. See also decision no. 55/2001.

<sup>67</sup> Tamás Babai-Belánszky, p. 7 (see literature review at the end of the document)

<sup>68</sup> Judit Fazekas, Development of Hungarian Consumer Protection Law p. 339 (see literature review at the end of the document). Municipal Court of Szeged (Szegedi Városi Bíróság), decision no. P. 23 454/1999/25. See also Szeged Court of Appeal (Szegedi Ítéltábla, decision no. Gf.I.30.552/2011/3. (also reported in BDT no. 2013. 2945.)

<sup>69</sup> The Kúria went as far as to entirely disregard the requirement of good faith in interpreting the test of fairness. It considered a term unfair should it cause a significant imbalance in the parties' obligations to the detriment of the consumer. Opinion 2/2012 of the Civil Chamber on the Unfairness of unilateral contract modification clauses used by financial firms in consumer credit contracts, point 6 (2/2012 (XII. 10.) PK vélemény a fogyasztói kölcsönszerződésben pénzügyi intézmény által alkalmazott általános szerződési feltételekben szereplő egyoldalú szerződésmódosítási jog tisztességtelenségéről).

<sup>70</sup> According to the Metropolitan Court of Appeal a clause that deviates from the default rules of law to the detriment of the consumer causes significant imbalance. In determining whether a clause is contrary to good faith it must be looked at whether the business could have reasonably expected from the consumer to accept the term if individual negotiations took place. Metropolitan Court of Appeal (Fővárosi Ítéltábla), decision no. 5.Pf.22.061/2013/4. (also reported in BDT no. 2013. 2945.)

types of terms are null and void. The difference between them is that grey listed terms are presumed to be unfair giving a chance to a business to prove the opposite, whereas black listed terms are considered to be unfair *per se*.<sup>71</sup>

According to stakeholders, the list works well in practice. The black list is more frequently applied than the grey list. The black list is easy to apply and is more effective in protecting consumers than the grey list, where business have a chance and were sometimes successful in the past in rebutting the presumption attached to the grey list.

- 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: In your country, have the effects of court decisions establishing the unfairness of an unfair term been extended to all contracts of the trader concerned or to the contracts of any other trader containing such a term? If so, how does this work in practice? What are the impacts on businesses? If there are no such effects of court decisions on unfair terms: what are the effects of this situation?*]

The effect of court decisions establishing the unfairness of a term has been extended to all contracts of a business concerned. The court can scrutinize the fairness of a contract term in three distinct situations. First, when the term has been previously used. Under Section 6:105 paragraph 2, the court is able to annul the term with a (quasi) *erga omnes* effect, reaching every contract (except those that have already been performed) concluded by a particular business (failing to reach contracts using the same term drafted by other business entities). Secondly, based on Section 6:105 paragraph 3, an action may also be taken against a business that has drafted and published the particular term but not yet used in practice. The court will issue an order to stop the business from using the term in the future. Finally, under Section 6:105 paragraph 4, an action may also be taken against the business that did not draft or use an unfair contract term, but made a public recommendation for its usage, for example, when the term has been drafted by professional chambers or organizations.<sup>72</sup> In this case the court will stop the business entity from using the particular term in the future.

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

In implementing Article 5 of the UCTD, Hungary went beyond the requirements of the UCTD. Section 6:103 paragraph 2 of the Civil Code states that an ambiguity of a (standard term or individually not negotiated) term in consumer contracts is a sufficient basis for establishing the unfairness of the term. Given that under Section 6:103 paragraph 3 an unfair term is null and void, a term may be null and void for being only non-transparent.

Current rules in interpreting transparency provisions are shaped by the ruling of the CJEU in C-26/13 and the Decision 2/2014 of Kúria that 'implemented' that ruling. In deciding on whether a contract term transferring the currency risk onto consumers was clear and understandable, it must be assessed whether an average consumer would have inferred this risk from the content of the contract, and from advertising and information provided during the process of contract conclusion. The provision of information mandated by sector specific rules and the signing of a declaration that revealed the risk, will satisfy the above criteria, until the opposite is proven. The burden of proof that the information has been provided is on the financial firm. It may happen however that despite the clarity of contract terms, the information received

<sup>71</sup> Commentary to Section 6:104 in Commentary to the Civil Code.

<sup>72</sup> Commentary on the relevant section of the old Civil Code in Complex Jogtár (database ceased to exist).

during the process of contract conclusion has misled a consumer into (falsely) believing that the currency risk is not realistic, it is unlikely to happen or that the amount of transferrable risk is capped. These circumstances give rise to the unfairness of a term in question. However, the burden of proof is on a consumer to show that the term of the contract transferring the currency risk onto him or her was not clear and understandable due to unsuited information.<sup>73</sup> As discussed above, proving oral information is very difficult, this condition therefore seems to be harsh on consumers, and may jeopardize the overall effectiveness of these rules.

In an earlier decision, the Kúria has guided lower courts in applying the rules on transparency. The Kúria has created an image of an average consumer. An average consumer is not an expert in the field in which the contract is concluded, and normally fails to understand the use of professional terminology and mathematical formulas. The use of specific terms such as EURIBOR is nevertheless not unfair in itself. It is imperative however that these terms appear in a transparent structure. Form contracts often direct consumers to terms that are in separate documents e.g. special standard terms and conditions, or even advertisements; and for an average consumer it becomes impossible to 'track down' the applicable terms and conditions for its contractual relationship with the financial firm. In such cases, a term in question will not be transparent. It is also required that terms are presented in a readable sized print and simple style.<sup>74</sup>

In addition to this protection, the Kúria also expects a certain standard of behaviour from the average consumer. It can be expected from consumers to inform themselves prior to the conclusion of the contract taking into account the character, the value and the associated risks to the transaction. An average consumer must carefully scrutinize the applicable standard terms and conditions, and seek additional explanations for the terms that are not clear. If necessary, a consumer can ask for additional time to read the contract and obtain an opinion of a lawyer.<sup>75</sup> Again, here it seems that the court places too much burden on consumers, expecting them to read complex contracts whereas this is not in line with reality.

Indeed, a representative of a consumer protection organization highlighted courts are not well 'tuned into' consumer disputes. They start from the traditional freedom of contract approach presuming that contracts have been read and understood. Public authorities seem to have a similar approach. A representative of a public authority highlighted that it works with the concept of an average consumer, and it is assumed, an average consumer has read the content of standard terms and conditions before concluding an individual contract with a provider, that are based on standard terms and conditions. This fiction applies even if everyone knows consumers fail to read standard terms and conditions.

A representative of a public authority asserted that although authorities work with the concept of average consumer, in reality there are more categories of consumers that require a different level and quantity of information. A basic need of one category is too much or too complex information for the other category. A one size fits all solution will not make information provision effective. In the practice of a public authority, consumers could be divided onto: 1) disinterested consumers (representing around 50-60% of the consumer population) that care about the price only. This category should be subject to a high level of protection that could be achieved by preventive control of standard terms and conditions i.e. the scrutiny of standard terms before they would be used; 2) informed consumers (around 35%) that are interested in obtaining detailed information to compare offers and make an informed decision; 3) expert consumers (around 2-3%) that know more about some (technical) features of a product or service than the provider of a service itself. These consumers are

<sup>73</sup> Kúria, Decision no 2/2014 for the unification of civil law (Polgrái Jogegységi Határozat), point 3.

<sup>74</sup> Kúria, Opinion no 2/2012, point 6 (see above the full title); see also Appellate Court of Szeged (Szegedi Ítéltábla), decision no. Pf. II. 20 486/2012 (reported in BDT no. 2013. 2889).

<sup>75</sup> Ibid.



interested to be informed but need a different kind of information than the above category.

There is no evidence that a term has been declared unfair only because it was not transparent. There is however evidence that courts (and the parties) fail to refer to transparency requirements as a reason for nullity. According to the Metropolitan Court of Appeal breaching an obligation to inform mandated by sector specific rules will result in a breach of contract based on those sector specific rules, or the information relates to an essential circumstance of the contract conclusion or element of the contract will make the contract voidable under the general rules of the Civil Code, and will not make the contract null and void. Here the court failed to see that the absence of information may trigger the operation of transparency rules of unfair contract terms and the special regime of nullity of contract terms/contracts.<sup>76</sup>

Drawing a general conclusion from what has been said above, there seem to be many obstacles that can hinder the effectiveness of transparency rules in Hungary.

- 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. [*Note: Question only relevant for MS that have put in place extensions of application of UCTD*]

Hungary did not extend the test of fairness to price or main subject matter terms as per Article 4 paragraph 2 of the UCTD (in Section 6:102 paragraph 3 of the Civil Code). As to the individual negotiated terms exemption, this also was followed in Hungary. So, the test of fairness (as will be explained below) is applicable to standard terms in both B2C and B2B context (Section 6:102 of the Civil Code). Although the applicability of the test of fairness is extended in consumer contracts beyond standard terms, it only reaches terms that were not individually negotiated (and does not go as far as individually negotiated terms) in Section 6:103 paragraph 1 of the Civil Code.

- 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?*]

Under Section 6:103 paragraph 3 of the Civil Code an unfair contract term in a consumer contract is null and void. This is a special rule for consumer contracts, as opposed to the general rule for B2B contracts that the use of unfair terms makes the contract voidable (Section 6:102 paragraph 5 of the Civil Code).

According to the Metropolitan Court of Appeal an unfair term is not binding. This is a special consequence of nullity based on EU law. Consumers become free from any obligation conferred upon them by an unfair term, the obligation becomes non-existent, null because of its content.<sup>77</sup> However, it is likely that declaring the term non-existent will not always or at least not entirely satisfy consumer needs. Consumers should also be able to rely on the general rules on consequences of nullity. Under the general rules the consequences of nullity are, upon the parties' request, restitution in integrum (Section 6:112 of the Civil Code) or validation of the contract (Section 6:111 of the Civil Code). Courts will not determine the consequences of their own motion, but the parties must be precise in putting forward their request, for example, they have to specify the amount of money they wish to be repaid. However, courts are not bound by the parties' requests and may order a different

<sup>76</sup> Metropolitan Court of Appeal (Fővárosi Ítéltábla), decision no. 6. Pf. 20 353/2013/4 (reported in BDT no. 2014.3097).

<sup>77</sup> Metropolitan Court of Appeal (Fővárosi Ítéltábla), decision no. 5. Pf. 21 456/2013/5 (reported in BDT no. 2014.3058).



consequence.<sup>78</sup> In the absence of a parties' request, courts will order damages compensation based on the rules of unjust enrichment.<sup>79</sup>

According to the general rules, an unfair term is void from the moment of its supposed conclusion, i.e. *ex tunc* (Section 6:88 paragraph 1 of the Civil Code). In theory no court process is necessary for establishing the consequences of nullity (Section 6:88 paragraph 1 of the Civil Code). However, in practice, if the business disputes the fairness of a term, courts have to make justice between the parties.

An unfair term will be removed from the contract whereas the rest continues in operation. In consumer contracts, an unfair clause will bring down the entire contract only if performance is impossible without the clause in question (Section 6:114 paragraph 2 of the Civil Code).

According to the general rules on nullity, courts observe nullity *ex officio* (Section 6:88 paragraph 1 of the Civil Code). In 2005 the Kúria (then the Supreme Court) issued an opinion that clarified the relationship of *ex officio* ruling with the traditional, civil procedure rules that place procedural (and substantive) initiatives in the parties' hands.<sup>80</sup> In 2010 the Kúria has issued a new opinion further clarifying procedural issues in *ex officio* ruling. According to this opinion, courts are obliged to inform the parties that they have noticed a reason for nullity, instructing the parties to provide the necessary evidence and giving the parties an opportunity to express their views on these. The Kúria has specially clarified that *ex officio* ruling is only possible based on the evidence provided by the parties; courts cannot collect evidence *ex officio* due to Section 164 paragraph 2 of Act III of 1952<sup>81</sup> on civil procedure.<sup>82</sup> Should the first instance court fail to rule on nullity *ex officio*, the obligation will transfer onto the second instance court; however, second instance courts are only obliged to proceed on their own motion if the information supplied in the first instance procedure is sufficient to determine the existence of nullity without a doubt, or if other procedural rules allow for the evaluation of the new facts or evidence that emerged following the first instance process.<sup>83</sup> It can therefore be seen that the lack of available information may present an obstacle for courts to scrutinize the fairness of terms on their own motion. This may be used by courts to justify their lack of initiative in scrutinizing fairness.

Indeed, the 'first generation' case law on consumer loans denominated in foreign currency mostly relied on 'traditional' contract law principles of usury, immorality, mistake, etc., failing to invoke the fairness of contract terms by both parties (and their lawyers) and the courts.<sup>84</sup> Before 2012, there was only one case where the court scrutinized the fairness of the terms of the contract *ex officio* (out of 53 relevant cases).<sup>85</sup> Subsequently however there are successful *ex officio* rulings. In BDT 2014.3097 for example, the Metropolitan Court of Appeal scrutinized the fairness of those terms that the parties failed to notice, finding a basis for this obligation in Article 6 paragraph 1 of the UCTD and in CJEU's ruling in C-397/11. It seems however that good examples such as the above are rare. According to stakeholders, courts normally refuse to rule on fairness of contract terms on their own motion, contemplating that the reason for this refusal may be because the Civil Code does not specially attribute this obligation to unfair contract terms. As mentioned above, the Civil Code only provides that an unfair term is null and void, without specially referring to the *ex officio* obligation of a court to scrutinize this nullity, this obligation is placed elsewhere

<sup>78</sup> Kúria, Opinion no. 2/2010, point 2 (see full title above).

<sup>79</sup> See on the new system of remedies introduced by the new Civil Code in György Wellman (see literature review at the end of the document).

<sup>80</sup> Kúria, Opinion no 1/2005 on the *ex officio* procedure to be followed in ruling on the reasons for nullity (1/2005. (VI.15.) PK vélemény a semmisségi ok hivatalbóli észlelése kapcsán követendő eljárásról).

<sup>81</sup> Kúria, Opinion no. 1/2010 on consequences of nullity (1/2010. (VI.28.) PK vélemény az érvénytelenség jogkövetkezményeiről), point 4.

<sup>82</sup> 1952. évi III. törvény a polgári perrendtartásról .

<sup>83</sup> *Ibid.*

<sup>84</sup> Mónika Józson, Country report for Hungary, p. 89-90 (see literature review at the end of the document).

<sup>85</sup> The Kúria's Case-Law Assessment Group, p. 7 (see literature review at the end of the document).

in the Civil Code. In addition, unfair terms in consumer contracts end in the so called 'relative nullity', i.e. nullity that can only be invoked in the interest of consumers (Section 6:103 paragraph 3 of the Civil Code). As with general nullity, this 'type' should also be observed *ex officio* by courts,<sup>86</sup> however, the word 'invoked' might be also interpreted as needing to have at least some activity of a party in alerting the court.<sup>87</sup> Although it can be seen that there is an obvious need for a statutory mandate for courts to rule on the fairness of the terms of the contract *ex officio*, this opportunity has been missed by the drafters of the new Civil Code.<sup>88</sup>

Generally, an unfair term is removed from the contract and cannot be replaced. However, there are also opinions that following the ruling of CJEU in C-26/13 courts are able to replace the unfair term with default rules of a law.<sup>89</sup> Interpreting the CJEU's particular ruling, the Kúria in its 2/2014 Decision has not mentioned this possibility. At another opportunity however the Kúria has not ruled out the possibility for courts to modify the terms of individual contracts following an unfair term and changed circumstances, and applying the general rules of contract modification by courts under Section 6:192 of the Civil Code.<sup>90</sup>

As already mentioned, enforcement of the UCTD is only in the hands of courts, and therefore an administrative remedy is not available for consumers.

- In a forward looking perspective: Are there other measures that could improve the effectiveness of the UCTD in establishing a high level of consumer protection in your country? Would a graphical presentation model improve the readability and comprehension by consumers of the T&Cs? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

In Hungary there are no special, formal requirements as to the readability of standard terms (statutory protection only extends to substantive matters).<sup>91</sup> According to the stakeholders, the very small print is abolished, and although letters could be larger this will not induce consumers to read contracts. Stakeholders highlighted the general problem that consumers do not read their contracts, this partially being due to the length and complexity of contracts. As a solution, a stakeholder suggested terms applicable for a particular transactional relationship should be extracted from the generally applicable standard terms and conditions or they should be specially highlighted and/or explained to the consumer in question (this could be one of the tasks of a consumer protection rapporteur, as explained above).

A stakeholder highlighted the practical usefulness of comparative tables, web-sites that compare the key features of a contract (going beyond comparing the price only).

Stakeholders noted the good practice of administrative control of the fairness of standard terms and conditions. Based on its power to commence public interest court actions under Section 6:105 of the Civil Code, the Hungarian National Bank has recently reviewed the fairness of standard terms and conditions of contracts for

<sup>86</sup> In Hungary, null contracts (érvénytelen szerződések) are divided onto void (semmis) and voidable (megtámadható) contracts, void contracts are further divided onto absolutely void (semmis) and relatively void contracts (relatív semmisség). Relatively void contracts are similar to voidable contracts because voidity can be invoked only in the interest of one contractual party, but they are a special case of void contracts, as voidity is observed *ex officio* without limitation period.

<sup>87</sup> Commentary on Section 6:103 in Commentary on the Civil Code (see literature review at the end of the document).

<sup>88</sup> This approach is in line with the general approach taken in drafting the appropriate sections on unfair contract terms of the new Civil Code that largely overtook the solutions from the 1959 Civil Code, failing to take into account the lessons learned from the case-law of the CJEU and from the case-law of domestic courts. See 1Józson Mónika, Hungary, p. 167 (see literature review at the end of the document).

<sup>89</sup> Commentary on Section 6:104 in Commentary on the Civil Code (see literature review at the end of the document). Also Katalin Szeghő, p. 9 (see literature review at the end of the document).

<sup>90</sup> Kúria, Decision no. 6/2013 for the unification of civil law (6/2013. számú Polgrái Jogegységi Határozat), point 7.

<sup>91</sup> Hungary did not act upon EU recommendations in regard to the size of the print.

vehicle financing, and recommended the necessary changes, affecting around 150 000 contracts.<sup>92</sup>

The foreign currency denominated loans crisis has showed the importance of regulating the effect of changed circumstances onto the validity of contract terms. The majority of disputes arose in regard to loans indexed in foreign currency, where following changes on money markets, consumers' monthly instalments have changed significantly from what they have anticipated at the time of contract conclusion. The relevant provisions from the Annex of the UCTD have been implemented into Section 6:104 paragraph 2 subparagraph d) making a unilateral modification without a valid reason unfair, and making a unilateral modification with a valid reason unfair provided a consumer is not granted a right of withdrawal. In addition, sector specific rules mandate that the contract contains an objective 'list of reasons' ('ok lista') for modification, as a pre-condition for unilateral contract modification.<sup>93</sup> Given the complexity of the rules and the importance of the question in addressing consumer detriment, the Kúria has developed guiding principles for deciding on the fairness of these terms. Clauses modifying the interest, fees and charges are unfair if they fail to adhere to one following principles: 1) their content is not clear and understandable for the consumer (the principle of clear and understandable language); 2) the conditions for modification are not objective, the business can influence their occurrence (the principle of objectivity); 3) a consumer could not foresee the conditions and the extent of modification (the principle of foreseeability); 4) a consumer is not guaranteed the right of withdrawal following the modification (the principle of withdrawability); 5) they take away the possibility to modify the terms of the contract in favour of a consumer (the principle of symmetry); 6) the 'list of reasons' for modification is missing or is not exhaustive<sup>94</sup> (the principle of exhaustive determination); 7) the conditions on the list are not relevant as they entirely or partially fail to influence the interest, fees and charges (the principle of reality and proportionality).

### 1.2.2. Effectiveness of the current rules 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 disparities have an impact on cross-border trade; [*Key aspects to consider are: Do national differences in the application/implementation of the Directive play a role for businesses? Have these differences led to changes in their business strategy? Have these differences caused problems? Please provide examples, if relevant*]
- 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.

As mentioned above, Hungarian businesses have very little experience with operating on the internal market, it is impossible therefore to estimate the effect of the above rules on cross-border trade.

### 1.2.3. Relevance for business-to-business transactions

Regarding the area of contractual fairness and in relation to the Unfair Contract Terms Directive, please analyse:

<sup>92</sup> Tamás Babai-Belánszky

<sup>93</sup> Kúria, Opinion no. 2/2012, point 6 (see full title above).

<sup>94</sup> The list must be exhaustive and contain only objective reasons, but the financial firm maintains a discretion to determining the precise content of the list.

- Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;

Stakeholders asserted that a need to provide a higher degree of protection to SMEs with regard to unfair contract terms exists. Given that around 99% of businesses are SMEs in Hungary, a differentiated approach that would provide more stringent protection to micro-enterprises would also be desirable. A stakeholder noted however that extending consumer protection rules may not be the most desirable solution given that B2B transactions are about different products that raise different problems than B2C transactions. Stakeholders agreed that there is no need to extend the rules onto large businesses where free competition should prevail. Despite these points of view, Hungary extended the application of the UCTD onto standard terms in B2B transactions, without differentiating between the size of businesses, as explained below.

- 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;
- 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 is a need for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive;

Key provisions of the UCTD are implemented without differentiating between B2B and B2C transactions.<sup>95</sup> Section 6:102 of the Civil Code regulates unfair standard contract terms. Paragraph 1 implements the general test of fairness in Article 3 paragraph 1 of the UCTD. Section 2 implements Article 4 paragraph 1. Section 3 implements Article 4 paragraph 2. Section 4 implements Article 1 paragraph 2.

The rules on unfair contract terms are extended to B2B transactions without differentiating between the size of businesses in the level of protection provided (although as shown above this would have been desirable).

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 contracts is limited to standard terms, and is not extended to individually 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 (Section 6:102 paragraph 5 of the Civil Code). The black and grey lists are only applicable to B2C contracts (see below).

- 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;

The black and grey lists in Section 6:104 of the Civil Code are only applicable for B2C contracts. Business representatives had no suggestions on specific terms that would deserve to be black or grey listed in B2B contracts.

- 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;

According to a stakeholder the rules are likely to encourage SMEs for cross-border trade.

<sup>95</sup> Commentary on Section 6:102 in Commentary on the Civil Code (see literature review at the end of the document).

- Whether the benefits of extending the scope to business-to-business transactions would exceed the negative consequences of such an extension.

As said above, despite the opinion of stakeholders that the unfair contract terms rules should not be extended onto transactions between large businesses, the current rules in the Civil Code does not differentiate between the sizes of businesses and is equally applicable to all B2B transactions. However, this extension does not seem to have shown any negative practical consequence so far.

### 1.3. Injunctions

#### 1.3.1. Effectiveness of the current rules in establishing a high level of consumer protection

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

- To what extent is the use of the injunction procedure in your country contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment?

Before answering the questions, it is worth noting that it is difficult to estimate the exact reach of the ID in reducing consumer detriment. The ID is implemented as part of a wider regulation of collective court actions and administrative enforcement, to an extent that for example Section 38 of the CPA has 8 paragraphs out of which Sections 6 to 8 implement the ID. These provisions are not 'free standing'. They provide for example for the publication of judgments, building on the previous sections that define the procedure. It is impossible to evaluate the effectiveness of the implementing provisions alone because of the inseparable link between those and the broader context of the procedures in which they operate. The report therefore evaluates the wider context in which these provisions operate. However, the wider context itself is complex given that there are two types of collective court actions (see below); and that the ID has been implemented as being part of both court and administrative processes. In addition, injunctions (as part of court and administrative processes) are foreseen by several acts that do not seem to implement the ID. Given that in the eyes of stakeholders no difference is made between the origin of the rules, the report refers to all injunctions procedures relevant for the Directives under scrutiny.

Injunctions as court processes are not very effective in providing a high level of consumer protection, as hardly any cases go to court. Consumer organizations on average commence 4-5 disputes per year, and the number is even lower for public authorities. Stakeholders noted that the effect of these actions is not noticeable on the reduction in the number of disputes. Consumers themselves contribute to the low effectiveness of injunctions on the reduction of consumer detriment by refraining to enforce their rights. In the well-known 'yellow cheque' case,<sup>96</sup> according to a stakeholder, only around 5% of consumers claimed compensation from the company.

Injunctions are more effective as preventive tools. Public authorities resolve most cases by negotiation, with the threat of the injunction in the background. Based on Section 45/B of Act CLV of 1997 the Consumer Protection Authority frequently controls the fairness of standard terms and conditions but it resolves around 90% of disputes by negotiation (around 15-20 per year), and takes only 1-2 per year to court. It is successful even with large businesses, such as Wizz Air, where the company agreed to make changes in its standard terms and conditions and conditions governing its

<sup>96</sup> 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 Ítéltábla), decision no. 14. Gf. 40.605/2013/7.

complaints procedure.<sup>97</sup> The Hungarian National Bank had a similar positive experience with the financial firms changing their standard terms and conditions following its notice in vehicle financing contracts (as explained above). Consumer protection organizations also experienced the positive response from businesses. Online shops have modified their standard terms and conditions following the commencement of injunctions procedures. They have negotiated with the organization after they have received the claim, and modified their terms before the end of the process.

Injunctions within administrative processes are more effective than court actions in preventing consumer detriment. Public authorities are empowered to issue cease and desist orders (based on e.g. Section 88 paragraph 1 of the Act CXXXIX of 2013, Section 47 paragraphs 1 subparagraphs a) and b) of Act CLV of 1997, Section 76 paragraph 1 subparagraph f) and g) of Act LVII of 1996, and Section 16/D of Act CVII of 2001 on electronic commercial services, and on some issues connected to information society services).<sup>98</sup> Stakeholders agreed, the success of these actions is largely due to the effectiveness of sanctions imposed by public authorities. Namely, the success of sanctions imposed in a court action depends on consumers. Depending on the type of action (as will be discussed below), in order to get compensation, consumers either have to turn to the business in question or commence a separate court enforcement action. Given that Hungarian consumers are normally passive and rarely claim compensation, even large court actions may not affect the businesses balance sheet. Sanctions targeting the reputation of the business are less effective, given that Hungarian businesses care less about their reputation than their counterparts in some other Member States (as discussed above). Apart from publicity, public authorities have a power to impose (large) fines. In the practice of the authorities, injunction orders are usually imposed together with fines, and these are effective in shaping future behaviour. In addition, according to a representative of a consumer protection organization, it is easier for these organizations to proceed in front of administrative authorities, the process is simpler and cheaper than in front of the court.

Court actions may follow administrative actions (in case of public interest enforcement, a type of court action for the protection of collective interests of consumers as will be explained below). However, the Kúria has noted that court actions are only justified if they are to serve a preventive role. If a business has already complied with the administrative decision and the infringement has not harmed a large number of consumers under Section 39 paragraph 1 of Act CLV of 1997, the administrative sanction is sufficient. The public interest element is not fulfilled and the court action is not justified.<sup>99</sup>

- What measures in your national legislation on injunction procedure are considered to be particularly effective, if any: measures regarding the cost of the procedure, the 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?

Measures regarding the cost of procedure, i.e. relief from court fees for consumer protection organizations; the erga omnes effect of judgments; the possibility to order damages compensation or specific performance in a court process. The possibility to join fines with injunction orders in an administrative process.

<sup>97</sup> See press release on agreement reached with Wizz Air at: <http://www.nfh.hu/node/13640>

<sup>98</sup> 2001. évi CVII. törvény az elektronikus kereskedelmi szolgáltatások, valamint az információs társadalommal összefüggő szolgáltatások egyes kérdéseiről.

<sup>99</sup> Kúria (then Supreme Court), decision no. Pfv. VIII. 21.007/2008 (reported in BH no. 2009.246).



- Has your country extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunction Directive? If yes, what are the additional consumer rights covered?

Court actions can be used for the protection of consumers in various situations and the legal base are set very broadly, including a 'catch all' provision enabling the public prosecutor and consumer protection organizations to commence actions in regard to any matter that falls under the competence of courts:

- Public interest actions can be submitted against the use of unfair contract terms based on Section 6:105 the Civil Code;
- Public interest enforcement can be commenced following anti-competitive agreements and practices that harmed consumers based on Section 92 of the Act LVII of 1996;
- Based on Section 45/A paragraphs 1 to 3 in connection with Section 81 paragraph 1 of Act CLV of 1997 public interest enforcement can be commenced following the administrative decision of the Consumer Protection Authority establishing the infringement of a wide range of consumer protection rules, i.e. distribution and the provision of services; protection of children and minor consumers; consumer credit groups; in relation to the operation of complaint handling, customers services or consumer protection rapporteur; the business entities information obligation related to the consumers' right to resolve their disputes in front of Consumer Arbitration Boards, and the business entities obligation to participate in the ADR process upon the initiation of the consumer (so called obligation to cooperate with the consumer – együttműködési kötelezettség); unfair commercial practices; marketing of goods; quality, composition and packaging of goods; measurement of goods on sale or intended for sale, government or other regulated price; guarantee and warranty rights; equal treatment in marketing goods or services; information of consumers. Public interest actions can be commenced in regard to any subject matter that falls under the competence of the courts, based on Section 39 paragraph 1 of Act CLV of 1997;
- For unfair contract terms, commercial practices and any other infringement of consumer's rights connected to financial services and products based on Section 164 of the Act CXXXIX of 2013.

In the absence of a 'catch all' provision, the legal basis for commencing administrative processes are limited to the competence of the public authorities in question (the Consumer Protection Authority, the Competition Authority, the National Bank of Hungary as explained above, and the National Media and Infocommunications Authority for infringements in the area of media and electronic communications).

- Analysis of the obstacles to the effective use of the injunction procedure, in particular by analysing which progress in removing obstacles has been made and/or new difficulties that have emerged in your country since 2012.

Court actions foreseen by Act CLV of 1997 have been significantly reformed in 2012 with Act LV of 2012,<sup>100</sup> which introduced the differentiation between the two types of court actions. The aim of the reform was to increase the usage of court actions by aligning the provisions of the Act CLV of 1997 with other acts allowing for court actions. This meant clarifying the powers of the court in terms of determining the content of the final award, easing the burden of proof and making enforcement of the judgment easier.<sup>101</sup> Although this made the legal rules clearer, according to all stakeholders, the effect on the increase of claims is not visible.

Injunction procedures as court procedures are subject to a number of obstacles:

Consumer protection organizations highlighted the following obstacles:

<sup>100</sup> Act LV of 2012 on amendments to Act CLV of 1997 on the protection of consumers (2012. évi LV. törvény a fogyasztóvédelemről szóló 1997. évi CLV. törvény módosításáról).

<sup>101</sup> Explanatory notes on Section 39 Act CLV of 1997 in Új Jogtár.



- Obstacles created by the absence of funding. Consumer protection organizations struggle with funding. Although they are exempted from paying court fees (under Section 5 paragraph 1 subparagraph b of Act XCIII of 1990 on Fees), lawyer's fees have to be covered and legal representation is mandatory. Disputes can last up to 3-4 years and generate such an expense that can force the organization into bankruptcy (under Section 78 paragraph 1 of Act III of 1952 the loser bear the costs of the parties). The more expensive (and expert) the lawyer is that represents the business entity, the more of a deterrent it is for consumer organizations to proceed (a representative of a consumer protection organization gave an example of withdrawal of claim upon the contemplation of the expertise and expenses of the business' lawyer). The majority of consumer organizations are funded by the state on yearly basis. The funding is constantly decreasing and there is no targeted funding available for financing court actions;
- Obstacles created by the lack of expertise. The problem of covering lawyers' fees could be overcome by employing qualified lawyers able to represent the organization in a court action, however, consumer protection organizations lack sufficient resources to make working in the organizations attractive for experts;
- Obstacles created by attitude. Representatives of government highlighted although the funding of organizations is constantly decreasing, consumer protection organizations should take steps to become self-sufficient instead of waiting for government funding. It should also be noted that a representative of a consumer protection organization stated that collective court actions are not necessary when there is an administrative decision on which consumers can rely on, as 'consumers will know what to do';
- Obstacles in informing/mobilizing consumers. Collective court actions are in part unsuccessful in reducing consumer detriment because consumers are not informed of their right to claim compensation. In the absence of sufficient media attention, and given the apparent ineffectiveness of publication of judgments, consumer protection organizations should conduct information campaigns to communicate the results of court actions, however, they lack sufficient funding.

Public authorities face the following obstacles:

- Problem with competence. The National Media and Infocommunications Authority lacks competence to file court actions for the protection of consumers' collective interests. The National Consumer Protection Authority lacks competence for the protection of consumers' contractual interests and finds it sometimes challenging to draw an often artificial line between an unfair commercial practice and an unfair contract term;
- Problem with informing/mobilizing consumers. Following a successful court action, stakeholders do not have the necessary tools to find and mobilize affected consumers, to organize information campaigns on how consumers can claim compensation;
- Procedural obstacles. Stakeholders highlighted the difficulty in providing evidence that an unfair commercial practice has taken place or in identifying the circle of affected consumers (for public interest enforcement), or the amount of damages suffered (for public interest enforcement);
- Problems created by institutional uncertainty. Representatives of public authorities highlighted that constant reorganization within the Consumer Protection Authority makes cooperation more difficult;
- Problems created by capacity. A government official noted that the Consumer Protection Authority had previously a department for collective court enforcement that is now abolished.

It should be noted that the Act III of 1952 is currently under revision.<sup>102</sup> Measures will be introduced to enhance the effectiveness of collective court dispute resolution, by laying down framework rules for public interest actions and introducing group actions. Group actions will enable the joinder of claims based on the consent of claimants (using the opt-in model) rather than public interest.<sup>103</sup> At the moment, there is no reference to collective court actions in this act.

- In a forward looking perspective: Should the coverage of the Injunctions Directive be extended (by including additional legislation into Annex I to the Directive)? If so, which EU legislation should be included? Are there other measures that could improve the effectiveness of the ID in establishing a high level of consumer protection? Should the scope of the Injunctions Directive be extended to the protection of collective business' interests? Are there best practices in your country that could be relevant for other countries and considered as model for the injunction procedure at EU level?

Stakeholders agreed that the Annex should be updated, suggesting that it could be aligned with the annex attached to Regulation 2006/2004 on consumer protection cooperation, or by periodically asking Member States for their experience in using the ID.

In Hungary, collective court actions are extended for the protection of business interest. Section 6:106 of the Civil Code empowers organizations representing the interests of businesses to commence public interest actions for the protection of collective interests of their members. There is little information however on the practical usefulness of this provision. Stakeholders could not recall that it has ever been used during the 2 years of its existence. According to a business representative this is because commercial chambers are not prepared to take up such complex disputes, as they do not have the necessary legal expertise and experience.

### 1.3.2. 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:

- How effective is the injunction procedure in addressing infringements originating in another EU country?
- How effective is it to address infringements originating in another EU country that qualified entities in your country are enabled to seek injunctions in the other Member State (Article 4 of the Injunctions Directive)?

Stakeholders could not come up with an example.

- In a forward looking perspective: Are there non-legislative or/and legislative measures that could improve the effectiveness of the injunction procedure in addressing infringements originating in another EU country? Are there best practices in your country that could be relevant for other EU countries and could be considered as a model for the injunction procedure at EU level?

Stakeholders asserted that cross-border injunctions seem very unlikely in practice. This aim could be achieved by raising the capacity of consumer protection organizations, i.e. targeted funding of collective court actions and relieving consumer protection organizations from mandatory legal representation.

A representative of a business suggested that in return for increased funding, the government should define the tasks of consumer protection organizations and monitor their efficiency in achieving these. An EU level recommendation is also plausible,

<sup>102</sup> T-11900 törvényjavaslat a polgári perrendtartásról.

<sup>103</sup> Wopera Zsuzsa (see literature review at the end of the document).

specifying the role of consumer protection organizations in achieving the goals of EU consumer protection policy.

### 1.3.3. Interplay between the Injunctions Directive and other enforcement instruments of consumer law

Please analyse:

- Is the injunction procedure as designed by the Injunctions Directive regulated separately in your country (in a separate legal act or as a separate procedure regulated within the same legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (UCPD, UCTD and by the Consumer Rights Directive)?

There is no special act that implements the ID. Its provisions are scattered in several legal acts that contain separate sections on injunctions procedures e.g. Sections 37-38 of the Act CLV of 1997; Section 164 of the Act CXXXIX of 2013, Section 92 of Act LVII of 1996. Injunctions procedures against the use of unfair contract terms is regulated separately, it is placed in Section 6:105 of the Civil Code. This provision however does not implement the ID (see Section 8:6 of the Civil Code). Injunctions against unfair contract terms are therefore not separated from the enforcement procedure envisaged by Article 7 of the UCTD.

- If these procedures are regulated separately: What are the main differences between them? How is the coherence between these procedures ensured? If these procedures are regulated in a single legal act (possibly as a single procedure): In what way do these procedures (or this procedure) go beyond measures foreseen by the Injunctions Directive?

The distinctive feature of injunctions as a court process is that there are two types of court actions in Hungary. One could be translated as public interest action (közérdekű kereset) and the other as public interest enforcement (közérdekű igényérvényesítés). The difference between the two is that the latter can only be commenced if there is a prior administrative decision that has established the infringement.

Public interest actions are regulated by Section 6:105 of the Civil Code and Section 39 of Act CLV of 1997<sup>104</sup>. The Civil Code empowers the court to scrutinize the fairness of a contract term in three distinct situations (as explained above), and these processes are pure injunctions, their result being the cessation of current use and desisting from future use of the unfair term. They end with a declaratory judgment, and any damages claim would have to be realized in a subsequent and separate court process. Public interest actions are somewhat different under Section 39 of Act CLV of 1997. These actions can be commenced against business an infringement that has harmed a large, identifiable group of consumers, whose personal identity is not known, or that has caused significant disadvantage, provided the matter falls under the courts' competence (paragraph 1). The process ends with a declaratory judgment establishing the infringement (without ordering to stop the infringement). In this case consumers would have to realize their damages claim in a separate process, only needing to prove the causal link between the infringement and their damages. In addition, the process can also end with a cease and desist order alone or with a case order accompanied with a restitution order, which is an order to restore the situation to the way it was prior to the infringement (paragraph 3). Alternatively, under Section 38 paragraph 3 the process may also include a claim for damages or specific performance provided the amount of damages or the content of the performance can be clearly determined at the time of submission in general terms, i.e. without having regard to individual circumstances of every consumer.

<sup>104</sup> Section 164 paragraph 9 of Act CXXXIX of 2013 also makes reference to public interest actions in the Civil Code.

The other type of collective actions is public interest enforcement, possible under Section 38 of Act CLV of 1997, Section 164 Act CXXXIX of 2013 and Section 92 Act LVII of 1996. These actions are conditioned upon the prior administrative process that has established the infringement, and a large number of consumers being affected by the infringement the circle of which can be determined at the time of submitting the claim. One option is to ask for a declaratory judgment that determines an infringement has occurred (without ordering to stop the infringement). The court will then identify the group of consumers affected by the judgment. Any injured consumer within the group may submit a separate claim for damages, only needing to prove the causal link between the infringement and damage and the amount of damages suffered. In addition to asking for an injunction, enforcement authorities can also seek damages or specific performance of the outstanding contractual obligation, provided the amount of damages or the content of specific performance is determinable (Section 164 paragraphs 3-4 Act CXXXIX of 2013, Section 38 paragraph 3 of Act CLV of 1997, Section 92 paragraph 4 of Act LVII of 1996). Businesses must voluntarily comply with the award of damages or specific performance in the absence of which affected consumers may ask the court to enforce the judgment.<sup>105</sup>

There are no special measures foreseen to secure the coherence of the regime. Coherence is only ensured by, on the one hand, the division of competences between the administrative authorities, qualified entities, and by the subject matter on the other hand. Unfair contract terms are only actionable based on the Civil Code; any infringements of consumer rights connected to financial services are within the competence of the National Bank (including unfair contract terms); anything connected to infringing the rules on fair competition are within the competence of the Competition Authority, infringements in the area of media and electronic communications within the competence of the National Media and Infocommunications Authority (only administrative actions) and anything else is in the competence of the Consumer Protection Authority. Although competences are nicely divided between public authorities and qualified entities (there are also well-working MoUs between them as shown above), and according to the stakeholders there are no problems in practice, a clash of competences is possible given that the list of qualified entities is much broader than public authorities. In addition to these, based on Section 6:105 of the Civil Code, court actions can also be conducted by 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. Court actions are apparently foreseen as a task of consumer protection organizations, as these are empowered to commence court actions by all relevant acts except for Act LVII of 1996. In theory therefore collective actions could be commenced at the same time by more enforcement authorities, however, in practice this is unlikely to happen given the scarcity of these actions.

Injunctions procedures go beyond the ID in two ways. Section 6:105 of the Civil Code attributes a quasi *erga omnes* effect to judgments on unfair terms, the annulment of the unfair terms reaches every contract between a particular business and its clients (except those that have already been performed). In actions other than those regarding unfair terms, the court will determine the circle of consumers that is affected by the judgment (Section 164 paragraphs 3-4 Act CXXXIX of 2013, Section 38 paragraph 3 of Act CLV of 1997, Section 92 paragraph 4 of Act LVII of 1996). Second, the court can directly remedy consumers in both types of collective actions whether through ordering specific performance or compensation.

<sup>105</sup> Explanatory notes on Section 39 Act CLV of 1997 in Új Jogtár.

## 1.4. Cross-cutting issues

### 1.4.1. Cost and benefits of the directives covered by the study

- To what extent is there evidence for benefits for consumers stemming from the protection provided by both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of benefits for consumers from the protection against unfair commercial practices and unfair standard terms in contracts; [*Note: a relevant aspect in this context is whether the costs for consumers in exercising their rights under these directives are limiting these benefits or not.*]

#### Administrative procedures

Costs for consumers in exercising their rights in front of public authorities in enforcing the UCPD does not in general limit their benefits given that administrative procedures are free of charge or trigger minimal costs.

Costs of procedures are regulated by Act XCIII of 1990 on Fees.<sup>106</sup> As a general rule, first instance administrative process costs HUF 3000 [approx. EUR 10]. The cost of the second instance process depends on the value of the claim, but it triggers the minimum cost of HUF 5000 [approx. EUR 16] (Section 29 paragraph 1). By way of an exception, first instance procedures in front of the Consumer Protection Authority are free of charge (Section 33 Paragraph 35) and so is the process in front of the National Bank (Section 33 Paragraph 34). However, the costs of any legal representation are to be covered by a consumer. Cost waivers and legal aid are available under the general rules (explained below).

The first instance process in front of the Competition Authority starts ex officio upon a consumer complaint or notification, and is free of charge for the consumer (Section 62/B paragraph 2 of Act LVII of 1996). However, should the consumer be unsatisfied with the outcome of the process, the second instance process is conducted in front of a court, where the court fees (explained below) are applicable.

#### Court process

The costs of commencing individual court processes for enforcing their rights under the UCPD and the UCTD may deter consumers from taking actions.

There are no specialized court fees or tariffs for consumer disputes; the general rules under Act XCIII of 1990 apply. The fee of a court process is 6% of the value of the claim, however it is a minimum HUF 15 000 [approx. EUR 48] or maximum HUF 1 500 000 [approx. EUR 4 843]. Very small value claims will therefore trigger the minimum amount of HUF 15 000 [approx. EUR 48] that may go (well) beyond the value of the claim.

In addition to these, parties may also engage lawyers, although lawyers' fees are often disproportionality high compared to the value of the dispute.<sup>107</sup> A representative of a consumer protection organization noted that lawyers rarely specialize in consumer law, and those that do may be reluctant to accept small value cases (it is therefore challenging to find the lawyer in the first place).

The general rule is that the costs of a court procedure are born by the losing party in the procedure (Section 78 of Act III of 1952), equally applies in consumer disputes. Consumers in hardship are eligible for cost waivers and for legal aid also under the general rules.

<sup>106</sup> 1990. évi XCIII. törvény az illetékekről.

<sup>107</sup> There are no pre-set tariffs for lawyers' fees, the final amount of which is subject to mutual agreement. Lawyers may charge a lump sum of first consultation fee, charge and hourly rate, charge by hearings or in percentage from the value of the dispute. The recommendation of the Lawyers Association for the hourly rate is between HUF 15 000 to 30 000 [approx. EUR 48 – 97], <http://www.irinkov.hu/hu/koltsegek.html>. First consultation fees may be as high as HUF 40 000 [approx. EUR 130] <http://www.ugyvedipraxis.hu/ugyvedi-munkadij>, fees for disputes for the annulment of contracts is 10% from the value of disputes that includes representations at 2 hearings, any subsequent hearings cost HUF 30 000 [approx. EUR 97]. See for more: <http://www.ugyvedek.net/ugyvedi-dijszabas>

Cost waivers are available in relation to fees, costs of expert witness, lawyers' fees, etc. Relief may be full or partial, however, full waiver is granted exceptionally, only if the consumer would be unable to participate in the court process with a partial waiver (Section 84 Act III of 1952). Legal aid is regulated by Act LXXX of 2003 on Legal Aid.<sup>108</sup> This Act lays down the conditions of obtaining legal aid connected to the conduct of civil procedure and to drafting documents and the provision of legal advice (activities outside the legal proceeding). Legal aid is available, *inter alia*, for: covering lawyers' fees (Section 11); drafting submissions and drafting other documents and for the provision of legal advice related to settling the dispute out of court; advice or drafting documents in an administrative procedure; advice on the most suitable procedure for the enforcement of rights an obtaining redress (including administrative, court and out-of-court procedures) (Section 3 paragraph 1).

#### Alternative Dispute Resolution

In enforcing their rights under the UCTD consumers may also turn to ADR bodies. Consumer Arbitration Boards (Békéltető Testület) are ADR bodies of general competence that handle all disputes except for those arising out of financial services contracts that is in the competence of the Financial Arbitration Board (Penzügyi Békéltető Testület).<sup>109</sup> Turning to these bodies is free of charge, however, given that the cost of the process are born by the losing party in the dispute (Section 33 paragraph 3 of Act CLV of 1997, Section 114 paragraph 4 of Act CXXXIX of 2013) and that consumers may have to support their claim with expert opinion, the cost may go well beyond the value of the claim.<sup>110</sup> This may therefore deter consumers from tuning to ADR bodies.

Related to all forums for enforcement, stakeholders highlighted that apart from fees consumers may also have costs that are non-recoverable such as costs associated with travel and time spent. Another representative also noted that any costs above HUF 4000 – 5000 [approx. EUR 13 – 16] would deter consumers from enforcing their rights.

- To what extent is there evidence for benefits for traders stemming from both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of creating a level playing field for honest traders by providing a legal basis to eliminate or at least constrain dishonest market practices, such as the use of unfair standard terms in contracts or unfair commercial practices, including through the application of the Injunctions Directive;

Although without doubt the rules have improved business practices and contract terms, the rules are not as effective as they could be given the enforcement framework in which they operate, especially the absence of effective enforcement through injunctions as court actions (as explained above).

Although there are incentives in place for inducing compliance with the rules, such as the Consumer Protection Authorities Certification System of Honest Businesses (as explained above), dishonest behaviours are still present, especially among small and medium sized companies. This may be due to business mentality in Hungary that focus on short term gains instead of long term sustainability (as explained above). A representative of businesses noted that consumer friendly or honest businesses are in competitive disadvantage compared to those that does not comply with all the rules. The level playing field is thus distorted by dishonest behaviour.

<sup>108</sup> 2003. évi LXXX. törvény a jogi segítségnyújtásról.

<sup>109</sup> Consumer Arbitration Boards are independent bodies operated by chambers of commerce and industry, i.e. the Budapest Chamber of Commerce and Industry and the 19 regional chambers of commerce and industry, and are regulated by Act CLV of 1997. There is only one Financial Arbitration Board that is attached to the Hungarian National Bank and is regulated by Act CXXXIX of 2013.

<sup>110</sup> Andrea Fejős, p. 463 (see literature review at the end of the document).

- What are costs for traders due to the need to respect the requirements under the directives covered by the study? [Note: Such as costs of research, legal advice and compliance as well as the amount of time necessary to comply with the directives]

Stakeholders could not come up with specific figures. Business representatives generally noted that consumer protection or compliance with many rules is expensive, but with effective management in place, businesses are able to calculate these costs into the final price of products and services and transfer them onto consumers. As long as the rules does not infringe competition they are not against the interest of business (in this regard however, it has been noted that consumer friendly businesses are in competitive disadvantage compared to those that does not comply with all the rules).

- What are the costs involved in the public enforcement of these rules?

Stakeholders noted that obviously the enforcement of consumer protection rules triggers expenses such as the cost of labour and other associated cost for example, per diem, travel expenses, expense of buying items in performing mystery shopping, however these vary and it is difficult to come up with any figures.

The amount spent on public enforcement is determined on yearly basis by the relevant statute on budget (*költségvetési törvény*). Under the general rule in Section 7 of Act CXL of 2004 on general rules of administrative procedures and services,<sup>111</sup> an administrative process in front of a public authority must adhere to the general principle of cost effectiveness, i.e. it must be organized in a way to complete the process as soon as possible burdening the authority and the consumer with minimal expenses. In 2015 the Parliament adopted a package of measures aiming to reduce bureaucracy. Following the general principle that public authorities must be reasonable in spending public money, and the governments' policy of shielding citizens from unnecessary expenses, a number of procedures have been simplified and their costs have been reduced.<sup>112</sup>

- Are there indications that the directives covered by the study are not implemented in your country in a cost-effective manner?

There are no indications that the directives are not implemented in a cost-effective manner in Hungary.

- Could the costs for implementing and enforcing the rules of the directives covered by the study be reduced without lowering the level of protection for consumers? If so, how?

According to a representative of a consumer protection organization, consumers should be freed from paying court fees when enforcing their rights under the UCPD and the UCTD. A representative of businesses noted the administrative burdens should be lowered.

#### 1.4.2. Interplay with EU sector-specific consumer protection legislation

Regarding the interplay of the horizontal EU consumer legislation [mainly UCPD and UCTD] with EU sector-specific consumer protection legislation in the areas of electronic communications, passenger transport, energy and consumer financial services, please:

<sup>111</sup> 2004. évi CXL törvény a közigazgatási hatósági eljárás és szolgáltatás általános szabályairól.

<sup>112</sup> The so called 'bürokráciacsökkentő csomag' that included a set of measures aiming to reform public administration. The key legal basis has been provided by Act CLXXXVI of 2015 on amendments related to the decrease of bureaucracy (2015. évi CLXXXVI. törvény a közigazgatási bürokráciacsökkentéssel összefüggő törvénymódosításokról) that has foreseen amendments to 110 legal acts.



- Analyse the levels of awareness of the requirements of the horizontal EU consumer legislation (mainly UCPD and UCTD) of businesses and consumers and the specific public enforcement bodies in the relevant sectors, as in particular demonstrated by their practical application; [*Key question here is: Are UCPD and UCTD applied in practice by national authorities and courts as a legal basis to combat unfair commercial practices and unfair standard terms in contracts in the regulated sectors?*]

In enforcing the UCPD, according to relevant stakeholders, public authorities are aware of the origins of national rules and sometimes refer to the UCPD. In enforcing the rules of Act XLVII of 2008 courts also make references to the UCPD, however, it is impossible to draw a general conclusion on the frequency of these references.<sup>113</sup>

In enforcing the UCTD courts do apply the UCTD. In fact, the matter of unfair contract terms is, as explained by the Kúria, considered to be a matter of EU Law. The interpretation of these rules is in the hands of the CJEU rather than national courts.<sup>114</sup> Given the recent foreign currency denominated loans crisis in Hungary, the key judgments involving ruling on the fairness of contract terms are about the terms of consumer credit contracts (i.e. regulated sector of financial services). The same approach is however likely in any other sector, given the courts general attitude that unfair terms are a matter of EU law.

Stakeholders noted that consumers and small and medium sized businesses have a general knowledge of the relevant national rules, while more detailed knowledge is typical for large businesses and consumer protection organizations. Apart from the latter, it is unlikely that the other players are aware of the origins of the rules.

- Specify whether in your country the same authority is responsible for the enforcement of the horizontal EU consumer law 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 UCPD/UCTD in the regulated sectors, as specified in the previous bullet?*]

According to Section 10 of Act XLVII of 2008 the enforcement of the UCPD is divided between three public authorities. The Consumer Protection Authority is the primary enforcement authority<sup>115</sup> competent for everything except for commercial practices capable of infringing competition that are in the competence of the Competition Authority and commercial practices connected to financial services that are entrusted to the Hungarian National Bank.

Based on Section 12 of Act XLVII of 2008 the relevant authorities are obliged to cooperate. The cooperation is to facilitate a uniform application of substantive and procedural rules and to avoid collision in competences. To develop their relationship, the authorities have signed a Memorandum of Understanding in 2015.<sup>116</sup> The authorities have now developed a mechanism for the exchange of their decisions and court judgments delivered based on these, and for the exchange of consumer complaints. The authorities also operate an 'alert system' through which they are able to notify each other on the occurrence of unfair commercial practice and the commencement and completion of the administrative process. According to stakeholders, this cooperation works well in practice.

<sup>113</sup> For example, in ruling on its competence the Kúria has referred to the preamble of the UCPD in its decision no. Kfv.III.37.869/2014/5.

<sup>114</sup> Kúria, Decision no. 6/2013 for the unification of civil law (6/2013. számú Polgrái Jogegységi Határozat).

<sup>115</sup> The Consumer Protection Authority takes a coordinating role in cooperation with other authorities, transferring relevant information and representing the interests of county government offices (first instance authorities).

<sup>116</sup> See the Memorandum of Understanding at: [http://www.nfh.hu/sites/default/files/GVH\\_MNB\\_NFH\\_20150206.pdf](http://www.nfh.hu/sites/default/files/GVH_MNB_NFH_20150206.pdf)

Enforcement of the UCTD is vested in courts who apply the regular rules of civil procedure.

- Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning contractual fairness, 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.?*]

According to stakeholders, the general and specific rules work well in practice. Authorities would in the first instance refer to sector specific rules, and if these are not available, to general rules. Sometimes the sector specific rules are applied together with general rules, using general rules as a 'safety net'. For example, one authority considered that a commercial practice of 'hiding' important information in the small print at a place that is likely to stay unnoticed by consumers, is an unfair practice despite formally complying with the specific rules that mandated the information in question. Therefore, although there are overlaps between the rules, a stakeholder highlighted, overlaps are not necessarily disadvantageous for consumers.

The relationship of the general and specific has also been developed by courts in interpreting the relationship between the 1959 Civil Code (now repealed by the new civil code) and the Act CXII of 1996 (now repealed by Act CCXXXVII of 2013). The Supreme Court (now Kúria) has specially acknowledged that in financial services contracts Act CXII of 1996 gets primacy over general rules on fairness in the Civil Code.<sup>117</sup> However, one court has departed from this general rule giving primacy to substance over form. The Metropolitan Court of Appeal has given primacy to the general rules on fairness. According to this court, a contract term will be unfair if contrary to the requirements of good faith causes a significant imbalance in the parties' rights and obligations (the test of fairness under the Civil Code) even if it complies with the rules on mandatory content of credit contracts in the sector specific law.<sup>118</sup> In this judgement therefore the court gave primacy to substantive fairness over formal compliance with the rules.

- What are the benefits of the complementary application of the UCPD and UCTD in the regulated sectors? What are the costs due to the complementary application with the sectoral EU consumer protection legislation?

The benefit of complementary application of the UCTD and the UCPD with sector specific rules stem from the existence of a safety net in form of general clauses. On the one hand, these are flexible, able to embrace new situations whereas sector specific rules are usually more rigid. On the other hand, general clauses can be invoked to establish infringements when businesses formally comply with sector specific rules but amount to an unfair contract term or unfair commercial practice under the general rules. For example, stakeholders mentioned the currently topical advertising of discounted deals that are not addressed by sector specific rules but can be tackled by reference to general clauses. Stakeholders noted that this complementary application, as any other task does carry certain costs which is impossible to quantify.

Stakeholders also considered useful the complementary application of the UCTD and the UCPD. This is because it is often difficult to differentiate between practices and terms, as the same set of facts may result in a contract term and a commercial practice. If for example a contract term is fair, the conclusion of the contract may be a result of an unfair commercial practice.

<sup>117</sup> Kúria (then Supreme Court), decision no. Gfv.IX-30.221/2011 (reported in BH no. 2012.41).

<sup>118</sup> Metropolitan Court of Appeal (Fővárosi Ítéltábla), decision no. 5. Pf. 21 456/2013/5 (reported in BDT no. 2014.3058).

- Assess any need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law.

A stakeholder noted that there may be a need to clarify the interplay of general clauses in the UCTD and UCPD on the one hand and sector specific rules on the other. These cause problems and require special cooperation between the authorities.

In regard to the interplay between the UCTD and the UCPD, a stakeholder noted that it should be clarified which rules should be applied for assessing the fairness of contract terms communicated pre-contractually.

#### 1.4.3. Relevance of consumer law directives for consumer-to-business transactions

- Please analyse the need and potential for the application of the consumer law directives (mainly UCPD and UCTD) to 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).

Stakeholders asserted, the issue is not very relevant in practice. The business does not suffer from information deficit and remain dominant in determining the conditions of sale. However, if the issue does arise, the general rules in the Civil Code provide sufficient protection for businesses.

In addition, given that in practice consumers-sellers could continue to be protected by the UCPD, a formal extension is not necessary.<sup>119</sup>

#### 1.4.4. Specific protection for vulnerable consumers

Please analyse:

- Whether the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined in the consumer law directives and relevant jurisprudence, and as applied by national authorities and courts in your country, continue to be valid and fit for purpose.

Based on the above evidence it can be concluded that the concepts of 'average consumer' and 'vulnerable consumer' are fit for purpose. They are sufficiently wide concepts to be able to respond to emerging practical trends and life situations.

As for the concept of a 'consumer,' stakeholder opinions seem to conflict. On the one hand, representatives of businesses have repeatedly emphasized the need for lower level of intervention in B2B transactions and the unsuitability of consumer protection rules for protecting businesses. On the other hand, there was the opinion that the notion of consumers should be extended onto businesses, that the previous approach in defining consumers should be reinstated. Namely, at the beginning of the process of implementing the EU consumer acquis, Hungary has extended the notion of consumers onto businesses. The Civil Code implementing the UCTD, for example defined a consumer as any person who is a party to a contract concluded for reasons other than economic or professional activities, emphasizing therefore the character of a transaction, as opposed to the character of the parties. Any natural or legal person could have been considered a consumer in a particular transaction.<sup>120</sup>

- To what extent the existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers and whether, based on the

<sup>119</sup> In Vj-122/2014, the Competition Authority has fined pawn shops for misleading statements in advertisements, considering depositors as consumers and applied the UCPD for estimating the fairness of messages.

<sup>120</sup> See Judit Fazekas, Fogyasztóvédelmi jog, p. 75-79 (see literature review at the end of the document).

experiences in your country, specific provisions should be introduced in other directives concerned, in particular the Unfair Contract Terms Directive.

According to stakeholders, the existing rules are good as they are in providing a high level of consumer protection.

In practice, courts have worked with the concept of an average consumer (even though such concept is not included into the UCTD) even before the CJEU's judgement in C-26/13. However, as explained above, the standard of the average consumer has been set quite high. Courts and public authorities expected from average consumers to read and understand their contracts, which is not in line with reality. For this reason, it would be useful to insert the average consumer concept into the UCTD and to define the concept in a more protective manner. One option would be to follow the CJEU's guidance in C-26/13 and subsequent case-law that set relatively low expectations to average consumers, recognizing that average consumers normally do not read their contracts and that some terms are simply not understandable for average consumers. Another option would be to introduce the concept of an average consumer and to create a vulnerable category of consumers for complex contracts such as contracts for financial services.

#### 1.4.5. EU added value

- Overall, would you consider that protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in your country since the implementation of the UCPD and the UCTD in national legislation?

The protection of consumers against unfair commercial practices and unfair contract terms has improved as a result of the UCTD and the UCPD. Stakeholders agreed that Hungarian law alone would not achieve the present level of protection. Representatives of public authorities highlighted that business practices have changed considerably since the implementation of these directives, these changes are difficult to quantify, but the improvements are visible in their practice.

- Overall, would you consider that the information of consumers regarding unit prices has improved since the implementation of the PID in national legislation?

Stakeholders agreed that the information in regard to unit prices has improved since the implementation of the PID.

- Overall, would you consider that the protection of businesses against unfair marketing in your country has improved since the implementation of the MCAD in national legislation?

According to a stakeholder, overall, the protection of businesses has increased. It should be noted however that the national implementation (as explained above) has a much broader scope of application than the MCAD.

- Overall, would you consider that it has become easier for businesses in your country to directly trade cross-border to final consumers located in other EU countries in recent years? Has it become easier for consumers in your country to directly purchase cross-border from traders located in other EU countries?

Stakeholders noted that although the rules have levelled the playing field throughout the EU in terms of the legal framework and expectations; other barriers for cross-border trade remained. For example, language, level of consumer awareness of the rules, different outcomes of enforcement procedures, etc.

As for consumers, stakeholders noted that harmonized rules are capable to raise consumer confidence. However, the success of the rules depends on their enforcement that needs further improvement.

- To what extent are these improvements, if any, due to the mentioned directives?

The implementation of the mentioned directives plays an important role in the improvements, although it is difficult to determine the extent of this influence.

UCPD: Prior to implementing the UCPD, unfair commercial practices have been regulated by Act LVII of 1996. Section 8 paragraph 1 contained a general prohibition of misleading consumers, whereas paragraph 2 contained certain misleading actions and omissions (albeit not as detailed as Act XLVII of 2008 today). The standard of an average consumer has been shaped in practice of the Competition Authority. The more detailed prohibitions, the explicit inclusion of aggressive practices, the black list and a special reference to the standard of the average consumer are improvements compared to the previous regime.<sup>121</sup>

UCTD: The first version of Act IV of 1959 did not contain any provisions on unfair contract terms. Act IV of 1977 on amendments to the Civil Code, inserted Section 209 on standard terms providing for a possibility to annul standard terms that gave one-sided, unjustified advantage to the legal person.<sup>122</sup> Prior to implementing the UCTD the Hungarian legal system was therefore not familiar with the notion of unfair contract terms. Although there is an opinion that despite making the test of fairness clearer and more precise, the implementation of the UCTD in practice brought the same results as the above 1977 test,<sup>123</sup> the situation is not that simple. The black and grey lists of terms are a result of the UCTD. The 1977 Act introduced the possibility of public interest actions or *actio popularis*, these were however not as far reaching as public interest actions in the Civil Code today.<sup>124</sup>

PID: Before implementing the PID, there were no similar rules to the PID in regard to indicating unit prices. This act is therefore certainly beneficial for consumers.

ID: Given the complexity of the implementation of the ID (as explained above), it is difficult to say to what extent it has raised the level of consumer protection.

The improved rules and their enforcement have raised the level domestic consumer protection given that cross-border transactions remain rare.

<sup>121</sup> See on the history: Attila Békés, p. 21-16 (see literature review at the end of the document).

<sup>122</sup> Fazekas, Európai Unió irányelv, p. 664 (see literature review at the end of the document).

<sup>123</sup> Attila Menyhárd, p. 350 (see literature review at the end of the document).

<sup>124</sup> See on the history Fazekas, Fogyasztóvédelmi jog, p. 142-145 (see literature review at the end of the document).

## Annex

## A. Transposition fact sheet

**Table 1: Fact sheet on transposition of directives in Member States' law – HUNGARY**

Directive	Transposition legislation (National law, Article)	Comments	Specific provisions going beyond minimum harmonisation requirements/use of exemptions	Included in national legislation	Comments
<b>Directive 93/13/EEC on unfair terms in consumer contracts</b>	Act V of 2013 on Civil Code (2013. évi V. törvény a Polgári Törvénykönyvről)		'Black list' of terms considered unfair in all circumstances	Yes	<i>Section 6:104 paragraph 1</i>
	Sections 6:102-6:105		'Grey list' of terms which may be considered unfair	Yes	<i>Section 6:104 paragraph 2</i>
			Extensions of the application of Directive to individually negotiated terms	No	
			Extensions of the application of Directive terms on the adequacy of the price and the main subject-matter	No	

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			Unfairness due to lack of transparency	Yes	<i>Section 6:103 paragraph 2</i>	
<b>Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market</b>	Act XLVII of 2008 on the prohibition of unfair business to consumer commercial practices (2008. évi XLVII. Törvény a fogyasztókkal szembeni tisztességtelen kereskedelmi gyakorlat tilalmáról)	<i>Apart from Act XLVII of 2008 the UCPD may have triggered the amendment of other related acts</i>	Provisions regarding financial services going beyond minimum harmonisation requirements	Yes	<i>Section 1 paragraph 4</i>	<i>Sector specific rules are restricted onto more stringent regulation of information provision.</i>
			Provisions regarding immovable going beyond minimum harmonisation requirements	Yes	<i>Section 1 paragraph 4</i>	<i>Sector specific rules are restricted to more stringent regulation of information provision.</i>
			Application of UCPD to B2B transactions	No		



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<b>Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers</b>	Act CLV of 1997 on consumer protection (1997. évi CLV. törvény a fogyasztóvédelemről)  Section 2 subparagraphs m) and n), Section 14 paragraphs 1-3, 5 and 6, Section 56/A paragraph 5		Extension of the application to other sectors (e.g. for immovable property)	Yes		<i>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)</i>
	Decree 4/2009 on detailed rules on the indication of prices and unit prices of products, and fees for services  (4/2009. (I. 30.) NFGM-SZMM együttes rendelet a termékek eladási ára és egységára, továbbá a szolgáltatások díja feltüntetésének részletes szabályairól)		Use of specific regulatory choices/derogations	Yes	Section 14 paragraph 2	<i>The rules on price indication are not applicable for products sold at auction, provided the starting bid is determined in the auction documents.</i>
					Section 3 paragraph 2	<i>The unit price shall not be indicated when the product is:</i> a) <i>under 50g, 50 ml or 5 cm,</i> b) <i>Sold from an automated machine,</i> c) <i>Sold in bulk,</i> d) <i>Is gift wrapped</i> e) <i>A foodstuff sold in a package for preparation of a particular meal.</i>
<b>Directive 2006/114/EC concerning misleading and comparative</b>	Act LVII of 1996 on the prohibition of unfair market conduct and restriction of competition (1996. évi LVII. törvény a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról)				Section 8	<i>Applies to 'business practice' that allows an investigation of a wider range of issues than advertising.</i>

advertising	Section 6/A, Section 8, Section 10, Section 10/A paragraph 1, Section 10/B, Section 10/C, Section 64/B paragraph 2, Section 72/A paragraph 1 subparagraph a), Section 76 paragraph 1 subparagraph j), Section 86 paragraph 1, Section 87/A, Section 88 paragraph 13, Section 88/A paragraph 2.			Section 10/A paragraph 2	Reference to the 'average business' standard.
Directive 2009/22/EC on injunctions for the protection of consumers' interests	Act CLV of 1997 on consumer protection (1997. évi CLV. törvény a fogyasztóvédelemről)  Section 38 paragraphs 6 and 8, Section 39 paragraphs 2 and 3, Section 46 paragraph 2 subparagraph b), Section 47 paragraph 1 subparagraphs a) and b), Section 49 paragraph 1, Section 51 paragraphs 2-4.	<i>This list may not be complete. Apart from these acts, the ID might have been implemented in other acts as well. Many national implementing measures<sup>125</sup> earlier reported are not valid any more.</i>			
	Act CXXXIX of 2013 on Hungarian National Bank (2013. évi CXXXIX. törvény a Magyar Nemzeti Bankról), Section 82 paragraph 1	<i>Note also that injunction procedures are also provided without implementing the ID in Section 6:105 of the Civil Code, Section 92 of Act LVII of 1996, and Section 88 and 164 of Act CXXXIX of 2013.</i>			

<sup>125</sup>See the list at: <http://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32009L0022>

	<p>Act CVII of 2001 on electronic commercial services, and on some issues connected to information society services (2001. évi CVII. törvény az elektronikus kereskedelmi szolgáltatások, valamint az információs társadalommal összefüggő szolgáltatások egyes kérdéseiről)</p> <p>Section 16/C paragraph 2, Section 16/D paragraph 4, Section 16/E paragraph 1 and 2.</p>					
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**Table 2: Fact sheet on Injunctions Directive – HUNGARY<sup>126</sup>**

Issue	Answer	Comments
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)?	- Yes, separate procedures in separate legal acts	<p><i>Injunctions procedures are regulated in various acts separately from the acts implementing the UCPD and the CRD.</i></p> <p><i>Note that the enforcement procedure of unfair contract terms is regulated in the Civil Code together with other provisions implementing the UCTD.</i></p>
Who is entitled to bring an action seeking an injunction?	<ul style="list-style-type: none"> <li>- Designated public bodies</li> <li>- Specified consumer associations</li> <li>- Individual consumers</li> </ul>	<p><i>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).</i></p>
<p>Is the injunction procedure a court or an administrative procedure?</p> <p>If your country legislation foresees both forms of the procedure, please explain in the comments column for which infringements the court or administrative procedure is foreseen</p>	- Both forms of procedure	
<p>Who bears the costs of an injunction procedure?</p> <p>If qualified entities (or some of their categories e.g. consumer organisations are entitled to an exemption of some/all cost related to the procedure, please explain the characteristic of such exemption in the comments column.</p>	<ul style="list-style-type: none"> <li>- The costs are as a rule borne by the losing party</li> <li>-The qualified entities are exempted from costs</li> <li>- Some administrative procedures in front of public authorities are free of charge.</li> </ul>	<p><i>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.</i></p>
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?	- Yes, scope of application extended to cover consumer law in general	<p><i>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).</i></p>

<sup>126</sup> This fact sheet is completed based on the solutions provided in acts/sections that implement the ID. A separate note is made of injunctions procedures that does not implement the ID, only where relevant.

Is protection of business' interests covered by the injunctions procedure? If scope of application extended to the protection of business' interests, please provide details in the comments column regarding type of business' interests covered by the injunctions procedure	- No	<i>Generally, no, but under Section 6:106 of the Civil Code business associations may file a claim for the protection of collective interest of its members against the use of unfair standard terms (note that this provision does not implement the ID).</i>
Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations	- No	
Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID)	- No	
Has your Member State taken specific measures regarding the prior consultation (Article 5 of the Injunctions Directive)?	- No such requirement	
Does the national legislation provide for measures ensuring summary procedure? Please specify main characteristics of the procedure (subject matter/time limits) in the comments column.	- No	
Are there sanctions for non-compliance with the injunction order (Article 2(1) of the Injunctions Directive)? If sanctions in form of penalty or fine foreseen, please specify in the comments column to who exactly should they be paid	- No, no sanction	
Has your Member State taken specific measures regarding the publication of the decision and/or the publication of a corrective statement?	- Yes	<i>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.</i>
Is it possible to claim within the injunction procedure for sanctions for the infringement?	- Yes	<i>It is possible to claim damages and specific performance in collective court actions under Section 38 paragraph 3 and Section 39 paragraph 3 of Act CLV of 1997.</i>
Can an action for the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to other beneficiary be brought within the injunction procedure?	- No	<i>Note that fines imposed based on Act CVIII of 2001 are payable to the account of the Media and Infocommunications Authority (Section 16/D paragraph 3 Act CVIII of 2001).</i>
Can an action for damages to be paid to the qualified entity or the public purse be brought within the injunction procedure?	- No	

Can an action for damages or redress to be paid to the consumers concerned be brought within the injunction procedure?	- Yes	<i>Under Section 38 paragraph 3 and Section 39 paragraph 3 of Act CLV of 1997.</i>
Can individual consumers base their individual claims for damages/remedies on the injunctions order?	- Yes	<i>Under Section 38 paragraph 3 of Act CLV of 1997, if a court process ends with a declaratory judgment, any injured consumer within the group identified by the court may submit a separate claim for damages, only needing to prove the causal link between the infringement and damage and the amount of damages suffered.</i>
Can the qualified entity claim other measures beyond the injunction, e.g. evidence of compliance with the judgment?	- Yes	<i>Qualified entities may claim damages or specific performance under Section 38 paragraph 3 and Section 39 paragraph 3 of Act CLV of 1997.</i>
Are the effects of individual injunctions orders extended to the future infringements and/or same or similar illegal practices (of other traders)?	- No	

## B. Data tables

*Number of B2C disputes*

Please indicate how many B2C disputes have been decided in your country on the basis of consumer law directives covered by this study (UCPD, UCTD, PID) as a proportion of the total number of B2C disputes decided on the basis of other national consumer legislation (based on statistics, or based on estimates by enforcement authorities and other stakeholders, where this is not the available).

**Table 3: B2C disputes decided on the basis of consumer law directives covered by this study in comparison with total B2C disputes decided on the basis of other legislation (most recent year for which data is available)**

Year	Type of data	Total number of B2C disputes (number of cases)	Share of B2C disputes decided on basis of ...					Comments
			UCPD	UCTD	PID	other EU consumer protection legislation (e.g. CRD, Sales Directive, sectoral legislation)	national consumer legislation not based on EU directives	
n.a.								

There is no reliable data available on the total number of B2C disputes or on B2C disputes involving the directives under scrutiny. For example, one authority could only provide data for appellate disputes. Another authority indicated that their records are not broken down by the directives under scrutiny.



*Costs of obtaining redress for a hypothetical case of invoking unfairness of a standard contract term*

- Please estimate the costs, including time, for consumers in obtaining redress when invoking the unfairness, and thereby the non-binding character of standard contract terms in a contract they concluded. Please provide the estimate for the hypothetical example below, focusing on costs (and needed time) of a lower court procedure and the use of ADR or other relevant procedure (if applicable).<sup>127</sup>

**Table 4: Estimate of costs for consumers in obtaining redress when invoking the unfairness of standard contract terms in a contract they concluded (for the hypothetical example provided in the box below)**

Redress mechanism	Estimated court fees (national currency)	Estimated lawyer's fees (national currency)	Other costs, if any (national currency)	Estimated time involved for consumer (hours)	Comments
<b>Lower court procedure</b>	6% from the value of the claim, that is, EUR 300 (around HUF 92 000)	Depending on how the charges are calculated: HUF 200 000 (based on 10 hours of work), lump sum initial consultation fee e.g. HUF 40 000 [approx. EUR 130] EUR 500 or around HUF 155 000, 10% from the value of the claim		5 hours	Note that lawyers' fees are approximate, fees are ultimately subject to mutual agreement
<b>ADR or other relevant procedure</b>	Free of charge in front of a Consumer Arbitration Board	The same rates as above. It is estimated that the work would take 5 hours.		2-3 hours	

**Hypothetical example: Terms which inappropriately exclude/limit consumers' rights to compensation**

*A consumer went on a package holiday with a friend to Kenya for which they paid € 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 €5,000 (€4,000 for the cost of the package and €1,000 for lost time and enjoyment). The tour operator agreed to compensate them €1,000 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*

<sup>127</sup> For the hypothetical example it is assumed that both the provider and the consumer are located in your country.

*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/unfair-contract-terms/index\\_en.htm](http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-contract-terms/index_en.htm)]*

- Please estimate how often court and ADR procedures are used in your country for invoking the unfairness, and thereby the non-binding character of standard contract terms (i.e. the number of cases per year)?

There is no available annual statistics on the number of these particular disputes in front of courts. As mentioned above, the 'first generation' of the disputes involving foreign currency loans rarely invoked the fairness of contract terms. This might have changed later, as the Government's first package of measures aimed at helping these debtors affected 11 000 pending cases,<sup>128</sup> where many or at least some disputes are likely to have involved the matter of the fairness of contract terms. The lawyers' awareness of the possibility to invoke the fairness of contract terms is likely to have gradually changed, and invoking the fairness of contract terms became more frequent. There is no exact data available, unfortunately.

There is no statistical data available on the number of these disputes in front of ADR bodies. The issue is not included into the reports of the Hungarian Chamber of Commerce and Industry summarizing the activities of all 20 Consumer Arbitration Boards,<sup>129</sup> and into the annual reports of Financial Arbitration Boards.<sup>130</sup>

<sup>128</sup> Barnabás Ferencz, p. 38 (see literature review below)

<sup>129</sup> <http://www.mkik.hu/hu/>

<sup>130</sup> <https://www.mnb.hu/bekeltetes/bemutakozas/ev-es-jelentesek>

## C. Interviews conducted and literature reviewed

**Table 5: Interviews conducted for this study**

Organisation	Stakeholder type	Date
<b>National Trade Association (Nemzeti Kereskedelmi Szövetség)</b>	Business association	13.07.2016.
<b>Hungarian Chamber of Trade and Industry (Magyar Kereskedelmi és Iparkamara)</b>	Business association	07.07.2016.
<b>National Consumer Protection Authority (Nemzeti Fogyasztóvédelmi Hatóság)</b>	National consumer enforcement authority	13.07.2016.
<b>National Media and Infocommunications Authority (Nemzeti Média és Hírközlési Hatóság)</b>	National regulatory authority	08.07.2016.
<b>Hungarian National Bank (Magyar Nemzeti Bank)</b>	National regulatory authority	12.07.2016. and in writing
<b>Competition Authority (Gazdasági Versenyhivatal)</b>	National regulatory authority	13.07.2016. and in writing
<b>Ministry of National Development (Nemzeti Fejlesztési Minisztérium)</b>	Ministry	17.08.2016.
<b>Ministry of Justice (Igazságügyi Minisztérium)</b>	Ministry	12.07.2016.
<b>European Consumer Center</b>	European Consumer Centre	13.07.2016
<b>National Consumer Protection Association (Országos Fogyasztóvédelmi Egyesület)</b>	Consumer organisation	13.07.2016.
<b>National Federation of Consumer Protection Associations (Fogyasztóvédelmi Egyesületek Országos Szövetsége)</b>	Consumer organisation	13.07.2016.

**Table 6: Literature reviewed for country report**

Author/Source	Year	Title of publication
Klára Gellén	2016 (forth-coming)	A reklámokkal megcélzott fogyasztó megítélése a Gazdasági Versenyhivatal gyakorlatában (In: Sajtószabadság és médiajog a 21.sz. elején. Vol. 3, Wolters Kluwer, Budapest, 429-446).
Lajos Vékás, Péter Gárdos (eds.)	2014	Commentary on the Civil Code - Kommentár a Polgári Törvénykönyvhöz (Wolters Kluwer, Budapest, E-book - no page numbers available).
József Zavodnjik	2013	Nagykommentár a tisztességtelen kereskedelmi gyakorlatról szóló törvényhez (Wolters Kluwer, Budapest, E-book -no page numbers available)
Ferenc Szilágyi	2014	Implementation of the Consumer Rights Directive: Hungary (Vol. 3 Issue 1 Journal of European Consumer and Market Law)
Andrea Fejős	2008	Consumer Protection in Sales Transactions in Hungary (Vol. Issue 4 Acta Juridica Hungarica)
Judit Fazekas	1995	Judit A fogyasztói szerződések tisztességtelen szerződési feltételeit szabályozó új Európai Unió irányelv és a magyar jog (Vol. 47 Issue 11 Magyar Jog).
József Zavodnjik	2014	Fogyasztók és kísérletek (Vol. 10 Issue 2 Versenytükör)
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## 1. Study to support the Fitness Check of EU Consumer law – Country report IRELAND

### 1.1. Unfair commercial practices and marketing

#### 1.1.1. Effectiveness of the UCPD in establishing a high level of consumer protection

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

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

According to an experienced policymaker located within the responsible Ministry for Consumer Protection, the UCPD comprises detailed rules (the blacklist), a principles-based approach (the general prohibition of unfair commercial practices) and a mix of the two (the prohibitions on misleading and aggressive commercial practices). In the view of the Ministry, this combination makes for an effective instrument. To date, however, most if not all of the enforcement actions taken in Ireland have been under the more specific rules in the blacklist or the prohibition of particular types of misleading practice. While the general prohibitions offers a potentially useful option for addressing new and emerging practices, its utility has yet to be established in practice.

An experienced legal practitioner with a strong academic background in consumer law said that the principle-based approach is to be preferred, being more flexible. The view was expressed that it can be 'more troublesome' to give concrete legal advice. Irish courts are not comfortable giving views on 'principles' issues such as the unfairness test in UCPD. The blacklist adds a degree of clarity.

Irish law has had a long history of deploying principles-based legislative measures to counteract the use of misleading commercial practices with the landmark legislation dating back to the Merchandise Marks Act 1887. This legislation, the subject of a significant number of amendments over the years, dates back to Victorian times when the United Kingdom Parliament had jurisdiction over Ireland, the Irish State being established in 1922. The Merchandise Marks Acts regulated commercial practices through the Criminal Law. In 1978 the legislation was updated by way of the Consumer Information Act 1987. Section 6 makes it a criminal offence to make false or reckless statements for purposes related to a trade, business or profession vis-à-vis services, accommodation or facilities. Section 7 relates to offers to supply goods, services or accommodation which contain a false or misleading indication of price, previous availability, a recommended price or installation charges. Section 8 proscribes the publication of false or misleading advertisements. Infraction of sections 6, 7 and 8 are criminal offences. Other regulatory measures prior to the UCPD involve the Civil law. Implied terms as to goods meeting a description, being of merchantable quality and fit for purpose again date back to Victorian legislation in the form of the Sale of Goods Act 1893. The 1983 legislation was reviewed in the Sale of Goods and Supply of Services Act 1980 (SOGSA). Most noteworthy is the fact that disclaimers and limitation clauses, after 1980 in consumer contracts, are void insofar as they seek to limit the effect of statutory implied terms.

Irish law, coming as it does from the common law tradition, does not contain a mechanism permitting public administrations to impose administrative sanctions: there are no administrative bodies that can impose penalties outside court procedures although this dichotomy is breaking down. Consumer bodies with a statutory basis must act within the confines of their legislative mandate: Office of the Director of Consumer Affairs, replaced by the National Consumer Agency, and merged in 2014 to form the consumer protection arm of the Competition and Consumer Protection Commission.

Self-regulation, in historical terms, has not been a significant part of the consumer protection landscape, while there have been a number of trade associations and they have often been important as lobbyists, the most significant body to promote self-regulation as a consumer dispute resolution body is the Advertising Standards Authority for Ireland (ASAI). The ASAI is an independent and self-regulatory body set up and financed by the advertising industry. ASAI has produced a Code of Standards for Advertising and Marketing Communications in Ireland, currently in a 7th edition. Section 3 sets out a set of general rules that must be observed by advertisers in making marketing communications. The Code is a central part of a complaints procedure and review mechanism. Donnelly and White, in *Consumer Law Rights and Regulation* (i.e. Donnelly and White), comment that, apart from ASAI, the most significant self-regulation trade bodies include the Direct Sellers Association of Ireland, the Irish Parking Association and the Irish Cellular Industry Association. The last mentioned body has an important Code of Practice which establishes standards that mobile phone operators must meet (ICIA Code of Practice 2014).

It is arguable that in recent years a plethora of Irish trade sectors have implemented self-regulation strategies of this kind which take Irish law much further than the minimum requirements that gave effect to the Misleading Advertising Directive - see the Misleading Advertising Regulations 1988 (S.I. No. 134 of 1988).

The Background to the adoption into Irish Law of Directive 2005/29/EC is sketched by Donnelly and White who point out that the Merchandise Marks Acts 1887 to 1931 may have contained criminal penalties for misleading or false trade descriptions, but, as these Acts only applied to goods, the law was 'extremely 'form-based' and hence inflexible', as well as being 'complex, confusing and often reactionary'.

Directive 2005/29 was transposed into Irish law by Part 3 of the Consumer Protection Act 2007, coming into operation on May 1, 2007. The impact of the transposition on earlier statute law was to repeal pre-existing but incompatible legislation such as the Merchandise Marks Acts 1887 to 1931. A number of transitional arrangements relating to price information were made (see section 93(1)). Donnelly and White provide a thorough review of the transposition difficulties such as the boundary between business to consumer transactions and problems of hidden traders and the fact that Ireland is in a minority position in relation to possible extension of the Directive to Consumer to Business transactions. Ireland has expressed a view favouring the extension of UCPD to Consumer to Business Transactions but the European Commission supports the view, as expressed by a majority of Member States, which favours limiting UCPD to Business to Consumer Transactions. The general clause in Article 5 of the Directive 2005/29/EC is transposed into Irish law in Section 41 of the Consumer Protection Act 2007. While Donnelly and White comment that there are some drafting adjustments made in Section 41, there is no suggestion that these changes do anything other than clarify how the general clause in Article 5 is intended to operate.

Most commentators consider UCPD to have been transposed correctly. In contrast to the work of the Irish drafters of the Consumer Protection Act 2007, Part 3, there is widespread criticism of the way in which one Irish High Court judge has approached the interpretation of what constitutes a commercial practice under the Consumer Protection Act 2007. In *McCambridge Ltd. v. Joseph Brennan Bakeries* (2012) a dispute over the use of copycat packaging in relation to similar bread products packaged in similar but not identical packaging was held not to warrant an injunction under the 2007 Act - a common law passing off claim was however successful - because the judge considered that design of packaging not to be a commercial practice. This decision is widely thought to be wrong; several commentators have argued that use of a competitor's packaging should be viewed as a commercial practice by the user.<sup>1</sup>

<sup>1</sup> Donnelly and White, *Consumer Law Rights and Regulation*, para.9.20 and Johnson and Gibson, (2015) 131 LQR 476 at 484.



Finally, in regard to the remedies available under Part 3 of the Consumer Protection Act 2007, persons convicted (first offence) relating to certain misleading commercial practices or aggressive or prohibited commercial practices may be fined up to EUR 4 000 or sentenced to imprisonment for six months or both (summary conviction). On conviction following proceedings upon indictment (first offence) persons may be fined up to EUR 60 000 or imprisoned for up to 18 months. For subsequent convictions higher fines and longer sentences of imprisonment may result. Civil remedies, like criminal sanctions, are largely in the hands of the Competition and Consumer Protection Commission. These consist of prohibition orders, undertakings to be given and meeting compliance notices.

The most striking example of the interplay between UCPD provisions, as transposed (specifically the fixed penalty notice provision in section 85 of the Consumer Protection Act 2007) took place during September 2016. The telecommunications regulator, ComReg, used the fixed penalty notice mechanism against Virgin Media for breaches of the requirement to make contracts available to customers in durable form, as required by the Consumer Rights Directive, as transposed by S.I. No. 484 of 2013. Virgin Media accepted the fixed penalty notice assessment of EUR 255 000 in respect of over 26,000 Virgin Media customers. While UCPD envisages civil remedies, the Section 85 mechanism is a criminal penalty predicated on a finding by an authorised officer that one of a range of criminal offences has been committed.

Consumers may also exercise civil law remedies in contract and consumer legislation, Section 74 of the Consumer Protection Act 2007 affords a damages remedy to a consumer who is aggrieved by an unfair, misleading or aggressive consumer practice.<sup>2</sup>

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

The blacklist is transposed into Irish law in sections 55(1) and 55(3) of the Consumer Protection Act 2007. Donnelly and White<sup>3</sup> point to some subtle differences that make the provisions relating to pyramid selling - a particular problem in Ireland - more effective than literal adherence to the Directive itself would achieve. According to a senior administrator in an enforcement agency, having a blacklist of commercial practices which are *per se* unfair is useful for consumers. Having such a set of rules compliments the principle based approach. The enforcement body actively monitors 'business opportunities' that may in fact be disguised pyramid promotional schemes. Consumers have made contact with us when they suspect that features of a business model that they are considering engaging with displays the hallmarks of a pyramid promotional scheme. The Consumer Protection Act 2007 gives particular prominence to combatting this blacklist practice.

An experienced administrator/policymaker in the relevant Ministry said that the Minister has an open mind about additions to the list. The Minister has not given the matter detailed consideration, but possible additions might include items on car 'clocking' (adjusting vehicle mileage readings downwards) as well as items dealing with digital content practices such as providing false or misleading information about interoperability. The Minister is prepared to consider mechanisms for adding to the UCPD blacklist short of a revision of the Directive.

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

There are significant benefits for consumers in financial services in respect of the derogation effected in Article 3(9) of the Directive. According to Donnelly and White, these derogations allow Member States to increase levels of consumer protection,<sup>4</sup>

<sup>2</sup> See *Untoy v. GEC Capital* (2015, HC).

<sup>3</sup> Consumer Law Rights and Regulation para. 9-63.

<sup>4</sup> Consumer Law Rights and Regulation para. 9-26.

being minimum harmonisation measures. There has been little or no discussion of how the Article 3(9) derogation in respect of immovable property has impacted, although there are examples of enhanced consumer protection in the form of the 'soft law' provisions in the Central Bank Consumer Protection Code of 2012 (e.g. on vulnerable consumers) and in relation to the purchaser of immovable property. Consumer protection for the purchasers of new dwellings is a contentious issue as it appears to be one area where consumer protection has failed Irish consumers. Buyers of homes that have been damaged by using pyrite infected material have found it difficult to get private law remedies, leading the Government to devise and fund a statutory pyrite remediation programme in 2013 as a remedy of last resort.

- 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 what 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?*]

Environmental Protection is a statutory function that has been delegated to the Environmental Protection Agency (the EPA elsewhere in this Report), as a result of the Environmental Protection Agency Act 1992. Under Section 19(1) of the Competition and Consumer Protection Agency Act 2014 the Competition and Consumer Protection Agency (CCPA) has entered into a 'Co-operation Agreement' with the EPA to facilitate co-operation on matters affecting consumers and other issues of synergy. There is nothing in the literature to suggest that the UCPD has been applied in the context of environmental claims. A similar co-operation agreement is in place between the CCPA and the Commission for Energy Regulation (hereafter ComReg). A legal practitioner with a strong academic background in consumer law noted no examples in Ireland where there has been any enforcement action taken regarding misleading environmental claims.

- 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 rigidly?*]

Irish transposing legislation takes the 'average consumer' test as found in Directive 2005/29/EC and transposes it literally. The Irish Act also directs that where the targeted group of consumers forms a defined category (e.g. children interested in sports) the commercial practice is to be assessed by reference to an average consumer in that group rather than consumers generally.

One experienced administrator involved in the judicial enforcement area told the interviewer that what constitutes the 'average consumer' in an Irish context is something that the national courts have had little difficulty in determining. Enforcement actions that have been taken have ultimately relied on the idea of the average, circumspect and reasonably well informed consumer as the benchmark against which the impugned practice is tested. In contrast, a legal practitioner was of the view that different judges have taken differing approaches, and expressed the opinion that the CJEU only offers abstract, not practical guidance.

In contrast, Donnelly and White comment that 'the average consumer benchmark, as mediated by a judge, may not reflect the fact that some consumers may be especially vulnerable'.<sup>5</sup>

<sup>5</sup> See also Reilly, (2005) 12 C.L.P. 125.

- 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 recognised new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted)?*]

There is a degree of dissatisfaction in Ireland with the marginal role afforded to vulnerable consumers. The Law Reform Commission, in a Report on Vulnerable Adults and the Law (2006) LRC 83 - pages 14 to 16, drew attention to the 'mental or physical infirmity, age or credulity' aspects of Article 5.3 and expressed the view that 'a potential difficulty could give arise here in determining the particular characteristics of an 'average member' of a group, but it is hoped that this definition will not reduce the protection available to vulnerable adults'. Some similar comments were made during debates on the Assisted Decision-Making (Capacity) Act 2015.

The Central Bank Consumer Protection Code 2012 sets out a definition of vulnerable consumer that has attracted a broad level of support: A 'vulnerable consumer' is a natural person who:

'(a) has the capacity to make his or her own decisions but who, because of individual circumstances, may require assistance to do so (for example, hearing-impaired or visually impaired persons); and/or

(b) has limited capacity to make his or her own decisions and who requires assistance to do so (for example, persons with intellectual disabilities or mental health problems).'

There is also a definition of a vulnerable consumer in relation to statutory disconnection powers and their use by the energy industry to be found in S.I. No. 463 of 2011. The definition is not directly income based, stressing either high levels of dependency on electricity or gas for medical devices or vulnerability due to age or medical condition, for instance.

- 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?*]

In Ireland one example of self and co-regulation is afforded by the Irish Cellular Industry Association (ICIA) Code of Practice. The four Irish mobile telephone operators have produced a Code of Practice that addresses the provision of all mobile services in the Irish market – voice, text, multi-media, mobile internet access and video telephone services. The Code deals with provision of parental controls for minors, offensive person to person communications, spam, access and illegal content, premium rate services and legislative compliance and enforcement. The Code is like most codes of this kind, weak on enforcement and sanctions. It is an example of a co-regulation code as it involves the interaction of the Data Protection and Communications regulators.

The most effective Code is the ASAI Code in respect of Advertising. According to an enforcement administrator, the best example of a self/co-regulation model that is directly applicable to the UCPD is run by the Advertising Standards Authority of Ireland (ASAI). It is industry funded and has a code of practice broadly in line with the requirements under the UCPD. There is a facility for consumers to make a complaint in relation to infringing advertising. The ASAI investigate such complaints and arrive at a decision.

- 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 this context, an enforcement administrator stated that most of the blacklisted practices investigated relate to pyramid schemes. Enforcement agencies since 2005 have had little experience in investigating most of the 31 blacklisted practices, leading the agencies to doubt how prevalent these practices are.

Because any additions to the list can only be brought about by a revision of the Directive, changing would appear to be quite a burdensome process. A facility should be available to respond to new developments but at this juncture the Department said it would not propose any changes. According to another practitioner, a straightforward mechanism by which the blacklist could be added to should be developed as new practices emerge, although no view as to how this could be done was expressed.

- Are there other measures that could improve the effectiveness of the UCPD in establishing a high level of consumer protection in your country? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

There is a reluctance in Ireland to prosecute and seek financial compensation in damages, with a mediated settlement and enforcement and other notices being a preferred solution. Certainly the levels of fine and the fact that first offenders are treated less harshly than multiple and serial offenders, should be noted. One enforcement administrator praised the UCPD, but suggests higher criminal penalties might be helpful. According to this administrator, the UCPD is a cornerstone of Ireland's consumer protection regime. This has been achieved through a number of channels including enforcement actions, advocacy efforts and an increased general awareness amongst consumers, traders and legal professionals as to rights and obligations that the UCPD has introduced into Irish law. There is however a weakness that relates to the level of fine that may be imposed on a trader for breaches of the UCPD. Currently, following a summary conviction for a breach of the UCPD, a trader can be fined up to EUR 4 000. To some traders such a fine may be considered a 'cost of doing business' and is therefore of little deterrent value. On the other hand the offences are 'strict liability' offences reflecting their regulatory nature and are hybrid offences which can be disposed of summarily or on indictment.

A policymaker in the relevant consumer protection Ministry suggested that additional resources for awareness and enforcement would improve the effectiveness of the UCPD. The same view was expressed by the Irish ECC.

The view expressed by consumer organisations was that while self-regulation as a means of supporting judicial and administrative enforcement mechanisms is important, some self-regulation mechanisms are weak and that sanctions may not be dissuasive. Consumer redress and the various ADR and European Small Claims Procedure initiatives have not been effective in Ireland.<sup>6</sup> There is felt to be an integration deficit for remedies.

<sup>6</sup> See Chapter 10 of Donnelly and White.

### 1.1.2. Effectiveness of the PID in establishing 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;

The Price Indication Directive (98/6/EC) was transposed into Irish law by the European Communities (Requirements to Indicate Product Prices) Regulation 2002 (S.I. No. 639 of 2002). Information about the impact of the Directive, in tangible terms, is difficult to locate and access. Under the Regulations the contravention of the Regulations constituted a criminal offence, to be prosecuted in the Circuit Court by (currently) the Competition and Consumer Protection Commission.

According to an administrator in the judicial enforcement area, the CCPC and its predecessor, the NCA, have actively enforced European Communities (Requirements to Indicate Product Prices) Regulations 2002. The Regulations introduce obligations concerning the display of unit prices which are also defined therein. The agencies have found that there is a very good level of compliance in relation to these regulations and consumers are being effectively informed.

A policymaker in the relevant consumer protection Ministry expressed the opinion that there is a high level of awareness of, and compliance with, the unit selling price provisions of the PID. Consumer awareness of price displays in Ireland is high, possibly because of national pricing legislation dating back to 1958. Whether consumers can distinguish between earlier 1958 national legislation provisions, the PID legislation and UCPD provisions may be a more interesting question.<sup>7</sup>

In the interview with one Business Organisation, that organisation said its members were compliant and that compliance levels are managed through regular inspection and monitoring by the organisation, as well as checks by the statutory agency.

- 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 policymaker in the relevant consumer protection Ministry pointed to the difficulties raised in this question saying the Ministry would be prepared to consider alternative measurement units on a case-by-case basis, but said it was not easy to think of alternatives that could be applied as readily and uniformly as those based on weight or volume. Another practitioner in the judicial enforcement area suggested that the view to be adopted was dependent on certainty of results. Numbers of washloads might not be effective as it is hard to imagine it as a consistent indicator of performance.

- The effects of the regulatory choices/derogations allowed by the Directive and applied by Member States. [*Key aspects to consider are: Is the derogation relevant? Do companies make use of it? Are there consumer complaints because of this? If so, approximately how many per year?*]

Not applicable to Ireland.

<sup>7</sup> Donnelly and White make a reference to the PID transposition order that supports this view: Paragraph 2 - 84, footnote 298.

### 1.1.3. Effectiveness of the MCAD in providing protection for businesses

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

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

A policymaker in the relevant consumer protection Ministry argued that, on the one hand, the replacement of Art. 3 MCAD by, for example, the more comprehensive provisions on misleading commercial practices at Articles 6-7 UCPD merits consideration; however, on the other hand, it appears to be the case, pending a full impact analysis at least, that the misleading practices affecting businesses involve a relatively small number of practices of mass-marketing frauds or scams such as misleading business directories and misleading payment forms. There may be a case for focusing any legislative proposal on the specific practices that are a cause of detriment rather than undertaking a large-scale extension of the scope of the present Directive. There are significant reservations in the Ministry about any legislative proposal that, in respect of goods and services purchased by traders for business purposes, proceeded on the assumption that traders needed the same level of protection as consumers. The case for protections for small businesses in particular against abuses that have been convincingly shown to be a serious source of detriment, should be assessed on its merits. It remains the case that traders are better placed than consumers to defend themselves against misleading communications about goods and services purchased on an ongoing basis for business purposes.

Two court cases about the misleading advertising provisions of the MCAD have raised a question about the scope of these provisions and their transposition in Ireland. In line with the interpretation in the Commission Communication of 2012 (Com (2012) 762 final) the Ministry believes that the Directive's misleading advertising provisions apply to misleading advertising in B2B transactions, while its comparative advertising provisions have both a B2B and a B2C dimension. The Directive defines 'misleading advertising' as 'any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor'. The Irish Regulations (the European Communities (Misleading and Comparative Marketing Communications) Regulations 2007 (S.I. No. 774/2007) state that a marketing communication is misleading if – in any way (including its presentation) it deceives or is likely to deceive in relation to any matter set out in paragraph (4) the trader to whom it is addressed or whom it reaches, and

- (i) by reason of its deceptive nature, it is likely to affect the trader's economic behaviour; or
- (ii) for any reason specified in this paragraph, it injures or is likely to injure a competitor (our emphasis).

The matter at issue accordingly is whether the substitution of 'trader' for 'persons' in the transposition of the definition of 'misleading advertising' in the Irish Regulations has resulted in the incorrect implementation of the Directive. In the view of Cregan J. in *Aldi Stores (Ireland) Ltd. v. Dunnes Stores*, (2009), the definition in the Directive was drafted more broadly than the provision in the Regulations in that it 'could include a consumer'. In an earlier case, *Tesco Ireland Ltd. v. Dunnes Stores*, however, Laffoy J. took a different interpretation and agreed with counsel for the plaintiff that the reference to 'trader' in Regulation 3(2) should be a reference to consumer.

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

As pointed out above, Irish case law has yet to resolve issues of overall effectiveness which is inextricably linked with the scope of MCAD.



- The effects of the minimum harmonisation provisions on misleading advertising; [*Key aspects to consider are: 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)?*]

Common law passing off actions continue to be relied upon rather than MCAD provisions or even UCPD actions, often as a result of legislative uncertainty or judicial error - see *McCambridge v. Joseph Brennan Bakeries* (2012).

An administrator in a relevant Ministry points out that Irish rules in relation to advertising by medical practitioners, dentists and solicitors, administered by professional bodies, appear to function effectively.

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

A senior policymaker in the relevant Ministry indicated that there were a number of cases in which traders in the retail sector have invoked the MCAD in response to claims of misleading comparative advertising about the price and other aspects of goods. Most recently, *Aldi Stores (Ireland) Ltd. v. Dunnes Stores* (2015), gave rise to a lengthy judgement and is the subject of an appeal to the Court of Appeals. The comparative advertising rules in the MCAD do not appear to the Ministry to be in need of substantial overhaul, but the policymaker indicated that any proposals for change would be examined on their merits.

- 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;

There are no other specific comments to be made on this question.

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

A policymaker in the relevant Ministry commented that there is no pattern of public enforcement of the MCAD in Ireland. Regulation 5 of the European Communities (Misleading and Comparative Marketing Communications) Regulations 2007 provides that a trader or other person may, upon giving notice to the trader against whom the order is sought, apply to the Circuit Court or the High Court for an order prohibiting that trader from engaging, or continuing to engage in, a misleading marketing communication or a prohibited comparative marketing communication. The Regulation also contains provisions on the procedure for making such an application and on the conduct of court proceedings. The Ministry does not have any evidence suggesting that the problem of misleading B2B advertising in Ireland is of a scale or severity that requires the establishment of a public enforcement mechanism. The advantage of a public enforcement mechanism for traders, particularly small traders, is clearly that it may relieve them of the cost and other burdens associated with the pursuit of private actions. The corresponding disadvantage is that it would transfer this cost and burden to public authorities in circumstances in which budgetary constraints make it difficult for public authorities to undertake their existing functions, let alone assume additional functions. The extension of public enforcement to misleading B2B advertising also has implications for the well-established principle in some Member States that businesses should look after their own interests in commercial dealings and not look to the State to do it for them. It may also lead to demands for an extension of public enforcement to other aspects of B2B relations. There is insufficient information to give an informed response to the question about the effectiveness of the MCAD in providing an effective enforcement framework for cross-border transactions.



- Are there measures that could improve the effectiveness of the MCAD in providing protection for businesses (see also 1.1.6 below)? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

No comments other than those above. A policymaker in a relevant Ministry indicated that awareness of rules in other jurisdictions, including Member States, was not such as to allow the question about best practice to be answered on an informed basis, suggesting that issues of awareness arising within the Member States, at a policymaking level, may itself be something that needs attention.

#### 1.1.4. Effectiveness of current rules 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 stated above, there has been little or no use made of the general clause, as transposed into Irish law in Section 41 CPA 2007. Section 43 has however been recently applied in a consumer finance transaction - Untoy v. GEC Capital (2015) in relation to misleading commercial practices.

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

No comments other than the above.

- Whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade. [*Do the national differences play a role in a business perspective? Have they caused problems?*]

There are no tangible instances relating to the two derogations other than as stated above.

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;

As stated above, there is little or no evidence or data that allows this to be answered effectively.

- Whether the minimum harmonisation character of provisions on misleading advertising represents a barrier to cross-border trade;

As stated above, there is not sufficient knowledge, data or expertise to provide a specific answer.

- 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 stated above, there is not sufficient knowledge, data or expertise to provide a specific answer.

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

As stated above, there is not sufficient knowledge, data or expertise to provide a specific answer.

#### 1.1.5. Interplay amongst UCPD information requirements according to Article 7(4) with the information requirements in the horizontal consumer law instruments

Regarding the information requirements according to Article 7(4) UCPD ("invitation to purchase") in the advertising stage, please analyse:

- The level of awareness of traders as regards information requirements at the advertising stage, as in particular demonstrated by their practical application; [*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?*]

According to a policymaker in the relevant consumer protection Ministry, the concept of 'invitation to purchase' was new to Irish law and remains one of the more problematical elements of the UCPD. It has been difficult, first, to determine where this concept fits in with the well-established (and reasonably well understood) concepts of 'offer' and 'invitation to treat'. There is a lack of clarity and certainty about the main elements of the definition ('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'.) It is far from clear what information the trader is required to provide in respect of the 'characteristics of the product'. Article 6(1)(b) of the Directive lists 18 separate items in its specification of the 'main characteristics' of the product. Should information about the characteristics (main and non-main) of the product involve even more items? It is far from clear similarly what level and type of information satisfies the criterion that it 'thereby enables the consumer to make a purchase'.

This view was endorsed by another interviewee who said that traditional contract information concepts were helpful approximations but that the invitation to purchase has become much more prevalent with the advent of the digital age and the huge increase in online purchasing. Art 7(4) has introduced information requirements specifically for invitations to purchase. There may be a level of uncertainty as to whether the information required to be provided to consumers is that information that relates solely to the transaction or whether it should be interpreted broadly so as to capture those factors which although not concerned directly with the transaction might influence the consumer's decision to transact.

Litigation is seeking to explore these enforcement issues in the Irish courts.

- 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?

A policymaker in the relevant consumer Ministry expressed sympathy for the plight of traders on this issue, saying that while the individual directives may have some

rationale or justification, there is little doubt but that many traders view them as an excessively complex and confusing set of overlapping rules.

There is a need, many of the interviewees said, for a review of the multiplicity of information requirements in force under different pieces of European Union legislation (UCPD, Price Indications Directive, Services Directive, e-Commerce Directive, Consumer Rights Directive, etc.). Such a review should have regard to the commitment in the EU Small Business Act to reduce and simplify the regulatory burden on SMEs.

#### 1.1.6. Relevance for business-to-business transactions

Regarding the area of unfair commercial practices/marketing, please analyse:

- 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 cross-border trade;

In Irish law there is a wider definition of 'consumer' that is applicable in respect of the jurisdiction of the Financial Services Ombudsman to investigate consumer complaints. The same definition of a 'consumer' is operative in respect of the application of the Central Bank Consumer Protection Code on respect of the application of the Code to investors (i.e. persons who finance investments by commercial borrowing). A consumer is:

- (a) a person or group of persons, but not an incorporated body, with an annual turnover in excess of EUR 3 million in the previous financial year; or
- (b) incorporated bodies having an annual turnover of EUR 3 million in the previous financial year.

Scholarly writing has not raised the question whether the UCPD should be extended or revised so as to apply to B2B transactions, much less the cross-border implications of such changes.

- 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;

There are no studies in Ireland that address this and material is absent from academic sources. There is however a provisional comment from the relevant Ministry that suggests a willingness to review the alignment issue:

'Aligning the legal regimes for B2B and B2C transactions in the area of commercial practices, the provisions on misleading advertising in the Regulations that give effect to the MCAD in Ireland are, subject to the necessary modifications, modelled on Article 6 of the UCPD, rather than on Article 3 of the MCAD, particularly in respect of the list of product or trader attributes that can be the subject of misleading advertising. This is an alignment that merits consideration in our view.'

- 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 also cover unfair commercial practices during and after the transaction;

There are no studies in Ireland that address this and material is absent from academic sources. Ministry comments suggest that this issue merits consideration. One business organisation, reflecting on the Groceries Order (S.I. No. 35 of 2016) (which introduces a dispute resolution mechanism for B2B disputes over groceries) warned about the unintended consequences of legislating for narrow disputes when loose definitions may

well have the effect of facilitating litigation amongst retailers who were not intended to be caught. S.I. No. 35 of 2016 was intended to deal with grocery supply contracts but some disputes involving large pharmacy outlets and supermarkets may now be engaged by the S.I. because pharmacies and supermarkets often sell groceries.

- Whether there is a need to have a black-list of practices in the business-to-business marketing area;

A policymaker in the relevant Ministry said that any Irish view on this would depend in large part on the content of any such blacklist. Ireland would have no objection *per se* to the inclusion of blacklist provisions in a revised MCAD but in view of the fact that misleading B2B practices of a serious nature appear to be relatively few in number, any such blacklist should reflect this fact. The interviewee indicated that a MCAD blacklist that came close to the thirty one items on the UCPD blacklist would be considered sceptically.

- What should be the enforcement cooperation mechanism in the business-to-business marketing area;

The view of a senior policymaker in the relevant Ministry is that Ireland has reserved its position on any such issue.

- Whether there is a need to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive;

The view of a senior policymaker in the relevant Ministry was that the Regulations that give effect to the MCAD in Ireland provide that in making an order on foot of an application under the Regulations, the Court may impose terms or conditions that it considers appropriate. The interviewee said there was willingness to consider a right of action in B2B cases similar to that which applies in B2C cases under section 74 of the Consumer Protection Act 2007.

- Whether there is a need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive.

A senior policymaker in the relevant Ministry said that Ireland would consider proposals for such adaptations 'on their merits'.

#### 1.1.7. Relevance of contractual consequences of unfair commercial practices

Please analyse whether there are in your country:

- 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;

Section 74 of CPA 2007 provides that consumers are to have a right of action for damages in respect of unfair, misleading or aggressive practices that fall outside meeting a commitment in a code of practice or the operation of a pyramid scheme. There is no case law. Section 74 is examined in Donnelly and White, para. 9-81. While there are public policy principles at common law, it is difficult to see these as being applicable. Even a breach of the Central Bank Consumer Code 2012 is not actionable in damages, nor does non-compliance make transactions unenforceable by the financial services provider (e.g. a bank or other lender).

- Any case law (enforcement decisions, court rulings) providing for such consequences;

Yes. One case in which an insurance product buyer recovered damages: *Untoy v. GEC Capital* (2015, HC).

- Whether there is, based on past experience in your country, a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

The range of enforcement mechanisms that are extra contractual suggests that Ireland does not wish to add a range of contractual options that are remedies vis-à-vis UCPD non-compliance. Principles such as *caveat emptor* are still strong in consumer sales law and case law in contract and tort, as well as some contract and tort law practices are addressed by statutory implied terms, e.g. a limitation clause seeking to limit or exclude liability for a non-fraudulent, pre-contractual misrepresentation must pass a statutory fair and reasonable test (SOGSA 1980, section 46).

## 1.2. Contract conclusion and performance

### 1.2.1. Effectiveness of the current rules in establishing 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;

Before considering this question it is necessary to point out that in traditional Irish consumer sales law the starting point is the principle of *caveat emptor* – Sale of Goods and Supply of Services Act 1980. The implied terms as to goods meeting their description, merchantability and fitness for purpose are exceptions. The main effect of the 1980 Act is to make a trader's contractual attempts to exclude or limit liability void. In the case of contracts for services there are some statutory implied terms. (e.g. service provider has the skill necessary to render the service) but in a B2C service contract these terms can be excluded if fair and reasonable: 1980 Act, section 39 and 40. Thus, the philosophy behind the UCTD, rooted as it is in German law, is quite difficult to accommodate within Irish common law and statute law framework. There are a number of interpretative decisions from the Irish Courts that support a good faith perspective e.g. *Carroll v. An Post National Lottery* (1996) when terms are onerous or unusual but Irish law does not confine this to consumer contracts – as a limited doctrine it can also operate in B2B transactions – *James Elliott Construction v. Irish Asphalt* (2011) (High Court decision). The law in Ireland on unconscionable bargains is both centuries old and rich in terms of legal tradition but it is not applied in sales law transactions. Unconscionable bargain protection is confined to property transactions in the main, when one party is weak and at a disadvantage to the other party, the contract terms and surrounding circumstances indicate unfairness and the weaker party has acted without independent advice. When the Unfair Contract Terms Directive was initially transposed by Statutory Instrument (S.I. No. 26 of 1995), Donnelly and White comment on the lack of imagination displayed by successive Irish legislators to use the potential inherent in UCTD:

'Like most early consumer protection directives, Directive 93/13 was transposed into Irish law with the most minimal domestic engagement and the UTCC Regulations do not expand the scale of consumer protection beyond that of Directive 93/13. The UTCC regulations have not been revisited in any depth since their original transposition although the civil enforcement remedies available have been expanded. There has also been minimal judicial engagement with the UTCC Regulations, with only one reported judgement to date (2014).'

Of the cases mentioned by Donnelly and White in *Consumer Law Rights and Regulation*, the reported case concerned an arbitration clause and the issue was whether arbitration was the consumer's sole remedy. Other cases have been engaged with the question whether the goods/services were provided to a consumer in the strict sense (e.g. loans for property investments). The most important case involved standard terms in a building contract – Re Application under Article 8(1) (December 5, 2001), discussed by Dorgan [2002] Law Society Gazette 12 to 17. This case is a 'one off' in the sense that court-sanctioned blacklisting of terms has not subsequently featured in Irish litigation.

The principle-based approach has been considered by the Irish Law Reform Commission in its 2011 Consultation Paper on Reform of Irish Insurance Law. Attention was drawn to the 'core' provision and uncertainty over its scope and application.

- 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 your MS? Does this work in practice or are there problems?*]

Transposition of the indicative list has been literal in form. There have been no reported cases in which the list has been discussed by an Irish Court. However, in the case of the Irish regulatory body that is responsible for judicial enforcement, the impact of the general clause and indicative list, when combined, has been said to be complementary. Relying solely on the indicative list, it was said, would not be enough because, during negotiations, traders have pointed to the absence of the practice in question on the indicative list. The enforcement agency states that the indicative list can operate as a reference point against which terms can be compared; the grey list carries a strong persuasive effect.

- 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; [*Note: If a black/grey list exists, key aspects to consider are: How does the list work in practice? Does it make a difference to have such a list?*]

Not applicable to Ireland.

- 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: Have the effects of court decisions establishing the unfairness of an unfair term been extended to all contracts of the trader concerned or to the contracts of any other trader containing such a term? If so, how does this work in practice? What are the impacts on businesses? If there are no such effects of court decisions on unfair terms: what are the effects of this situation?*]

The only Irish written decision is a record of an extempore decision handed down by the Irish High Court on December 5, 2002 and contained in an article by Patrick Dorgan in [2002] Law Society Gazette 12. Under Regulation 8(1) of S.I. No. 27 of 1995 the Enforcement Agency (now CCPC):

'may apply to the High Court for, and may, at the discretion of the Court, be granted, an order prohibiting the use or, as may be appropriate, the continued use of any term in contracts concluded by sellers or suppliers adjudged by the court to be an unfair term' (See now S.I. No. 160 of 2013.)



It should be noted that the application is an administrative matter: a consumer cannot use it:

- it must be made by the Statutory Regulator;
- the application need not be based upon a specific dispute;
- the order does not address any specific contract or contractual relationship;
- the order is given at the discretion of the court;
- the order sought, if granted, is prohibitory of terms used by sellers or suppliers;
- the order speaks to future use – ‘continued use’.

The order actually given by the High Court judge applied to 15 terms and variants thereon: the order prohibited ‘any term that is intended to, or does in fact, have like effect’. Amongst these 15 clauses were:

- entire agreement clauses;
- clauses excluding liability for death or personal injury;
- penalty clauses;
- unilateral termination clause for the supplier;
- one way extension of fixed term contracts.

See the list at [2002] Law Society Gazette, page 16.

Therefore, in response to this question, it is evident that Irish law does enable the regulatory body to obtain court orders that may regulate contractual terms across a sector with appropriate safeguards being in place via a court hearing and the exercise of a judicial discretion.

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

The Directive has been literally transposed. Little or no Irish jurisprudence has been produced to date. As the jurisprudence of the ECJ/CJEU reveals, there are drafting ambiguities in the Directive that must be addressed by the courts within the EU. The view of the current enforcement regulator, in summing up Irish practical experience over the last decade is to explain that the practice is not to go to court but to open a dialogue with the trader concerned and discuss the fairness or otherwise of a particular term. Rather than using UCT Regulations there is use made of an undertakings procedure under the Consumer Protection Act 2007 (i.e. UCPD) that has been more successful.

- 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. [*Note: Question only relevant for MS that have put in place extensions of application of UCTD*]

Not applicable to Ireland.

- 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?*]

Irish law transposes Article 6(1) of Directive 93/13 but no case law exists on this vis-à-vis whether the contract will continue in existence.



There are no Irish cases on the interpretation of the 'core terms' exemption. Academic commentary on 'core terms' is critical of the lack of clarity on this point and the failure of the Irish Government to revise Irish law in the light of CJEU decisions such as the *Kasler* case C-26/13. See Donnelly and White.<sup>8</sup>

The National Consumer Agency, predecessor of the Competition and Consumer Protection Commission (CCPC) set out a number of important points of practice in its Unfair Contract Terms Guidance Document, Identifying and Avoiding the Use of Unfair Terms in Consumer Contracts (June 2014).

Enforcing the Directive involves a network of mechanisms. Under the 1995 Regulations the powers were vested in the Office of the Director of Consumer Affairs although in 2000 the regulations were amended to cover other consumer bodies that met a statutory test.

Co-operation agreements between the successor body (NCA and now the CCPC) and the Central Bank give the Central Bank and CCPC concurrent functions in relation to enforcement powers in relation to consumer financial services. In the energy sector the Commission for Energy Regulation has a consumer protection division which investigates consumer complaints over matters such as misleading advertising.

Enforcement preferences, as stated above, revolve around reaching agreements to amend unfair contract terms under formal agreements facilitated by the Consumer Protection Act 2007, section 73. In this way both the UCTD and the UCPD provide complimentary enforcement mechanisms that avoid the need for (expensive) litigation.

The energy regulatory body stated the sanctions are effective.

In relation to telecommunications, the pattern set in Ireland (which relates to enforcement by negotiation and settlement) has recently been added to the use of fixed penalty notice provisions. The Regulator, ComReg has used UCPD powers in a Press Release. It was said:

'Virgin Media Ireland Limited ('Virgin Media') is to pay the Commission for Communications Regulation (ComReg) a EUR 255 000 penalty after an investigation found that Virgin failed to provide 26,046 of its customers with a contract in a durable form. This is in contravention of the Consumer Information Regulations 2013.

ComReg has imposed this penalty in the form of Fixed Payment Notices ('FPNs') under Section 85 of the Consumer Protection Act 2007. Virgin Media has accepted that it breached the Consumer Information Regulations 2013 and has committed to pay the penalty in full.

ComReg investigated Virgin Media as a result of complaints from Virgin customers who said they did not receive contracts from the company in durable form. This made it difficult for the affected Virgin Media customers to recognise and see exactly what they were being charged for by the company.

This is the first time that ComReg has imposed FPNs. ComReg has the power to issue FPNs under the Consumer Protection Act 2007 for breaches of the Consumer Information Regulations 2013. The Consumer Information Regulations 2013 give consumers certain protections where contracts are concluded online, by telesales etc. or otherwise by means of what is known as a 'distance contract'.

<sup>8</sup> Consumer Law Rights and Regulation para 5-88.

- In a forward looking perspective: Are there other measures that could improve the effectiveness of the UCTD in establishing a high level of consumer protection in your country? Would a graphical presentation model improve the readability and comprehension by consumers of the T&Cs? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

According to consumer protection organisations and advocates, while the UCTD has been effective in providing guidelines and reference points in assessing unfair terms, it has a need for expanded application. Individual consumers can rely on the Directive in court cases but in practice, costs of proceedings are prohibitive for most cases other than small claims jurisdiction. No statistics exist on UCTD cases here. Academic commentary supports recent proposals to build upon a provision in the Arbitration Act 2010 that designates a contract that requires a trader and consumer in an arbitration to pay their own costs an unfair term under the Regulations.

Ireland has established a policy whereby when these provisions are reviewed in Parliament, a court should have to consider the unfairness of a term regardless of whether this has been pleaded in the case. It has also been recommended to apply the UCTD to negotiated terms. The biggest improvement the Ministry had advanced is that it should be expressly provided that terms should be legible, clearly presented and readily accessible. 'Core' terms should only be excluded from assessment if prominent and transparent, that is, brought to the attention of the consumer in such a way as to lead to the conclusion that the consumer be aware of the term.

#### 1.2.2. Effectiveness of the current rules 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 disparities have an impact on cross-border trade; [*Key aspects to consider are: Do national differences in the application/implementation of the Directive play a role for businesses? Have these differences led to changes in their business strategy? Have these differences caused problems?*]

There is no evidence that vis-à-vis the United Kingdom the general fairness clause has any impact on cross border trade. From experience with consumers, geoblocking practices and currency factors are more important differentials. Retail Ireland has recently highlighted that online sales effected via Amazon are 30% higher than a year ago and that the fall in the value of sterling following the UK referendum on leaving the European Union on 23 June 2016 has exacerbated a trend under which some 70% of online sales are effected by Irish buyers with companies located outside the jurisdiction of Ireland.<sup>9</sup>

- 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;

Donnelly and White have this to say about the impact that Irish minimal transposition may have in this context:

'Ireland was unusual among EU Member States in choosing to transpose Directive 93/13 without any expansion of the scope of protection afforded to consumers in respect of unfair terms. As a result, Irish consumers are less well protected in respect of unfair terms than consumers in most other Member States. While a lax regime is clearly problematical for Irish consumers, it may also increasingly serve as an impediment to Irish

<sup>9</sup> Irish Times November 29, 2016 "Online Shoppers migrate to UK Websites",

businesses seeking to compete in the cross border market. As discussed above, Directive 2011/83 now requires Commission publication, inter alia, on a designated website of measures taken by Member States that extend consumer protection beyond the terms of Directive 93/13. While it is not clear how many consumers will actually use such a website, the publication of this information will undoubtedly have a trickle-down effect through other forms of media. Thus, a reputation for limited consumer protection from unfair terms could render Irish businesses less competitive. For this reason, there is a strong case for a thoroughgoing review of Irish consumer protection in respect of unfair terms. [...]

Secondly, the 'core terms' exemption, as it stands, leaves the most significant aspects of consumer contracts outside of the scope of consumer protection, very often without the consumer's awareness that a particular term is part of the core terms of the contract [...] if the 'core terms' exemption is to be maintained, the issue of 'hidden' core terms must be addressed more effectively than is the case at present. [...]

Finally, the lack of formal legal standing for the indicative list needs to be addressed. There is a risk that designating terms as automatically unfair will have an undesirable impact on the market; therefore, while there may be a case for some blacklisting, any moves in this direction should be approached with care. There is a stronger case for introducing a formal presumption of unfairness where a term is in accordance with the terms mentioned in the list. As well as introducing greater clarity in respect of judicial assessment, this would also enhance the enforcement capabilities of authorised bodies and provide consumers with a more definitive indication of what is, and is not, legally acceptable.<sup>10</sup>

- 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.

Consumer awareness that some jurisdictions might, in a formal sense, provide a degree of consumer protection that only meets a minimal standard in terms of not applying to individually negotiated terms, or core terms examination (as in Ireland) may provide a barrier to cross-border trade. Arguably this should be a matter for each jurisdiction to address any substantive law shortcomings. Also see quotation from Donnelly and White in connection with the last question.

### 1.2.3. Relevance for business-to-business transactions

Regarding the area of contractual fairness and in relation to the Unfair Contract Terms Directive, please analyse:

- Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;

This is little demonstrable enthusiasm for the expansion of UCTD provisions into B2B contracts. While some contractual disputes in respect of insurance and other financial services contracts between SMEs with a turnover of EUR 3 million and financial services companies come under the jurisdiction of the Central Bank and Financial Services Ombudsman, this has not permeated into a general demand for expansion. Ireland, unlike many other Member States, does not have any general provisions to regulate unfair B2B terms. The relevant Ministry sees any such development as a fundamental shift in the way in which commercial transactions are regulated in Ireland. There has been one recent development in respect of the supply of food and

<sup>10</sup> Consumer Law Rights and Regulation paras, 5-152 to 5-155.

drink to supermarkets in the form of grocery goods contracts, with term transparency and unfair term implications but this is exceptional as a piece of Irish legislation and academic commentators think that suppliers will be slow to use S.I. No. 35 of 2016 (a UCPD piece of legislation in the sense that the legislative basis rests on a permissive provision in the 2007 legislation). The negative consequences for freedom of contract outweigh any benefits that may arise. On the other hand, one of the business organisations in the course of an interview said that the CCPC and the previous entity, the NCA, was reluctant to get involved in examining B2B disputes even where the complainant is a micro business or SME and the 'offender' is a multinational. Few SMEs have the scale or resources to initiate private proceedings and in the absence of CCPC action the matter is left unresolved, even though consumers suffer when the larger entity imposes unfair terms on the micro business or SME. Another business organisation tentatively suggested that enforcement and costs are of critical importance.

- 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;

Irish law in general does not require good faith in negotiation. Good faith during performance may be inferred so a statutory good faith requirement would be opposed by Irish commercial entities if it were to be a mandatory rule of law. Costs of litigation and commercial uncertainty that would result are not acceptable consequences of Irish business.

- 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;

See answers to this question above in this section.

- 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;

See answers to this question above in this section.

- Whether there is a need for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive;

See answers to this question above in this section.

- Whether an extension of the Unfair Contract Terms Directive to B2B transactions can bring benefits for cross-border trade;

See answers to this question above in this section.

- Whether the consequences of such an extension would have an effect on innovation by or market opportunities for SME providers/suppliers;

See answers to this question above in this section.

- Whether the benefits of extending the scope to business-to-business transactions would exceed the negative consequences of such an extension.

See answers to this question above in this section.

### 1.3. Injunctions

#### 1.3.1. Effectiveness of the current rules in establishing a high level of consumer protection

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

- To what extent is the use of the injunction procedure in your country contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment?

In relation to the UCTD the statutory enforcement agency, the Office of the Director of Consumer Affairs (later the National Consumer Agency, now the Competition and Consumer Protection Commission (CCPC) was the only body that could seek statutory enforcement remedies. In 2000 the Irish regulations on UCTD were amended to allow any other 'consumer organisation' to constitute an 'authorised body' for enforcement purposes (S.I. No. 307 of 2000). In 2013 there were changes made by S.I. No. 160 of 2013 which extended the status of an authorised body to the Central Bank for the purposes of financial services enforcement. In 2011 the Central Bank and the National Consumer Agency (predecessor to the CCPC) signed a cooperation agreement under Section 21 of the Consumer Protection Act 2007. Where there are concurrent functions this cooperation agreement procedure allows one body (in this instance the (now) CCPC) to forbear from exercising its enforcement functions under the UCTD enforcement regulations in respect of a financial service provided by a regulated financial service provider unless the CCPC and the Bank agree 'within a reasonable timeframe that the Bank has chosen not to exercise such functions': See Donnelly and White, paragraph 5 – 141.

It follows that the three enforcement bodies in Ireland (the CCPC, any consumer organisation and the Central Bank) enjoy enforcement powers under UCTD. These authorised bodies can apply to the Circuit Court or High Court for a declaration that any term drawn up for use between consumers and sellers, and that the Court has a discretion to grant an order prohibiting the use of such a term or a term having similar effect. This provision is not much used.<sup>11</sup> Enforcement provisions under the Consumer Protection Act 2007, transposing the UCPD include prohibition orders and compliance notices under Sections 71 and 75 of the 2007 Act (available as civil reliefs) from the Circuit Court or High Court. Thus, under the UCTD and UCPD, before the ID was transposed, injunction type reliefs were in place. In practice, there is no real use of the ID in Ireland at all. The relevant Ministry in relation to contracts involving the retail sector, reported that some traders in the retail sector had sought injunctions and other court orders under the comparative advertising parts of the Directive on Misleading and Comparative Advertising.

- What measures in your national legislation on injunction procedure are considered to be particularly effective, if any: measures regarding the cost of the procedure, the 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?

As the ID replicates existing provisions at national level, there is no data on this. Donnelly and White state that the ID 'remains an alternative tool for enforcement of consumer law'. But the statutory enforcement agency itself in the interview indicated that it has never had to invoke the procedures set out in the current transposing measure. An experienced practitioner with a strong academic background in consumer law credited the drafters of the 2007 Consumer Protection legislation with the lack of visibility that the ID has in Ireland. The 2007 legislation has a comprehensive remedies system in terms of mandatory orders being available and the view was

<sup>11</sup> See Dorgan [2002] Law Society Gazette 12 for one instance

expressed that few practitioners knew of S.I. No. 555/2010 as a separate remedy. Lack of use was attributed to the expense of obtaining an injunction, particularly where multiple jurisdictions were concerned. Businesses rather than consumers express more interest in the ID when rivals 'tarnish' a brand (e.g. by web advertising practices that are likely to confuse consumers).

- Has your country extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunction Directive? If yes, what are the additional consumer rights covered?

Yes. Directive 2011/83/EC has been added.

- Analysis of the obstacles to the effective use of the injunction procedure, in particular by analysing which progress in removing obstacles has been made and/or new difficulties that have emerged in your country since 2012.

Donnelly and White address the effectiveness issue but do not do so by reference to Irish materials. They refer to Commission Report COM (2012) 635 final. In the interviews two interviewees indicated that the mutual assistance/cooperation provisions under which the enforcement agencies communicated with each other over cross border complaints/investigations was more cost effective than seeking injunctions on a cross-border basis. As the enforcement agencies in Ireland do not use the ID there cannot be any data on obstacles to use in Ireland. However, the relevant Ministry, without any empirical evidence to support this view, suggested the main obstacle is likely to be the cost of legal proceedings.

- In a forward looking perspective: Should the coverage of the Injunctions Directive be extended (by including additional legislation into Annex I to the Directive)? If so, which EU legislation should be included? Are there other measures that could improve the effectiveness of the ID in establishing a high level of consumer protection? Should the scope of the Injunctions Directive be extended to the protection of collective business' interests? Are there best practices in your country that could be relevant for other countries and considered as model for the injunction procedure at EU level?

There is not much point in extending the scope of a Directive that seems to be little used other than on a mutual cooperation level. In an interview the relevant Ministry said that there would be no support for proposals to extend protection to collective business interests.

### 1.3.2. 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:

- How effective is the injunction procedure in addressing infringements originating in another EU country?

It has never been used in Ireland.

- How effective is it to address infringements originating in another EU country that qualified entities in your country are enabled to seek injunctions in the other Member State (Article 4 of the Injunctions Directive)?

It has never been used in Ireland.



- In a forward looking perspective: Are there non-legislative or/and legislative measures that could improve the effectiveness of the injunction procedure in addressing infringements originating in another EU country? Are there best practices in your country that could be relevant for other EU countries and could be considered as a model for the injunction procedure at EU level?

The ID procedure has never been used in Ireland so there are no national measures that inform the issue of improvements that may be made to the injunction procedure.

### 1.3.3. Interplay between the Injunctions Directive and other enforcement instruments of consumer law

Please analyse:

- Is the injunction procedure as designed by the Injunctions Directive regulated separately in your country (in a separate legal act or as a separate procedure regulated within the same legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (UCPD, UCTD and by the Consumer Rights Directive)?

As set out above, the ID was transposed separately by way of a distinct statutory instrument, S.I. No. 449 of 2001 transposed Directive 98/27/EC and S.I. No. 555 of 2010 transposed the Consolidated Directive, Directive 2009/22/EC.

- If these procedures are regulated separately: What are the main differences between them? How is the coherence between these procedures ensured? If these procedures are regulated in a single legal act (possibly as a single procedure): In what way do these procedures (or this procedure) go beyond measures foreseen by the Injunctions Directive?

The separate enforcement mechanisms under, on the one hand, the UCTD and the UCPD transposition measures, and the ID transposing measures, are broadly similar in a formal and structural sense. Both involve enforcement by seeking Court orders by way of Circuit Court applications (although the High Court may also take injunction in regard to the UCTD and UCPD provisions). The coherence that exists as between the application of these two broadly parallel streams of regulation can be said to be cultural in a sense. The traditional approach to enforcement since 1978 has been to seek to mediate and educate traders into following best practice guidelines and ensure that traders agree to follow compliance agreements secured by the enforcement body. Instances of egregious conduct are normally addressed via criminal prosecutions by the enforcement body.

## 1.4. Cross-cutting issues

### 1.4.1. Cost and benefits of the directives covered by the study

- To what extent is there evidence for benefits for consumers stemming from the protection provided by both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of benefits for consumers from the protection against unfair commercial practices and unfair standard terms in contracts; [*Note: a relevant aspect in this context is whether the costs for consumers in exercising their rights under these directives are limiting these benefits or not.*]

In terms of the views of consumer rights and enforcement stakeholders the UCTD was seen as a 'ground breaking' measure that strikes a balance between a consumer having to negotiate contract terms and being bound by standard terms over which the consumer would have no chance of negotiating improvements. One enforcement professional said that the possibility of a consumer reopening a contract improves consumer confidence but it also forces the trader to think beyond the immediate



transaction. The same enforcement professional said that the same can be said of the UCPD, requiring the trader to abandon a *caveat emptor* philosophy and exercise professional diligence standards in relation to consumers. The academic opinion of Donnelly and White explore the economic dimensions of providing effective consumer redress. At paragraph 10 – 09 of *Consumer Rights and Regulation* they write:

'Effective consumer redress plays a crucial role in growing the consumer market and making this market operate more efficiently. Effective consumer redress contributes to heightened consumer confidence and improved market discipline. If consumers believe they have effective redress they will be more prepared to enter the market in question, thus facilitating growth in the market and more effective competition.'

- To what extent is there evidence for benefits for traders stemming from both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of creating a level playing field for honest traders by providing a legal basis to eliminate or at least constrain dishonest market practices, such as the use of unfair standard terms in contracts or unfair commercial practices, including through the application of the Injunctions Directive;

Academic opinion from Donnelly and White points to the significance of market discipline for traders. They write (op. cit.) that market discipline is enhanced because traders will desist from certain practices when the costs of anti-consumer practices exceed the benefits for them: this is a self-regulatory mechanism. This however depends on the trader acting rationally and the enforcement measures being effective. As an enforcement professional pointed out, a trader should not be economically disadvantaged by complying with the law while other traders do not. Policing is however entirely reliant on adequate resources being available to ensure compliance and take enforcement action when necessary. In some ways criminal law measures are the best form of enforcement mechanism, as several interviewees said. The high profile created by the September 2016 Fixed Penalty notice agreement between ComReg and Virgin Media (EUR 255 000 fine) creates a real sense of 'compliance as culture' and strengthens CCPC and other regulators in their education of consumers mission. A business organisation commented that honest traders were often restricted by the unwillingness of consumer enforcement agencies to engage in B2B disputes, remarking that new laws are of little value unless there are enforcement mechanisms, and that SMEs and individual traders do not have the capacity to take prosecutions or undertake enforcement actions directly.

- What are costs for traders due to the need to respect the requirements under the directives covered by the study? [Note: Such as costs of research, legal advice and compliance as well as the amount of time necessary to comply with the directives]

One enforcement professional gave the view that there was no excessive burden on traders in the context of securing compliance with the Directives. Costs of court proceedings, while very high in Ireland, must be seen in the context of a culture of negotiation and mediation with traders by regulators, with criminal law charges being reserved for extreme cases. At the transaction cost level, it was said that the same level of effort will be needed to draft a compliant standard form contract as it will be for a non-compliant contract. Once a contract is drafted in a compliant manner, it is unlikely to require further remedial work and attract consumer and regulatory disapproval or sanction. The existence of the general clause in the UCPD repairs a defect in the general law prior to 2007 in Ireland and even if this is an additional cost, procuring professional diligence from traders is a cost worth bearing. Fees in employing legal advice when a trader is seeking to trade in a multiplicity of jurisdictions can be an issue but many see this as an opportunity cost that is worth bearing. The relevant Ministry expressed the view that trader costs should be seen as an essential cost of doing business.

- What are the costs involved in the public enforcement of these rules?

An enforcement professional said it was difficult to assess the costs involved as each case turns on its own facts. Criminal prosecutions can result in the award of court costs if the prosecution is successful but these do not provide reimbursement of investigation costs. The same is true of civil proceedings, rare though they are in Ireland. In both these contexts, civil and criminal proceedings, it was said that the attitude of the trader will be a significant determinant on the level of effort and the commensurate costs that an enforcement agency will be prepared to expend.

- Are there indications that the directives covered by the study are not implemented in your country in a cost-effective manner?

An enforcement professional as well as an interviewee in the relevant Ministry answered 'No' to this question.

- Could the costs for implementing and enforcing the rules of the directives covered by the study be reduced without lowering the level of protection for consumers? If so, how?

It is difficult to see how this could be done without damaging the level of consumer protection. In Ireland civil legal aid for consumer disputes does not exist in reality. In any event, the question assumes that courts see the law in EU terms. As one interviewee put it, court costs will not really differ where a consumer relies on national sales law and (transposed) directives and costs will not be easy to apportion to directives, national rules, and directive-based national rules. Budgets are under strain across the Irish State sector.

#### 1.4.2. Interplay with EU sector-specific consumer protection legislation

Regarding the interplay of the horizontal EU consumer legislation [mainly UCPD and UCTD] with EU sector-specific consumer protection legislation in the areas of electronic communications, passenger transport, energy and consumer financial services, please:

- Analyse the levels of awareness of the requirements of the horizontal EU consumer legislation (mainly UCPD and UCTD) of businesses and consumers and the specific public enforcement bodies in the relevant sectors, as in particular demonstrated by their practical application; [*Key question here is: Are UCPD and UCTD applied in practice by national authorities and courts as a legal basis to combat unfair commercial practices and unfair standard terms in contracts in the regulated sectors?*]

There are no official statistics that would inform questions concerning the levels of awareness of consumers or traders in respect of the relationship between sector specific consumer protection legislation on the one hand, and UCPD and UCTD on the other. In the Energy Sector, the Commission for Energy Regulation (CER) is chiefly responsible for the protection of energy customers who interact with licensed energy suppliers for the supply of gas and electricity. CER has general consumer protection functions but the CCPC is the enforcement body. CER has functions in regard to consumer protection measures, specifically as a body that is required to approve energy suppliers' codes of practice. Consumer law compliance obligations are set out in Electricity and Gas Supply Licence Conditions and the Suppliers Handbook. CER has also implemented specific requirements in respect of marketing and advertising by suppliers. These are found in a Code of Practice on Marketing and Advertising which is contained in the Suppliers Handbook. These documents are available from the CER website. A similar structure and relationship exists in respect of telecommunications regulation as between CCPC and the Commission for Communications Regulation. The Cooperation Agreements are formal and regulated agreements under Section 19(10) of the Competition and Consumer Protection Act 2014. Some studies completed in

2014 by CER in relation to consumer awareness are available on the CER website. Other sectoral prescribed bodies that must under statute interact with the CCPC, *inter alia*, in relation to decisions by prescribed bodies affecting consumers include the relevant prescribed bodies for broadcasting, financial services, aviation, data protection, environmental protection, the Central Bank, Financial Services Ombudsman, food safety, health insurance and transport.

It is open to conjecture whether the prescribed bodies are as aware of the sector specific and horizontal directives although the prescribed bodies themselves appear to insist that suppliers must meet all legal standards if they are to meet licensing conditions.

The relevant enforcement agency indicated in an interview that general awareness by sectoral prescribed bodies has been improving but that periodic refreshment of the messages was needed. Prosecution efforts are based on the UCPD so they are well known. One interviewee pointed out that terminology can be a barrier. Most directives address 'consumers' but in the transport sector the directives address 'passengers'.

- Specify whether in your country the same authority is responsible for the enforcement of the horizontal EU consumer law 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 UCPD/UCTD in the regulated sectors, as specified in the previous bullet?*]

In Ireland the enforcement body that is charged with enforcement is the CCPC. While in the area of financial services the Central Bank is the enforcement body, recent legislative changes render enforcement and other functions concurrently vested in the Central Bank and the CCPC (2010). A 2011 Cooperation Agreement was provided for under what is now section 19(1) of the Competition and Consumer Protection Act 2014. See Donnelly and White *Consumer Law Rights and Regulation*, paragraph 2 – 57 for a list of the prescribed bodies that must consult with the CCPC. It is evident therefore that prescribed bodies, as such, are not enforcement agencies but they do serve as bodies that can refer matters to CCPC once a consumer has exhausted any grievances he or she may have with licensed suppliers/contractors in the relevant sector.

- Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning contractual fairness, 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.?*]

Sector specific prescribed bodies work in conjunction with the CCPC under the statutory framework of cooperation agreements. As pointed out above, the Central Bank and CCPC hold dual powers for financial services.

Nothing further can be added to that explained above and the enforcement body, in the interview, simply expressed the view that these mechanisms work quite well.

- What are the benefits of the complementary application of the UCPD and UCTD in the regulated sectors? What are the costs due to the complementary application with the sectoral EU consumer protection legislation?

Several interviewees believed that the dichotomy had tangible benefits insofar as sectoral bodies very quickly developed specialist knowledge of the kinds of undesirable practices that developed in specific sectors. Because these practices often took place within the context of industries which required participant traders to comply with general laws as a precondition to trading/renewal of licences, it was thought that the

threat of commercial sanctions like removal of a licence could often bring undesirable practices to an end, following discussion between the prescribed body and the trader.

- Assess any need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law.

Because the relationship between the sector-specific regulatory bodies and the CCPC has been fixed by statute – section 19(1) of the Competition and Consumer Protection Act 2014 is the current basis – there appears to be no need for further clarification. The only case where there is a lack of clarity, according to Donnelly and White, relates to the relationship between the Central Bank and the CCPC. The authors seek to argue that the concurrent jurisdiction of both bodies in certain areas requires monitoring so as to 'ensure that consumer protection in the financial services context is delivered in a maximally effective way'.<sup>12</sup>

#### 1.4.3. Relevance of consumer law directives for consumer-to-business transactions

- Please analyse the need and potential for the application of the consumer law directives (mainly UCPD and UCTD) to 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 Irish enforcement agency believes that there is a case to be made to extend the two unfair terms and practices directive to consumer to business transactions.

#### 1.4.4. Specific protection for vulnerable consumers

Please analyse:

- Whether the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined in the consumer law directives and relevant jurisprudence, and as applied by national authorities and courts in your country, continue to be valid and fit for purpose.

Most enforcement and prescribed bodies are of the view that the definitions of consumer and vulnerable consumer are generally clear and beneficial. Attention has been drawn above to the way in which legislation transposing the UCPD has broadened out the vulnerable consumer definition.

In the context of the energy sector, the definition of a vulnerable consumer has been expanded in S.I. No. 463 of 2013 which refers to a consumer's vulnerability to disconnection from energy supplies: These regulations provide, in addition to UCTD and UCPD rules:

“vulnerable customer’ means a household customer who is –

- (a) critically dependent on electricity powered equipment, which shall include but is not limited to life protecting devices, assistive technologies to support independent living and medical equipment, or
- (b) particularly vulnerable to disconnection during winter months for reasons of advanced age or physical, sensory, intellectual or mental health.’

Additional protections are in place in relation to advertising practices and vulnerable consumers.

<sup>12</sup> Consumer Law Rights and Regulation para 2-102.

- To what extent the existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers and whether, based on the experiences in your country, specific provisions should be introduced in other directives concerned, in particular the Unfair Contract Terms Directive.

The consumer enforcement body states that this issue has not been raised or discussed in Ireland. There are no Irish experiences that inform any such debate on expanding the unfair terms legislation into sector specific directives. One interviewee asked what the point would be, as Directive 93/13 applies anyway.

#### 1.4.5. EU added value

- Overall, would you consider that protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in your country since the implementation of the UCPD and the UCTD in national legislation?

The overall assessment of the protection of consumers, the information provided to consumers, and the positive nature of EU action cannot be in doubt. All interviewees said EU action had improved the consumer protection landscape. The enforcement agency interviewee in particular said that in the last nine years of his time in his job the importance of the community acquis provisions and the increasingly sophisticated awareness of Irish consumers was a remarkable development. Acting in conjunction with national regulators and particularly through websites, self-help and complaints by consumers demonstrated considerable developments in terms of consumer assertiveness.

- Overall, would you consider that the information of consumers regarding unit prices has improved since the implementation of the PID in national legislation?

Pricing mechanisms were part of the landscape in Ireland since 1958 and under Groceries Orders, part of national law, but PID had improved the levels of compliance and consumer awareness.

- Overall, would you consider that the protection of businesses against unfair marketing in your country has improved since the implementation of the MCAD in national legislation?

Most interviewees did not express a view although one of them thought this was a difficult issue to quantify, particularly in the case of misleading advertising provisions. Enforcement and complaints here can involve trade mark issues as well as common law passing-off complaints.

- Overall, would you consider that it has become easier for businesses in your country to directly trade cross-border to final consumers located in other EU countries in recent years? Has it become easier for consumers in your country to directly purchase cross-border from traders located in other EU countries?

Most interviewees were of the view that though a range of impediments to cross-border selling remain, these are less marked than in the past and there are a number of proposals under the Digital Single Market Strategy to reduce them further. Cross-border purchases by Irish consumers have increased steadily in recent years and this would suggest that it has become easier for consumers to buy goods, digital content or services from traders in other Member States.

- To what extent are these improvements, if any, due to the mentioned directives?

That is difficult to say. The increased level of harmonisation brought about by the Unfair Commercial Practices Directives may have lessened some of the regulatory impediments to cross-border trade, while the increased protections provided by these Directives may have helped make consumers more confident in purchasing from traders in other Member States. Geoblocking, especially of digital content, is still a big issue.

## Annex

## A. Transposition fact sheet

**Table 1: Fact sheet on transposition of directives in Member States' law – IRELAND**

Directive	Transposition legislation (National law, Article)	Comments	Specific provisions going beyond minimum harmonisation requirements/use of exemptions	Included in national legislation		Comments
<b>Directive 93/13/EEC on unfair terms in consumer contracts</b>	European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (S.I. No. 27 of 1995) (UCTR)		'Black list' of terms considered unfair in all circumstances	No		
			'Grey list' of terms which may be considered unfair	Yes	UCTR, Reg 3(7) at Schedule 3	
			Extensions of the application of Directive to individually negotiated terms	No		
			Extensions of the application of Directive terms on the adequacy of the price and the main subject-matter	No		



<b>Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market</b>	Consumer Protection Act 2007		Provisions regarding financial services going beyond minimum harmonisation requirements	No		
			Provisions regarding immovable going beyond minimum harmonisation requirements	Yes	Consumer Protection Act 2007, S.2(1) (definition of 'goods')	
			Application of UCPD to B2B transactions	No		
<b>Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers</b>	European Communities (Requirements to Indicate Product Prices) Regulations 2002 (S.I. No. 639 of 2002) (2002 Regulations)		Extension of the application to other sectors (e.g. for immovable property)	No		
			Use of specific regulatory choices/derogations	Yes	2002 Regulations, Regulation 3	Products supplied under provision of a service and auctions sales and sales of works of art and antiques
<b>Directive 2006/114/EC concerning misleading and comparative advertising</b>	European Communities (Misleading and Comparative Marketing Communications) Regulations 2007 (S.I. No. 774 of 2007)					

<b>Directive 2009/22/EC on injunctions for the protection of consumers' interests</b>	European Communities (Court Orders for the Protection of Consumer Interests) Regulations 2010 (S.I. No. 555 of 2010)						
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**Table 2: Fact sheet on Injunctions Directive – IRELAND**

Issue	Answer	Comments
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)?	- Yes, separate procedures in separate legal acts	<i>Drafted in compliance with Directive 2009/22/EC. Application is made by qualified entities to the Circuit Court.</i>
Who is entitled to bring an action seeking an injunction?		<i>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.</i>
Is the injunction procedure a court or an administrative procedure? If your country legislation foresees both forms of the procedure, please explain in the comments column for which infringements the court or administrative procedure is foreseen	- Court procedure	
Who bears the costs of an injunction procedure? If qualified entities (or some of their categories e.g. consumer organisations are entitled to an exemption of some/all cost related to the procedure please explain the characteristic of such exemption in the comments column.		<i>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.</i>
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?	- No, scope of the Directive not extended	
Is protection of business' interests covered by the injunctions procedure? If scope of application extended to the protection of business' interests, please provide details in the comments column regarding type of business' interests covered by the injunctions procedure	- No	
Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations	- No	
Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID)	- No	
Has your Member State taken specific measures regarding the prior consultation (Article 5 of the Injunctions Directive)?	- Yes, requirement for party seeking injunction to consult with the defendant	

Does the national legislation provide for measures ensuring summary procedure? Please specify main characteristics of the procedure (subject matter/time limits) in the comments column.	- Yes	<i>Qualified entity must make reasonable efforts to consult with the infringer and request cessation of infringement. After commencement of consultation, the qualified entity may make the application to the Circuit Court.</i>
Are there sanctions for non-compliance with the injunction order (Article 2(1) of the Injunctions Directive)? If sanctions in form of penalty or fine foreseen please specify in the comments column to who exactly should they be paid	- Yes, penalty of a fine for each day of non-compliance	<i>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.</i>
Has your Member State taken specific measures regarding the publication of the decision and/or the publication of a corrective statement?	- Yes	<i>The Circuit Court makes provision for publicity when making the order.</i>
Is it possible to claim within the injunction procedure for sanctions for the infringement?	- No	
Can an action for the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to other beneficiary be brought within the injunction procedure?	- No	
Can an action for damages to be paid to the qualified entity or the public purse be brought within the injunction procedure?	- No	
Can an action for damages or redress to be paid to the consumers concerned be brought within the injunction procedure?	- No	
Can individual consumers base their individual claims for damages/remedies on the injunctions order?	- No	
Can the qualified entity claim other measures beyond the injunction, e.g. evidence of compliance with the judgment?	- No	
Are the effects of individual injunctions orders extended to the future infringements and/or same or similar illegal practices (of other traders)?	- No	

## B. Data tables

*Number of B2C disputes***Table 3: B2C disputes decided on the basis of consumer law directives covered by this study in comparison with total B2C disputes decided on the basis of other legislation (most recent year for which data is available)**

Year	Type of data	Total number of B2C disputes (number of cases)	Share of B2C disputes decided on basis of ...					Comment
			UCPD	UCTD	PID	other EU consumer protection legislation (e.g. CRD, Sales Directive, sectoral)	national consumer legislation not based on EU directives	
n.a	n.a							

Note: No data exists in relation to this question.

*Costs of obtaining redress for a hypothetical case of invoking unfairness of a standard contract term*

- Please estimate the costs, including time, for consumers in obtaining redress when invoking the unfairness, and thereby the non-binding character of standard contract terms in a contract they concluded. Please provide the estimate for the hypothetical example below, focusing on costs (and needed time) of a lower court procedure and the use of ADR or other relevant procedure (if applicable).<sup>13</sup>

<sup>13</sup> For the hypothetical example it is assumed that both the provider and the consumer are located in your country.

**Table 4: Estimate of costs for consumers in obtaining redress when invoking the unfairness of standard contract terms in a contract they concluded (for the hypothetical example provided in the box below)**

Redress mechanism	Estimated court fees (national currency)	Estimated lawyer's fees (national currency)	Other costs, if any (national currency)	Estimated time involved for consumer (hours)	Comments
Lower court procedure	n.a				
ADR or other relevant procedure	n.a				

Notes: There are no precedents from Irish case law that can provide an approximate answer to the hypothetical example. There are no reported cases that could provide a benchmark.

**Hypothetical example: Terms which inappropriately exclude/limit consumers' rights to compensation**

A consumer went on a package holiday with a friend to Kenya for which they paid € 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 €5,000 (€4,000 for the cost of the package and €1,000 for lost time and enjoyment). The tour operator agreed to compensate them €1,000 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/unfair-contract-terms/index\\_en.htm](http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-contract-terms/index_en.htm)]

- Please estimate how often court and ADR procedures are used in your country for invoking the unfairness, and thereby the non-binding character of standard contract terms (i.e. the number of cases per year)?

No information is available upon which any answer could be made which would be even an approximate guide to the levels of use of court or arbitration mechanisms in assessing unfairness.

## C. Interviews conducted and literature reviewed

**Table 5: Interviews conducted for this study**

Organisation	Stakeholder type	Date
<b>Competition and Consumer Protection Commission</b>	National Consumer Enforcement Authority	September 6, October 19, 2016
<b>Department of Jobs, Enterprise and Innovation</b>	Ministry	September 12 and October 10, 2016
<b>Commission for Energy Regulation</b>	National Regulatory Authority	September 14 and 27, 2016
<b>4 ECC Ireland</b>	European Consumer Centre	September 27, 2016
<b>Bar Library Member</b>	Consumer Rights Advocate	October 21, 2016
<b>RGDATA</b>	Business Association	November 9, 2016
<b>IBEC/Retail Ireland</b>	Business Association	November 9, 2016



**Table 6: Literature reviewed for country report**

Author/Source	Year	Title of publication
Bird	2008	Consumer Protection Act 2007
Barry and Others	2016	Blackstone's Guide to the Consumer Rights Act 2015
Clark	2016	Contract Law in Ireland
Davidson	2010	The Law of Electronic Commerce
Donnelly & White	2014	Consumer Law: Rights and Regulation
Donnelly & White	2013	Irish Consumer Law: Asserting a Domestic Agenda DULJ 1-34
Donnelly & White	2008	The Effectiveness of Information-Based Consumer Protection Yearbook of Consumer Law
Haigh	2001	Contract Law in an E-Commerce Age
Heffron	2015	Energy Law
Law Reform Commission	2006	Report on Vulnerable Adults
Lawson	2013	Exclusion Clauses and Unfair Contract Terms
Reilly	2005	The UCPD and the Average Consumer (10) (5) CLP
Reilly	2009	Trader Enforcement of Consumer Law DULJ 100
Sales Law Review Group	2011	Report on the Legislation Governing the Sale of Goods and Supply of Services
White	2012	Commercial Law
White	2015	Selling Online 22(2) CLP 31 and (22)3 CLP 63

# 1. Study to support the Fitness Check of EU Consumer law – Country report ITALY

## 1.1. Unfair commercial practices and marketing

### 1.1.1. Effectiveness of the UCPD in establishing a high level of consumer protection

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

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

The UCPD was implemented by legislative decree No. 146 of 2 August 2007, which introduced the current Art. 18-27-*quater* of the Italian 'Consumer Code'. The legislative decree No. 221 of 23 October 2010 inserted then in the list of the 'Fundamental Rights of the Consumers' contained in Art. 2 of the Consumer Code, the 'Right to commercial practices that are in conformity with the principles of good faith, fairness and loyalty'. Art. 7, Para 2 of law decree No. 1 of 24 January 2012 converted, with modifications, by law No. 27 of 24 March 2012 on 'Urgent provisions for competition, infrastructure development and competitiveness' introduced Art. 18, Para 1, lit. d-*bis* of the Consumer Code, which inserted the definition of 'micro enterprises' in the general set of definitions laid down in Art. 18 of the Consumer Code (which implements Art. 1 and 2 of the UCPD)<sup>1</sup> and partially extended to the relationships business-to-microenterprises the scope of application of the implementing provisions of the UCPD by modifying Art. 19, Para 1 of the Consumer Code (which implements Art. 3 UCPD).<sup>2</sup>

Art. 36 of the law decree No. 201/2011, which was converted with modifications by law No. 214 of 22 December 2011 on the 'Conversion to law, with modifications, of law decree No. 201 of 6 December 2011 on urgent measures for the growth, equity and consolidation of public finances' introduced then Para 3-*bis* of Art. 21 of the Consumer Code (which contains also the implementing provisions of Art. 6 UCPD), which specifically concerns unfair commercial practices laid down by banks, credit institutions or financial agencies and has been further modified by Art. 28, Para 3, of law decree No. 1 of 24 January 2012 converted, with modifications by law No. 27 of 24 March 2012 on 'Urgent provisions for competition, infrastructure development and competitiveness'.<sup>3</sup> Furthermore law Decree No. 179 of 18 October 2012, which was converted with modifications by law No. 221 of 17 December 2012 later, introduced a new Para 4-*bis* into Art. 21 of the Consumer Code, which deals with the problems

<sup>1</sup> Art. 18, Para 1., lit. d-*bis*, Consumer Code: 'd-*bis*) 'micro-enterprises': entities, companies or associations that, regardless of their legal form, engage in an economic activity, even as an individual or family, that employs fewer than ten persons and generates an annual revenue or total annual balance sheet not in excess of two million Euros, pursuant to section 2, paragraph 3 of the annex to recommendation 2003/361/EC of the Commission, dated 6 May 2003'.

<sup>2</sup> Art. 19, Para 1, Consumer Code: 'This Title shall apply to unfair business-to-consumer commercial practices before, during and after a commercial transaction in relation to a product as well as any unfair commercial practices between professionals and micro-enterprises. The protection of micro-enterprises from deceitful advertising and unlawful comparative advertising is explicitly guaranteed by legislative decree n. 145 of 2 August 2007'. In this regard see G. De Cristofaro, Unfair Business-to-Microenterprise Commercial Practices: The Italian Solution in the European Context – The Extended Scope of Application of UCP Directive's Implementing Provisions, in *Journal of European Consumer and Market Law*, 2015, p. 20 ff.; D. Valentino, Timeo Danaos et dona ferentes. La tutela del consumatore e delle microimprese nelle pratiche commerciali scorrette, in *Rivista di Diritto civile*, 2013, p. 1157 ff.

<sup>3</sup> Art. 21, Para 3-*bis*, Consumer Code: 'It is considered to be an unfair commercial practice when a bank, credit institution or financial agency makes the stipulation of a loan contract conditional on the stipulation of an insurance policy supplied by the same bank, institution or intermediary or to open an account with the same bank, institution or intermediary.'

arising from the costs-surcharge for the finalisation of an electronic transaction with a supplier of goods or services.<sup>4</sup>

As specifically concerns misleading omissions, Art 22 of law No. 99 of 23 July 2009 containing 'Provisions for the development and internationalisation of firms, and regarding Energy' introduced Art. 22-*bis* of the Consumer Code, which specifically deals with deceptive advertising of prices charged by maritime companies.<sup>5</sup>

Art. 27 of the Consumer Code regulates the enforcement measures that can be taken by the Autorità Garante della Concorrenza e del Mercato against businesses which infringe the prohibition of unfair commercial practices.<sup>6</sup> The businesses can challenge the decisions (Provvedimenti) of the AGCM before the Tribunale Amministrativo Regionale (TAR) Lazio-Roma,<sup>7</sup> whose judgements can be challenged before the Consiglio di Stato (the highest administrative court in Italy).<sup>8</sup>

If the trader infringes the prohibition of unfair commercial practices, consumer associations are entitled to pursue an injunction for the protection of their collective interests according to Art. 139 and 140 of the Consumer Code (which implement directive 2009/22/EC on injunctions for the protection of consumers' interests<sup>9</sup>) and the individual consumer is entitled to the '*Azione di classe*' (a kind of class-action) regulated by Art. 140-*bis* of the Consumer Code.<sup>10</sup>

Art. 19, Para 3 of the Consumer Code (which implements Art. 3, Para 4 UCPD) further provides that 'In the event of conflict, the provisions of Community directives or other Community legislation, and the national provisions transposing them to govern specific aspects of unfair commercial practices shall prevail over the provisions of this Title and shall apply to these specific aspects'.<sup>11</sup> In order to clarify the meaning of this provision

<sup>4</sup> Art. 21, Para 4-*bis*, Consumer Code: 'It is considered to be an unfair commercial practice to require costs surcharge for the finalization of an electronic transaction with a supplier of goods or services'.

<sup>5</sup> Art. 22-*bis*, Consumer Code: 'Advertising regarding prices charged by maritime companies operating from Italy either directly or under code-sharing agreements is deemed deceptive when it advertises the cost of the ticket purchased from the maritime company separately from additional charges, port taxes and from any other charges borne by the consumer, the maritime company being obliged to advertise a single price which includes all of these items'.

<sup>6</sup> The decisions of the Autorità Garante della Concorrenza e del Mercato are available at: <http://www.agcm.it/consumatore--delibere/consumatore-provvedimenti.html>. See A. Ciatti, Art. 27 Codice del consumo, in G. De Cristofaro and A. Zaccaria, Commentario breve al Diritto dei consumatori, 2nd ed., Padua 2013, p. 226 ff.

<sup>7</sup> The decisions of the Tribunale Amministrativo Regionale Lazio-Roma are available at: [https://www.giustizia-amministrativa.it/cdsavvocati/faces/provvedimentiRic.jsp?\\_afLoop=5268480246385225&\\_afWindowMode=0&\\_adf.ctrl-state=cy8xrd8mw\\_14](https://www.giustizia-amministrativa.it/cdsavvocati/faces/provvedimentiRic.jsp?_afLoop=5268480246385225&_afWindowMode=0&_adf.ctrl-state=cy8xrd8mw_14).

<sup>8</sup> The decisions of the Consiglio di Stato are available at: [https://www.giustizia-amministrativa.it/cdsavvocati/faces/provvedimentiRic.jsp?\\_afLoop=5268594620163736&\\_afWindowMode=0&\\_adf.ctrl-state=cy8xrd8mw\\_49](https://www.giustizia-amministrativa.it/cdsavvocati/faces/provvedimentiRic.jsp?_afLoop=5268594620163736&_afWindowMode=0&_adf.ctrl-state=cy8xrd8mw_49).

<sup>9</sup> The text of both provisions is available at <http://www.normattiva.it/ricerca/semplice>.

<sup>10</sup> The text of the provision is available at <http://www.normattiva.it/ricerca/semplice>.

<sup>11</sup> For the discussion in this concern see e.g. L. Arnaudo, Concorrenza tra Autorità indipendenti. Noterelle bizzarre intorno a un parere del Consiglio di Stato, in *Giurisprudenza commerciale*, 2010, p. 916 ff.; T. Broggiato, Pratiche commerciali scorrette: dalla direttiva europea alla normativa nazionale di recepimento, in *Bancaria*, 2010, fasc. n. 4.; B. Carducci Agostini, Criteri di raccordo tra la disciplina generale a tutela del consumatore e la normativa di settore assicurativa, in *Diritto ed economia dell'assicurazione*, 2009, p. 49 ff.; G. Carriero - P. De Ioanna - A. Frignani - F. Nanni - M. Prosperetti, Pratiche commerciali scorrette ed assicurazioni, in *Diritto ed economia dell'assicurazione*, 2010, p. 727 ff.; M. Clarich, Le competenze delle Autorità indipendenti in materia di pratiche commerciali scorrette, in *Giurisprudenza commerciale*, 2010, I, p. 688 ff.; G. Corvese, La pubblicità dei prodotti assicurativi: un tentativo di ricostruzione della disciplina, in *Responsabilità civile e previdenza*, 2010, p. 2130 ff.; M. Libertini, Clausola generale e disposizioni particolari nella disciplina delle pratiche commerciali scorrette, in *Contratto e impresa*, 2009, p. 73 ff.; M. Libertini, Le prime pronunce dei giudici amministrativi in materia di pratiche commerciali scorrette, in *Giur. comm.*, 2009, II, p. 880 ff.; V. Meli, L'applicazione della disciplina delle pratiche commerciali scorrette nel 'macrosettore credito e assicurazioni', in *Banca, Borsa e Titoli di credito*, 2010, I, p. 334 ff.; V. Meli, Le pratiche commerciali scorrette nella relazione banca-cliente, in *A.A.V.V.*, Nuove regole per le relazioni tra banche e clienti. Oltre la trasparenza?, Torino 2010, p. 104 ff.; G. Meo, Consumatori, mercato finanziario e impresa: pratiche scorrette e ordine giuridico del mercato, in *Giurisprudenza commerciale*, 2010, I, p. 720 ff.

and the relationship between the implementing provisions of the UCPD and the sectoral legislation, the Italian legislator recently modified Art. 27 of the Consumer Code in way of the implementation of Directive 2011/83/EU on consumer rights by means of the insertion of a new paragraph (Para 1-*bis*),<sup>12</sup> which provides that 'even in regulated sectors pursuant to Art. 19, para 3, the power to intervene with respect to conducts of traders involved in unfair commercial practices, without prejudice to current regulations, shall lie exclusively with the Competition Authority [*Autorità Garante della Concorrenza e del Mercato*] which acts on the basis of the powers granted by this Section after getting the opinion of the competent Regulation Authority. This without prejudice to the competence of the Regulation Authorities to exercise their powers in the event of infringement of the regulations non constituting unfair commercial practices. The Authorities may regulate through memorandums of understanding the enforcement and procedural issues of their mutual cooperation, pursuant to the respective competences'.<sup>13</sup>

Within the described context, the principle-based approach under the UCPD has been widely welcomed in Italy as it allows the necessary flexibility in order to cope with the changing aspects of the market and market practices and at the same time it avoids the risk of obsolescence of the UCPD and its implementing provisions. This aspect has been emphasised especially by national stakeholders, which underlined that the principle-based approach offers space to enforcement authorities to adapt the concept to the new needs. Some reports also underlined that this approach gives to traders more space for innovation and is therefore a positive element for the market. On the contrary, some national stakeholders fear that this approach could have negative effects especially as concerns the risk of divergent interpretation on among the different member States.

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

Relevant benefits arise from the provisions of the black list, first of all the legal certainty for both consumers and businesses. Nevertheless there are also disadvantages connected to the black list, as it reduces the degree of flexibility. In this regard, in particular the enforcement authorities highlighted some contradictions relating to the black list, as some of its provisions are formulated in a way which requires an evaluation of the fairness/unfairness of the term, which is not 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') of the Annex I of the UCPD. In particular, it has been underlined that the provisions of the black list which require an assessment *in concreto* of the unfairness of the behaviour of the traders are not compatible with the nature of the black list. Consumer organisations point out that from the black list arise relevant benefits for consumers, as in particular concerns predictability and clarity.

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

In implementing UCPD, Italy has not made use of the option, offered by Art. 9, par. 3 of the UCPD, to introduce special rules imposing more restrictive and prescriptive requirements in the field of financial services and immovable property. There is also no case law concerning this aspect. Some consumer associations sharply criticised the UCPD approach in this regard, by emphasising the connected risk to lower the level of

<sup>12</sup> The modification was laid down by Art. 1, Para 6 of Legislative Decree No. 21 of 21 February 2014: 'Implementation of the directive 2011/83/UE of consumer rights, amending directives 93/13/CEE and 1999/44/CE and repealing directives 85/577/CEE e 97/7/CE'. See Consiglio di Stato, ad. plen., 9 February 2016, No. 3, in Foro Amministrativo, 2016, p. 274.

<sup>13</sup> For issues relating to intertemporal law see Consiglio di Stato, ad. plen., 9 February 2016, No. 3, in Giurisprudenza italiana, 2016, p. 1206 (case note C.E. Gallo).

consumer protection relating to sectors in which there is a relevant need of consumer protection (e.g. relating to investment services).

- 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 what 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 UCPD has been applied also for tackling both misleading environmental claims and for addressing misleading practices in the energy market. In this concern, there has been a conflict of competence between the *Autorità Garante della Concorrenza e del Mercato* and other sectoral authorities. Such conflict has been solved by the Italian legislator in way of implementation of Directive 2011/83/EU on consumer rights: in that context the Italian legislator has clarified that even relating to commercial practices in the mentioned sectors, when a behaviour integrates an unfair commercial practice, the *Autorità Garante della Concorrenza e del Mercato* has the competence to decide on the case. Indeed, the new Art. 27, Para 1-*bis* of the Consumer Code (as amended by Art. 1, Para 6 of legislative decree No. 21 of 21 February 2014 'Implementation of the Directive 2011/83/UE of consumer rights, amending Directives 93/13/EEC and 1999/44/EC and repealing Directives 85/577/EEC e 97/7/EC') provides that: 'Even in regulated sectors pursuant to Art. 19, Para 3 [of the Consumer Code],<sup>14</sup> the power to intervene with respect to conducts of traders involved in unfair commercial practices, without prejudice to current regulations, shall lie exclusively with the Competition Authority which acts on the basis of the powers granted by this Section after getting the opinion of the competent Regulation Authority. This without prejudice to the competence of the Regulation Authorities to exercise their powers in the event of infringement of the regulations non constituting unfair commercial practices. The Authorities may regulate through memorandums of understanding the enforcement and procedural issues of their mutual cooperation, pursuant to the respective competences'.

As in particular concerns the application of the UCPD in tackling misleading environmental claims and/or in addressing misleading practices in the energy market, some stakeholders underlined that in these sectors it is particularly difficult for the consumer to verify the misleading nature of the commercial practice, and that such a situation usually means that consumers are unaware as to the misleading nature of the practice. This happens especially when consumers trust in a specific brand, which is renowned for being trustworthy, as e.g. happened in the so called '*Volkswagen-case*'.<sup>15</sup> Considering the described situation, some stakeholders propose to introduce a mechanism in order to monitor the claims before their diffusion and to provide in advance automatic penalties for the cases in which those claims are false. In the opinion of some consumer associations, the UCPD has not reached in this sector a satisfying level of protection. Considering the growing diffusion of those claims, the same associations underlined the need that a reshaped version of the UCPD contains a part specifically dedicated to this topic.

<sup>14</sup> Art. 19, Para 3, Consumer Code: 'In the event of conflict, the provisions of Community directives or other Community legislation, and the national provisions transposing them to govern specific aspects of unfair commercial practices shall prevail over the provisions of this Title and shall apply to these specific aspects'.

<sup>15</sup> See the decision of the AGCM 4 August 2016, PS 10211, Volkswagen Group Italia S.p.A. and Volkswagen AG, in [www.agcm.it](http://www.agcm.it).

- 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 your country rigidly?*]

In the opinion of the enforcement authorities, the concept of 'average consumer' works well in practice. The concept has not been applied rigidly, but rather flexibly. On the contrary, some consumer associations underline that the notion of average consumer is too widely formulated and does not comply with the reality of consumers behaviour: in this context, it has been highlighted the risk that consumers with lower skills than the average consumer remains without adequate protection. Other consumer associations suggest maintenance of the concept of average consumer and creation of additional specific categories of consumers.<sup>16</sup>

- 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 in your country recognised new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted)?*]

The enforcement authority has not created ad hoc categories concerning the notion of 'vulnerable consumer'. Some of the interviewed consumer associations propose introducing specific provisions to protect consumers in situations of poverty and/or over-indebtedness (in all cases in which such circumstances can influence the commercial decision of the consumer).

- 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 interviewed stakeholders reported the positive contribution given by self- and co-regulation in combating unfair commercial practices. In any case they underlined that such regulations, in order to be really effective, need to provide: i) precise information duties determined jointly by business and consumers associations, ii) precise consequences for the cases of not compliance; iii) an authority which is competent for assessing the cases of not compliance with the rules stated in the self-regulatory codes of conduct.<sup>17</sup> In this context, positive effects have been experienced in Italy throughout the activity of the 'Giuri dell'Autodisciplina Pubblicitaria',<sup>18</sup> which is competent for ensuring the observance and the application of the the 'Codice di Autodisciplina della Comunicazione Commerciale',<sup>19</sup> which aims to ensure that marketing communication is carried out as a service to the public, with special consideration given to its influence on consumers.

- 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?

On the one hand, according to the opinion of the interviewed enforcement authorities, there is no need to extend the black list of the UCPD, as they underline that the

<sup>16</sup> See in this regard G. De Cristofaro, Art. 20 Codice del consumo, in G. De Cristofaro and A. Zaccaria (eds.), *Commentario breve al Diritto dei consumatori*, 2nd ed., Padua 2013, p. 160 ff.

<sup>17</sup> See in this regard P. Fabbio, *I codici di condotta nella disciplina delle pratiche commerciali sleali*, 'Giurisprudenza commerciale', 2008, p. 706 ff.

<sup>18</sup> See Istituto dell'Autodisciplina Pubblicitaria, <http://www.iap.it/>.

<sup>19</sup> For an English version of the 'Codice di Autodisciplina della Comunicazione Commerciale' (62nd edition effective December 20th, 2016), see <http://www.iap.it/about/the-code/?lang=en&lang=en>.



principle based approach is the real added value of the UCPD: according to the enforcement authorities, the black list should be rather amended and reshaped, as some of its provisions are formulated in a way, which requires an evaluation of the fairness/unfairness of the term, which is not compatible with the nature of the black list: see e.g. the formulations contained in the No. 7 ('falsely stating'), No. 17 ('falsely claiming'), No. 18 ('inaccurate information'), No. 22 ('falsely claiming') and No. 23 ('creating the false impression') of the Annex I of the UCPD. The provisions of the black list which require an assessment *in concreto* of the unfairness of the behaviour seem not to be compatible with the nature of the black list. On the other hand, the interviewed consumer associations are in favour of an extension of the black list of the UCPD, by including new cases which are experienced in the practical application of the implementing provisions of the aforementioned Directive.

- Are there other measures that could improve the effectiveness of the UCPD in establishing a high level of consumer protection in your country? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

The enforcement of the UCPD in Italy is already particularly effective due to the fast and efficient activity of the *Autorità Garante della Concorrenza e del Mercato*. In this regard, stakeholders underline that a further improvement of the effectiveness of the implementing provisions of the UCPD has been experienced since 2012, when the highest limit of the administrative fine for unfair commercial practices has been increased up to EUR 5 000 000.00,<sup>20</sup> a limit which has been reached *inter alia* in a recent judgement published on 4 August 2016 concerning the so called 'Volkswagen-case'.<sup>21</sup>

### 1.1.2. Effectiveness of the PID in establishing 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;

The PID was implemented by the legislative decree No. 84 of 25 February 2000,<sup>22</sup> which was later repealed by Art. 146, Para 1, lit. m, Consumer Code, as the implementing provisions of the PID have been transferred into Art. 13-17 of the Consumer Code.<sup>23</sup>

Based on the available evidence and the interviews conducted for this country report, there is little case law on this issue. In this regard it is not clear whether this circumstance arises from a very high level of compliance in this sector or rather from a lack of interest or of information of the consumers.

<sup>20</sup> See Art. 27, Para 9, Consumer Code: '9. In its measure prohibiting the unfair commercial practice, the Authority shall also impose an administrative fine of between EUR 5 000.00 and EUR 5 000 000.00, to take account of the seriousness and the duration of the infringement [...]'.

<sup>21</sup> See in this regard the decision of the AGCM 4 August 2016, PS 10211, Volkswagen Group Italia S.p.A. and Volkswagen AG, in [www.agcm.it](http://www.agcm.it), in which the Authority sanctioned Volkswagen Group Italia S.p.A. and Volkswagen AG with an administrative fine of EUR 5 000 000.00.

<sup>22</sup> For the English text of legislative decree No. 84 of 25 February 2000, see [http://www.normattiva.it/ricerca/semplice;jsessionid=LgJdTWEG3mv2lxd4n64EeA\\_\\_na1-prd-norm](http://www.normattiva.it/ricerca/semplice;jsessionid=LgJdTWEG3mv2lxd4n64EeA__na1-prd-norm). Concerning the previous legislation on this topic: A. Ciatti, L'obbligo di indicare il prezzo di vendita e il prezzo per unità di misura dei prodotti offerti dai commercianti ai consumatori, in *Contratto e impresa/Europa*, 1998, p. 1124 ff.

<sup>23</sup> In this regard see F. Toschi Vespasiani, Art. 13-17 Codice del consumo, in G. De Cristofaro and A. Zaccaria (eds.), *Commentario breve al Diritto dei consumatori*, 2<sup>nd</sup> ed., Padua 2013, p. 110 ff..



- 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?

The stakeholders consulted consider this not to be a problematic issue. In particular, they are not in favour of an increase of the information duties as they see in this possible increase a concrete risk of information overload.

### 1.1.3. Effectiveness of the MCAD in providing protection for businesses

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

- 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 was implemented by the legislative decree No. 145 of 2 August 2007,<sup>24</sup> which contains also provisions (Art. 1, 5, 6 and 7 of the legislative decree No. 145/2007) introduced by the Italian legislator in addition to those which were necessary in order to implement the MCAD: Art. 1, 5, 6 and 7 of the legislative decree No. 145/2007 apply generally to any kind of advertising (the notion of 'advertising' is contained in Art. 2, lit. a of the legislative decree No. 145/2007).<sup>25</sup>

Concerning the enforcement in particular, Art. 8 of the legislative decree No. 145/2007 regulates the measures that can be taken by the *Autorità Garante della Concorrenza e del Mercato* against businesses which infringe the rules laid down in the legislative decree.<sup>26</sup> The businesses can challenge the decisions (*Provvedimenti*) of the AGCM before the *Tribunale Amministrativo Regionale (TAR) Lazio-Roma*,<sup>27</sup> whose judgements can be challenged before the *Consiglio di Stato* (the highest administrative court in Italy).<sup>28</sup>

The interviewed stakeholders highlighted that MCAD ensures a satisfactory level of protection for businesses but, considering its scope of application, it causes a disequilibrium between the levels of protection provided for the two sectors of Business-to-Business and of Business-to-Consumer.

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

Also in the context of misleading advertising, the interviewed stakeholders did not assess particular application problems. Even the behaviours, which do not fall squarely within the notion of 'advertising' have been easily included in the scope of application of Directive 84/450/EEC concerning misleading advertising and of its implementing provisions.

<sup>24</sup> The English version of the legislative decree No. 145 of 2 August 2007 is available at: <http://www.agcm.it/en/consumer-protection/consumer-protection-legislation/1726-legislative-decree-no-145-of-2-august-2007.html>.

<sup>25</sup> See e.g. G. De Cristofaro, La disciplina 'generale' della pubblicità contenuta nel d.lgs. 2 agosto 2007, n. 145, in G. De Cristofaro (ed.), *Pratiche commerciali scorrette e codice del consumo*, Turin 2008, p. 487 ff.

<sup>26</sup> The decisions of the Autorità Garante della Concorrenza e del Mercato are available at: <http://www.agcm.it/consumatore--delibere/consumatore-provvedimenti.html>.

<sup>27</sup> The decisions of the Tribunale Amministrativo Regionale Lazio-Roma are available at: [https://www.giustizia-amministrativa.it/cdsavvocati/faces/provvedimentiRic.jsp?\\_afLoop=5268480246385225&\\_afWindowMode=0&\\_adf.ctrl-state=cy8xrd8mw\\_14](https://www.giustizia-amministrativa.it/cdsavvocati/faces/provvedimentiRic.jsp?_afLoop=5268480246385225&_afWindowMode=0&_adf.ctrl-state=cy8xrd8mw_14).

<sup>28</sup> The decisions of the Consiglio di Stato are available at: [https://www.giustizia-amministrativa.it/cdsavvocati/faces/provvedimentiRic.jsp?\\_afLoop=5268594620163736&\\_afWindowMode=0&\\_adf.ctrl-state=cy8xrd8mw\\_49](https://www.giustizia-amministrativa.it/cdsavvocati/faces/provvedimentiRic.jsp?_afLoop=5268594620163736&_afWindowMode=0&_adf.ctrl-state=cy8xrd8mw_49).

- The effects of the minimum harmonisation provisions on misleading advertising; [Key aspects to consider are: 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)?]

In Italy there are several national rules, which go beyond the MCAD. In particular, Art. 1, para 2 and Art. 5-7 have been autonomously shaped and adopted by the Italian legislator, in addition to those contained in the MCAD. The first rule which goes beyond the MCDA is contained in Art. 1, para 2 of the legislative decree No. 145 of 2007, which provides that: 'Advertisements must be transparent, truthful and accurate'.

The second rule which goes beyond the MCDA is contained in Art. 5 of the legislative decree No. 145 of 2007, which provides that: '1. Advertisements must be clearly recognisable as such. Press advertisements must be distinguishable from other forms of public notices, and use graphical forms that are easily perceptible. 2. The terms 'guarantee', 'guaranteed' and similar expressions may only be used if they are accompanied with specific details of the substance of the guarantees and the formalities relating to the guarantee offered. When the advertisement is too short to publish these details in full, the summary reference to the substance and the procedures for claiming against the guarantee must explicitly refer to a text which the consumer can easily obtain, setting out all the details. 3. All forms of subliminal advertising are prohibited'.

The third rule which goes beyond the MCAD is contained in Art. 6 of the legislative decree No. 145 of 2007, which concerns advertising of products that are dangerous to health and safety and provides that: '1. Any advertisement is deemed to be misleading when it fails to indicate that a product advertised is likely to threaten the health or safety of the public in such a way that the public may be led to neglect the normal rules of prudence and vigilance'.

The fourth rule which goes beyond the MCAD is contained in Art. 7 of the legislative decree No. 145 of 2007, which concerns advertising addressed to children and adolescents and provides that: '1. Any advertisement is deemed to be misleading when, being likely to be seen by children and adolescents, it exploits their natural credulity or lack of experience or which, by using children and adolescents in the advertisements, without prejudice to the provisions of section 10 of Law No 112 of 3 May 2004, exploits the natural sentiments of adults towards children. 2. Any advertisement is deemed to be misleading when, being likely to be seen by children and adolescents, it may, even indirectly, place their safety in jeopardy'. In this concern, stakeholders have underlined that it is quite difficult to imagine cases of advertising which can be dangerous to health and safety of a business (Art. 6 of the legislative decree No. 145 of 2007).

The interviewed stakeholders have highlighted in this concern that it is difficult to fit the provision of Art. 7 of the legislative decree No. 145 of 2007 into the B2B sector. The reason of the presence of such provisions is that they were already contained in the Art. 5 and 6 of the legislative decree No. 74 of 25 January 1992, which implemented in Italy Directive 1984/450/EEC on misleading advertising. Based on the available evidence and the interviews conducted for this country report, it is concluded that the effects of the provisions on misleading advertising have to be considered positively. In particular, in the view of Italian stakeholders, the MCAD marked an important step forward.

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

According to the opinion of Italian stakeholders, the detailed and restrictive rules on comparative advertising produced the effect of *de facto* eliminating this kind of advertising.

- 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;

See above.

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

In this regard Italian stakeholders highlighted several criticisms. In particular, several problems arise from the fact that the EC Regulation 2006/2004 concerns only the business-to-consumer relationships and is therefore not applicable to situations which fall within the scope of application of the MCAD: the problems here concern both the investigation activity and the execution of the decisions. Furthermore, Italian enforcement authorities underline that they receive several complaints in this regard but that they are not able to react adequately, because of the lack of adequate instruments concerning the cross-border cooperation.

Therefore, Italian stakeholders consider it to be of crucial importance to extend the scope of application of the EC Regulation 2006/2004 at least to the business-to-micro-enterprises relationships and at best to all B2B disputes. This is considered to be even more important in light of the proposal of the European Commission for a new regulation on Geoblocking.<sup>29</sup>

Taking the opportunity of the new strategy for the creation of a Digital Single Market,<sup>30</sup> it would be therefore of particular importance to lay down common rules, which ensure that national authorities are able to provide effective cross-border enforcement. Otherwise, national authorities will not be able to enforce their decisions in other countries. Due to this lack of harmonised provisions, the enforcement in the B2B sector is therefore as of today really difficult and problematic.

- Are there measures that could improve the effectiveness of the MCAD in providing protection for businesses (see also 1.1.6 below)? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

Please see 1.1.6. below.

#### 1.1.4. Effectiveness of current rules 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;

Based on the available evidence and the interviews conducted for this country report, it is concluded that national differences in the application/implementation of the UCPD play a detrimental role for businesses, as they are required to adapt their commercial behaviour to different national legislations. This causes a lack of confidence of the businesses in marketing abroad. At the end this causes also an increase of costs and therefore leads to higher prices for consumers. In certain markets there is no real cross-border competition at the retail level.

<sup>29</sup> Proposal of the European Commission for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

<sup>30</sup> Cf. A. De Franceschi (ed.), *European Contract Law and the Digital Single Market: The Implications of the Digital Revolution*, Cambridge – Antwerp – Portland, 2016.

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

The uniform black list of commercial practices annexed to the UCPD is deemed to have positive effects, as it allows businesses to identify the limits for their best practices and therefore contributes to enhancing their confidence in marketing abroad.

- Whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade. [*Do the national differences play a role in a business perspective? Have they caused problems?*]

No specific experiences reported other than those stated above.

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;

No specific experiences reported other than those stated above.

- Whether the minimum harmonisation character of provisions on misleading advertising represents a barrier to cross-border trade;

No specific experiences reported other than those stated above.

- 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;

According to the opinion of Italian stakeholders, the detailed and restrictive rules on comparative advertising produced the effect of *de facto* eliminating this kind of advertising.

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

Based on the available evidence and the interviews conducted for this country report, it is concluded that the lack of cross-border enforcement mechanisms in B2B relations constitutes a relevant barrier to cross-border trade. Several problems arise from the fact that the EC Regulation 2006/2004 concerns only business-to-consumer relationships and is therefore not applicable to situations which fall within the scope of application of the MCAD: this situation causes problems concerning both the investigation activity and the execution of decisions. It would be therefore of crucial importance to extend the scope of application of the EC Regulation 2006/2004 also at least to the B2Micro-enterprises relationships and at best to all B2B disputes.

#### 1.1.5. Interplay amongst UCPD information requirements according to Article 7(4) with the information requirements in the horizontal consumer law instruments

Regarding the information requirements according to Article 7(4) UCPD ("invitation to purchase") in the advertising stage, please analyse:

- The level of awareness of traders as regards information requirements at the advertising stage, as in particular demonstrated by their practical application; [*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?*]

The level of awareness of traders as regards information requirements seems to be quite high, as they have also to pay reputation damages if they fail to comply with these requirements. Several interviewees underline that the information requirements contained in Art. 7, Para 4 UCPD would need a more precise coordination with the comprehensive pre-contractual information requirements of the CRD. In particular, the overlappings between the information duties under several directives creates confusion not only among consumers and businesses, but also among the enforcement authorities, which are entitled to apply these provisions.

- 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 interviewees reported many problems of overlap between Art. 7, Para 4 UCPD and the E-Commerce Directive (in particular with its Art. 5) as well as with the CRD (in particular with its Art. 6). It has been indeed pointed out that there is a too high amount of information duties and there is a need of compliance with all subsystems which are abstractly applicable to the concrete commercial behaviour.

Several consumer organisations reported problematic overlaps between the information duties contained in Directive 2011/83/EU on consumer rights, Directive 2006/123/EC on services in the internal market and Directive 2000/31/EC on electronic commerce. In particular, Art. 6, Para 8 CRD highlights that the information requirements laid down in that Directive 'are in addition to information requirements contained in Directive 2006/123/EC and Directive 2000/31/EC and do not prevent Member States from imposing additional information requirements in accordance with those Directives. Without prejudice to the first subparagraph, if a provision of Directive 2006/123/EC or Directive 2000/31/EC on the content and the manner in which the information is to be provided conflicts with a provision of this Directive, the provision of this Directive shall prevail'. Furthermore, recital 12 CRD adds that 'Member States should retain the possibility to impose additional information requirements applicable to service providers established in their territory'. This broad space left to the discretionality of national legislators can create relevant problems in the cross-border trade and is in evident contrast with the targeted full harmonisation.<sup>31</sup>

#### 1.1.6. Relevance for business-to-business transactions

Regarding the area of unfair commercial practices/marketing, please analyse:

- 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 cross-border trade;

<sup>31</sup> See A. De Franceschi, Informationspflichten und formale Anforderungen im Europäischen E-Commerce, in Gewerblicher Rechtsschutz- und Urheberrecht – Internationaler Teil, 2013, p. 866 f.

Art. 7, para 2 of law decree 1/2012 converted, with modifications, by law No. 27 of 24 March 2012 on 'Urgent provisions for competition, infrastructure development and competitiveness' introduced in the set of definitions contained in Art. 18, Para 1, of the Italian Consumer Code (implementing Art. 2 UCPD) the definition of 'micro-enterprises' (according to Art. 18, para 1, lit. *d-bis*, Consumer Code 'micro-enterprises' are 'entities, companies or associations that, regardless of their legal form, engage in an economic activity, even as an individual or family, that employs fewer than ten persons and generates an annual revenue or total annual balance sheet not in excess of two million Euros, pursuant to section 2, paragraph 3 of the annex to recommendation n. 2003/361/EC of the Commission, dated 6 May 2003;'). Furthermore, Art. 7, Para 2 of law decree No. 1/2012 converted, with modifications, by law No. 27 of 24 March 2012 on 'Urgent provisions for competition, infrastructure development and competitiveness' modified also Art. 19, Para 1 of the Italian Consumer Code – which implements Art. 3 UCPD –, introducing the following formulation: '1. This Title shall apply to unfair business-to-consumer commercial practices before, during and after a commercial transaction in relation to a product as well as any unfair commercial practices between professionals and micro-enterprises. The protection of micro-enterprises from deceitful advertising and unlawful comparative advertising is explicitly ensured by legislative decree No. 145 of 2 August 2007 [which contains the implementing provisions of Directive 2006/114/EC]'.

Italian enforcement authorities have warmly welcomed this extension of the scope of application. Also business organisations and scholars have fundamentally welcomed this extension of the scope of application to the relationships between businesses and micro-enterprises.<sup>32</sup>

- 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;

Based on the opinion of stakeholders and literature, it seems to be appropriate to extend, in all European Member States, the scope of application of the implementing provisions of the Directive on Unfair Commercial Practices to the relationships Business-to-Microenterprises. On the contrary, such an extension would be more problematic in other sectors, taking e.g. into consideration the circumstance that the UCPD takes as one of the parameters the notion of 'average consumer'.

- 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 also cover unfair commercial practices during and after the transaction;

Italian stakeholders and enforcement authorities consider it useful to extend the scope of protection in B2B transactions in order to cover also unfair commercial practices during and after the transaction. At the present stage, the protection from misleading advertising in the B2B sector covers only the advertising in the pre-contractual stage.

- Whether there is a need to have a black-list of practices in the business-to-business marketing area;

As already mentioned above, concerning the black-list of practices in the business-to-consumer marketing area according to the UCPD, it has to be pointed out that the

<sup>32</sup> See e.g. G. De Cristofaro, Unfair Business-to-Microenterprise Commercial Practices: The Italian Solution in the European Context – The Extended Scope of Application of UCP Directive's Implementing Provisions, in *Journal of European Consumer and Market Law*, 2015, p. 20 ff.; D. Valentino, Timeo Danaos et dona ferentes. La tutela del consumatore e delle microimprese nelle pratiche commerciali scorrette, in *Rivista di Diritto civile*, 2013, p. 1157 ff.



introduction of black-list provisions causes a certain degree of rigidity, which may have negative effects on the system. Furthermore, the introduction of such a list in the B2B sector would be welcomed by the enforcement authorities only in the case in which all black-list provisions introduced in this way would not require an assessment of the concrete unfairness of the behaviour of the concerned parties.

- What should be the enforcement cooperation mechanism in the business-to-business marketing area;

Italian stakeholders consider it essential to create a cross-border enforcement instrument similar to the EC Regulation 2006/2004 also in the B2B sector. For this purpose it would be essential to avoid a duplication of the parallel system to that of EC Regulation 2006/2004, but rather to extend the scope of application of EC Regulation 2006/2004 also to the B2B sector.

- Whether there is a need to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive;

Enforcement authorities have serious doubts concerning the opportunity to regulate at the European level contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive, as European member States have different categories concerning contract law remedies and therefore a harmonisation would be particularly difficult to be accepted by the member States.

- Whether there is a need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive.

No specific experiences reported or literature to mention other than stated above.

#### 1.1.7. Relevance of contractual consequences of unfair commercial practices

Please analyse whether there are in your country:

- 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;

The Italian implementing provisions of the UCPD do not expressly provide any specific contractual consequences of unfair commercial practices. Nevertheless, provisions on the vices of will contained in the Italian Civil Code (Art. 1427-1440) and the consequent remedy of the annulment of the contract for fraud, duress or mistake (Art. 1441-1446) are commonly accepted to apply in this context<sup>33</sup>. In particular, Art. 19, Para 1, lit. a of the Consumer Code, which reproduces (without any relevant changes) Art. 3, Para 2 of Directive 2005/29/EC expressly provides that Title III, Part II of the Consumer Code (concerning unfair commercial practices) 'is without prejudice to contract law and, in particular, to the rules on the formation, validity, or effect of a contract'. In this concern, the Italian literature has underlined that by means of the aforementioned provision the legislator aimed at clarifying that the implementing provisions of the UCPD do not exclude the application of the usual contract law remedies provided for by the Italian Civil Code. Therefore, in the cases in which a contract is void, voidable or not binding on the consumer the remedies are those listed

<sup>33</sup> See e.g. G. De Cristofaro, Unfair Commercial Practices and Italian Private Law, in *Journal of European Consumer and Market Law*, 2015, p. 251 ff.; G. De Cristofaro, Pratiche commerciali scorrette, in *Enciclopedia del Diritto. Annali* vol. V, Milan 2012, p. 1113 ff.; M.R. Maugeri, Violazione della disciplina sulle pratiche commerciali scorrette e rimedi contrattuali, in *Studi in onore di Giorgio Cian*, Padua 2010, p. 1677; C. Camardi, Pratiche commerciali scorrette e invalidità, in *Studi in onore di Giorgio Cian*, Padua 2010, p. 367 ff.; S. Delle Monache, Pratiche commerciali scorrette, obblighi di informazione, dolo contrattuale, in *Annuario del contratto*, 2009, p. 109 ff.



in Art. 1418, 1425 and 1427 of the Civil Code.<sup>34</sup> It has been in particular underlined that unfair commercial practices should be considered among the elements which are to be taken into account in the interpretation of a contract. Furthermore, 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 Art. 34, Para 1 of the Consumer Code (which implements Art. 4 UCTD), are relevant for the assessment of the unfair nature of the contractual terms<sup>35</sup> and to decide whether these terms are drafted in plain and intelligible language, in order to comply with the principle laid down in Art. 35 of the Consumer Code (which implements Art. 5 UCTD). Furthermore, it has been observed that, relating to proceedings brought for the avoidance of a B2C contract for threat or fraud, the rules laid down in the articles 21, 22, 23, 24, 25 and 26 of the Consumer Code (which implement Art. 6, 7, 8, 9 and the Annex I of the UCPD) can, as concerns the B2C relationships, contribute to reshape the concepts of 'deception', 'misrepresentation' and 'threat' laid down in the Italian Civil Code.<sup>36</sup>

- Any case law (enforcement decisions, court rulings) providing for such consequences;

In this regard there are no available data.

- Whether there is, based on past experience in your country, a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

The enforcement authorities consider not necessary for the legislator to provide specific contract law consequences linked to the use of unfair commercial practices. On the contrary some consumer associations proposed to lay down specific contract law remedies, which give the possibility to terminate the contract without recurring to the civil jurisdiction. Furthermore, some authors consider it necessary to lay down a harmonised solution at EU level concerning contractual and/or non-contractual remedies.<sup>37</sup>

## 1.2. Contract conclusion and performance

### 1.2.1. Effectiveness of the current rules in establishing 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 implemented by law No. 52 of 6 February 1996. The implementing provisions were inserted in Art. 1469-*bis* to 1469-*sexies* of the Italian Civil Code.<sup>38</sup> Those provisions have been later repealed on the occasion of the release of the Italian

<sup>34</sup> G. De Cristofaro, Unfair Commercial Practices and Italian Private Law, in *Journal of European Consumer and Market Law*, 2015, p. 255.

<sup>35</sup> See in this regard also ECJ Case C-453/10 *Perenicova and Perenic v SOS financ spol s r o* [2012] ECLI:EU:C:2012:144.

<sup>36</sup> G. De Cristofaro, Unfair Commercial Practices and Italian Private Law, in *Journal of European Consumer and Market Law*, 2015, p. 255.

<sup>37</sup> G. De Cristofaro, Die zivilrechtlichen Folgen des Verstoßes gegen das Verbot unlauterer Geschäftspraktiken: eine vergleichende Analyse der Lösungen der EU-Mitgliedstaaten, in *Gewerblicher Rechtsschutz- und Urheberrecht - Internationaler Teil*, 2010, p. 1017.

<sup>38</sup> See e.g. 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*, 1997, p. 751 ff.; G. Cian, *Il nuovo capo XIV-bis (titolo II, libro IV) del codice civile, sulla disciplina dei contratti con i consumatori*, in *Studium Iuris*, 1996, p. 411 ff.; E. Minervini, *Tutela del consumatore e clausole vessatorie*, Naples 1999.

Consumer Code<sup>39</sup> and transferred into Art. 33 to 37 of the Italian Consumer Code.<sup>40</sup> As an element of significative originality, the Italian legislator introduced (into Art. 1469-quinquies of the Civil Code, and later) into Art. 36 Para 2 a black list of contract terms, which 'shall be null, even if they have been individually negotiated, where they have the purpose or effect of: a) excluding or exempting liability of the professional in the event of the death of the consumer or personal injury to the latter resulting from an act or omission of that professional; b) excluding or exempting the actions of the consumer vis-à-vis the professional or another party in the event of total or partial non-performance or inadequate performance by the professional; c) providing for an extension of the consumer's acceptance to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract'.

As particularly concerns enforcement, Art. 5, law decree No. 1 of 24 January 2012 (converted into law with slight amendments by law No. 27 of 24 March 2012 on 'Urgent provisions for competition, infrastructure development and competitiveness') introduced Art. 37-*bis* of the Consumer Code, which lays down the rules for the 'Administrative protection against unfair terms'.<sup>41</sup>

Based on the available evidence and on the interviews conducted for this country report, it can be concluded that the general clause has proved to be able to adapt consistently to the developments of society and concrete behaviours of businesses and it has therefore been welcomed by judges, as well as by business and consumer associations.<sup>42</sup>

- 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 your MS? Does this work in practice or are there problems?*]

The indicative list of unfair terms annexed to the Directive was initially (by law No. 52 of 6 February 1996) transposed in Art. 1469-*bis* of the Civil Code and is now contained (since Legislative decree No. 206 of 6 September 2005: see the previous bullet) into Art. 33, Para 2, Consumer Code. Such indicative list has been implemented as a 'grey-list' of unfair contract terms (Art. 33, Para 2, Consumer Code provides indeed that: '2. Terms are presumed unfair, unless proved otherwise, where they have the object or effect of...'). According to the enforcement authorities, this solution provides for a

<sup>39</sup> Legislative decree No. 206 of 6 September 2005: the updated version of the legislative decree is available at <http://www.normattiva.it/ricerca/semplice>.

<sup>40</sup> An English version of those provisions is available at <http://www.agcm.it/en/consumer-protection/consumer-protection-legislation/1725-legislative-decree-no-206-of-6-september-2005-consumer-code.html>.

<sup>41</sup> Art. 37-*bis* of the Consumer Code: '1. The *Autorità Garante della Concorrenza e del Mercato*, having heard the representative national-level professional associations and the interested chambers of commerce or their unions, *ex officio* or in response to complaints, and for the sole purpose of the subsequent paragraphs, declares the unfair nature of terms that are included in contracts between professionals and consumers through the acceptance of general contract conditions or the signing of forms, models or templates. The provisions envisaged by section 14, paragraphs 2, 3 and 4 of law n. 287 of 10 October 1990 apply in accordance with the procedures noted in the regulation referred to in paragraph 5. In cases of non-compliance with orders by the Authority pursuant to section 14, paragraph 2 of law n. 287 of 10 October 1990, the Authority may apply pecuniary administrative sanctions ranging from EUR 2 000 to EUR 20 000. If the information or documentation that is untruthful, the Authority may apply pecuniary administrative sanctions ranging from EUR 4 000 to EUR 40 000.

2. An extract of the measure establishing the unfair nature of the term shall also be distributed via publication in a special section of the Authority's institutional website, on the website of operators who adopt terms deemed to be unfair and by any other means deemed opportune in relation to furnish consumers with due notice by and at the expense of the operator. In cases of non-compliance with the provisions of the present paragraph, the Authority may apply pecuniary administrative sanctions ranging from EUR 5 000 to EUR 50 000. any case [...].'

<sup>42</sup> See S. Troiano, Art. 33 Codice del Consumo, in G. De Cristofaro and A. Zaccaria (eds.), *Commentario breve al Diritto dei consumatori*, 2<sup>nd</sup> ed., Padua, 2013, p. 252 ff.; E. Navarretta, 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*, 1997, p. 864; A. Barengi, Art. 33 Codice del consumo, in V. Cuffaro (ed.), *Codice del consumo*, Milan, 2015, p. 280.

good functioning and does not create relevant problems. According to the opinion of the consumer associations, the mix of principle-based approach of the Directive and 'grey-list' of unfair terms ensures a good balance between legal certainty and flexibility.

- 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; [*Note: If a black/grey list exists in your country, key aspects to consider are: How does the list work in practice? Does it make a difference to have such a list?*]

According to the opinion of the interviewed stakeholders, the black list of unfair contract terms entails the risk of creating a too high degree of rigidity in the framework of the unfairness-check. In particular, some stakeholders underlined that the introduction of a black list causes a limitation of competition and therefore can have negative effects on the market. Therefore any introduction of black list provisions in a future refit of the Directive 1993/13/EEC should be subject to a stringent proportionality test, in order to make sure that any restriction of market freedom has a positive net effect in terms of consumer welfare.

- 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: In your country, have the effects of court decisions establishing the unfairness of an unfair term been extended to all contracts of the trader concerned or to the contracts of any other trader containing such a term? If so, how does this work in practice? What are the impacts on businesses? If there are no such effects of court decisions on unfair terms: what are the effects of this situation?*]

In the Italian system, the effects of a decision of a court concerning the unfairness of a term is limited to the individual relationship between the specific trader and the consumer. As a consequence, the effects of a court decision cannot be automatically extended to other contracts. Especially in the cases in which the decision concerning the unfairness of the term was released by the Supreme Court, this increases the probability that the same term will be considered unfair in a later judgement as well. Furthermore it has to be underlined that, since the introduction of the 'administrative protection against unfair terms' through Art. 37-*bis* of the Consumer Code (see above), the Autorità Garante della Concorrenza e del Mercato, having heard the representative national-level professional associations and the interested chambers of commerce or their unions, *ex officio* or in response to complaints, and for the sole purpose of the subsequent paragraphs of Art. 37-*bis* of the Consumer Code, can declare the unfair nature of terms that are included in contracts between professionals and consumers through the acceptance of general contract conditions or the signing of forms, models or templates. In cases of non-compliance with orders by the Authority pursuant to section 14, paragraph 2 of law No. 287 of 10 October 1990, the Authority may apply pecuniary administrative sanctions ranging from EUR 2 000 to EUR 20 000. If the information or documentation is untruthful, the Authority may apply pecuniary administrative sanctions ranging from EUR 4 000 to EUR 40 000.

In particular, Art. 37-*bis*, Para 3 of the Consumer Code provides that the enterprises in question may ask in advance the Autorità Garante della Concorrenza e del Mercato to determine whether the terms they intend to use in commercial relations with consumers would be considered unfair. The Authority should take a decision on this consultation within one hundred and twenty days of when the request is received, unless the information that was provided turns out to be seriously inaccurate, incomplete or untruthful. Terms that are found not to be unfair as a result of the consultation are immune to further assessment by the Authority. The afore mentioned

provision highlights in this regard that the professionals' accountability to consumers remains unchanged in any case. It is worth to be underlined that Art. 37-*bis*, Para 4 of the Consumer Code expressly safeguards the ability of civil courts to assess the fairness of contractual terms and to rule on damages.

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

The UCTD does not expressly provide a sanction for the violation of the contractual transparency requirements under the Directive. Italian stakeholders underline that this situation leads to a lack of clarity, as it remains doubtful which consequences should arise from the violation of such requirements.<sup>43</sup> In this concern it has been highlighted that the violation of the contractual transparency requirements could give rise to a pre-contractual responsibility.<sup>44</sup> Furthermore, Italian courts assessed the unfairness<sup>45</sup> and the consequent voidness<sup>46</sup> of the non-transparent term. According to Italian literature, the non-observance of the duty of transparency can be a basis for an injunction according to Art. 37 of the Consumer Code (which contains the implementation provision of Art. 7 UCTD).<sup>47</sup>

- 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. [*Note: Question only relevant for MS that have put in place extensions of application of UCTD*]

The Italian legislator has not put in place this extension of the scope of application of the UCTD.

- 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?*]

According to the interviewed stakeholders, the sanction foreseen by the UCTD for unfair contract terms (term is not binding) has a high level of effectiveness, in particular because Italian courts take up the active role imposed by the European Court of Justice, by invoking *ex officio* the unfairness.<sup>48</sup> In Art. 37-*bis* of the Consumer Code (see above), the Italian legislator provided furthermore an administrative remedy in this area. In any case, the scope of application of the afore mentioned provision has not been extended to the B2B or B2Microenterprises sector.

<sup>43</sup> See in this regard, e.g. S. Pagliantini, *Trasparenza contrattuale*, in *Enciclopedia del Diritto, Annali V*, Milan 2012, p. 1280 ff.; E. Minervini, *La trasparenza contrattuale*, in *I Contratti* 2011, p. 97 ff.

<sup>44</sup> So A.M. Azzaro and P. Sirena, *Il giudizio di vessatorietà delle clausole*, in E. Gabrielli and E. Minervini (eds.), *I contratti dei consumatori*, in P. Rescigno and E. Gabrielli, *Trattato dei contratti*, in E. Gabrielli and E. Minervini, *I contratti dei consumatori*, I, Turin 2005, p. 152; A. Barenghi, *I contratti per adesione e le clausole vessatorie*, in Lipari (ed.), *Trattato di diritto privato europeo*, Padua 2003, III, p. 346.

<sup>45</sup> Tribunale di Roma, 3 March 2005, in *Guida al Diritto* 2005, No. 30, p. 62 ff.; Tribunale di Bergamo, 10 May 2005, in *I contratti*, 2006, p. 592.

<sup>46</sup> Tribunale di Vigevano, 6 June 2003, in *Studium Iuris*, 2004, p. 115 f.

<sup>47</sup> 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.

<sup>48</sup> For a detailed and in-depth analysis of the most relevant issues in this regard, see S. Pagliantini (ed.), *Le forme della nullità*, Turin 2009.

- In a forward looking perspective: Are there other measures that could improve the effectiveness of the UCTD in establishing a high level of consumer protection in your country? Would a graphical presentation model improve the readability and comprehension by consumers of the T&Cs? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

Based on the interviews conducted for this country report, the answer is negative. In this concern, stakeholders have underlined the circumstance that, in any case, the average consumer does not really read the general terms and conditions.

### 1.2.2. Effectiveness of the current rules 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 disparities have an impact on cross-border trade; [*Key aspects to consider are: Do national differences in the application/implementation of the Directive play a role for businesses? Have these differences led to changes in their business strategy? Have these differences caused problems?*]

As has been underlined by the interviewed stakeholders, national differences in the application/implementation of the directives have a detrimental impact on businesses, as they are committed to adapt their commercial behaviour to different national legislations. This causes less confidence of the businesses in marketing abroad. This causes also an increase of costs and therefore leads to higher prices for consumers. In certain markets there is no real cross-border competition at the retail level.

- 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;

The uniform indicative list of commercial practices annexed to the UCTD is deemed to have positive effects, as it allows businesses to identify the limits for their best practices and therefore contributes to enhance their confidence in marketing abroad.

- 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.

No specific experiences reported other than those stated above.

### 1.2.3. Relevance for business-to-business transactions

Regarding the area of contractual fairness and in relation to the Unfair Contract Terms Directive, please analyse:

- Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;

According to the relevant stakeholders, in Italy there is a particular argument for the extension at least to the Business-to-Microenterprises sector of the provisions of the UCTD, as the weakness of the contractual position of small and medium businesses often shows similarities to the weakness of the contractual position of consumers.

- 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;

Based on the available evidence and the interviews conducted for this country report, it is concluded that 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.

- 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;

According to the opinion of the interviewed stakeholders, if the legislator decides to extend the scope of B2B protection against unfair contract terms, one could consider the possibility to extend the protection 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;

No specific experiences reported other than those stated above.

- Whether there is a need for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive;

The decisive question in this concern is whether the protection ensured by the UCTD should be extended also to the B2B sector. Once this decision has been taken, it seems to be rational to apply the transparency requirements equally to B2B transactions.

- Whether an extension of the Unfair Contract Terms Directive to B2B transactions can bring benefits for cross-border trade;

No specific experiences reported other than those stated above.

- Whether the consequences of such an extension would have an effect on innovation by or market opportunities for SME providers/suppliers;

Based on the available evidence and the interviews conducted for this country report, it has to be concluded that such an extension would have a positive 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.

Based on the available evidence and the interviews conducted for this country report, it has to be concluded that the benefits of extending the scope of application of the provisions of the UCTD to business-to-business transactions would exceed the negative consequences of such an extension.



### 1.3. Injunctions

#### 1.3.1. Effectiveness of the current rules in establishing a high level of consumer protection

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

- To what extent is the use of the injunction procedure in your country contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment?<sup>49</sup>

The Italian implementing provisions of Directive 2009/22/EC on injunctions for the protection of consumers' interests are laid down in Art. 139 and 140 of the Consumer Code. Before the implementation of the ID, the Italian legislator already regulated the injunction procedure in Art. 1469-*sexies* of the Civil Code (the implementing provision of Art. 7 UCTD). On the occasion of the entry into force of the Consumer Code, Art. 1469-*sexies* of the Civil Code was repealed and its contents were transferred into Art. 37 of the Consumer Code. In the Italian legal system there is therefore now a 'bipolar' system of collective protection of the consumers' interests: i) Art. 37 of the Consumer Code regulates the injunction procedure for the particular case of violation of the consumers' collective interests (the case in which the trader inserts unfair terms in the general contract terms);<sup>50</sup> ii) Art. 139 and 140 of the Consumer Code contain the rules of the so called 'general injunction procedure': the injunction procedure for the cases of violation of the collective interests of consumers protected by the rules of the Consumer Code.<sup>51</sup>

In the absence of statistical data it is not possible to provide a precise assessment concerning the effects of the use of the injunction procedure in Italy in terms of contributing to the reduction in the number of infringements of consumer protection rules and reduction in consumers' detriment. However, the interviewed stakeholders underlined that while the collective injunction procedure is highly effective at national level, there is a lack of effectiveness at cross-border level.

- What measures in your national legislation on injunction procedure are considered to be particularly effective, if any: measures regarding the cost of the procedure, the 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?

The interviewed stakeholders underline the effectiveness of the publication of decisions in newspapers. In this regard, they highlight in particular the circumstance that it is most important that at least one of the mentioned newspapers has a circulation at national level.

<sup>49</sup> Consumers' detriment should be understood as consumers' financial loss caused or that could have been caused by the infringements as defined by article 1, Para 2 of the Injunctions Directive.

<sup>50</sup> See e.g. M. Libertini, Prime riflessioni sull'azione inibitoria dell'uso di clausole vessatorie, in *Contratto e Impresa/Europa*, 1996, p. 567 ff.; E. Minervini, Contratti dei consumatori e tutela collettiva nel codice del consumo, in *Contratto e impresa*, 2006, p. 635 ss.; R. Donzelli, *La tutela giurisdizionale degli interessi collettivi*, Naples 2008.

<sup>51</sup> See e.g. E. Vullo, Art. 139-140 Codice del consumo, in G. De Cristofaro and A. Zaccaria (eds.), *Padua 2013*, p. 926 ff.; S. Benucci, Le azioni inibitorie e l'accesso alla giustizia, in G. Vettori (ed.), *Il contratto dei consumatori, dei turisti, dei clienti, degli investitori e delle imprese deboli. Oltre il consumatore*, Padua, 2009, p. 1441 ff.



- Has your country extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunction Directive? If yes, what are the additional consumer rights covered?

Yes. In the implementing provisions of the Injunction Directive the Italian legislator does not refer to the list of directives mentioned in the Annex I to the Injunction Directive. Art. 139 of the Consumer Code has indeed a broad scope of application and refers more generally to the 'collective interests of consumers and users'. In particular, Art. 139 of the Consumer Code provides that the consumers' and users' associations listed in Art. 137 of the Consumer Code are entitled to take an action, according to Art. 140 of the Consumer Code (which implements Art. 2 ID) for the protection of the consumers' and users' collective interests. Furthermore, Art. 139 of the Consumer Code states that, in addition to what is disposed in the general provision of Art. 2 of the Consumer Code<sup>52</sup>, the mentioned associations are entitled to take an action in the case of violation of the collective interests of the consumers listed in the subjects regulated by the Consumer Code and in the following acts: i) law No. 233 of 6 August 1990 and subsequent modifications, including those contained in the general act on radio and television (legislative decree No. 177 of 31 July 2005 and law No. 122 of 30 April 1998); ii) legislative decree No. 541 of December 1992 concerning the advertising of medicinal products for human use; iii) legislative decree No. 59 of 26 March 2010, which implemented the Directive 2006/123/EC on services in the internal market; iv) regulation 2013/524/EU of the European Parliament and of the Council on online dispute resolution for consumer disputes. It has therefore to be underlined that collective interests for whose violation the mentioned associations are entitled to take an action are not only those listed in the general provision of Art. 2 of the Consumer Code, but also those listed in different law provisions which are recalled by the Consumer Code (as e.g. legislative decree No. 385 of 1 September 1993, which is a general act containing the rules concerning Banks and Credit (especially Art. 121-127); legislative decree No. 114 of 31 March 1998 on the regulation of commerce; legislative decree No. 300 of 16 December 2004, which implemented Directive 2003/33/EC on the advertising and sponsorship of tobacco products; legislative decree No. 58 of 24 February 1998, which is a general act containing the rules concerning investment services and activities.<sup>53</sup>

- Analysis of the obstacles to the effective use of the injunction procedure, in particular by analysing which progress in removing obstacles has been made and/or new difficulties that have emerged in your country since 2012.

Consumer associations argue that the slowness of the procedures before the civil courts is the major obstacle to the effective use of the injunction procedure. As concerns the Italian system, despite the recent reforms of the civil procedure, there is no evidence of relevant improvements of the described situation.

- In a forward looking perspective: Should the coverage of the Injunctions Directive be extended (by including additional legislation into Annex I to the Directive)? If so, which EU legislation should be included? Are there other measures that could improve the effectiveness of the ID in establishing a high level of consumer protection? Should the scope of the Injunctions Directive be extended to the protection of collective business' interests? Are there best practices in your country that could be relevant for other countries and considered as model for the injunction procedure at EU level?

Based on the available evidence and the interviews conducted for this country, it seems to be more adequate not to restrict the scope of application of the ID to particular rights or directives. It would be rather more equilibrated to cover all

<sup>52</sup> The text of Art. 2 of the Consumer Code is available at <http://www.normattiva.it/ricerca/semplice>.

<sup>53</sup> See in this regard E. Vullo, Art 139 Consumer Code, in G. De Cristofaro and A. Zaccaria (eds.), *Commentario breve al Diritto dei consumatori*, 2nd ed., Padua 2013, p. 929 ff.

legislative measures which are mentioned in the annex to the regulation 2006/2004/EC on the administrative cooperation for the protection of consumer interests.

### 1.3.2. 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:

- How effective is the injunction procedure in addressing infringements originating in another EU country?

Based on the available evidence and the interviews conducted for this country, the obstacles faced by consumer associations in trying to access foreign civil courts, dissuades them from starting an injunction procedure for addressing infringements originating in another EU country.

- How effective is it to address infringements originating in another EU country that qualified entities in your country are enabled to seek injunctions in the other Member State (Article 4 of the Injunctions Directive)?

As mentioned under the previous bullet, consumer associations underline that financial obstacles for bringing claims to foreign courts are insurmountable, mainly because of the related costs.

- In a forward looking perspective: Are there non-legislative or/and legislative measures that could improve the effectiveness of the injunction procedure in addressing infringements originating in another EU country? Are there best practices in your country that could be relevant for other EU countries and could be considered as a model for the injunction procedure at EU level?

Concerning this point, consumer associations underline that in order to improve the effectiveness of the injunctions procedure in addressing infringements originating in another EU country, they would need an adequate financial support, as the main obstacle for bringing claims to foreign courts are mainly of financial nature.

### 1.3.3. Interplay between the Injunctions Directive and other enforcement instruments of consumer law

Please analyse:

- Is the injunction procedure as designed by the Injunctions Directive regulated separately in your country (in a separate legal act or as a separate procedure regulated within the same legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (UCPD, UCTD and by the Consumer Rights Directive)?

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 provision for 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).

- If these procedures are regulated separately: What are the main differences between them? How is the coherence between these procedures ensured? If these procedures are regulated in a single legal act (possibly as a single procedure): In what way do these procedures (or this procedure) go beyond measures foreseen by the Injunctions Directive?

Please refer to earlier answers.

#### 1.4. Cross-cutting issues

##### 1.4.1. Cost and benefits of the directives covered by the study

- To what extent is there evidence for benefits for consumers stemming from the protection provided by both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of benefits for consumers from the protection against unfair commercial practices and unfair standard terms in contracts; [*Note: a relevant aspect in this context is whether the costs for consumers in exercising their rights under these directives are limiting these benefits or not.*]

According to enforcement authorities and consumer associations it is particularly difficult to assess the benefits for consumers arising from the protection provided by European directives. Italian stakeholders underlined that such protection benefits consumers. On the one hand, the procedure before the Autorità Garante della Concorrenza e del Mercato is fast, effective and free of charge to consumers. On the other hand, the procedure before the national courts is relatively slow and expensive for consumers: this significantly impairs the effectiveness of the consumer protection. The circumstance that the Autorità Garante della Concorrenza e del Mercato is particularly fast and efficient in applying the implementing provisions of the UCPD has caused a high effectivity of the concerning rules.

The interviewed consumer associations underlined on the one hand that the mix of general clauses and black lists is to be particularly welcomed, as it allows a good degree of flexibility in order to protect the consumers' interests. On the other hand, the same consumer associations underline that the high costs and length of judgements before the national courts impair in a significant way the effectivity of such provisions. Consumer associations further underline that also ADR do not meet the expectations as concerns their functioning.

- To what extent is there evidence for benefits for traders stemming from both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of creating a level playing field for honest traders by providing a legal basis to eliminate or at least constrain dishonest market practices, such as the use of unfair standard terms in contracts or unfair commercial practices, including through the application of the Injunctions Directive;

The quick and effective enforcement activity – especially that carried out by the Autorità Garante della Concorrenza e del Mercato concerning unfair commercial practices – ensures relevant direct benefits for consumers and indirect benefits for fair handling businesses. As specifically concerns the implementing provisions of the UCPD, the extension of the scope of application from the B2C to the B2Microenterprises relationships, should enhance the benefits for traders.

- What are costs for traders due to the need to respect the requirements under the directives covered by the study? [*Note: Such as costs of research, legal advice and compliance as well as the amount of time necessary to comply with the directives*]

Based on the available evidence and the interviews conducted for this country, it is difficult to quantify the costs for traders in order to comply with consumer law legislation. In any case, stakeholders underlined the circumstance that a too high

amount of information duties and in particular their fragmentation and overlappings (see above, 1.1.5.) cause higher costs for businesses without really enhancing the level of consumer protection.

- What are the costs involved in the public enforcement of these rules?

There are no sufficient elements in order to answer this question as neither the interviewed stakeholders nor other institutions have conducted studies concerning the costs involved in the public enforcement of these rules. As specifically concerns the enforcement of the implementing provisions of the UCPD, the circumstance that the administrative fine for unfair commercial practices has been increased in 2012 up to a limit of EUR 5 000 000.00<sup>54</sup> (a limit which has been reached *inter alia* in a recent judgement published on 4 August 2016 concerning the so called "Volkswagen-case")<sup>55</sup> could help not only to enhance the level of compliance by the traders and the level of consumer protection but also to cover the costs involved in the public enforcement of these rules (see above 1.1.1.).

- Are there indications that the directives covered by the study are not implemented in your country in a cost-effective manner?

The interviewed stakeholders stated that European directives are implemented in Italy in a cost-effective manner.

- Could the costs for implementing and enforcing the rules of the directives covered by the study be reduced without lowering the level of protection for consumers? If so, how?

Based on the available evidence and the interviews conducted for this country report, it does not seem to be realistic to reduce the costs for implementing and enforcing the rules of the directives covered by this study without lowering the level of protection for consumers. On the contrary, as the proceedings before the civil courts are particularly slow, it would be particularly reasonable, as concerns Italy, to increase the costs for implementing and enforcing the rules of the directives. Consumer associations further underline the need to invest more in order to enhance the awareness of consumers concerning their rights and duties. They hope to experience soon a significant increase of the effectiveness of the ADR procedure.

<sup>54</sup> See Art. 27, Para 9, Consumer Code: '9. In its measure prohibiting the unfair commercial practice, the Authority shall also impose an administrative fine of between EUR 5 000.00 and EUR 5 000 000.00, to take account of the seriousness and the duration of the infringement [...]'.

<sup>55</sup> See in this regard the decision of the AGCM 4 August 2016, PS 10211, Volkswagen Group Italia S.p.A. and Volkswagen AG, in [www.agcm.it](http://www.agcm.it), in which the Authority sanctioned Volkswagen Group Italia S.p.A. and Volkswagen AG with an administrative fine of EUR 5 000 000.00.

#### 1.4.2. Interplay with EU sector-specific consumer protection legislation

Regarding the interplay of the horizontal EU consumer legislation [mainly UCPD and UCTD] with EU sector-specific consumer protection legislation in the areas of electronic communications, passenger transport, energy and consumer financial services, please:

- Analyse the levels of awareness of the requirements of the horizontal EU consumer legislation (mainly UCPD and UCTD) of businesses and consumers and the specific public enforcement bodies in the relevant sectors, as in particular demonstrated by their practical application; [*Key question here is: Are UCPD and UCTD applied in practice by national authorities and courts as a legal basis to combat unfair commercial practices and unfair standard terms in contracts in the regulated sectors?*]

With specific regard to the banking sector, the Bank of Italy highlighted that businesses and the specific public enforcement bodies are aware of the requirements of the UCPD and the UCTD and of the interactions among those directives and the sector-specific legislation.

As regards consumers, they are aware of the existence of consumer protection rules and tend to submit their complaints to those Authorities that they suppose are better placed to deal with them (i.e. the Bank of Italy and/or the Autorità Garante della Concorrenza e del Mercato).

In particular, unfair contract terms can also be reviewed by the judicial authority as well as by the Italian financial Ombudsman (Arbitro Bancario Finanziario) set up in 2009 according to the Italian Consolidate Law on Banking (legislative decree No. 385 of 1993)<sup>56</sup>. In the banking and financial sector, national law transposing the directives is widely used as a legal basis to combat unfair commercial practices and unfair standard terms. Italian legislation transposing the UCPD is commonly applied by the Italian competition authority in its proceedings on unfair commercial practices held by banks and other financial institutions; as already stated, compliance of the Italian legislation on unfair contract terms is ensured by the courts as well as by the Italian financial Ombudsman.

- Specify whether in your country the same authority is responsible for the enforcement of the horizontal EU consumer law 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 UCPD/UCTD in the regulated sectors, as specified in the previous bullet?*]

In Italy, while the Authority in charge of the enforcement of the horizontal EU consumer law is the Autorità Garante della Concorrenza e del Mercato, enforcement of sector specific rules usually lies under the responsibility of other authorities, each one responsible for its own specific sector. As regards the banking and financial industry, financial consumer protection is carried out by four financial market supervisory authorities: Bank of Italy, Commissione Nazionale per le Società e la Borsa (CONSOB), Commissione di Vigilanza sui Fondi di Pensione (COVIP) and Istituto per la Vigilanza sulle Assicurazioni (IVASS). The Bank of Italy is competent for Banking services (deposits, payment services, current accounts, loans). The IVASS is competent for Insurance related issues. The CONSOB is competent for securities, collective portfolio management activities and investment services. The COVIP is competent for private pension plans. The Autorità Garante della Concorrenza e del Mercato is competent for Unfair commercial practices and for the further aspects related to the enforcement of

<sup>56</sup> The decisions of the Arbitro Bancario e Finanziario are available at <https://www.arbitrobancariofinanziario.it/decisioni>.

the CRD listed in Art. 66 of the Consumer Code.<sup>57</sup> The division of functions is coupled by strong co-ordination and co-operation mechanisms.

In order to reduce administrative and regulatory burdens for financial services providers to a minimum and to ensure the effectiveness of supervision over them, supervisors must coordinate their activity. For this purpose they are mandated to exchange all relevant information and establish co-operation frameworks through memorandums of understanding (which are made public). This framework allows to establish the arrangements which are more appropriate in order to deal with cross-sectoral issues taking into consideration their specificities. Moreover, formal and informal meetings are held on a regular basis and some committees are established in order to improve the co-operation among different authorities. It is worth noting that regulators cannot invoke professional secrecy while dealing with each other.

As regards the activity of banks and other financial institutions, co-operation between the Italian competition authority and the Bank of Italy has been formalised since 2011 within a memorandums of understanding, in order to avoid possible overlaps in their respective activities.

- Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning contractual fairness, 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.?*]

The interaction among horizontal EU consumer law (especially the UCPD) and the sector-specific rules has not been plain for a certain time. While the different sets of provisions were expected to ensure a very comprehensive protection of financial consumers, Italian administrative courts have called into question the applicability of the UCPD in those sectors (e.g. energy, media) for which specific rules are provided.

In order to solve the aforementioned problems, in way of implementation of Directive 2011/83/EU on consumer rights the Italian legislator laid down Para 1-*bis* of Art. 27 of the Consumer Code, which clearly states that, also in those sectors for which specific consumer protection rules are provided, the Italian competition authority is in charge for the enforcement of the provisions that have transposed the UCPD into the Italian system; the same legislation specifies that all infringements of sectoral regulations different from unfair commercial practices remain within the remit of each specific authority. The new rules make clear that coordination between the Italian competition authority and the specific public enforcement body in each relevant sector must be achieved. To that end, the Italian competition authority, when ascertaining whether a firm operating in a sector that lies within the mandate of a specific public body has

<sup>57</sup> Art. 66 of the Consumer Code: '1. In order to ensure compliance with the provisions of Subchapters I to IV of this Chapter by operators, the provision of Sections 27, 139, 140, 140-bis, 141 and 144 of this Code shall apply. 2. The Competition Authority *ex officio* or upon application of an interested person or organisation shall ascertain breach of the provisions of Subchapters I to IV of this Chapter, shall inhibit its continuation and eliminate the effects. 3. On assessment and penalties for infringement Section 27, paragraphs (2) to (15) of this Code shall apply. 4. The Competition Authority shall have the role of competent authority pursuant to Section 3 letter c) of EC Regulation No. 2006/2004 of the European Parliament and the Council of 27 October 2004 with respect to the issues referred to in Subchapters I to IV of this Chapter. 5. This is without prejudice to the jurisdiction of the Ordinary Courts. This is also without prejudice to extra-judicial resolution of litigations on the consumer relationship, on matters involving Sections I to IV of this Chapter, at the appropriate bodies set up by the chambers of commerce, pursuant to Section 2, paragraph (4) of Law No. 580 of 29 December 1993'.



held a commercial practice that is not compliant with the UCPD, is mandated to seek an opinion from the specific public body that has regulatory powers over that sector.<sup>58</sup>

A Memorandum of Understanding currently sets out a co-operation scheme between the Italian competition authority and the Bank of Italy; as stated before, it includes the exchange of information, holding meetings on a regular basis, as well as the issuance of opinions by the Bank of Italy in the context of proceedings of the Italian competition authority on unfair commercial practices.<sup>59</sup>

The interviewed stakeholders also underlined that there is an overlap between the different sets of information duties.

This overlapping originates at EU level and let rise the need of a better coordination of the interaction of information duties laid down in different legislative instruments. Concerning e.g. the sector of the passenger air services, there is a complex interaction between EU Regulation 1008/2008 on passenger air services (ASR), Directive 2005/29/EC on unfair commercial practices and Directive 2011/83/EU on consumer rights. On the one hand, the information duties contained in Art 23 ASR contribute to specify the content of the provisions concerning unfair (and, in particular, misleading) commercial practices. On the other hand, Art 3 para 2 CRD foresees that if any of the CRD's provisions conflicts with a provision of another Union act governing specific sectors, the provision of that other Union act shall prevail and apply to those specific sectors. In particular, Art 3 para 3 lit k CRD clarifies that the sole provisions of the consumer rights directive which find application to contracts for passenger transport services are Art 8 para 2 as well as Art 19 and 22 CRD. In this concern it is in particular necessary to adequately coordinate Art 23 ASR with Art 8 para 2 and Art 22 CRD as well as with Art 6 and 7 UCPD.<sup>60</sup>

- What are the benefits of the complementary application of the UCPD and UCTD in the regulated sectors? What are the costs due to the complementary application with the sectoral EU consumer protection legislation?

The main benefit that arises from the complementary application of the UCPD and UCTD in the regulated sectors is that a certain minimum level of consumer protection is always granted. However, this comes at a cost, because coordination among the

<sup>58</sup> The modification was laid down by Art. 1, Para 6 of Legislative Decree No. 21 of 21 February 2014: 'Implementation of the directive 2011/83/EU of consumer rights, amending directives 93/13/EEC and 1999/44/EC and repealing directives 85/577/EEC e 97/7/EC'. Art. 19, Para 3 of the Consumer Code (which implements Art. 3, Para 4 UCPD) further provides that 'In the event of conflict, the provisions of Community directives or other Community legislation, and the national provisions transposing them to govern specific aspects of unfair commercial practices shall prevail over the provisions of this Title and shall apply to these specific aspects'. In order to clarify the meaning of this provision and the relationship between the implementing provisions of the UCPD and the sectoral legislation, the Italian legislator modified Art. 27 of the Consumer Code in way of the implementation of directive 2011/83/EU on consumer rights throughout the insertion of a new paragraph (Para 1-bis), which provides that 'even in regulated sectors pursuant to Section 19, paragraph (3), the power to intervene with respect to conducts of traders involved in unfair commercial practices, without prejudice to current regulations, shall lie exclusively with the Competition Authority [*Autorità Garante della Concorrenza e del Mercato*] which acts on the basis of the powers granted by this Section after getting the opinion of the competent Regulation Authority. This without prejudice to the competence of the Regulation Authorities to exercise their powers in the event of infringement of the regulations non constituting unfair commercial practices. The Authorities may regulate through memorandums of understanding the enforcement and procedural issues of their mutual cooperation, pursuant to the respective competences'.

<sup>59</sup> The full text of the 'Protocollo d'intesa tra la Banca d'Italia e l'Autorità Garante della Concorrenza e del Mercato in materia di tutela dei consumatori nel mercato bancario e finanziario' is available at <https://www.bancaditalia.it/compiti/vigilanza/accordi/protocollo-BI-AGCM-tut-cons-mbf.pdf>.

<sup>60</sup> See in this concern CJEU 15.1.2015 Case 573/13 (*Air Berlin v Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e. V.*) ECLI: EU:C:2015:11; see also Consiglio di Stato, 30 June 2011, No 3897, para 9.1, in <http://www.neldiritto.it/appgiurisprudenza.asp?id=6565#.VWrLkNH9I3c>, which qualified as misleading commercial practice the behavior of the trader who inferred the consumer's consent by using default options (and, in particular, an 'opt-in' mechanism). For a comment see A. De Franceschi, Additional Payments and Final Price for Passenger Air Services: Interactions between Air Service Regulation and EU Directives, in *Journal of European Consumer and Market Law*, 2015, p. 107 ff.



horizontal EU consumer law and the provisions applicable in the field of financial consumer protection although theoretically clear may turn to be difficult to implement in concrete cases; it is also worth noting that coordination between the Italian competition authority and the Bank of Italy is necessary in order to avoid a *bis in idem* (i.e. more than one administrative proceeding being carried out with reference to the same commercial practice in cases when it might be relevant both under the UCPD provisions and the specific sector regulation).

- Assess any need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law.

Several consumer organisations report problematic overlap between the information duties contained in Directive 2011/83/EU on consumer rights, Directive 2006/123/EC on services in the internal market and Directive 2000/31/EC on electronic commerce. In particular, Art. 6, Para 8 CRD highlights that the information requirements laid down in that Directive 'are in addition to information requirements contained in Directive 2006/123/EC and Directive 2000/31/EC and do not prevent Member States from imposing additional information requirements in accordance with those Directives. Without prejudice to the first subparagraph, if a provision of Directive 2006/123/EC or Directive 2000/31/EC on the content and the manner in which the information is to be provided conflicts with a provision of this Directive, the provision of this Directive shall prevail'. Furthermore, recital 12 CRD adds that 'Member States should retain the possibility to impose additional information requirements applicable to service providers established in their territory'. This broad space left to the discretion of national legislators may create relevant problems in the cross-border trade and is in evident contrast with the targeted full harmonisation.<sup>61</sup>

Furthermore, in the opinion of the interviewed stakeholders, and in particular of the Bank of Italy, there is some room for clarification in the interplay between the UCPD and other EU sector-specific rules in the field of banking services. The UCPD states that i) that in the case of conflict between the provisions of the Directive itself and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects (art. 3(4) UCPD); ii) in relation to 'financial services', as defined in Directive 2002/65/EC, Member States may impose requirements which are more restrictive or prescriptive than the Directive itself (art. 3(9) UCPD). In the field of financial consumer protection, it happens quite often that directives and regulations at the EU level state that they should apply without prejudice to the provisions of the UCPD (cf. e.g. Art. 4, Para 4 Directive 2008/48/EC on consumer credit; Recital No. 55 of the EU Directive 2015/2366 on payment services). As a matter of principle, the Bank of Italy considers that it could be very useful if EU directives and regulations involving financial consumer protection identify more clearly the provisions that regulate 'specific aspects' of unfair commercial practices and therefore should prevail over the corresponding provisions of the UCPD. In the opinion of the interviewed stakeholders such solution would imply a more effective and consistent approach in the enforcement of the EU-level provisions in the field of consumer protection.

#### 1.4.3. Relevance of consumer law directives for consumer-to-business transactions

- Please analyse the need and potential for the application of the consumer law directives (mainly UCPD and UCTD) to 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).

<sup>61</sup> See A. De Franceschi, Informationspflichten und formale Anforderungen im Europäischen E-Commerce, in Gewerblicher Rechtsschutz- und Urheberrecht – Internationaler Teil, 2013, p. 866 f.

Based on the available evidence and the interviews conducted for this country report, it is concluded that there is a general desire for the extension of the scope of application of the consumer law directives to consumer-to-businesses relations. 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. The classic example regards a non-professional who sells gold to a jewellery or a dedicated shop. In this regard, the actual provisions on consumer protection would not find application to such a case. Therefore competent authorities might be led to configure this contractual scheme as that of a service contract, in which framework the consumer pays for a service consisting in the assessment of the value of the goods proposed to the jewellery or the dedicated shop. Based on this evidence as well as on the previous evaluations, it would be therefore much more efficient to extend the scope of application of the consumer law directives (at least UCPD and UCTD) also to consumer-to-business (C2B) relations.

#### 1.4.4. Specific protection for vulnerable consumers

Please analyse:

- Whether the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined in the consumer law directives and relevant jurisprudence, and as applied by national authorities and courts in your country, continue to be valid and fit for purpose.

According to the interviewed stakeholders, the notions of 'consumer', 'vulnerable consumer' and 'average consumer' as currently defined by the EU legislation and interpreted by EU case law work fine in practice. In particular, the stakeholders manifested doubts concerning the opportunity to introduce new categories of 'vulnerable consumers', as this would entail the risk to create certain rigidities in the system without at the same time enhancing the legal certainty. Furthermore, consumer protection organisations underline that the standard of the 'average consumer' risks to be too abstract and outdated, as the concrete experience shows that consumers are much more vulnerable than the average consumer. In particular, consumer protection organisations consider adequate to introduce specific protection for consumers which are vulnerable due to their economic conditions, as e.g. poverty and/or considerable indebtedness.

- To what extent the existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers and whether, based on the experiences in your country, specific provisions should be introduced in other directives concerned, in particular the Unfair Contract Terms Directive.

The interviewed stakeholders underlined the opportunity to extend the protection, which is actually limited to consumers, also to microenterprises. Also consumer protection organisations underline the opportunity to extend to the business-to-microenterprises relationships the protection against both unfair commercial practices and unfair contract terms. As mentioned above (1.4.3.), stakeholders consider that it would be therefore much more efficient to apply consumer law directives (at least UCPD and UCTD) to consumer-to-business (C2B) relations.

#### 1.4.5. EU added value

- Overall, would you consider that protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in your country since the implementation of the UCPD and the UCTD in national legislation?

Before the implementation of the UCTD, Italian law did not offer a substantive control of unfair terms. Therefore, by means of the implementation of the UCTD, Italian Law

experienced a ground-breaking change, which has been very welcomed by stakeholders and literature and which influenced also interpretation and legislation concerning unfair trade terms outside the business-to-consumers sector (see Art. 9 of law No. 192 of 1998 on subcontracting in manufacturing activities).<sup>62</sup> The UCPD has been also welcomed in Italy, even if it has been criticised for not providing a precise set of consequences for the violation of the prohibition of unfair commercial practices.<sup>63</sup> As proof of the mentioned positive assessment, the Italian legislator extended the scope of application of the implementing provisions of the UCPD from the business-to-consumer to the business-to-microenterprises sector (Art. 18, para 1, lit. *d-bis* and 19, Para 1 of the Consumer Code) and introduced several further provisions regulating specific cases of unfair commercial practices (see Art. 21, Para 3-*bis*, Art. 21, Para 4-*bis* and Art. 22-*bis* of the Consumer Code: see above 1.1.1.).

- Overall, would you consider that the information of consumers regarding unit prices has improved since the implementation of the PID in national legislation?

Concerning the implementation provisions of the PID there is extremely limited case law and in the opinion of the interviewed stakeholders it is not possible to say that the information of consumers regarding unit prices has improved since the implementation of the PID in national legislation.

- Overall, would you consider that the protection of businesses against unfair marketing in your country has improved since the implementation of the MCAD in national legislation?

Based on the available evidence and the interviews conducted for this country report, the MCAD did not really contribute in increasing the protection of businesses against unfair marketing in Italy. As underlined by the interviewed stakeholders, the real considerable improvement of the protection of businesses against unfair marketing has been rather a consequence of the implementation of Directive 1984/450/EEC on misleading advertising.

- Overall, would you consider that it has become easier for businesses in your country to directly trade cross-border to final consumers located in other EU countries in recent years? Has it become easier for consumers in your country to directly purchase cross-border from traders located in other EU countries?

The increase of the number of contracts concluded by electronic means has made it considerably easier for businesses to directly trade cross-border. This is also a consequence of the circumstance that the recent consumer protection legislation (and especially Directive 2005/29/EC on unfair commercial practices and Directive 2011/83/EU on consumer rights) enhanced considerably the confidence of consumers in directly purchasing cross-border from traders located in other EU countries.

- To what extent are these improvements, if any, due to the mentioned directives?

Based on the interviews conducted for this country report, the directives which particularly contributed in enhancing the cross border trade and purchase in the EU are Directive 2005/29/EC on unfair commercial practices and Directive 2011/83/EU on consumer rights.

<sup>62</sup> An English version of the mentioned provision is available at <http://www.agcm.it/en/competition/competition-legislation/1970-law-no-192-of-18-june-1998-article-9-abuse-of-economic-dependence-rules-on-subcontracting-in-manufacturing-activities.html>.

<sup>63</sup> G. De Cristofaro, Die zivilrechtlichen Folgen des Verstoßes gegen das Verbot unlauterer Geschäftspraktiken: eine vergleichende Analyse der Lösungen der EU-Mitgliedstaaten, in Gewerblicher Rechtsschutz- und Urheberrecht – Internationaler Teil, 2010, p. 1017.

## Annex

## A. Transposition fact sheet

**Table 1: Fact sheet on transposition of directives in Member States' law – Italy**

Directive	Transposition legislation (National law, Article)	Comments	Specific provisions going beyond minimum harmonisation requirements/use of exemptions	Included in national legislation	Comments
Directive 93/13/EEC on unfair terms in consumer contracts	Art. 25, law No. 52 of 6 February 1996, introducing Art. 1469-bis to 1469-sexies of the Civil Code		'Black list' of terms considered unfair in all circumstances	Yes Until legislative decree No. 205 of 6 September 2005: Art. 1469- <i>bis</i> , Para 2 of the Civil Code Since legislative decree No. 205 of 6 September 2005: Art. 36, Para 2, Consumer Code	
			'Grey list' of terms which may be considered unfair	Yes Until legislative decree No. 205 of 6 September 2005: Art. 1469- <i>quinquies</i> of the Civil Code Since legislative decree No. 205 of 6 September 2005: Art. 33, Para 2, Consumer Code	

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			Extensions of the application of Directive to individually negotiated terms	No		
			Extensions of the application of Directive terms on the adequacy of the price and the main subject-matter	No		
<b>Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market</b>	Law decree No. 1 of 24 January 2012 converted, with modifications, by law No. 27 of 24 March 2012 on 'Urgent provisions for competition, infrastructure development and competitiveness'		Provisions regarding financial services going beyond minimum harmonisation requirements	No		
			Provisions regarding immovable going beyond minimum harmonisation requirements	No		
			Application of UCPD to B2Microenterprises transactions	Yes	Consumer Code (legislative decree No. 205 of 6 September 2005)  Art. 18, Para 1, lit. d- <i>bis</i> (definition of Microenterprises)  and  Art. 19, Para 1 (extension of the scope of application of the UCPD)	

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<p><b>Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers</b></p>	<p>Until legislative decree No. 205 of 6 September 2005:                      Art. 1, 2, 3, 4, 5, 6 of legislative decree No. 84 of 25 February 2000</p> <p>Since legislative decree No. 205 of 6 September 2005:                      Art. 13, 14, 15, 16, 17 of the Consumer Code (legislative decree No. 205 of 6 September 2005)</p>		<p>Extension of the application to other sectors (e.g. for immovable property)</p>	<p>No</p>		
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	<p>Resolution of the Ministry of Economic Development, 'Chiarimenti su decreto legislativo 6 settembre 2005, n. 206 – Pubblicità – Prezzo di vendita e prezzo per unità di misura</p> <p>No. 96410 of 19 June 2015</p>	<p>Derogations:</p> <p>The following products are excluded from the duty of indicating the unit price:</p> <ul style="list-style-type: none"> <li>a) Products which are sold without packaging;</li> <li>b) Products of different nature put in one single package;</li> <li>c) Products sold by means of vending machines;</li> <li>d) Products which are destined to be mixed with one another in order to create another product;</li> <li>e) Pre-packaged product which are exempted from the duty of indication of the net quantity;</li> <li>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;</li> <li>g) 'Fantasy products';</li> <li>h) Single-item ice creams;</li> <li>i) Non-food products which can be sold only per piece.</li> </ul>	<p>Yes</p>		
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<p><b>Directive 2006/114/EC concerning misleading and comparative advertising</b></p>	<p>Legislative decree No. 145 of 2 August 2007</p>	<p>Provisions going beyond the MCAD:</p> <p>Art. 1, para 2, legislative decree No. 145 of 2 August 2007: ‘Advertisements must be transparent, truthful and accurate’</p> <p>Art. 5 legislative decree No. 145 of 2 August 2007:</p> <p>‘1. Advertisements must be clearly recognisable as such. Press advertisements must be distinguishable from other forms of public notices, and use graphical forms that are easily perceptible. 2. The terms ‘guarantee’, ‘guaranteed’ and similar expressions may only be used if they are accompanied with specific details of the substance of the guarantees and the formalities relating to the guarantee offered. When the advertisement is too short to publish these details in full, the summary reference to the substance and the procedures for claiming against the guarantee must explicitly refer to a text which the consumer can easily obtain, setting out all the details. 3. All forms of subliminal advertising are prohibited’.</p>	<p>Yes</p>	<p>Art. 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 of Legislative decree No. 145 of 2 August 2007</p>	
			<p>Art. 6 of the legislative decree No. 145 of 2007: ‘1. Any advertisement is deemed to be misleading when it fails to indicate that a product advertised is likely to threaten the health or safety of the public in such a way that the public may be led to neglect the normal rules of prudence and vigilance’.</p>	<p>Yes</p>	

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			<p>Art. 7 of the legislative decree No. 145 of 2007: '1. Any advertisement is deemed to be misleading when, being likely to be seen by children and adolescents, it exploits their natural credulity or lack of experience or which, by using children and adolescents in the advertisements, without prejudice to the provisions of section 10 of Law No 112 of 3 May 2004, exploits the natural sentiments of adults towards children. 2. Any advertisement is deemed to be misleading when, being likely to be seen by children and adolescents, it may, even indirectly, place their safety in jeopardy'.</p>	Yes		
<p><b>Directive 2009/22/EC on injunctions for the protection of consumers' interests</b></p>	<p>Art. 139 and 140 Consumer Code</p>					

**Table 2: Fact sheet on Injunctions Directive – Italy**

Issue	Answer	Comments
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)?	- Yes, separate procedures in a single legal act	<i>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).</i>
Who is entitled to bring an action seeking an injunction?	- Designated public bodies - Specified consumer associations - Other	<i>Consumers' associations pursuant to Article 137, associations representing professionals, and Chambers of Commerce, Industry, Crafts and Agriculture</i>
Is the injunction procedure a court or an administrative procedure? If your country legislation foresees both forms of the procedure, please explain in the comments column for which infringements the court or administrative procedure is foreseen	- Court procedure (art. 37, 139 and 140 Consumer Code)	<i>The procedures regulated by Art. 37, 139 and 140 of the Consumer Code provide that the aforementioned subjects may bring proceedings against any professional or professional association that uses or recommends the use of contractual terms drawn up for general use, and may request the competent court to grant orders preventing the use of terms that have been found to be unfair.</i>
Who bears the costs of an injunction procedure? If qualified entities (or some of their categories e.g. consumer organisations are entitled to an exemption of some/all cost related to the procedure please explain the characteristic of such exemption in the comments column.	- The costs are normally beared by the unsuccessful party	
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?	- Yes, scope of application extended to cover consumer law in general	

<p>Is protection of business' interests covered by the injunctions procedure? If scope of application extended to the protection of business' interests, please provide details in the comments column regarding type of business' interests covered by the injunctions procedure</p>	<p>- Yes</p>	<p><i>According to Art. 37 of the Consumer Code, also associations representing professionals, and Chambers of Commerce, Industry, Crafts and Agriculture, may bring proceedings against any professional or professional association that uses or recommends the use of contractual terms drawn up for general use, and may request the competent court to grant orders preventing the use of terms that have been found unfair.</i> <i>According to this, the afore mentioned provision aims at protecting the fair competition between businesses.</i></p>
<p>Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations</p>	<p>- No</p>	
<p>Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID)</p>	<p>- Yes</p>	<p><i>Art. 140 Consumer Code provides that the injunction procedure can be started only after 15 days after sending by registered letter with acknowledgement of receipt a request to cease the unlawful behaviour. After the afore mentioned period of 15 days, the consumer organisations can also start a procedure of conciliation before the competent chamber of commerce or start an ADR procedure.</i></p>
<p>Has your Member State taken specific measures regarding the prior consultation (Article 5 of the Injunctions Directive)?</p>	<p>- Yes, requirement for party seeking injunction to consult with the defendant and a qualified entity</p>	
<p>Does the national legislation provide for measures ensuring summary procedure? Please specify main characteristics of the procedure (subject matter/time limits) in the comments column.</p>	<p>- Yes</p>	<p><i>Art. 140, Para 8, Consumer Code provides that in urgent a summary procedure is ensured according to Articles 669-bis to 669-quater of the Code of Civil Procedure</i></p>
<p>Are there sanctions for non-compliance with the injunction order (Article 2(1) of the Injunctions Directive)? If sanctions in form of penalty or fine foreseen please specify in the comments column to who exactly should they be paid</p>	<p>- Yes, pecuniary sanction</p>	<p><i>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.</i></p>
<p>Has your Member State taken specific measures regarding the publication of the decision and/or the publication of a corrective statement?</p>	<p>- Yes</p>	<p><i>The decisions of the judges or of the administrative authority may be published on national newspapers. The decisions of the administrative authority may be published also on the institutional website of the authority.</i></p>

Is it possible to claim within the injunction procedure for sanctions for the infringement?	- Yes	<i>It is provided by Art. 140, Para 7 of the Consumer Code</i>
Can an action for the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to other beneficiary be brought within the injunction procedure?	- No	
Can an action for damages to be paid to the qualified entity or the public purse be brought within the injunction procedure?	- No	
Can an action for damages or redress to be paid to the consumers concerned be brought within the injunction procedure?	- No	
Can individual consumers base their individual claims for damages/remedies on the injunctions order?	- No	<i>They need to bring a civil action before an ordinary court</i>
Can the qualified entity claim other measures beyond the injunction, e.g. evidence of compliance with the judgment?	- Yes	
Are the effects of individual injunctions orders extended to the future infringements and/or same or similar illegal practices (of other traders)?	See comment	<i>Individual injunctions orders may have a role as precedents, even if in the Italian legal system the precedent is in itself not binding.</i>

## B. Data tables

*Number of B2C disputes*

Please indicate how many B2C disputes have been decided in your country on the basis of consumer law directives covered by this study (UCPD, UCTD, PID) as a proportion of the total number of B2C disputes decided on the basis of other national consumer legislation (based on statistics, or based on estimates by enforcement authorities and other stakeholders, where this is not the available).

**Table 2: B2C disputes decided on the basis of consumer law directives covered by this study in comparison with total B2C disputes decided on the basis of other legislation (most recent year for which data is available)**

Year	Type of data	Total number of B2C disputes (number of cases)	Share of B2C disputes decided on basis of ...					Comments
			UCPD	UCTD	PID	other EU consumer protection legislation (e.g. CRD, Sales Directive, sectoral legislation)	national consumer legislation not based on EU directives	
n.a.								

Note: There are no data available in this regard.

*Costs of obtaining redress for a hypothetical case of invoking unfairness of a standard contract term*

- Please estimate the costs, including time, for consumers in obtaining redress when invoking the unfairness, and thereby the non-binding character of standard contract terms in a contract they concluded. Please provide the estimate for the hypothetical example below, focusing on costs (and needed time) of a lower court procedure and the use of ADR or other relevant procedure (if applicable).<sup>64</sup>

There are no data available in this regard.

<sup>64</sup> For the hypothetical example it is assumed that both the provider and the consumer are located in your country.

**Table 3: Estimate of costs for consumers in obtaining redress when invoking the unfairness of standard contract terms in a contract they concluded (for the hypothetical example provided in the box below)**

Redress mechanism	Estimated court fees (national currency)	Estimated lawyer's fees (national currency)	Other costs, if any (national currency)	Estimated time involved for consumer (hours)	Comments
<b>Lower court procedure</b>	EUR 264.00	EUR 7 054.85: this is the average fee calculated according to the Decree of the Ministry of Justice No. 55 of 2014 and can be derogated in case of an agreement between the lawyer and the defended party.	ca. EUR 250.00	It is impossible to estimate: it depends on knowledge, literacy, perseverance and experience of consumer.	The proceedings are connoted by high costs and duration.
<b>ADR or other relevant procedure</b>	ADR: from EUR 0 to EUR 20  'Negoziazione assistita': EUR 0  Mediation: EUR 48.80 at the beginning. In case the procedure is concluded, the fee goes from EUR 238 to EUR 406.25	The determination of the lawyer's fee is determined by an agreement between the lawyer and the client.  According to the Decree of the Ministry of Justice No. 55 of 2014, the average fee is EUR 4 647.74 (EUR 1890.00 + further costs and value added tax: EUR 2757.74).	Cost for notification: ca. EUR 30	It is impossible to estimate: it depends on knowledge, literacy, perseverance and experience of consumer.	

Notes: due to the Italian financial crisis, the indicated fees are often considerably lowered .



**Hypothetical example: Terms which inappropriately exclude/limit consumers' rights to compensation**

*A consumer went on a package holiday with a friend to Kenya for which they paid € 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 €5,000 (€4,000 for the cost of the package and €1,000 for lost time and enjoyment). The tour operator agreed to compensate them €1,000 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/unfair-contract-terms/index\\_en.htm](http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-contract-terms/index_en.htm)]*

- Please estimate how often court and ADR procedures are used in your country for invoking the unfairness, and thereby the non-binding character of standard contract terms (i.e. the number of cases per year)?

In the absence of a register for ADR procedures and decisions it is not possible to give either statistics or even an estimation. The interviewed stakeholders had no further evidence available in this regard.

## C. Interviews conducted and literature reviewed

**Table 4: Interviews conducted for this study**

Organisation	Stakeholder type	Date
<b>Assoelettrica</b>	Business association	27 July 2016
<b>Confcommercio</b>	Business association	15 July 2016
<b>Autorità Garante della Concorrenza e del Mercato (AGCM)</b>	National enforcement and regulatory authority	1 August 2016
<b>Autorità per le Garanzie nelle Comunicazioni (AGCOM)</b>	National enforcement and regulatory authority	31 August 2016
<b>Banca d'Italia</b>	National Regulatory Authority	1 August 2016
<b>Ministero della Giustizia</b>	Responsible Ministry	28 July 2016
<b>Ministero dello Sviluppo Economico</b>	Responsible Ministry	25 July 2016
<b>European Consumer Centre Italy</b>	European Consumer Centre	20 July 2016
<b>Federconsumatori</b>	National Consumer Organisation	8 August 2016 11 August 2016
<b>Adiconsum</b>	National Consumer Organisation	20 July 2016
<b>Altroconsumo</b>	National Consumer Organisation	5 August 2016

**Table 5: Literature reviewed for country report**

Author/Source	Year	Title of publication
G. Alpa (ed.)	2014	I contratti dei consumatori, Milan
G. Alpa and G. Conte (eds.)	2015	I contratti d'impresa, Milan
G. Alpa e S. Patti (eds.)	2003	Clausole vessatorie nei contratti del consumatore (art. 1469 <i>bis</i> -1469 <i>sexies</i> ), in Commentario Schlesinger, Milan
L. Arnaudo	2010	Concorrenza tra Autorità indipendenti. Noterelle bizzarre intorno a un parere del Consiglio di Stato, in Giurisprudenza commerciale, p. 916 ff.
A.M. Azzaro and P. Sirena	2005	Il giudizio di vessatorietà delle clausole, in E. Gabrielli and E. Minervini (eds.), I contratti dei consumatori, in P. Rescigno and E. Gabrielli, Trattato dei contratti, in E. Gabrielli and E. Minervini, I contratti dei consumatori, I, Turin, p. 152
A. Barenghi	2003	I contratti per adesione e le clausole vessatorie, in Lipari (ed.), Trattato di diritto privato europeo, Padua, III, p. 346
A. Barenghi	2015	A. Barenghi, Art. 33 Codice del consumo, in V. Cuffaro (ed.), Codice del consumo, 4th ed., Milan, p. 280
P. Barucci and C. Rabitti Bedogni (eds.)	2010	20 anni di Antitrust, Turin
A. Belelli, L. Mezzasoma and F. Rizzo	2014	Le clausole vessatorie a vent'anni dalla direttiva CEE 93/13, Naples
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# 1. Study to support the Fitness Check of EU Consumer law – Country report LATVIA

## 1.1. Unfair commercial practices and marketing

### 1.1.1. Effectiveness of the UCPD in establishing a high level of consumer protection

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

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

The stakeholders have underscored that the implementation of the UCPD in Latvia has been successful. The stakeholders have unanimously praised the principle-based approach under the UCPD. The reasoning behind this approach is focused on the inability of specific rules to regulate adequately each and every case. The principle-based approach, on the other hand, gives administrative authorities and adjudicators the necessary freedom and flexibility to decide cases, paying due attention to all the relevant circumstances. The only disadvantage is that the principle-based approach may diminish legal certainty, but overall this disadvantage is outweighed by advantages related to the use of the principle-based approach.

The practice of the Consumer Rights Protection Center (hereinafter – CRPC) illustrates application of the principle-based approach. The CRPC had established that once consumers make air ticket reservations, an airline company offered automatically activated check boxes for additional services or receipt of optional price supplements. The administrative case was initiated. In its decision the CRPC stated that the airline company had violated a well-known fair commercial practice and good faith principle and this significantly influenced the economic conduct of the average consumer.<sup>1</sup> In the case at hand, the principle-based approach and the concept of 'average consumer' were successfully applied.

The stakeholders have likewise noted that the European Commission's Guidance document concerning the Directive<sup>2</sup> facilitates more effective application of the implementing national legislation. Moreover, the CRPC has developed its own Guidelines, helping the traders to follow or to be aware of the fair commercial practices.<sup>3</sup>

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

According to the stakeholders, the black list facilitates identification of unfair commercial practices. This provides certainty to traders. Thus, while the stakeholders have supported the principle-based approach under the UCPD, they have equally supported the use of the black list.

<sup>1</sup> Consumer Rights Protection Centre's decision in the case No. E03-PTU-K115-39 dated 23 October 2012. Available in Latvian at [http://www.ptac.gov.lv/sites/default/files/lieta\\_air\\_baltic\\_keksi\\_lemums\\_izraksts\\_23\\_10\\_12\\_2\\_.pdf](http://www.ptac.gov.lv/sites/default/files/lieta_air_baltic_keksi_lemums_izraksts_23_10_12_2_.pdf) (last seen on 30.07.2016). The decision was appealed before a court and the court affirmed the decision.

<sup>2</sup> DG Justice Guidance document concerning 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. European Commission, DG Justice, June 2014; Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29 EC on Unfair Commercial practices. SWD (2016) 163 final, 25 May 2016.

<sup>3</sup> For example, Guidelines on Implementing Fair Commercial Practices in Consumer Crediting, Guidelines on Implementing Fair Commercial Practices in Area of Electronic Communication, Guidelines on Implementing Fair Commercial Practices in Price Identification of Goods and Services etc.



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

The minimum harmonisation rules allow governments to construe an appropriate solution for specific problems arising in a particular Member State, which may be non-existent or less prevalent in other Member States.

The Latvian Government has adopted specific restrictions of consumer crediting.<sup>4</sup> They also indicate the non-exhaustive list of advertising encouraging irresponsible borrowing.<sup>5</sup> However, these rules are not adopted under the UCPD, but are implementing the Directive 2008/48/EC, dated 23 April 2008 on credit agreements for consumers.<sup>6</sup>

There are no cases concerning immovable property.

- 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 what 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 CRPC has been actively involved in the supervision and monitoring of the opening of the electricity market from the point of view of consumer protection in Latvia as from 1 January 2015, thus the transposed rules of the UCPD were intensively applied. In addition, the CRPC has developed the Guidelines for traders. Moreover, the CRPC actively participated in consumer information activities on the opening of this market. The involvement of the CRPC ensured that application of the UCPD in the electricity market was very effective. The stakeholders have emphasized that currently there are no specific problems with application of the UCPD in this area.

There is no practice concerning environmental claims in Latvia and at the moment the issue is not topical. However, the authorities are planning to focus on this area, making more detailed studies about the state of affairs therein. The CRPC is currently preparing national guidelines on unfair commercial practices in this area, while the Ministry of Agriculture has focused on the use of words 'bio', 'eco' and has developed the Guidelines on using these words in the labels of food supplements.<sup>7</sup> The new rules limit the use of those words in the names of the companies.

- 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 rigidly?*]

The stakeholders gave positive assessment of the concept 'average consumer'. The concept creates the framework of reference for assessing economic behaviour of the consumer. The concept is actively used in practice.

The latter statement is confirmed by the publicly available case-law of the CRPC. The concept of 'average consumer' is referred to in a majority of its cases. In its practices,

<sup>4</sup> Regulations on Consumer Crediting [Noteikumi par patērētāja kreditēšanu]. Regulations of Cabinet of Ministers No. 1219 adopted 28 December 2010. On application of these rules, see also the Consumer Rights Protection Centre's decision in the case No. 18-pk dated 30 June 2016. Available in Latvian at [http://www.ptac.gov.lv/sites/default/files/lemuma\\_izraksts4finance.pdf](http://www.ptac.gov.lv/sites/default/files/lemuma_izraksts4finance.pdf) (last seen on 30.07.2016).

<sup>5</sup> Article 11, Regulations on Consumer Crediting [Noteikumi par patērētāja kreditēšanu]. Regulations of Cabinet of Ministers No. 1219 adopted 28 December 2010.

<sup>6</sup> B. Vītolīņa, Patērētāju tiesību aizsardzības pamati. [Basics of Protection of Consumer Rights]. Rīga, Zvaigzne ABC, 2015, 264-265.

<sup>7</sup> Vadlīnijas par terminu „bioloģisks”, „ekoloģisks” un vārdu daļu „bio” un „eko” lietošanu uztura bagātinājuma marķējumā [Guidelines on Use of Terms „Biological”, „Ecological” and Parts of Words „bio” and „eco” in Labels of Food Supplements]. Guidelines of Ministry of Agriculture adopted 9 March 2016.

the CRPC often refers to Recital 18 of the UCPD and the case-law of the Court of Justice of the European Union (hereinafter – CJEU)<sup>8</sup> to clarify the meaning of the concept. Notwithstanding these references, the practice of the CRPC, usually, does not explain how specific facts of the case were assessed in light of the concept of 'average consumer'. As emphasized by a consumer organisation, the concept remains very uncertain. For this reason, it seems impossible make a general statement as to how the concept is applied in the Member State.

There are two main problems with application of this concept. Firstly, the stakeholders observe that businesses often consider that consumers are more advanced than established through the practice of the CRPC. This may be, *inter alia*, due to sometimes not easily perceivable content of the concept of 'average consumer'. In other words, for a layperson it may be difficult to grasp how the concept is applied in a particular case. Secondly, the stakeholders consider that it is often difficult to apply the concept of 'average consumer' in cases concerning groups of consumers, for example, persons of older age.

The use of the concept allows authorities to render a flexible decision, specifying the content of the concept of 'average consumer' in a manner that is best suited for the specific case. This is an obvious advantage given to the authorities that are not bound by formalistic and overly specific rules, when evaluating the nature of the supposedly unfair practice. The disadvantage is that nuances of that evaluation often remain unknown to those who read the practice of the CRPC, since the precise limits of the concept are usually not uncovered.

- 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 in your country recognised new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted)?*]

No new categories are introduced by law. However, the concept of 'vulnerable consumers' has been used in the practice of the CRPC, most notably in respect of persons with serious diseases.<sup>9</sup> Likewise, children and young persons have been often described as 'vulnerable consumers' in the practice of the CRPC. However, the CRPC has also characterized unemployed persons (actively seeking employment) as 'vulnerable consumers' since their income, on average, is below minimal income determined by the state.<sup>10</sup>

- 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?*]

According to the stakeholder, the co-regulation actions are employed in practice. The CRPC plays the central role in their employment. This institution, together with traders and other institutions, develops guidelines for fair commercial practices. These guidelines also address issues related to advertising. Two important examples are the

<sup>8</sup> E.g., CJEU case No. C-112/99 dated 25 October 2001, para. 52 ([...] the perception of an average individual who is reasonably well informed and reasonably observant and circumspect. Account should be taken of the type of persons at whom the advertising is directed.); CJEU case No. C-44/01 dated 8 April 2003, para. 55; CJEU case No. C-356/04 dated 19 September 2006, para. 78; CJEU case No. C-381/05 dated 19 April 2007, para. 23.

<sup>9</sup> E.g., Consumer Rights Protection Centre's decision in the case No. E03-REUD-31 dated 13 August 2009. Available in Latvian at <http://www.ptac.gov.lv/sites/default/files/bioaktivators.pdf> (last seen on 30.07.2016); Consumer Rights Protection Centre's decision in the case No. E03-REUD-53 dated 10 December 2009. Available in Latvian at <http://www.ptac.gov.lv/sites/default/files/izraksts.pdf> (last seen on 30.07.2016).

<sup>10</sup> Consumer Rights Protection Centre's decision in the case No. E03-KREUD-49 dated 16 September 2010. Available in Latvian at [http://www.ptac.gov.lv/sites/default/files/lemums\\_nr-e03-kreud-49\\_sia\\_baltic\\_euroex\\_izraksts.pdf](http://www.ptac.gov.lv/sites/default/files/lemums_nr-e03-kreud-49_sia_baltic_euroex_izraksts.pdf) (last seen on 30.07.2016).

2010 Guidelines on Preparation of Fair Loan Agreements<sup>11</sup> and 2013 Guidelines on Implementing Fair Commercial Practices in Consumer Crediting.<sup>12</sup>

These guidelines are not binding, but contain recommendations, explaining the requirements set by the law and provide examples of unfair commercial practices. These guidelines help traders make preventive assessments of their activities and avoid unfair commercial practices. Moreover, during the drafting stage, the CRPC receives useful information from traders, identifying problems in the market. However, some stakeholders have stated that it would have been better, if the CRPC were allowed to draft binding instruments.

In addition, traders sometimes directly contact the CRPC to obtain its opinion on legality of their practices. For example, to verify whether content of a particular advertisement could cause non-compliance with consumer protection laws.

The most important tool for self-regulation is the creation of Good Practice Codes. The traders may develop such a code - a voluntary agreement of the traders or a body of provisions - regulating the behaviour of such performers of commercial practices, who have undertaken to fulfil the commitments specified in the good practice code in one or several types of commercial practices, as well as in one or several fields of economic or professional activity. The CRPC, upon its own initiative or upon a request of professional associations of traders, evaluates content of such codes and provides a recommendatory opinion. Such codes are developed by traders in consumer credit and advertising markets.

The stakeholders, however, note that the use of such codes does not always achieve its goal. The codes may simply reproduce requirements set out in laws, while being presented to consumers as encompassing good practices beyond those imposed by law, hence misleading consumers. Scholars also observe that only few industries use such codes and even when they exist they are not effective.<sup>13</sup> Moreover, in some cases, industries create their own bodies for assessing compliance of businesses with such codes. In practice, these bodies sometimes fail to limit their assessment to such codes and, likewise, assess compliance with laws in force. This creates confusion within the industry and among consumers as such decisions may differ from the practice of the CRPC, rendering consumer law standards more ambiguous.<sup>14</sup> However, there are also positive examples. In 2013, large associations of traders voluntarily agreed to the memorandum 'Fair Euro Enforce'. This memorandum did function in practice and helped smooth transition from the former national currency to the euro.

The practice of the CRPC shows that often the CRPC must intervene first in order to provide an initial cause for establishment of self-regulatory instruments within the industry. For that reason, the CRPC monitors different areas of commerce in accordance with annually set priority areas. To give an example, in 2008 the CRPC, with assistance of phone operators, scanned 14 websites that were offering mobile content services (melodies of calls, pictures, games etc.). The CRPC concluded that the websites provided unclear or incomplete information about the services or prices, violating the fair commercial practice rules. In order to tackle the problem, the CRPC rendered individual decisions in these cases and also developed advice package for consumers. Only after the CRPC took these measures, mobile phone operators developed their own Code of Conduct, eliminating these practices. Overall, the stakeholders expressed scepticism about self-regulation measures.

<sup>11</sup> Vadlīnijas taisnīga patērētāja kreditēšanas līguma sastādīšanai. Consumer Rights Protection Centre, 2010. Available in Latvian at [http://www.ptac.gov.lv/sites/default/files/docs/vadlinijas\\_taisniga\\_pateretaja\\_kreditesanas\\_liguma\\_sasta\\_disanai.pdf](http://www.ptac.gov.lv/sites/default/files/docs/vadlinijas_taisniga_pateretaja_kreditesanas_liguma_sasta_disanai.pdf) (last seen on 16.07.2016).

<sup>12</sup> Vadlīnijas godīgas komercprakses īstenošanai patērētāju kreditēšanas jomā. Consumer Rights Protection Centre, 03.09.2013, No.8. Available in Latvian at [http://www.ptac.gov.lv/sites/default/files/docs/fin\\_vadlinijas\\_komercprakse.pdf](http://www.ptac.gov.lv/sites/default/files/docs/fin_vadlinijas_komercprakse.pdf) (last seen on 16.07.2016).

<sup>13</sup> B. Vītoļiņa, Patērētāju tiesību aizsardzības pamati. [Basics of Protection of Consumer Rights]. Rīga, Zvaigzne ABC, 2015, 250.

<sup>14</sup> Ibid., 250-251.

- 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?

The stakeholders have not signalled the existence of major difficulties with the black list of the UCPD. The existing list does not require changes. However, the list has to be adjusted to modern trends in commerce, i.e., developments of modern technologies, like e-commerce, digital tendencies and innovative marketing methods. The changes should be introduced through the standard procedure of amending directives.

- Are there other measures that could improve the effectiveness of the UCPD in establishing a high level of consumer protection in your country? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

Firstly, as it was stated above, one improvement – amendments to the black list dealing with development of modern technologies. Secondly, the UCPD should have more elaborate regulation on new economic forms. For example, the sharing economy – peer-to-peer traveling/shopping/car sharing, price comparing webpages etc. and blogs popularizing the particular goods or services or using (often fake) endorsements of previous consumers.

Another particular problem that should be addressed are the so called 'rogue traders', who offer goods or services to consumers, collect monies but then vanish from the market. Currently, there are no efficient tools against this practice. So far, the competent authorities have attempted initiating criminal proceedings against them, but with no success. It is also problematic to deal with a situation when a trader provides certain services for free and while the service is performed offers goods to the customer. In such a situation, the consumer may be forced to buy goods.

Thirdly, just as with other Directives studied here, the stakeholders have underscored the need for more harmonization to ensure better cross-border cooperation. Successful cross-border cooperation is difficult if standards vary across Member States. Thus, in general full harmonization is preferable to minimum harmonization.

Fourthly, sometimes there are problems with delimitation of competences among enforcing authorities. For example, the CRPC has established that the branch of an Estonian bank had distributed the advertisement inviting to conclude the crediting contract and the particular advertisement was recognized as unfair commercial practice thus the penalty was imposed on the mother bank as a supervising entity of the branch.<sup>15</sup> In some cases even the criminal proceedings are initiated because the foreign branch continues the unfair commercial practice and does not comply with a CRPC decision.<sup>16</sup> In more general terms, there is a need for harmonisation and clarification of issues arising during the enforcement of the UCPD. Notably, questions of penalties, allocation of enforcement authority, etc.

Finally, the CRPC develops guidelines for the traders – that is the good practice that can be shared with other Member States. While these guidelines do not automatically reduce the number of infringements, they ensure more rapid resolution of disputes and promote legal certainty.

<sup>15</sup> Consumer Rights Protection Centre's decision in the case No. E03-PTU-F342-10 dated 2 July 2015. Available in Latvian at

[http://www.ptac.gov.lv/sites/default/files/lemums\\_par\\_administrativa\\_soda\\_uzlikšanu\\_bigbank\\_izraksts.pdf](http://www.ptac.gov.lv/sites/default/files/lemums_par_administrativa_soda_uzlikšanu_bigbank_izraksts.pdf) (last seen on 21.06.2016).

<sup>16</sup> Consumer Rights Protection Centre's decision in the case No. 7-nk dated 27 August 2010. Available in Latvian at [http://www.ptac.gov.lv/sites/default/files/lemums\\_nr-7-nk\\_viasat\\_izraksts.pdf](http://www.ptac.gov.lv/sites/default/files/lemums_nr-7-nk_viasat_izraksts.pdf) (last seen on 21.06.2016).

### 1.1.2. Effectiveness of the PID in establishing 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;

First, it shall be noted that the Cabinet of Ministers has adopted the Regulations No. 178 "Procedures for Indication of Prices of products and Services" prescribing the procedure by which selling price and price per unit of measurement for products and services offered to a consumer shall be indicated.<sup>17</sup> Thus Latvia extended the application of the PID to services. Moreover, the Regulations provided for the procedure of dual display of prices of products and services during the period of Latvia's accession to the 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, in auctions and in marketing of works of art and antiques (Article 12). The price per certain unit of measurement does not have to be indicated at small points of sale 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.<sup>1</sup>).

According to the stakeholders, consumers are effectively informed about the unit selling price in Latvia. Certain difficulties were foreseen when Latvia joined the euro-zone in 1 January 2014. The law provided for special parallel price identification requirements as from 1 October 2013 – 30 June 2014. From 1 January until 30 June 2014, the CRPC performed 15'768 inspections and in 4890 cases (31%) violations were ascertained but the discrepancies in parallel identification of the prices were cured in 87% cases. Consumers' complaints were received in January 2014, including complains against carriers of the transport as it was not clear how the price for carriage has changed (change of tariffs) and it was considered as increase of price and violation of the law providing that conversation from the Latvian Lats to euro was to be conducted pursuant to rate set by the Council.<sup>18</sup>

The CRPC has adopted the 'Guidelines on Price Identification in Selling the Goods and Providing Services, Taking into Account Fair Commercial Practice' in 2015. The guidelines are not an official interpretation of the relevant norms, however, they are recommendations by the CRPC based on the practice, complains and understanding of the norms.<sup>19</sup>

- 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?

Such an approach is not adopted in Latvia. Pursuant to the stakeholders, discussions about its introduction were initiated, but it was established that it would be an enormous burden for traders.

<sup>17</sup> See: Kārtība, kādā norādāmas preču un pakalpojumu cenas [Procedures for Indication of Prices of Products and Services]. Cabinet of Ministers Regulations No.178 adopted 18 May 1999. Available in English at [http://www.vvc.gov.lv/export/sites/default/docs/LRTA/MK\\_Noteikumi/Cab\\_Reg\\_No\\_178\\_-\\_Procedures\\_for\\_Displaying\\_Prices\\_of\\_Products\\_x\\_Services.doc](http://www.vvc.gov.lv/export/sites/default/docs/LRTA/MK_Noteikumi/Cab_Reg_No_178_-_Procedures_for_Displaying_Prices_of_Products_x_Services.doc) (last seen on 21.06.2016).

<sup>18</sup> Patērētāju tiesību aizsardzības centra 2014. gada pārskats [Report of the Consumers' Rights Protection Centre of 2014]. Consumer Rights Protection Centre, p. 34. Available in Latvian at [http://www.ptac.gov.lv/sites/default/files/docs/publiskais\\_parskats\\_2014.pdf](http://www.ptac.gov.lv/sites/default/files/docs/publiskais_parskats_2014.pdf) (last seen on 21.06.2016).

<sup>19</sup> Vadlīnijas preču un pakalpojumu cenu norādīšanai, tostarp godīgas komercprakses īstenošanā. Consumer Rights Protection Centre, 1.10.2015, No. 21. Available in Latvian at [http://www.ptac.gov.lv/sites/default/files/nr\\_21.pdf](http://www.ptac.gov.lv/sites/default/files/nr_21.pdf) (last seen on 21.06.2016).



- The effects of the regulatory choices/derogations allowed by the Directive and applied by Member States. [Note: Key aspects to consider are: Is the derogation relevant? Do companies make use of it? Are there consumer complaints because of this? If so, approximately how many per year?]

N/A

### 1.1.3. Effectiveness of the MCAD in providing protection for businesses

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

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

First of all, it is necessary to explain the current legal framework in Latvia. Misleading commercial practices, encompassing misleading advertising, is regulated by the Unfair Commercial Practice Prohibition Law.<sup>20</sup> This law is implementing the UCPD. The Advertising Law deals with misleading and comparative advertisement in non-consumer cases and implements the MCAD.

Article 1 of the Advertising Law states that '[a]dvertising is any form or any mode of announcement or endeavor associated with economic or professional activity, intended to promote the popularity of or demand for goods or services (including immovable property, rights and obligations).'<sup>21</sup> Thus, in essence (though not in precise wording), the definition of 'advertising' used in said law is identical to that of Article 2(a) of the MCAD.

In general, the scope of the MCAD is rather broad and provides effective protection for traders. In practice two problems have been identified. Firstly, currently in Latvia, there is a discussion about drawing a line between political statements and advertisements. Recently, the Non-bank Creditor Association made statements criticizing the practice of the CRPC in relation to non-bank crediting. The statements were distributed through media via advertisements. The obvious objective of these statements was to protect non-bank financial institutions from more rigorous practices of the CRPC. In such cases, the problem is to distinguish between an economic or professional activity intended to promote goods or services and expression of opinion by businesses and their associations. This is, of course, a very specific problem, closely related to issues of constitutional legal order and is thus difficult to solve at the supranational level.

The second problem is that monitoring and supervision of the area is difficult in practice. The competing traders use advertisements against each other and sometimes breaking ethical rules or using illegal forms of advertisement when replying to advertisement campaigns by other traders. Moreover, there are suspicions that complaints by traders against each other are overloading the supervising authorities.

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

The stakeholders have positively evaluated the principle-based approach, as it allows finding a reasonable solution for each particular case. The downside of the approach is a lower level of legal certainty. However, benefits of the approach outweigh this disadvantage.

<sup>20</sup> Negodīgās komercprakses aizlieguma likums [Unfair Commercial Practice Prohibition Law]. Latvian Law adopted 22 November 2007 Available in English at [http://vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Unfair\\_Commercial\\_Practice\\_Prohibition\\_Law.doc](http://vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Unfair_Commercial_Practice_Prohibition_Law.doc) (last seen on 17.07.2016).

<sup>21</sup> See Reklāmas likuma [Advertising Law]. Latvian Law adopted 20 December 1999. Available in English at [http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Advertising\\_Law.pdf](http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Advertising_Law.pdf) (last seen on 21.06.2016).

- The effects of the minimum harmonisation provisions on misleading advertising; [Key aspects to consider are: 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)?]

Articles 8 and 9 of the Advertising Law almost *verbatim* reproduce Articles 3 and 4 of the MCAD when defining misleading and comparative advertisement.<sup>22</sup> Hence, substantive scope of protection under the national law does not go beyond that of the Directive. It is, however, important to mention that there are other provisions giving protection to businesses in case of misleading advertising. For example, Article 2352<sup>1</sup> of the Latvian Civil Law<sup>23</sup> protects honour, respect and business reputation. In some cases, misleading advertising may be considered to cause damage to other market participants.

The UCPD is not extended to B2B transactions. There are no other rules protecting B2B transactions. The majority of the stakeholders have observed that the current situation is adequate. However, the stakeholders dealing with competition law consider that while there is no hard data about the need for such extension, in principle, it would be considered a positive development.

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

The stakeholders consider that full harmonisation provisions on comparative advertising effectively allow to tackle problems linked to comparative advertising. At the same time, the stakeholders have underscored the need for further guidelines on application of the MCAD.

- 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;

In principle, the answer is positive. However, it was stated above in respect of the UCPD, there may be some problems in regards to use of blogs or webpages with consumer (often fake) endorsements of products comparing them to competing products. As the stakeholders have noted, in respect to the UCPD, current legal instruments in the area of advertising are difficult to enforce in such cases. Possibly, a more elaborate regulation is needed for these types of comparative advertising.

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

As with other Directives, the functioning of the MCAD in cross-border transactions is subject to successful cooperation among enforcement authorities in different Member States. So far, this cooperation is not without problems. For example, 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 whatsoever.

The stakeholders note that to ensure better cooperation, full harmonization provisions must be preferred to minimum harmonization, even if limiting the marge of appreciation. Similarly, issues of territorial competence, penalties and matters of enforcement must be harmonized.

<sup>22</sup> Ibid.

<sup>23</sup> Latvijas Republikas Civillikums [Civil Law]. Latvian Law adopted on 28 January 1937. Available in English at [http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/The\\_Civil\\_Law.doc](http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/The_Civil_Law.doc) (last seen on 17.07.2016).



- Are there measures that could improve the effectiveness of the MCAD in providing protection for businesses (see also 1.1.6 below)? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

For measures that could improve the effectiveness of the MCAD see the previous answer. While the CRPC is elaborating guidelines for laws implementing consumer protection, similar guidelines may be useful for the MCAD.

#### 1.1.4. Effectiveness of current rules 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;

The Unfair Commercial Practice Prohibition Law, implementing the UCPD, transposes its provisions almost verbatim. Moreover, the practice of the CRPC shows that it often refers both to the text of the law implementing in Latvia and the UCPD itself. Now, the problem is that principle-based approach provides a large margin of appreciation to Member State authorities. Even the practice of the CJEU does not solve the issue as it likewise operates with rather ambiguous notions. Had the CJEU acted otherwise, it would render the principle-based approach meaningless, substituting it by formalized rules. It is important to note that the practice of the CRPC and case-law of the Administrative Courts do not show that these institutions would refer to practice of foreign courts or institutions. Thus, disparities among Member States in application of the principle-based approach are inevitable.

However, the stakeholders have not indicated that application of the principle-based approach would create particular problems. According to the stakeholders, usually, the minimum harmonization provisions or gaps in EU rules create disparities in the market. Theoretically, the principle-based approach may be prone to disparities, although there are no specific statistics or studies about the issue.

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

The stakeholders have, in general, considered the black list to be an efficient tool, complementing the principle-based approach. The fact that the black list contains an exhaustive and precise list of unfair commercial practices should, in principle, aid free movement of goods and services as it provides more uniformity. As stated above, while the principle-based rules of the UCPD are also harmonizing the legal environment, their application may differ among Member States. The black list with its precise rules generates lesser disparities among Member States.

- Whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade. [*Do the national differences play a role in a business perspective? Have they caused problems?*]

The stakeholders have indicated that while in principle full harmonization is preferred by enforcement authorities, in respect of financial services minimum harmonization provides important advantages as the Latvian legislator was able to implement measures dealing with troublesome development in the market of non-bank crediting. However, currently a special regime for consumer crediting is established through implementation of the Directive 2008/48/EC, dated 23 April 2008 on credit agreements for consumers.

As there is no practice on immovable property and this is not a topical issue in Latvia, there is also no significant effect on cross-border trade.

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;

The stakeholders have not indicated that the principle-based approach would genuinely create disparities. However, it must be taken into account that Latvia is a small market and it may be difficult to spot certain problems due their scale. In future, if practice among Member States authorities varies, such disparities could affect cross-border trade. However, in any case, the affect would most likely be negligible.

- Whether the minimum harmonisation character of provisions on misleading advertising represents a barrier to cross-border trade;

The stakeholders have noted that the use of minimum harmonisation is creating barriers. It allows traders to escape from the application of more stringent rules.

It is not known to what degree businesses exporting into Member States with higher requirements are suffering from varying regulations.

- 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;

The full harmonization rules, in principle, are satisfactory and ensure equal treatment of the market participants.

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

According to the stakeholders, this is not so much a problem of barriers to cross-border trade, but rather a problem of evasion from enforcement by certain traders. This, however, may negatively affect cross-border trade indirectly, by distorting competition among traders in different Member States.

#### 1.1.5. Interplay amongst UCPD information requirements according to Article 7(4) with the information requirements in the horizontal consumer law instruments

Regarding the information requirements according to Article 7(4) UCPD ("invitation to purchase") in the advertising stage, please analyse:

- The level of awareness of traders as regards information requirements at the advertising stage, as in particular demonstrated by their practical application; [*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?*]

According to the stakeholders, there is no research uncovering the level of awareness among traders. However, the everyday observations of the stakeholders enforcing consumer protection rights show that the level of awareness is comparatively low. The study of the practice of the CRPC also shows that disregard of requirements set out on Article 7(4) UCPD is not the main infringement of consumer law, but it is a recurrent

infringements.<sup>24</sup> The practice of the CRPC shows that traders frequently do not indicate prices.<sup>25</sup> In one case, a trader did not indicate precise prices in its internet advertisements, claiming that clients could find the price by clicking on additional links.<sup>26</sup> Also traders have failed to indicate sufficient information about the payment, delivery, performance and other provisions of the contract.<sup>27</sup> These cases show that the level of awareness is probably low.

The usefulness of the information requirements in view of the more comprehensive pre-contractual information requirements of the CRD is not studied in Latvia and is not a topical issue.

- 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 stakeholders have noted that no such overlap has been established. The practice of the CRPC shows that these instruments are occasionally applied. For example, in respect of E-commerce the concept of advertising the Law on Information Society Services (implementing the E-commerce Directive) and the Advertising Law (implementing the MCAD) complement each other.<sup>28</sup> Complementary application of different laws make it complicated for businesses (especially, smaller ones) to navigate among different legal regimes.

This implies two problems. First is related to implementation of the Directives. All three directives (the MCAD, Service and E-commerce Directive) are implemented via three different laws with multiple cross-references and provisions determining their mutual interplay. Implementation in a single law might simplify the situation, making the legal regime more transparent. Second is related to the Directives themselves. The fact that they contain complementary legal regimes makes it difficult to determine their scope.

#### 1.1.6. Relevance for business-to-business transactions

Regarding the area of unfair commercial practices/marketing, please analyse:

- 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 cross-border trade;

This problem has not been discussed in Latvian scholarship or among enforcement authorities. However, theoretically, there are both advantages and disadvantages to

<sup>24</sup> E.g., Consumer Rights Protection Centre's decision in the case No. E03-PTU-K204-4 dated 9 April 2015. Available in Latvian at [http://www.ptac.gov.lv/sites/default/files/lemums\\_komerpcr\\_k-204izraksts.pdf](http://www.ptac.gov.lv/sites/default/files/lemums_komerpcr_k-204izraksts.pdf) (last seen on 21.06.2016).

<sup>25</sup> Consumer Rights Protection Centre's decision in the case No. E03-PTU-L13-L34-14 dated 23 July 2015; Available in Latvian at [http://www.ptac.gov.lv/sites/default/files/lemums\\_rigas\\_satiksme\\_23\\_07\\_2015\\_izraksts\\_majas\\_lapai\\_0000003.pdf](http://www.ptac.gov.lv/sites/default/files/lemums_rigas_satiksme_23_07_2015_izraksts_majas_lapai_0000003.pdf) (last seen on 21.06.2016). Consumer Rights Protection Centre's decision in the case No. 11-pk 4 April 2016. Available in Latvia at [http://www.ptac.gov.lv/sites/default/files/04\\_04\\_2016\\_sia\\_promotion\\_studio.pdf](http://www.ptac.gov.lv/sites/default/files/04_04_2016_sia_promotion_studio.pdf) (last seen on 21.06.2016).

<sup>26</sup> Consumer Rights Protection Centre's decision in the case No. 11-pk dated 4 April 2016. Available in Latvia at [http://www.ptac.gov.lv/sites/default/files/04\\_04\\_2016\\_sia\\_promotion\\_studio.pdf](http://www.ptac.gov.lv/sites/default/files/04_04_2016_sia_promotion_studio.pdf) (last seen on 21.06.2016).

<sup>27</sup> Consumer Rights Protection Centre's decision in the case No. E03-PTU-K20-5 dated 14 May 2015. Available in Latvian at [http://www.ptac.gov.lv/sites/default/files/lemums\\_komerpcr\\_k-20izraksts.pdf](http://www.ptac.gov.lv/sites/default/files/lemums_komerpcr_k-20izraksts.pdf) (last seen on 21.06.2016).

<sup>28</sup> Consumer Rights Protection Centre's decision in the case No. E03-PTU-P65-7 dated 2 March 2012. Available in Latvian at [http://www.ptac.gov.lv/sites/default/files/lemums\\_nr-eo3-ptu-p65-7.pdf](http://www.ptac.gov.lv/sites/default/files/lemums_nr-eo3-ptu-p65-7.pdf) (last seen on 21.06.2016).

such extension. On the one hand, the extension would have helped to level the playing field among Member States in B2B transactions. On the other hand, it is not without its problems.

B2B transactions are a broad category. Some of them may, in principle, require application of such rules. These would be transactions between smaller and larger businesses. The former may have level of competence and bargaining power similar to those of consumers. For example, Latvian tax law recognizes the so-called 'patent tax payers' regime. A patent tax payer is a natural person registered in the State Revenue Service, whose annual turnover does not exceed EUR 50 000, who does not employ other persons and does not provide services to other traders (for example, mushroom pickers). Patent tax payers are unprotected and for them such new legal regime may be helpful.

The problem is to design objective criteria making it possible to identify those traders that need additional protection. These criteria should be harmonized and be efficient, notwithstanding very different national regulations of commercial forms.

As there are no studies on the need for such extension in the market, it is impossible to make an unequivocal conclusion, whether such extension is needed.

- 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;

The B2C regime is based upon the premise that a consumer is a weaker and less competent party. The B2B regime cannot be based upon the same premise as all parties involved are businesses. For example, Article 5(5) of the UCPD provides that Annex I contains the list of those commercial practices which shall in all circumstances be regarded as unfair. It may be questioned whether all practices enumerated therein could be considered unfair in B2B transactions, where parties should normally have a higher level of competence than consumers. Similarly, the concept of the average consumer is probably not a good benchmark to assess B2B transactions. Thus, both regimes should remain distinguished.

For the sake of uniformity both regimes could be based upon similar terminology and similar categories (unfair commercial practices, misleading actions/omission and aggressive commercial practices), but thresholds used within each category must differ for B2B transactions.

Finally, since 1 January 2016 Latvia has adopted Unfair Retail Trade Practice Prohibition Law restricting the use of buying power of retailers against suppliers in order to balance the interests of suppliers and retailers in retail trade.<sup>29</sup> The existence of such national laws, creates problems with alignment of B2B and B2C regimes.

- 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 also cover unfair commercial practices during and after the transaction;

There are no studies analysing the need and effects of such an extension and its possible scope. Thus, it is impossible to draw unequivocal conclusions.

- Whether there is a need to have a black-list of practices in the business-to-business marketing area;

<sup>29</sup> Negodīgas mazumtirdzniecības prakses aizlieguma likums [Unfair Retail Trade Practice Prohibition Law]. Latvian Law adopted 21 May 2015. Available in English at [http://vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Unfair\\_Retail\\_Trade\\_Practices\\_Prohibition\\_Law.pdf](http://vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Unfair_Retail_Trade_Practices_Prohibition_Law.pdf) (last seen on 21.06.2016).

As was stated above, the stakeholders consider the black-list of practices to be useful for B2C transactions. The list could be likewise used for B2B transactions. However, in Latvia advertising is almost exclusively targeted at consumers. Thus, the need for such a list is questionable.

- What should be the enforcement cooperation mechanism in the business-to-business marketing area;

Currently, in Latvia there is no authority that would deal with the matter in respect to B2B transactions. Thus, it is impossible to speak of any cooperation mechanism at this moment.

- Whether there is a need to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive;

The stakeholders have in general expressed their preference for contractual consequences. If the scope of the MCAD is extended, then introduction of contractual consequences would be reasonable.

- Whether there is a need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive.

The stakeholders have not indicated that this is necessary.

#### 1.1.7. Relevance of contractual consequences of unfair commercial practices

Please analyse whether there are in your country:

- 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;

Latvian law does not provide contractual consequences for the breaches of the UCPD. Similarly, the law does not provide the right to avoid the contract due to such infringements.

However, Article 25(8) of the Consumer Rights Protection Law provides that, if the CRPC establishes a violation of the consumer rights, which affects group consumer interests (collective interests of consumers) and may cause losses or harm to consumers, as well as to a particular consumer, the CPRC, having evaluated the nature and essence of the violation, as well as other aspects, may take, *inter alia*, the following measures: '1) propose that the manufacturer, trader or service provider makes a commitment in writing to rectify the violation within the specified time period; 2) take a decision, by which the manufacturer, trader or service provider is required to cease the violation, and to perform specific activities in order to rectify the impact thereof and which determine the time period for the implementation of such activities [...].'<sup>30</sup>

If the manufacturer, trader or service provider makes a commitment in writing to rectify the violation, it is considered that he/she has acknowledged the infringement of consumer rights and the CPRC abstains from making a decision requiring to cease the violation and perform specific activities in order to rectify the impacts of the infringement. However, if the commitment is not fulfilled, the CPRC requests to cease the infringement and to perform specific activities in order to rectify the impact and establishes a period for its implementation.

<sup>30</sup> Patērētāju tiesību aizsardzības likums [Consumer Rights Protection Law]. Latvian Law adopted 18 March 1999. Available in English at [http://vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Consumer\\_Rights\\_Protection\\_Law.pdf](http://vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Consumer_Rights_Protection_Law.pdf) (last seen on 21.06.2016).

- Any case law (enforcement decisions, court rulings) providing for such consequences;

Contractual consequences are not provided for in Latvian law; hence, no case-law on the matter.

- Whether there is, based on past experience in your country, a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

The stakeholders consider that introduction of contractual consequences would be beneficial for consumer protection in Latvia. Indeed, contractual consequences may be an efficient measure to strengthen protection of consumers and, notably, have a preventive effect upon businesses attempting to infringe consumer protection law. Notwithstanding that, the stakeholders have also pointed out certain problems related to the introduction of contractual consequences. For example, the stakeholders have indicated the difficulty of establishing that goods were bought due to the (misleading) advertisement.

## 1.2. Contract conclusion and performance

### 1.2.1. Effectiveness of the current rules in establishing 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;

According to the stakeholders, the principle-based approach, all things considered, is more effective than the use of specific rules, as the latter would always contain gaps. The principle-based approach allows the authorities and adjudicators to apply the law in a flexible manner, taking into account all factual circumstances. Moreover, the approach adjusts to the changing values of society about legal, social and political processes.<sup>31</sup>

This flexibility is illustrated by the following example. In one case, the court *ex officio* evaluated the principle of legal equality of the contracting parties (Article 5(1) of the Consumer Rights Protection Law). This rule provides that contractual terms shall be deemed to contradict the principle of legal equality of the contracting parties, if the terms reduce the liability of the parties prescribed by law, restrict the rights of the consumer to enter into contracts with third parties, stipulate privileges to the manufacturer, trader or service provide, and restrictions to the consumers and put the consumer in a disadvantageous position and are contrary to the requirements of the good faith (Article 5(2) of the Consumer Rights Protection Law). The Court acknowledged that the Consumer Rights Protection Law is not intended to release the consumer for any and all liabilities arising from the breach of the contract but the purpose of the law is to protect the consumer against the application of contractual terms, providing disproportionate liability for the non-execution of the contract. If all terms unfavourable to consumers were to be considered unfair, it would violate the principle of legal equality. The judge concluded that in the case at hand the consumer

<sup>31</sup> Vadlīnijas taisnīgu elektronisko sakaru pakalpojumu līguma sastādīšanai [Guidelines on Drafting Fair Electronic Communication Service Agreement] Consumer Rights Protection Centre, 2012, p. 48. Available in Latvian at [http://www.ptac.gov.lv/sites/default/files/docs/vadlinijas\\_elektroniskie\\_sakari\\_ligumu\\_sastadisana.pdf](http://www.ptac.gov.lv/sites/default/files/docs/vadlinijas_elektroniskie_sakari_ligumu_sastadisana.pdf) (last seen on 11.07.2016).



had not fulfilled their obligations under the contract, thus had not acted in good faith. The creditor's claim against the consumer was satisfied.<sup>32</sup>

In certain areas, creating particular concern for consumer protection, the application of the principle-based approach has achieved notable results. For example, the supervision of contracts used in non-bank crediting has been an effective means of debtor protection.

- 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 your MS? Does this work in practice or are there problems?*]

In 2014, the CRPC received 132 complaints regarding unfair terms. In 2015 the number increased to 164. In 2015, the majority of complaints (37 %) was about consumer crediting<sup>33</sup> considered to be one of the most problematic sectors, even though since the introduction of the licensing in 2011 consumer crediting agreements are scrutinized by the CRPC. Namely, when the CRPC decides whether to issue licenses or not, it evaluates draft contracts, thus eliminating the unfair contractual terms.

In the opinion of stakeholders and in practice a non-exhaustive black list of unfair terms is incorporated in Article 6 of the Consumer Rights Protection Law. It suggests that, contrary to the Directive, the list in the national law is not only indicative, i.e. providing examples for unfair terms, but also bears a mandatory character.<sup>34</sup> Namely, unfair contractual terms listed in the law shall be regarded as unfair and not in effect if they are not mutually discussed by the contracting parties.

The Supreme Court has stated that this Article provides just for the general list of possible violations of the principle of legal equality, describing their main characteristics; but it is impossible to indicate all unfair contractual terms.<sup>35</sup>

Part 3(7) of Article 6 provides that contractual terms, which have not been mutually discussed by the contracting parties, shall be deemed to be unfair if they exclude or hinder the right of the consumer to apply to consumer rights protection institutions or to courts or to use rights protection means, especially those providing for adjudication of disputes only by arbitration tribunals, unjustifiably restrict the use of proof available for a consumer or impose a burden of proof on a consumer which in accordance with the laws and regulations is an obligations of other contractual party. However, the Article 10(2) of Law on Arbitration Courts provides freedom for any party to conclude an arbitration agreement.<sup>36</sup> It is stated that the norm included in the Consumer Rights Protection Law is a special norm in connection with the norm included in the Civil Procedure Law (general norm)<sup>37</sup>. Thus in accordance with national law and para 1(q) of the Directive's Annex<sup>38</sup> contractual term providing only for the dispute settlement in

<sup>32</sup> Dobele region court's judgment in the case No. C30624015 dated 30 May 2016. Available in Latvian at <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/271015.pdf> (last seen on 11.07.2016). See also Supreme Court's judgment in the case No. C10100611 dated 14 September 2016. Available in Latvian at <http://at.gov.lv/files/uploads/files/archive/departament1/2016/SKC-116-2016.doc> (last seen on 01.02.2017).

<sup>33</sup> Official statistics of the CRPC. Available in Latvian at <http://www.ptac.gov.lv/lv/content/statistika-par-pateretaju-sudzibam-un-konsultacijam> (last seen on 11.07.2016).

<sup>34</sup> See, B. Vītoļa, Patērētāju tiesību aizsardzības pamati. [Basics of Protection of Consumer Rights]. Rīga, Zvaigzne ABC, 2015, 110-111.

<sup>35</sup> Administrative Cases Department of the Supreme Court's judgment in the case No. C30519003 dated 7 March 2006.

<sup>36</sup> Šķīrējtiesu likums [Law On Arbitration Courts]. Latvian Law adopted 11 September 2014.

<sup>37</sup> Civilprocesa likums [Civil Procedure Law]. Latvian Law adopted 14 October 1998. Available in English at [http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Civil\\_Procedure\\_Law.pdf](http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Civil_Procedure_Law.pdf) (last seen on 11.07.2016).

<sup>38</sup> Unfair term (q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by



arbitration can be deemed unfair.<sup>39</sup> The Constitutional Court has also indicated: 'when interpreting the restrictions determined in the Directive to bind the consumer with a jurisdiction clause, the European Court of Justice has pointed out that the potential unfairness and validity of such a clause shall be assessed by the court of its own motion [...]. The Constitutional Court holds that the courts of general jurisdiction of Latvia shall also act in the similar manner [...].'<sup>40</sup>

The CRPC, frequently, faces contractual terms imposing upon consumers disproportionately large contractual penalties or other compensation for non-performance or improper performance of the contractual obligations. These terms are considered unfair under Latvian law.<sup>41</sup>

There is a recent example from the CRPC's practice. The CRPC received number of consumer complaints regarding the parking services contracts. The parking contracts placed in the parking sites and on the web page of the service provider established that consumers were to pay several penalties for the same breach and their total amount was disproportionate and exceeded the contractual penalties provided by law. The services provider declined the CRPC's proposition to eliminate the breach of consumer rights and to submit the written acknowledgment providing that the service provider would not offer or apply particular unfair terms. Taking into account that particular violation affected collective interests of the consumers, the CRPC decided to consider the specific contractual terms and required the service provider to stop applying the terms, to change them and to submit a new version of the contract for a review.<sup>42</sup> The decision of the first instance court has been appealed and the litigation is pending.

The list has helped eliminate the use of arbitration clauses in consumer contracts without them being individually negotiated.<sup>43</sup> The state of arbitration in Latvia, in the eyes of the public, does not ensure comprehensive implementation of high ethical standards among arbitrators. Thus, the use of arbitration is considered to be non-transparent and sometimes plainly unjust method of dispute settlement. This is even more so in consumer contracts, where the consumer would usually not understand all the consequences of the having the dispute decided in arbitration (in particular, when there is a risk that arbitrators/arbitration institution have certain links with the trader). The stakeholders have considered this to be the single most important improvement of the consumer practice in Latvia.

- 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

legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

<sup>39</sup> Vadlīnijas taisnīga patērētāja kredīvēšanas līguma sastādīšanai [Guidelines on Drafting Fair Consumer Credit Agreement] Consumer Rights Protection Centre, 2010, Available in Latvia at [http://www.ptac.gov.lv/sites/default/files/docs/vadlinijas\\_taisniga\\_pateretaja\\_kreditesanas\\_liguma\\_sasta\\_disanai.pdf](http://www.ptac.gov.lv/sites/default/files/docs/vadlinijas_taisniga_pateretaja_kreditesanas_liguma_sasta_disanai.pdf) (last seen 11.07.2016), p. 32.

<sup>40</sup> The Constitutional Court of the Republic of Latvia judgment in the case No.2004-10-01 dated 17 January 2005, para. 9.3.2. Available at [http://www.satv.tiesa.gov.lv/wp-content/uploads/2004/05/2004-10-01\\_Spriedums\\_ENG.pdf](http://www.satv.tiesa.gov.lv/wp-content/uploads/2004/05/2004-10-01_Spriedums_ENG.pdf) (last seen on 11.07.2016).

<sup>41</sup> See: Administrative district court's judgment in the case No. A42765709 dated 31 May 2012 available in Latvian at <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/125753.pdf> (last seen 01.02.2017); Administrative regional court's judgment in the case No. 420563412 dated 16 October 2013. Available in Latvian at <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/118686.pdf> (last seen on 01.02.2017).

<sup>42</sup> Consumer Rights Protection Centre's decision in the case No. 2-pk dated 8 October 2015. Available in Latvian at [http://www.ptac.gov.lv/sites/default/files/lemuma-izrakts-europarklatvia\\_2pi.pdf](http://www.ptac.gov.lv/sites/default/files/lemuma-izrakts-europarklatvia_2pi.pdf) (last seen on 30.07.2016). The decision was appealed by the service provider; however, the first instance court denied the appeal. See: Administrative regional court's judgment in the case No. A420336415 dated 17 June 2016. Available in Latvian at <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/270650.pdf> (last seen on 01.02.2017).

<sup>43</sup> Consumer Rights Centre's decision in the case No.1/06 – 5338 dated 24 August 2005. Available in Latvian at [http://www.ptac.gov.lv/sites/default/files/lemums\\_nr106\\_5338\\_2005\\_08\\_24\\_aas\\_baltijas\\_apdrosinasan\\_as\\_nams.pdf](http://www.ptac.gov.lv/sites/default/files/lemums_nr106_5338_2005_08_24_aas_baltijas_apdrosinasan_as_nams.pdf) (last seen on 30.07.2016).

purely indicative list of the Directive; [Note: If a black/grey list exists in your country, key aspects to consider are: How does the list work in practice? Does it make a difference to have such a list?]

The black list is necessary for a number of reasons. Firstly, the list simplifies the task of the CRPC of creating uniform practice on unfair contract terms and provides information to public. For example, currently the CRPC keeps a database of unfair contractual terms, which is available on the CRPC's webpage. Moreover, in selected sectors the CRPC develops Guidelines on Drafting the Consumer Contracts, containing examples of unfair contract terms.<sup>44</sup> This allows consumers and traders alike to assess contractual terms. An indicative list would provide lesser legal certainty and clarity.

Secondly, the list has helped to eradicate certain practices, notably, the use of arbitration clauses in consumer contracts. Their almost complete eradication from consumer contracts was positive development, bearing in mind that arbitration in Latvia is often short of highest international standards and its use in consumer disputes exposed consumers to unreasonable risk of denial of due process and access to justice. An indicative list would make such eradication slower, due to the case-by-case assessment. The use of the black list provides a faster and more efficient solution.

The practical application of the black list may be illustrated by the following example. The contract for telecommunication services provided that '[i]nformation about the changes in contract will be provided on [services provider's] webpage. Information on prices, tariffs and additional costs of the service will be provided in writing or, if it is not against normative acts of the Republic of Latvia, via [services provider's] webpage, mass media and/or in other suitable way.' The CRPC referred to Article 6(3)(12) of the Consumer Rights Protection Law, providing that the term permitting service provider to unilaterally amend the contractual terms shall be considered unfair. Further the CRPC stated that this norm in national law shall be interpreted within line of Annex 1, Article 1(j) and 2(b) of the Directive and Article 23 (3) Electronic Communications Law.<sup>45</sup> The CRPC established that the law explicitly did not provide in which way the consumer shall be informed about the changes in electronic communication service agreement, but it was determined that the consumer should have 'receive[d] an individual' notice about changes in contract thus the CRPC imposed an obligation to change the particular term of the contract to the service provider and inform about the decision's enforcement.<sup>46</sup>

However, the introduction of the black list in national law does not mean that all terms listed therein are always unfair. The CRPC has published the cases when the term was not considered as unfair. For instance, in one case, the consumer complained that the contract provided for the contractual penalty of 2.5 % per day from the debt in case the consumer delays the payments.<sup>47</sup> The CRPC evaluated the proportionality of the contractual penalty within the context of the Article 6(3)(4) of the Consumer Rights Protection Law, providing that the contractual term imposing a disproportionately large contractual penalty for non-performance of the contractual obligations upon a

<sup>44</sup> For example, Vadlīnijas taisnīgu elektronisko sakaru pakalpojumu līguma sastādīšanai [Guidelines on Drafting Fair Electronic Communication Service Agreement]. Consumer Rights Protection Centre, 2012, p. 48. Available in Latvian at [http://www.ptac.gov.lv/sites/default/files/docs/vadlinijas\\_elektroniskie\\_sakari\\_ligumu\\_sastadisana.pdf](http://www.ptac.gov.lv/sites/default/files/docs/vadlinijas_elektroniskie_sakari_ligumu_sastadisana.pdf) (last seen on 11.07.2016).

<sup>45</sup> Elektronisko sakaru likums [Electronic Communication Law]. Latvian Law adopted 28 October 2004. Available in English at [http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Electronic\\_Communications\\_Law.doc](http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Electronic_Communications_Law.doc) (last seen on 11.07.2016). Article 23(3) provides: „Subscribers have the right to terminate an electronic communications services contract without the application of penalties if the subscriber, upon receipt of a notification from the electronic communications merchant regarding changes in the conditions of the contract, does not agree to the offered changes in the contract conditions.”

<sup>46</sup> Consumer Rights Protections Centre's Decision No. 25-Ig dated 7 August 2006. Available in Latvian [http://www.ptac.gov.lv/sites/default/files/lemums\\_nr.25\\_lg\\_2006.08.25\\_sia\\_bite\\_latvija.pdf](http://www.ptac.gov.lv/sites/default/files/lemums_nr.25_lg_2006.08.25_sia_bite_latvija.pdf) (last seen on 11.07.2016).

<sup>47</sup> The CRPC does not decide on individual claims anymore.

consumer was unfair. In the case at hand taking into consideration the circumstances of the case, it was decided that the contractual penalty was fair.<sup>48</sup> Thus the terms themselves allow to maintain certain flexibility in their application.

- 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: In your country, have the effects of court decisions establishing the unfairness of an unfair term been extended to all contracts of the trader concerned or to the contracts of any other trader containing such a term? If so, how does this work in practice? What are the impacts on businesses? If there are no such effects of court decisions on unfair terms: what are the effects of this situation?*]

A judgment concerns only a particular consumer. This is illustrated by the following case. A consumer - the contracting party to a pledge agreement -, submitted the request to the CRPC, requesting to acknowledge that a number of the contractual terms were void. The CRPC decided not to initiate an administrative case, because some of the terms were fair, while in respect of the arbitration clause, the trader had given a public acknowledgment that it will not apply it. The consumer submitted the claim to the court. The case was reviewed by three instances, including the Supreme Court as cassation. The Supreme Court stated that in accordance with the law, the consumer itself cannot initiate the administrative case on breach of collective consumer interests in accordance with Article 25(8<sup>1</sup>) of the Consumer Rights Protection Law.<sup>49</sup> Secondly, in case of individual consumer disputes about unfair contract terms, the CRPC evaluates the complaints and replies stating its opinion regarding unfairness of the particular terms. Such a reply is not binding and does not constitute an administrative act. The CRPC protects collective consumer interests as provided in Directive No. 2009/22.<sup>50</sup>

Some of the stakeholders, in particular consumer organisations, have indicated that after recent amendments, the dispute resolution of the individual disputes became more complicated.

However, if the violation of the consumer rights, affecting group consumer interests (collective interests of consumers), has been established, and it may cause losses or harm to consumers, as well as to a particular consumer, the CRPC, having evaluated the nature and essence of the violation, as well as other aspects, is entitled *inter alia* to propose that the manufacturer, trader or service provider makes a commitment in writing to rectify the violation within the specified time period (Article 25(8) of the Consumer Rights Protection Law). The CRPC has published 16 such written commitments in 2015. The system helps curing amicably infringements and eliminating unfair terms from contracts, simultaneously protecting traders from punishment proceedings and fines.

Moreover, while judgments concern only specific cases, the practice of the Supreme Court is normally followed by lower courts in similar cases. However, not always is there a dominant practice followed by all courts in all similar cases. While the precise

<sup>48</sup> Consumer Rights Protection Centre's decision No.19-Ig dated 07 June 2006. Available in Latvian at [http://www.ptac.gov.lv/sites/default/files/docs/ptac\\_lemumi/2006/lemums\\_nr.19\\_lg\\_2006.06.07\\_sia\\_ma\\_ksinet.pdf](http://www.ptac.gov.lv/sites/default/files/docs/ptac_lemumi/2006/lemums_nr.19_lg_2006.06.07_sia_ma_ksinet.pdf) (last seen on 11.07.2016).

<sup>49</sup> This Article provide that the CRPC can initiate collective interest case upon its own initiative, on the basis of a submission of the association for consumer rights protection, on the basis of the information provided by such institution within the competence of which is the supervision and control of the relevant sector; on the basis of a submission of such institution of the European Union Member State which is included in the list referred to in Article 4(3) of Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests.

<sup>50</sup> Administrative Cases Department of the Supreme Court's decision in the case No. A420299513 dated 11 July 2014. Available in Latvian at <http://at.gov.lv/files/uploads/files/archive/departments3/2014/472-ska-2014.doc> (last seen on 13.07.2016).

effect is unknown, it could be speculated that this creates uncertainty for both traders and consumers, inflates costs of litigation, but equally motivates traders to use potentially unfair terms, expecting favourable court decisions. Thus most probably there is a need for the mechanism to extend the finding in one case to all consumer contracts, for example, in the national level the Supreme Court could publish summary of the judicature, i.e., recommended judiciary practices.

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

Article 6(2) of the Consumer Rights Protection Law provides that contractual terms shall be expressed in plain and comprehensible language. This implements the transparency requirement of the Directive. Within the meaning of this law, the principle of transparency means that an average consumer must be able to read and understand a consumer contract without lawyer's assistance, and none of its terms is putting the consumer in disadvantageous position because he/she does not understand a particular term and cannot imagine that it can be applied against him/her.<sup>51</sup>

The CRPC rarely deals with assessment of the contractual transparency requirements in practice. However, in some sectors, e.g., insurance, the use of non-transparent contractual clauses is a problem that is addressed by the institution.

However, it must be noted that the CRPC, in its publicly available materials and guidelines for traders, underscores the need for transparent contractual language. The existence of such a legal requirement, even if not always easy to apply in practice, nevertheless, draws attention of traders to the language used in their contracts.

- 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. [*Note: Question only relevant for MS that have put in place extensions of application of UCTD*]

In principle, Article 5(1) of the Consumer Rights Protection Law established equality between parties and extends to all terms, whether individually negotiated or not, if they are causing effects enumerated in Art. 5(2) of the said law. This means that, formally, Latvia has extended the application of Directive to individually negotiated terms and terms on the adequacy of the price.

However, Article 6 of the said law, dealing with unfair terms, tackles only terms that were not individually negotiated. However, it still encompasses terms on the adequacy of the price and the main subject-matter, but only if they are not formulated in clear and understandable manner.

In practice this means that the CRPC is dealing only with terms that were not individually negotiated. It may deal with terms on the adequacy of the price and the main subject-matter terms, provided they were not individually negotiated and were not formulated in clear and understandable manner. This means that these terms, for practical purposes, may only be assessed by a court. The court will assess whether the term is contrary to the principle of equality of parties. In practice this is a very unlikely occurrence. Thus, the effect of the extension is minimal, if any.

- 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*

<sup>51</sup> Vadlīnijas taisnīga patērētāja kredītēšanas līguma sastādīšanai [Guidelines on Drafting Fair Consumer Credit Agreement]. Consumer Rights Protection Centre, 2010, p. 9. Available in Latvian at [http://www.ptac.gov.lv/sites/default/files/docs/vadlinijas\\_taisniga\\_pateretaja\\_kreditesanas\\_liguma\\_sasta\\_disanai.pdf](http://www.ptac.gov.lv/sites/default/files/docs/vadlinijas_taisniga_pateretaja_kreditesanas_liguma_sasta_disanai.pdf) (last seen on 11.07.2016).

*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?]*

As was mentioned above, the sanction foreseen by the UCTD have been effective in some areas. For example, the invalidity of non-negotiated arbitration clauses in consumer contracts to a large degree has alleviated problems related to their use in consumer contracts.

However, there are a number of problems with application of these sanctions in practice. Firstly, while the CRPC may find that certain terms are unfair, it is sometimes hard to trace whether the trader has discontinued using the particular term in its contracts. Similarly, in cases when traders submit written commitments, it is not easy to control their observation.

Secondly, for the majority of consumers, it is difficult to establish whether a contractual term is unfair or not. This subjects consumers to serious risks, if they incorrectly consider the term to be invalid and refuse to perform it. For example, if the consumer considers that the contractual penalty is unfair and refuses to pay, this may lead to litigation. If the court finds that the term was not unfair, the consumer will be found to have breached the contract. Thus, to avoid the risk, the consumer would need first to contact the CRPC or bring a claim in a court. In accordance with the Article 26 of the Consumer Rights Protection Law, the CRPC cannot issue administrative decisions in cases of infringement of rights of individual consumers. Here, the CRPC can only consult the consumer and express its opinion about the alleged infringement. This means that at the end of the day, if the consumer believes that a contractual term is unfair, he/she will have to commence litigation. This makes application of sanctions difficult and costly.

Pursuant to the observations of the stakeholders, the court practice is becoming more inclined to invoke unfairness of the contractual terms *ex officio*. This is due to two factors. Firstly, the line of reasoning has been approved by the Supreme Court.<sup>52</sup> Previously judges hesitated or were not informed about this principle, now there is an established case law by the Supreme Court. For example, the Supreme Court, interpreting Article 6(11) of the Consumer Rights Protection Law<sup>53</sup>, established that the court shall evaluate the compliance of the terms in consumer contracts to requirements of good faith and shall not apply unfair terms, even if the consumer had challenged the term.<sup>54</sup> The same was confirmed by the Constitutional Court.<sup>55</sup> Secondly, judges become more active participants of judicial training programs in consumer law.

As it was stated above, the CRPC does not issue administrative decisions in individual cases. However, in accordance with Article 25(8) of the Consumer Rights Protection

<sup>52</sup> E.g., Civil Cases Department of the Supreme Court's judgment in the case No. SKC – 94/2016 dated 3 March 2016. See also Civil Cases Department of the Supreme Court's judgment in the case No. Skc-108/2013 dated 12 March 2013.

In this case, the Supreme Court ruled that a court must invoke invalidity of the unfair terms *ex officio*. In order to justify this conclusion, the Supreme Court referred to four cases by the CJEU: Court of Justice case No. C-618/10 dated 14 June 2012; Court of Justice case No. C-472/11 dated 21 February 2013; Court of Justice case No. C-488/2011 dated 30 May 2013; Court of Justice case No. C-169/2014 dated 17 July 2014.

<sup>53</sup> "Upon resolving a dispute or carrying out other procedural actions arising from the contract entered into between a manufacturer, trader or service provider and a consumer, the court shall evaluate the terms of the contract and for the resolution of the dispute shall not apply the unfair terms provided for in the contract in relation to the consumer".

<sup>54</sup> Civil Cases Department of the Supreme Court's judgment in the case No. SKC-98/2015 dated 21 September 2015. Available in Latvian at <http://at.gov.lv/files/uploads/files/archive/departament1/2015/SKC-98-2015.doc> (last seen 14.07.2016).

<sup>55</sup> The Constitutional Court of the Republic of Latvia judgment in the case No. 2004-10-01 dated 17 January 2005, para. 9.3.2. Available at [http://www.satv.tiesa.gov.lv/wp-content/uploads/2004/05/2004-10-01\\_Spriedums\\_ENG.pdf](http://www.satv.tiesa.gov.lv/wp-content/uploads/2004/05/2004-10-01_Spriedums_ENG.pdf) (last seen on 11.07.2016). See reference in footnote 42.



Law, 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 CRPC, 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; 2) to take a decision, by which the manufacturer, trader or service provider is required to cease the violation, and to perform specific activities in order to rectify the impact thereof and which determine the time period for the implementation of such activities; 3) to publish the decision taken either fully or partially on the home page of the Consumer Rights Protection Centre and in the newspaper *Latvijas Vēstnesis* [the official Gazette of the Government of Latvia] (the costs associated with the publication shall be covered by the manufacturer, trader or service provider).<sup>56</sup>

If the CRPC takes a decision on the basis of said provision, it issues an administrative act.

Finally, it should be noted that term 'consumer' appears only once in the Civil Procedure Law. Namely, Article 405 of the law provides that if the judge finds that the application for the undisputed enforcement is unfounded or the amount of penalty indicated in the application is disproportionate to the principal debt, or the document to be enforced contains unfair contractual provisions violating consumer rights, he or she shall take a decision on dismissal thereof. Therefore, it can be suggested that not only guidance by the CJEU is valuable, but also the national procedural law shall be adjusted to be more favourable for the consumers. Also a consumer organisation indicated that there are no procedural reliefs for the NGO's protecting consumer interests – no reduction of court fees etc.

Moreover, in the interviews it was suggested that there is a need for Commission's guidelines.

- In a forward looking perspective: Are there other measures that could improve the effectiveness of the UCTD in establishing a high level of consumer protection in your country? Would a graphical presentation model improve the readability and comprehension by consumers of the T&Cs? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

The European Consumer Centre already provides graphical presentations and easy-to-understand layouts of EU consumer law.<sup>57</sup> However, it is questionable whether all contract terms can be expressed in graphical presentation.

The CRPC provides a useful database of unfair contract clauses on the internet.<sup>58</sup> Currently the webpage contains information on all unfair clauses included in the list. Of course, a greater number of examples, preferably derived from practice, giving guidance to both consumers and traders about the state of law in this area, would further strengthen legal certainty.

In addition, the CRPC webpage provides a database of unfair terms across different industries. These examples are also very useful to obtain an overview of the current state of affairs in the case law. Presentation of a large number of typical unfair clauses with commentaries by the relevant authority in a simple and understandable manner,

<sup>56</sup> According to scholars, the home page of the Consumer Rights Protection Centre is considered more accessible to general public; therefore, the CRPC does not use its right to publish decisions in the official Gazette of the Government of Latvia. See, B. Vītolīņa, *Patērētāju tiesību aizsardzības pamati*. [Basics of Protection of Consumer Rights]. Rīga, Zvaigzne ABC, 2015, 351.

<sup>57</sup> Information provided by the European Consumer Centre is available in Latvian at <http://www.ecclatvia.lv/lv/publikacijas/bukleti-brosuras> (last seen on 17.07.2016).

<sup>58</sup> The databased of the CRPC is available in Latvian at [http://www.ptac.gov.lv/sites/default/files/docs/2014.11.26.%20pielikums\\_netainigu%20noteikumu%20piemeru.pdf](http://www.ptac.gov.lv/sites/default/files/docs/2014.11.26.%20pielikums_netainigu%20noteikumu%20piemeru.pdf) (last seen on 17.07.2016).

may be considered to be the best practice relevant for other Member States. Also, before issuing the licence to non-bank consumer creditors, the CRPC evaluates contractual templates, establishing whether the contractual terms are fair.

### 1.2.2. Effectiveness of the current rules 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 disparities have an impact on cross-border trade; [*Key aspects to consider are: Do national differences in the application/implementation of the Directive play a role for businesses? Have these differences led to changes in their business strategy? Have these differences caused problems?*]

The stakeholders have not indicated such effects on cross-border trade. In general, any divergence may have a negative impact. However, cross-border trade develops slowly and traders hesitate to address new consumers in other Member States due to other obstacles such as lack of resources and knowledge of laws or particularities of the specific market. Due to the slow development of cross-border trade, Latvian traders do not have extensive experience of application of the general fairness clause in other Member States.

- 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;

Pursuant to the view of the stakeholders, the black list of unfair contract terms is easier to understand as they set the clear proscriptive rules. The grey list, establishing just a rebuttable presumption of unfairness, may be more open to interpretation on a case by case basis that may vary among Member States. This may be a barrier to cross border trade as traders have to investigate the approach taken by the other Member State. However, there are no studies or information obtained from the stakeholders, providing any real life examples of such effects.

- 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.

There are no studies or information received from the stakeholders implying that other extensions of the application of the UCTD would represent a barrier to cross-border trade.

### 1.2.3. Relevance for business-to-business transactions

Regarding the area of contractual fairness and in relation to the Unfair Contract Terms Directive, please analyse:

- Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;

This issue has not been discussed by legal scholars in Latvia. Thus, there is no clear academic opinion. However, Article 4<sup>1</sup> of the Consumer Rights Protection Law provides that the provisions of Chapters III (Conformity of Goods and Services to Provisions of a Contract) and IV (Information about the Goods and Services) of the law shall be applicable to such legal regulations, which are established between a trader or a service provider and a consumer, and also any other subject who expresses a wish to purchase goods or services for a purpose which is not related to economic of



professional activity of such subject. Thus, there is already protection for businesses, but only in the cases in which they are not acting in their business interests.

Creation of wider protection may be questionable. Large businesses rarely will need it as their contracts are often prepared or reviewed by in-house lawyers. On the other hand, small businesses in regard to competence or bargaining power may be in a position similar to that of consumers. However, at least in Latvia, it is difficult to distinguish between businesses in need of such protection and those that do not. For example, in Latvia certain legal services may be provided by jurists established in the form of an enterprise with only a few people involved. Such an enterprise would hardly need additional protection.

Moreover, if the protection is extended to certain categories of businesses, it may pose a problem of legal certainty. Normally, the larger businesses would need to know in advance whether their counterparties have only limited private autonomy.

In addition, commercial law tradition underscores private autonomy. Across the board application of the UCTD in respect of such transactions would bring serious changes in traditional understanding of private autonomy and its limits in commercial law. At best, this approach could be acceptable for standard terms, but not for individually negotiated terms.

- 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;

Neither authorities, nor scholars have seriously considered and discussed this issue, thus it is hard to provide a definite answer. Overall, the use of good faith principle could be acceptable.

The principle of good faith is also embodied in Article 1 of the Latvian Civil Law, making it part of private law. The use of a similar notion (although with an autonomous content due to its EU origins) in B2B transactions would not be something extraordinary for Latvian legal culture. The notion would give enforcement authorities and courts a sufficiently wide margin of appreciation to apply the law in a nuanced manner.

At the same time, in B2B transactions parties, usually, have lesser disparities of bargaining power and competence. Normally, imbalance of rights and obligations would be attributed to free exercise of private autonomy. Thus, if the concept of imbalance of rights and obligations is used it could apply only to most manifest cases. Otherwise, it would disrupt the basis of the market economy, where parties can design their own contracts.

- 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;

In B2B transactions, the standard terms carry the highest risk of creating imbalance between parties. If the scope of the UCTD is extended at all, this area should be tackled first. However, in Latvia use of standard terms in a commercial setting is not widespread.

In principle, Latvian legal tradition would not favour wide-scope intervention into the contract law. Theoretically, if applicable to individually negotiated terms, it could extend only to terms manifestly unfair, beyond reasonable doubts, e.g., extremely high penalty clauses, extremely broad exemptions from liability, etc.

- 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;

Some of such terms are already provided in the Latvian general civil law. E.g., Article 1643 of the Latvian Civil Law provides that an agreement between parties excluding liability for intentional infringements is invalid. Similarly, terms that eliminate access to courts all together should be treated as unfair. However, most such manifestly unfair terms would be invalid in accordance with Latvian law anyway.

These examples show that only terms that are outright incompatible with the most fundamental understanding of justice can be regarded as unfair in all circumstances. Other clauses, e.g., penalty clauses, may be unfair, if they provide extremely high penalties.

- Whether there is a need for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive;

In practice many B2B transactions are drafted in a heavy language with extensive use of legalese. But while transparency is welcomed, it is not obvious that the duty of transparency should be legally imposed upon parties.

Firstly, B2B transactions are usually much more complicated than consumer contracts. Secondly, in B2B transactions, from the perspective of the current legal culture in Latvia, parties have freedom to choose the wording of their contract. This follows from the principle of private autonomy. It would seem that imposition of contractual transparency would function as serious restriction upon private autonomy. It is doubtful whether such a policy is appropriate for B2B transactions. B2B contracting should, in principle, remain controlled by parties.

- Whether an extension of the Unfair Contract Terms Directive to B2B transactions can bring benefits for cross-border trade;

In cross-border transactions, the bargaining power among parties may vary more drastically than in domestic transactions. The extension of the UCTD to B2B transaction could eradicate some of the negative effects arising from this disparity. However, the practice of implementation and application of the EU directives may also vary, thus the benefit should not be exaggerated. It is also necessary to study the effect of such extension on the application of other international substantive private law instruments like the Convention on International Sales of Goods and UNIDROIT Principles of International Commercial Contracts. Thus, currently, it is impossible to foresee the benefits and drawbacks.

- Whether the consequences of such an extension would have an effect on innovation by or market opportunities for SME providers/suppliers;

There is no assessment of the possible effect of the extension of the UCTD to B2B transactions. However, on somewhat speculative bases, it has to be noted that fragmentary unification of contractual law would hardly provide sensible effect upon the conditions of SME providers/suppliers in Latvia. This type of harmonization would not eliminate legal barriers among Member States. Their full elimination would require across the board harmonization of private law.

- Whether the benefits of extending the scope to business-to-business transactions would exceed the negative consequences of such an extension.

As stated above, such extension currently is not justified. It strongly interferes with private autonomy and makes it difficult to identify businesses that are protected by the extension.

### 1.3. Injunctions

#### 1.3.1. Effectiveness of the current rules in establishing a high level of consumer protection

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

- To what extent is the use of the injunction procedure in your country contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment?<sup>59</sup>

According to the stakeholders, the out-of-court injunction procedures are effective and reduce the number of infringements.

In 2015, the CRPC initiated 180 cases dealing with infringements of collective interest of consumers, including cases regarding commercial practices and contractual terms in consumer crediting, commercial practice in e-commerce and electronic communication etc.<sup>60</sup> There have been 4 cases where traders were registered in other EU countries and in 3 cases infringements were amicably resolved.<sup>61</sup>

The following case illustrates that some obstacles remain. Upon a number of complaints regarding two internet stores, collecting money without sending the goods ordered, the CRPC established that the trader conducted unfair commercial practice, *inter alia*, the trader did not send ordered goods on time and did not repay the received monies to a consumer. The CRPC made a decision requesting to end the unfair commercial practice and inflicted a penalty. After this decision, the webpages were closed, but the monies were not paid back to the consumers.<sup>62</sup> In other words, although, the unfair commercial practice was terminated, the damages of the consumers were not compensated. Thus the problem of 'rogue traders' remains and has been acknowledged as topical by the interviewed stakeholders.

The Health Inspectorate conducted 194 planned controls on advertisement of medicine products and in 35 % (67 cases) the infringements were established.<sup>63</sup>

In contrast, there are no explicit special procedural rules on collective claims submitted in the court what is considered as fundamental disadvantage.

- What measures in your national legislation on injunction procedure are considered to be particularly effective, if any: measures regarding the cost of the procedure, the 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?

The most effective and widely used measure is the publication of corrective statements on the webpage of the CRPC. In 2015, 16 written commitments were published.

<sup>59</sup> 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.

<sup>60</sup> Patērētāju tiesību aizsardzības centra 2015. gada pārskats [Report of the Consumers' Rights Protection Centre of 2015]. Consumer Rights Protection Centre, p. 30. Available in Latvian at [http://www.ptac.gov.lv/sites/default/files/ptac\\_publicais\\_parskats\\_2015.pdf](http://www.ptac.gov.lv/sites/default/files/ptac_publicais_parskats_2015.pdf) (visited 17.07.2016).

<sup>61</sup> Ibid., p.39.

<sup>62</sup> Consumer Rights Protection Centre's decision in the case No. E03-PTU-K20-5 dated 14 May 2015. Available in Latvian at [http://www.ptac.gov.lv/sites/default/files/lemums\\_komercpr\\_k-20izraksts.pdf](http://www.ptac.gov.lv/sites/default/files/lemums_komercpr_k-20izraksts.pdf) (visited 17.07.2016).

<sup>63</sup> Veselības Inspekcijas 2015. gada pārskats [Report of Health Inspectorates of 2015], p. 32. Available in Latvian at [http://www.vi.gov.lv/uploads/files/2015g\\_publicais\\_parskats.pdf](http://www.vi.gov.lv/uploads/files/2015g_publicais_parskats.pdf) (last seen on 17.07.2016).

- Has your country extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunction Directive? If yes, what are the additional consumer rights covered?

No, the scope of application is not extended.

- Analysis of the obstacles to the effective use of the injunction procedure, in particular by analysing which progress in removing obstacles has been made and/or new difficulties that have emerged in your country since 2012.

In general, the same obstacles are in places as mentioned in the report on the Directive in 2012.

According to the stakeholders, there were certain problems with the total amount of penalties for breaching the law. Namely, the Administrative Violations Code<sup>64</sup> provided a penalty only up to EUR 14 000 for violation of the fair commercial practice rules, but after recent amendments in the Unfair Commercial Practice Prohibition Law<sup>65</sup>, the penalty was increased to 10 % from the last year's net turnover but not more than EUR 100 000. Now the penalty is reasonable, as the infringement can cause millions in damages. However, there are indications that some of the traders are not complying with the decision of the CRPC thus enforcement of the decisions is burdensome in some of the cases.

- In a forward looking perspective: Should the coverage of the Injunctions Directive be extended (by including additional legislation into Annex I to the Directive)? If so, which EU legislation should be included? Are there other measures that could improve the effectiveness of the ID in establishing a high level of consumer protection? Should the scope of the Injunctions Directive be extended to the protection of collective business' interests? Are there best practices in your country that could be relevant for other countries and considered as model for the injunction procedure at EU level?

Pursuant to the opinion of the stakeholders, the new Consumer Directive shall be included in the Directive's annex.

There were important amendments to the injunction procedure in Latvia, thus, currently; it is difficult to indicate the best practices.

### 1.3.2. 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:

- How effective is the injunction procedure in addressing infringements originating in another EU country?

According to the stakeholders, there is no extensive practice of addressing infringements originating in other EU countries. It is problematic to address this issue because the legal rules and their interpretation differ among Member States.

<sup>64</sup> Administratīvā pārkāpuma kodekss [Administrative Violation Code]. Latvian Law adopted 25 October 2001. Available in English at [http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Administrative\\_Procedure\\_Law.doc](http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Administrative_Procedure_Law.doc) (last seen on 17.07.2016).

<sup>65</sup> Negodīgas komercprakses aizlieguma likums [Unfair Commercial Practice Prohibition Law]. Latvian Law adopted 22 November 2007 Available in English at [http://vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Unfair\\_Commercial\\_Practice\\_Prohibition\\_Law.doc](http://vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Unfair_Commercial_Practice_Prohibition_Law.doc) (last seen on 17.07.2016).

- How effective is it to address infringements originating in another EU country that qualified entities in your country are enabled to seek injunctions in the other Member State (Article 4 of the Injunctions Directive)?

Some of the Member States try to protect their nationals. The interest of competent entities in different Member States to cooperate is also an important factor.

- In a forward looking perspective: Are there non-legislative or/and legislative measures that could improve the effectiveness of the injunction procedure in addressing infringements originating in another EU country? Are there best practices in your country that could be relevant for other EU countries and could be considered as a model for the injunction procedure at EU level?

According to the stakeholders, harmonisation of rules would be advisable. That would help addressing infringements more effectively.

### 1.3.3. Interplay between the Injunctions Directive and other enforcement instruments of consumer law

Please analyse:

- Is the injunction procedure as designed by the Injunctions Directive regulated separately in your country (in a separate legal act or as a separate procedure regulated within the same legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (UCPD, UCTD and by the Consumer Rights Directive)?

The Injunction procedures are regulated separately.

Article 25 of the Consumer Rights Protection Law provides injunction proceedings.

Article 15 of the Unfair Commercial Practice Prohibition Law states that the CRPC shall supervise commercial practices, assessing the impact of the potential violation on the collective interests of consumers, as well as ensuring balanced supervision of activities of persons implementing commercial practices.

Article 21<sup>3</sup> of the Electronic Mass Media provides that if the audio-visual services threaten the consumers' protection, the National Council of Electronic Mass Media informs media, other EU countries and the European Commission *inter alia* about the injunction.<sup>66</sup> The Council is the responsible institution within the meaning of the Directive No. 89/552/EEC.

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 establishes that the Health Inspectorate is the responsible institution as concerns the Directive No. 2001/83/EC.<sup>67</sup>

<sup>66</sup> Elektronisko plašsaziņas līdzekļu likums [Electronic Mass Media Law]. Latvian Law adopted in 12 July 2010.

<sup>67</sup> Zāļu reklamēšanas kārtība un kārtība, kādā zāļu ražotājs ir tiesīgs nodot ārstiem bezmaksas zāļu paraugus [Procedures for Advertising Medicinal Products and Procedures by Which a Medicinal Product Manufacturer is Entitled to Give Free Samples of Medicinal Products to Physicians]. Cabinet of Ministers Regulations No. 378 adopted 17 May 2011. Available in English at [http://vvc.gov.lv/export/sites/default/docs/LRTA/MK\\_Noteikumi/Cab\\_Reg\\_No\\_378\\_-\\_Advertising\\_Medicinal\\_Products.pdf](http://vvc.gov.lv/export/sites/default/docs/LRTA/MK_Noteikumi/Cab_Reg_No_378_-_Advertising_Medicinal_Products.pdf) (last seen 21.07.2016).

- If these procedures are regulated separately: What are the main differences between them? How is the coherence between these procedures ensured? If these procedures are regulated in a single legal act (possibly as a single procedure): In what way do these procedures (or this procedure) go beyond measures foreseen by the Injunctions Directive?

The CRPC is the institution responsible for the injunction proceedings concerning all Directives included in the Annex 1 of the Injunction Directive, with the exception of the Directives No. 89/552/EEC and Directive No. 2001/83/EC. For the latter two Directives, responsible authorities are different and the procedures are simplified as explained above.

There are minor differences between the injunction proceedings provided in the Consumer Rights Protection Law and Unfair Commercial Practice Prohibition Law. For example, in case of violations of consumer rights affecting group consumer interests, the CRPC can initiate the case also upon request of Consumer Rights Protection Association; however, in the unfair commercial practice case there is no such provision. Those two procedures are coherent as there is one enforcing authority (the CRPC).

## 1.4. Cross-cutting issues

### 1.4.1. Cost and benefits of the directives covered by the study

- To what extent is there evidence for benefits for consumers stemming from the protection provided by both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of benefits for consumers from the protection against unfair commercial practices and unfair standard terms in contracts; [*Note: a relevant aspect in this context is whether the costs for consumers in exercising their rights under these directives are limiting these benefits or not.*]

There are no studies calculating benefits and costs for consumers. The costs are usually associated with litigation. They involve legal costs: costs of legal services and comparatively high court fees, as consumers have no remissions. These costs are sometimes prohibitive. High costs of litigation are, possibly, also preventing the court practice from reaching the necessary level of uniformity to have preventive effect upon traders. If the court only rarely intervenes, many unfair terms and practices remain outside the purview of courts, diminishing preventive effect upon traders.

The practice shows that in some cases mentioned above (elimination of arbitration agreements, excessive penalty clauses, elimination unfair commercial practices in non-bank crediting, etc.), implementation of the EU consumer law has allowed to eradicate widespread abuses of consumers. These are clear benefits for consumers.

- To what extent is there evidence for benefits for traders stemming from both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of creating a level playing field for honest traders by providing a legal basis to eliminate or at least constrain dishonest market practices, such as the use of unfair standard terms in contracts or unfair commercial practices, including through the application of the Injunctions Directive;

No specific data is available, but see the answer to the previous question.

- What are costs for traders due to the need to respect the requirements under the directives covered by the study? [*Note: Such as costs of research, legal advice and compliance as well as the amount of time necessary to comply with the directives*]

No specific data is available.



Since the awareness of traders of consumer law remains unsatisfactory, it may be doubted whether traders make large investments to comply with the Directives. According to the information provided by the stakeholders, costs of dispute settlement before the CRPC, in cases where collective interests of consumers are concerned, are comparatively low.

Litigation before courts may be long and expensive. Court fees depend upon the type and amount of the claim and lawyer's fees. While the defendant does not pay court fees as such he/she has to reimburse court fees and lawyer's fees (until a certain threshold) of the winning party (that is, a consumer).

If the trader is initiating administrative proceedings against the decision of the CRPC, the court fees are EUR 28.46 to initiate litigation; EUR 56.91 for appeals litigation and EUR 71.14 (called the 'security deposit') for review of the lower court's decision on points of law by the Supreme Court. The court fees are reimbursed, if the claimant succeeds.

In principle, since the costs vary among Member States, this may be an obstacle to cross-border trade.

- What are the costs involved in the public enforcement of these rules?

There are no specific studies calculating such costs. Normally, supervision of the application of consumer law and administrative proceedings generate most costs for the CRPC.

- Are there indications that the directives covered by the study are not implemented in your country in a cost-effective manner?

Implementation of the Directives is not expensive, expenses come with enforcement. However, according to the stakeholders, there are no indications that the enforcement is not cost-effective.

- Could the costs for implementing and enforcing the rules of the directives covered by the study be reduced without lowering the level of protection for consumers? If so, how?

As indicated above, the stakeholders expect further guidelines and commentaries to the EU Directives, as well as summaries of the best practices. This could reduce the costs of implementation and enforcement of the Directives. Better awareness of consumers and traders alike may reduce costs of supervision.

Probably, it may also be considered whether the EU should enact rules harmonising court fees for consumer disputes.

#### 1.4.2. Interplay with EU sector-specific consumer protection legislation

Regarding the interplay of the horizontal EU consumer legislation [mainly UCPD and UCTD] with EU sector-specific consumer protection legislation in the areas of electronic communications, passenger transport, energy and consumer financial services, please:

- Analyse the levels of awareness of the requirements of the horizontal EU consumer legislation (mainly UCPD and UCTD) of businesses and consumers and the specific public enforcement bodies in the relevant sectors, as in particular demonstrated by their practical application; [*Key question here is: Are UCPD and UCTD applied in practice by national authorities and courts as a legal basis to combat unfair commercial practices and unfair standard terms in contracts in the regulated sectors?*]



A 2015 study on Latvian consumers' knowledge about their consumer rights and their experience purchasing non-confirming or unsafe goods, showed that 39% of natural persons are very well informed about their consumer rights, while 58% of the respondents weight their knowledge as low. Even though this study shows the general tendencies, it also can be associated with the awareness of the requirements included in the Directives covered by this research.

There are no statistics about the knowledge of traders. In some sectors the knowledge seems insufficient. In others like non-bank consumer crediting, the law requires that an institution, willing to enter into the market, must first receive a licence from the CRPC. Before providing the licence, the CRPC shall verify whether inner policies of the institution and contractual templates comply with consumer law.

The public institutions enforcing sector-specific policies and the CRPC cooperate in order to implement the directives in practice. There are regular meetings held to discuss the sector policies and consumer rights. Judges are regularly trained regarding the consumer protection rights and court practice is becoming more uniform and constant.

- Specify whether in your country the same authority is responsible for the enforcement of the horizontal EU consumer law 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 UCPD/UCTD in the regulated sectors, as specified in the previous bullet?*]

The Ministry of Economics is a coordinator of the horizontal EU consumer law policies. The Consumer Rights Protection Law is general law and covers all areas of economy. Other ministries are responsible for sector-specific policies. E.g. the Ministry of Agriculture is responsible for the food sector, the Ministry of Transportation – for the transport sector.

The CRPC is subject to the control by the Ministry of Economics. The CRPC is responsible for supervision of unfair commercial practices and unfair commercial terms in all sectors, except medicine. In the latter sector, supervision of unfair commercial practices is administered by the Health Inspectorate. Certain role in consumer protection is also played by other institutions, overviewing regulated industries.<sup>68</sup>

The CRPC does not enforce sector specific rules; this is done by different authorities. According to the information provided by the CRPC, in order to preserve effective implementation of consumer law, the CRPC has regular meetings and discussions with other authorities.

- Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning contractual fairness, 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.?*]

Consumer legislation is drafted with participation of all authorities involved. This ensures clarity and coherence of legal rules. Currently, there are three overarching consumer protection acts (Consumer Rights Protection Law, Unfair Commercial Practice Prohibition Law and Advertisement Law), these acts are drafted and amended in a manner that ensures their compatibility. Cooperation with other authorities ensures that sector-specific legal acts are compatible with consumer protection law.

<sup>68</sup> B. Vītoļiņa, Patērētāju tiesību aizsardzības pamati. [Basics of Protection of Consumer Rights]. Rīga, Zvaigzne ABC, 2015, 339.

Notwithstanding that, the stakeholders do consider that occasionally there are problems concerning combination of horizontal consumer provisions and sector-specific rules. In 1 January 2015, Latvia opened its electricity market, this has created frictions between sector-specific rules and consumer protection laws, in particular, in regards to consumer rights of withdrawal.

- What are the benefits of the complementary application of the UCPD and UCTD in the regulated sectors? What are the costs due to the complementary application with the sectoral EU consumer protection legislation?

There is no information about benefits or costs related to complementary application of sector-specific legislation and EU consumer protection legislation.

- Assess any need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law.

The stakeholders have emphasized that such clarifications are needed. Firstly, there is a need for general guidance on delimitation of different instruments. For example, advertising is both a commercial practice and object of the MCAD directive. This poses a question which instrument applies. Clarifications provided by the Commission's guidelines would be valuable. Secondly, in particular, for Latvia, it is necessary to have clarifications regarding the interplay between EU consumer law and sector-specific rules in the field of the electricity market. It is preferable that such clarifications are made in form of guidelines or commentaries of the relevant Directives.

#### 1.4.3. Relevance of consumer law directives for consumer-to-business transactions

- Please analyse the need and potential for the application of the consumer law directives (mainly UCPD and UCTD) to 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).

Currently, Latvian national law does not extend consumer law to C2B relations. In practice such an extension is of minor importance. On the one hand, such transactions are less frequent as consumers are not normally producers or resellers of goods or providers of services. On the other hand, such relations pose smaller risks to consumers, as usually their main interest is to receive agreed remuneration. This allows evading more complicated questions of quality of goods and services, their return, etc. Moreover, such an extension would require not only extension of consumer law, but creation of new rules specifically protecting consumers in C2B relations. Overall, the stakeholders have considered these developments unnecessary.

#### 1.4.4. Specific protection for vulnerable consumers

##### Please analyse:

- Whether the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined in the consumer law directives and relevant jurisprudence, and as applied by national authorities and courts in your country, continue to be valid and fit for purpose.

According to the information provided by the stakeholders, currently these notions are valid and fit for the purpose. As it was stated above, these notions (in particular, 'vulnerable consumer' and 'average consumer') are sufficiently flexible for authorities to construe them in the light of particular circumstances.

- To what extent the existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers and whether, based on the experiences in your country, specific provisions should be introduced in other directives concerned, in particular the Unfair Contract Terms Directive.

The stakeholders did not indicate any specific omissions in these instruments.

#### 1.4.5. EU added value

- Overall, would you consider that protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in your country since the implementation of the UCPD and the UCTD in national legislation?

As indicated above, the introduction of the UCPD and UCTD into the Latvian legal system has been assessed as an extremely positive development by the stakeholders. To mention few examples: The implementation of the UCPD has introduced the notion of the aggressive commercial practices; this novelty is praised by scholars.<sup>69</sup> The implementation of the UCTD has allowed for eradication abusive use of arbitration clauses in consumer contracts and equally prevents the use of excessive penalties. Implementation of these instruments created the whole environment of consumer protection: 1. Ensured high standard of consumer protection; 2. Established a well-structured system of supervision; 3. Helped (to a certain degree) raise awareness among traders and consumers. Thus, that these instruments have greatly improved consumer protection.

- Overall, would you consider that the information of consumers regarding unit prices has improved since the implementation of the PID in national legislation?

Indeed, the information to consumers regarding unit prices has improved since the implementation of the PID in national laws. As indicated above, the national law covers not only indication of prices but also services that is considered to be a very good solution. Moreover, the transposition of the PID rules helped during Latvia's accession to the euro-zone.

- Overall, would you consider that the protection of businesses against unfair marketing in your country has improved since the implementation of the MCAD in national legislation?

Implementation of all Directives studied herein has improved the legal environment and provided better protection to all market participants (consumers or traders). This is also true for the MCAD. The Directive creates a complex, but flexible legal regime in the area of advertising that effectively reduces unfair competition.

- Overall, would you consider that it has become easier for businesses in your country to directly trade cross-border to final consumers located in other EU countries in recent years? Has it become easier for consumers in your country to directly purchase cross-border from traders located in other EU countries?

The stakeholders were unable to provide specific information on this issue. Likewise, there are no previous studies. In principle, similarity between legal regimes should simplify access to foreign markets. At the same time, a high level of consumer protection makes it safer to purchase goods and services abroad. This should stimulate cross-border trade. However, it is doubtful that harmonisation of consumer law has significantly simplified cross-border trade. Traders and consumers alike are driven by a number of considerations when deciding to participate in cross-border

<sup>69</sup> See, B. Vītolīņa, *Patērētāju tiesību aizsardzības pamati*. [Basics of Protection of Consumer Rights]. Rīga, Zvaigzne ABC, 2015, 243.

trade not all of them are related to the legal environment and even those that are may be related to other issues (taxation, law applicable to contracts of transportation of goods abroad, etc.).

- To what extent are these improvements, if any, due to the mentioned directives?

See the previous answer.

## Annex

## A. Transposition fact sheet

**Table 1: Fact sheet on transposition of directives in Member States' law – LATVIA**

Directive	Transposition legislation (National law, Article)	Comments	Specific provisions going beyond minimum harmonisation requirements/use of exemptions	Included in national legislation		Comments
	Law on Consumer Rights Protection, (Patērētāju tiesību aizsardzības likums, Latvian Herald, No. 104/105, 15.04.1999)		Specific rules on legal equality of parties	Yes	Law on Consumer Rights Protection, Article 5	
<b>Directive 93/13/EEC on unfair terms in consumer contracts</b>			'Black list' of terms considered unfair in all circumstances (if a contractual term has not been mutually discussed by the contracting parties)	Yes	Law on Consumer Rights Protection, Article 6	
			'Grey list' of terms which may be considered unfair	No	n/a	
			Extensions of the application of Directive to individually negotiated terms	No	n/a	
			Extensions of the application of Directive terms on the adequacy of the price and the main subject-matter	No	n/a	
			Strict regulatory framework of consumer crediting	Yes	Law on Consumer Rights Protection, Article 8	

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<b>Directive 2005/29/EC concerning unfair business-to- consumer commercial practices in the internal market</b>	Unfair Commercial Practice Prohibition Law (Negodīgas komercprakses aizlieguma likums, Latvian Herald, No. 3775, 12.12.2007).		Provisions regarding financial services going beyond minimum harmonisation requirements	No		
			Provisions regarding immovable going beyond minimum harmonisation requirements	No		
			Application of UCPD to B2B transactions	No		

## Study for the Fitness Check of EU consumer and marketing law

<b>Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers</b>	Procedures for Indication of Prices of Products and Services. Regulations No.178 of the Cabinet of Ministers, adopted 18.05.1999		Extension of the application also to services Provides dual display of prices (in Lats and euros) and converting during Latvia's accession to euro zone	Yes	Procedures for Indication of Prices of Products and Services, Article 1	
	Law on Consumer Rights Protection, (Patērētāju tiesību aizsardzības likums, Latvian Herald, No. 104/105, 15.04.1999)	Reference that the Cabinet of Ministers shall adopt regulation concerning procedures for indication of prices (see above)		Yes	Law on Consumer Rights Protection, Article 17 (3)	
<b>Directive 2006/114/EC concerning misleading and comparative advertising</b>	Advertising Law (Reklāmas likums, Latvian Herald, No. 1918, 10.01.2000)				Advertising Law, Articles 8 and 9,	
<b>Directive 2009/22/EC on injunctions for the protection of consumers' interests</b>	Law on Consumer Rights Protection, (Patērētāju tiesību aizsardzības likums, Latvian Herald, No. 104/105, 15.04.1999)					
	Unfair Commercial Practice Prohibition Law					



	<p>Article 21<sup>3</sup> 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</p>					
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**Table 2: Fact sheet on Injunctions Directive – LATVIA**

Issue	Answer	Comments
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)?	- Yes, separate procedures in separate legal acts	<i>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</i>
Who is entitled to bring an action seeking an injunction?	- Designated public bodies	<i>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)</i>
Is the injunction procedure a court or an administrative procedure? If your country legislation foresees both forms of the procedure, please explain in the comments column for which infringements the court or administrative procedure is foreseen	- Administrative procedure	<i>CRPC's decisions on injunctions can be appealed in Administrative court.</i>
Who bears the costs of an injunction procedure? If qualified entities (or some of their categories e.g. consumer organisations are entitled to an exemption of some/all cost related to the procedure please explain the characteristic of such exemption in the comments column.	-The qualified entities are exempted from costs	<i>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.</i>
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?	- No, scope of the Directive not extended	
Is protection of business' interests covered by the injunctions procedure? If scope of application extended to the protection of business' interests, please provide details in the comments column regarding type of business' interests covered by the injunctions procedure	- No	
Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations	- No	

<p>Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID)</p>	<p>- Yes</p>	<p><i>Injunction procedure is out-of-court procedure.</i></p>
<p>Has your Member State taken specific measures regarding the prior consultation (Article 5 of the Injunctions Directive)?</p>	<p>- No such requirement</p>	
<p>Does the national legislation provide for measures ensuring summary procedure? Please specify main characteristics of the procedure (subject matter/time limits) in the comments column.</p>	<p>- Yes</p>	<p><i>Article 25(8) Consumer Rights Protection Law provides 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:</i></p> <p><i>1) to propose that the manufacturer, trader or service provider makes a commitment in writing to rectify the violation within the specified time period</i></p> <p><i>Article 15 of the Unfair Commercial Practices Prohibition Law states that the Supervisory Authority, evaluating the conformity of commercial practices with the requirements of this Law, is entitled to request and to receive from the performer of commercial practices all information, documents and other evidence regarding the veracity of the information used in commercial practices, the conformity of the activity with the requirements of this Law, as well as to determine the time period for the submission of the documents and evidence necessary for the clarification of the case</i></p>
<p>Are there sanctions for non-compliance with the injunction order (Article 2(1) of the Injunctions Directive)? If sanctions in form of penalty or fine foreseen please specify in the comments column to who exactly should they be paid</p>	<p>- Yes, other sanction</p>	<p><i>Sanctions are provided in the Latvian Administrative Violation Code. Article 175<sup>9</sup> 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</i></p>

<p>Has your Member State taken specific measures regarding the publication of the decision and/or the publication of a corrective statement?</p>	<p>- Yes</p>	<p><i>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:</i></p> <p><i>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<sup>1</sup> 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:</i></p> <p><i>1) not to perform specific activities;</i></p> <p><i>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;</i></p> <p><i>3) to reimburse the losses caused to consumers.</i></p> <p><i>(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</i></p>
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		<p><i>cases when the nature of the intended measures justifies a longer time period.</i></p> <p><i>(3) If the performer of commercial practices commits, in accordance with Section 15, Paragraph five, Clause 2 of this Law, to eliminate the detected violation and the written commitment has entered into effect, the Supervisory Authority shall not take the decisions referred to in Section 15, Paragraph eight of this Law and shall terminate the administrative record-keeping in the part regarding the violation, which the performer of commercial activities is committing to eliminate. If the Supervisory Authority detects that the written commitment is not being carried out, it is entitled to take one or several of the decisions referred to in Section 15, Paragraph eight of this Law.</i></p> <p><i>(4) The performer of commercial practices shall, without delay but not later than within three working days after the end of the time period laid down in Paragraph three of this Section, inform the Supervisory Authority regarding carrying out, adding proof certifying the carrying out.</i></p>
Is it possible to claim within the injunction procedure for sanctions for the infringement?	- Yes	<p><i>Article 25 (10) of the Consumer Rights Protection Law provides that if the manufacturer, trader or service provider has not implemented the specified activities by the end</i></p> <p><i>of the specified time period, or has not informed the Consumer Rights Protection Centre regarding the implementation thereof, the Consumer Rights Protection Centre shall apply the administrative penalty provided for the relevant violation according to the procedures specified by law.</i></p> <p><i>Article 15<sup>2</sup> of the Unfair Commercial Practices Prohibition Law provides that supervising authority can impose the fine as explained before.</i></p>
Can an action for the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to other beneficiary be brought within the injunction procedure?	- No	<i>There is no such possibility provided</i>
Can an action for damages to be paid to the qualified entity or the public purse be brought within the injunction procedure?	- No	<i>There is no such possibility provided</i>
Can an action for damages or redress to be paid to the consumers concerned be brought within the injunction procedure?	- No	<i>There is no such possibility provided</i>

Can individual consumers base their individual claims for damages/remedies on the injunctions order?	- No	
Can the qualified entity claim other measures beyond the injunction, e.g. evidence of compliance with the judgment?	- Yes	<i>Article 25(10) of the Consumer Rights Protection Law states that before of the end of the specific time period in the decision, the manufacturer, trader or service provider shall inform the Consumer Rights Protection Centre regarding the implementation of the specified activities. If the manufacturer, trader or service provider has not implemented the specified activities by the end of the specified time period, or has not informed the Consumer Rights Protection Centre regarding the implementation thereof, the Consumer Rights Protection Centre shall apply the administrative penalty provided for the relevant violation according to the procedures specified by law.</i>
Are the effects of individual injunctions orders extended to the future infringements and/or same or similar illegal practices (of other traders)?	- No	

## B. Data tables

*Number of B2C disputes*

Please indicate how many B2C disputes have been decided in your country on the basis of consumer law directives covered by this study (UCPD, UCTD, PID) as a proportion of the total number of B2C disputes decided on the basis of other national consumer legislation (based on statistics, or based on estimates by enforcement authorities and other stakeholders, where this is not the available).

**Table 3: B2C disputes decided on the basis of consumer law directives covered by this study in comparison with total B2C disputes decided on the basis of other legislation (most recent year for which data is available)**

Year	Type of data	Total number of B2C disputes (number of cases)	Share of B2C disputes decided on basis of ...					Comments
			UCPD	UCTD	PID	other EU consumer protection legislation (e.g. CRD, Sales Directive, sectoral legislation)	national consumer legislation not based on EU directives	

There are no such data available.

*Costs of obtaining redress for a hypothetical case of invoking unfairness of a standard contract term*

- Please estimate the costs, including time, for consumers in obtaining redress when invoking the unfairness, and thereby the non-binding character of standard contract terms in a contract they concluded. Please provide the estimate for the hypothetical example below, focusing on costs (and needed time) of a lower court procedure and the use of ADR or other relevant procedure (if applicable).<sup>70</sup>

<sup>70</sup> For the hypothetical example it is assumed that both the provider and the consumer are located in your country.



**Table 4: Estimate of costs for consumers in obtaining redress when invoking the unfairness of standard contract terms in a contract they concluded (for the hypothetical example provided in the box below)**

Redress mechanism	Estimated court fees (national currency)	Estimated lawyer's fees (national currency)	Other costs, if any (national currency)	Estimated time involved for consumer (hours)	Comments
<b>Lower court procedure</b>	EUR 434.74	Lawyer's fees depend on individual lawyer's fees	Other costs can involve translation/expert costs but they are calculated individually in each particular case	There are no such data and it is impossible to estimate and it might be different in each particular case.  15 days for trader's reply to the consumer's complaint + if the dispute is not resolved the out-of-court dispute resolver shall decide on case within 90 days	
<b>Out-of-Court dispute resolution</b>	For free or for reasonable fee	Lawyers or other representatives shall not assist in out-of-court proceedings	Other costs can involve translation/expert costs but they are calculated individually in each particular case	It is impossible to estimate.	Only since 1 January 2016 out-of-court consumers' dispute resolution was introduced in Latvia.

**Hypothetical example: Terms which inappropriately exclude/limit consumers' rights to compensation**

*A consumer went on a package holiday with a friend to Kenya for which they paid € 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 €5,000 (€4,000 for the cost of the package and €1,000 for lost time and enjoyment). The tour operator agreed to compensate them €1,000 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/unfair-contract-terms/index\\_en.htm](http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-contract-terms/index_en.htm)]*

- Please estimate how often court and ADR procedures are used in your country for invoking the unfairness, and thereby the non-binding character of standard contract terms (i.e. the number of cases per year)?

There are no particular statistics regarding cases in the courts of general jurisdictions.

In 2015 the CRPC has received 164 complaints regarding unfair contract terms. In 136 cases the CRPC has provided information or consultations. In 13 cases positive solution of the issue has been found.<sup>71</sup>

In 2015 the CRPC has published 13 written acknowledgments by traders admitting that there were unfair terms in their consumer contracts and they are rectified. The acknowledgments are applied to all similar contracts concluded by the trader.<sup>72</sup>

<sup>71</sup> Statistics of the Consumer Rights Protection Centre, 2015 at <http://www.ptac.gov.lv/lv/content/statistika-par-pateretaju-sudzibam-un-konsultacijam> (last seen on 07.07.2016).

<sup>72</sup> Information on Acknowledgments, 2015 at <http://www.ptac.gov.lv/lv/table/rakstveida-apnemsanas> (last seen on 07.07.2016).

## C. Interviews conducted and literature reviewed

**Table 5: Interviews conducted for this study**

Organisation	Stakeholder type	Date
<b>Consumer Rights Protection Centre/ ECC Latvia</b>	National consumer enforcement authority / European Consumer Centre	28.06.2016
<b>Ministry of Economics</b>	Ministry	21.07.2016
<b>Latvian Consumers' Association</b>	Consumer organisation	01.08.2016
<b>Competition Council</b>	National regulatory authority	02.08.2016

**Table 6: Literature reviewed for country report**

Author/Source	Year	Title of publication
B. Vītolija	2015	Patērētāju tiesību aizsardzības pamati. [Basics of Protection of Consumer Rights]. Rīga, Zvaigzne ABC, 2015
Administrative District Court	2012	Judgment in the case No. A42765709
Administrative Regional Court	2013	Judgment in the case No. A420563412
Administrative Regional Court	2016	Judgment in the case No. A420336415
Saeima (Parliament) of the Republic of Latvia	1999	Consumer Rights Protection Law
Saeima (Parliament) of the Republic of Latvia	2001	Administrative Violation Code
Saeima (Parliament) of the Republic of Latvia	2007	Unfair Commercial Practice Prohibition Law
Saeima (Parliament) of the Republic of Latvia	2015	Unfair Retail Trade Practice Prohibition Law
Saeima (Parliament) of the Republic of Latvia	2015	Law On Arbitration Courts
Saeima (Parliament) of the Republic of Latvia	1998	Civil Procedure Law
Saeima (Parliament) of the Republic of Latvia	1999	Advertising Law
Consumer Rights Protection Centre	2016	Decision in the case No. 18-pk
Consumer Rights Protection Centre	2015	Decision in the case No. E03-PTU-F342-10
Consumer Rights Protection Centre	2010	Decision in the case No. 7-nk
Cabinet of Ministers	1999	Regulations on Procedures for Indication of Prices of Products and Services
Consumer Rights Protection Centre	2014	Report of the Consumers' Rights Protection Centre
Consumer Rights Protection Centre	2015	Report of the Consumers' Rights Protection Centre
Consumer Rights Protection Centre	2015	Guidelines No. 21 on Indication of the Prices for Goods and Services
Consumer Rights Protection Centre	2012	Guidelines on Drafting Fair Electronic Communication Service Agreement
Dobele region court	2016	Judgment in the case No. C30624015
Consumer Rights Protection Centre	2015	Official Statistics
Administrative Cases Department of the Supreme Court	2006	Judgment in the case No. C30519003
Consumer Rights Protection Centre	2010	Guidelines on Drafting Fair Consumer Credit Agreement
Consumer Rights Protection Centre	2015	Decision in the case No. 2-pk
Consumer Rights Protection Centre	2005	Decision in the case No.1/06 – 5338

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The Constitutional Court of the Republic of Latvia	2005	Judgment in the case No. 2004-10-01
Saeima (Parliament) of the Republic of Latvia	2004	Electronic Communication Law
Consumer Rights Protection Centre	2006	Decision No. 25-Ig
Consumer Rights Protection Centre	2006	Decision No.19-Ig
Administrative Cases Department of the Supreme Court	2014	Decision in the case No. A420299513
Civil Cases Department of the Supreme Court	2016	Judgment in the case No. SKC-116/2016
Civil Cases Department of the Supreme Court	2016	Judgment in the case No. SKC-94/2016
Civil Cases Department of the Supreme Court	2015	Judgment in the case No. SKC-98/2015
Consumer Rights Protection Centre	2014	Data base on Unfair Contractual Terms
Civil Cases Department of the Supreme Court	2013	Judgment in the case SKC-108/2013
Saeima (parliament) of the Republic of Latvia	1937	Civil Law
Consumer Rights Protection Centre	2015	Decision in the case No. E03-PTU-K20-5
Health Inspectorate	2015	Report of Health Inspectorate

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Consumer Rights Protection Centre	2012	Decision in the case No. E03-PTU-K115-39
Cabinet of Ministers	2010	Regulations on Consumer Crediting
Consumer Rights Protection Centre	2016	Decision in the case No. 18-pk
Consumer Rights Protection Centre	2009	Decision in the case No. E03-REUD-31
Consumer Rights Protection Centre	2009	Decision in the case No. E03-REUD-53
Consumer Rights Protection Centre	2010	Decision in the case No. E03-REUD-49
Consumer Rights Protection Centre	2013	Guidelines on Fair Commercial Practices in Consumer Crediting
Consumer Rights Protection Centre	2015	Decision in the case No. E03-PTU-K204-4
Consumer Rights Protection Centre	2015	Decision in the case No. E03-PTU-L13-L34-14
Consumer Rights Protection Centre	2016	Decision in the case No. 11-pk 4
Consumer Rights Protection Centre	2015	Decision in the case No. E03-PTU-K20
Consumer Rights Protection Centre	2012	Decision in the case No. E03-PTU-P65-7
Ministry of Agriculture	2016	Guidelines on Use of Terms „Biological“, „Ecological“ and Parts of Words „bio“ and „eco“ in Labels of Food Supplements
Cabinet of Ministers	2011	Procedures for Advertising Medicinal Products and Procedures by Which a Medicinal Product Manufacturer is Entitled to Give Free Samples of Medicinal Products to Physicians
Saeima (Parliament) of the Republic of Latvia	2010	Electronic Mass Media Law

## 1. Study to support the Fitness Check of EU Consumer law – Country report LITHUANIA

### 1.1. Unfair commercial practices and marketing

#### 1.1.1. Effectiveness of the UCPD in establishing a high level of consumer protection

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

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

Prior to the UCPD, Lithuania did not regulate fair commercial practices outside private law. Lithuania did not have any particular public law legal act regulating fairness of commercial practices and instead relied on general tort and contract law. Thus, the introduction of the UCPD completely overhauled the legal landscape of fair (unfair) commercial practices. The UCPD was transposed into the Law on Prohibition of Unfair Business-to-Consumer Commercial Practices of the Republic of Lithuania (hereinafter – the LPUBCCP) and the Law on Advertising of the Republic of Lithuania (hereinafter – the Law on Advertising) as well as the Civil Code.

The principle-based approach established under the UCPD is considered to be a positive step for the protection of consumers.<sup>1</sup> Both enforcement authorities and consumer associations praise this approach as it affords protection to consumers against innovative traders and allows for punishing offenders even if their actions do not fall under any of the black-listed actions.

One of the enforcement authorities confirmed that usually it finds an infringement of the general prohibition of unfair commercial practices rather than any particular black-listed activities. Thus, for Lithuania, the principle-based approach met the expectations of the legislator.

According to *travaux préparatoires* of the UCPD and Article 5(4) of the UCPD, one may conclude that usually a three step test should be concluded. Firstly, the practices should be evaluated in the light of the black-list; secondly, if they do not fall into the black-list, then they should be assessed in the light of provisions on misleading actions or omissions; and, thirdly, only if the commercial practices of the trader do not fall into any of the first two categories, they should then be reviewed in the light of the general fairness principle.<sup>2</sup> The practice of the Lithuanian Supreme Administrative Court confirms that the Lithuanian courts tend to interpret the black-list as *lex specialis* compared with the general fairness clause.<sup>3</sup> Thus, the general fairness test indeed acts as a 'catch-all' provision (safety net) and is only applicable when particular commercial practices do not fall into any of the first two categories.

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

The enforcement authorities consider the black-list to be an effective measure, because both the consumers and businesses are given a list of comprehensive situations in which commercial activities of traders are considered to be unfair without the need to collect any additional evidence.

However, one of the enforcement authorities indicated that in some instances consumers intentionally incorrectly interpret the black-list and abuse their rights even

<sup>1</sup> RIMKEVIČIUS M. „Nacionalinės moralės“ išimtis Nesąžiningos komercinės veiklos direktyvoje. Teisė, 2011, t. 79.

<sup>2</sup> RIMKEVIČIUS M. Sąžiningos ir nesąžiningos komercinės veiklos samprata. Teisė, 2011, t. 81.

<sup>3</sup> Ruling of the Supreme Administrative Court of 23 December 2010 in case No A-502-1684/2010.



when the trader actually did not intentionally perform any unfair commercial practices. For instance, in one case, there was a technical error in an e-shop, where the consumer could buy a product for EUR 0 even though there were no products left. After the consumer was informed about the error and that there were no products left, the consumer still demanded to provide that product for EUR 0, claiming that the trader performed a black-listed commercial practice as provided in Clause 6 of Annex I of the UCPD.

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

Minimum harmonisation clauses always provide for at least basic protection for consumers, thus every action increasing the protection afforded to consumers is generally accepted positively by enforcement authorities and consumer associations, as well as ministries. Currently, the enforcement authority in Lithuania has not received any complaints in relation to UCPD in the field of financial services or immovable property, thus one may conclude that the minimum harmonisation clauses afford sufficient consumer protection in Lithuania in these fields.

- 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 what 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?*]

There is a clear division of competence between the authority responsible for the enforcement of the LPUBCCP and the Law on Advertising (both of them are the UCPD transposing national laws) and other sector-specific environmental or energy authorities. The authorities responsible for the enforcement of the requirements of LPUBCCP deal with complaints only with respect to unfair commercial practices of the suppliers. If the complaint is based on sector-specific grounds, the said enforcement authorities forward the complaint to competent sector-specific authorities.

The application of UCPD in such sector-specific energy and environmental markets is rather effective. Lithuanian enforcement authorities dealt with cases both in energy and environmental sectors. For instance, one enforcement authority dealt with aggressive commercial practices of a supplier in energy sector (case was related to undue influence), as well as misleading actions of wastewater equipment suppliers.

However, according to the experience of one enforcement authority, consumers often claim that suppliers in the energy sector perform misleading actions or aggressive commercial practices, however only in some of the instances is this found to be true. Consumers often falsely perceive the following actions of the supplier as being aggressive (undue influence) or being unfair commercial practice in general: (i) provision of a bill to the consumer by the supplier, (ii) calculation of energy-related prices (even though these prices are either set by state authorities or state authorities provide mandatory price calculation methods), (iii) necessary construction and repair works done by apartment building administrators, (iv) transfer of debt collection to debt collection companies, (v) mandatory change of old electricity meters.

- 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 your country rigidly?*]

The respondents agree that in each case of unfair commercial practices or misleading or unlawful comparative advertising, such actions are directed either at the society at large or at a particular group of consumers. The concept of the average consumer allows the enforcement authorities to assess the lawfulness of commercial practices

and advertising from the perspective of an average consumer, to whom such actions were directed, i.e. to step into the shoes of the particular consumer and evaluate whether the actions of the trader had any negative and unlawful impact on the average consumer.

Lithuanian enforcement authorities and courts tend to establish whether the advertising or commercial practice was directed at the society at large or only a particular group of people. The amount and intensity of scrutiny depends on the identified average consumer. If it is determined that the average consumer is especially vulnerable, the examination of traders' activities intensifies. Thus, in Lithuania, the concept of average consumer is applied rather flexibly and takes into account the circumstances and particularities of each case.

- 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 in your country recognised new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted)?*]

Lithuania properly transposed the requirements of the UCPD ensuring that vulnerable consumers are well protected. Lithuanian enforcement authorities and courts clearly identify three criteria that are used to establish whether the particular group of consumers are vulnerable: (i) mental or physical infirmity, (ii) age or (iii) credulity. From a practical perspective, if the enforcement authorities or courts establish that the commercial practice is directed to this specific category of vulnerable consumers, they assess such a commercial practice from the perspective of such an average vulnerable consumer.

There were several cases in which the standard of the average vulnerable consumer was applied. For instance, the commercial practice was directed at elderly people (criterion of age) and people having health issues (criterion of physical infirmity).<sup>4</sup> In another case the practice was directed at people having health issues (criterion of physical infirmity).<sup>5</sup> There were also cases of aggressive commercial practices where the practice was directed at children (criterion of age), elderly people (criterion of age), poor (criterion of financial situation, which is not prescribed by the UCPD), indebted (criterion of financial situation, which is not prescribed by the UCPD), as well as people who speak another language (criterion of language, which is not prescribed by the UCPD). In such cases concerning vulnerable consumers, the enforcement authorities conduct a more intensive investigation.

- 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?*]

According to available data and opinions of stakeholders, self-and co-regulation actions show positive effects for consumer protection.

Firstly, Lithuanian enforcement authorities tend to issue recommendations before commencing formal infringement proceedings. For instance, after the enforcement authority receives a complaint or ex officio notices a possible infringement, it notifies the trader and requests additional information. If the trader eliminates the infringement, in most cases the authority will not initiate a formal infringement procedure and will not impose a fine. Instead, the enforcement authority issues a further recommendation on some particular steps how to avoid further infringements. In other words, the enforcement authorities cooperate with the traders and, firstly, try to educate the traders on the requirements for proper commercial practices and marketing. Cooperation with the traders and issuance of such recommendations are

<sup>4</sup> Ruling of the Supreme Administrative Court of 2013-05-23 in administrative case No A-502-731/2013.

<sup>5</sup> Ruling of the Competition Council of 2010-09-09 No 2S-20.

not suitable in situations where the traders do not intend to stop the unfair commercial practices or the dissemination of misleading or unlawful comparative advertising and do not acknowledge that their commercial activities or marketing materials possibly infringed applicable laws.

Secondly, the Law on Advertising was amended in 2013 in order to boost the self-regulation of traders. Traders were given a clear right to form self-regulation institutions and prepare ethics codes, the compliance with which such self-regulation institutions would monitor.

In order to increase the popularity of such self-regulation of traders, the legislator provided for two incentives. Firstly, the enforcement authority may refuse to initiate an investigation if the respective self-regulation institutions provide the enforcement authority with proof that the particular piece of advertising was already reviewed for compliance with the ethics code, that the self-regulation institution already adopted a decision thereon, and that the trader stopped the dissemination of such infringing piece of advertising. Through this option, the traders are allowed to solve amongst themselves the lawfulness of advertising without the need for the enforcement authority to conduct an investigation and impose a fine. Secondly, if the enforcement authority initiates an investigation and establishes that the advertising was indeed in violation of the Law on Advertising, in such instances, if the trader followed the code of ethics and had no prior violations of the ethics code, such participation in self-regulation may be considered as a mitigating circumstance and decrease the amount of the fine.

One sectoral institution explained that they tried to initiate discussions on the adoption of such a code in the field of energy, however, due to lack of initiative on the part of the traders, no code was ever adopted. On the other hand, the banking sector adopted an ethics code, however it is of a very general nature, containing no concrete obligations in terms of fair commercial practices and advertising.

Thirdly, one of the enforcement authorities issued publicly available guidelines on misleading advertising and unlawful comparative advertising. The document is available in two versions – first, a short guide of several pages to give a general overview of the regulation and, second, in an in-depth guide of almost 100 pages. The short version is intended to assist advertising personnel of traders to quickly ascertain whether there is a risk of potential infringement, whereas in-depth guide should assist lawyers of traders' internal legal departments to review the advertising materials in greater detail. Such promotion of self-regulation (internal company regulation) and education is intended to prevent or reduce the amount of infringements which are performed unknowingly or accidentally.

Thus, Lithuania promotes self-and co-regulation as long as the traders are willing to stop dissemination of misleading or unlawful comparative advertising or unfair commercial practices in good faith. By doing so, in most cases the traders may avoid a considerable fine and even get further advice and recommendations from the enforcement authorities.

- 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?

From the practical perspective, most of the unfair commercial practices in Lithuania are recognized as either misleading actions or misleading omissions. Enforcement authorities identify and fine traders as a result of black-listed commercial practices on rarer occasions (mostly Clauses 6 and 7 of Annex I of the UCPD).

However, one enforcement authority additionally explained that they had experienced some issues in applying a black-listed practice established in Clause 19 of Annex I of the UCPD. In this modern IT driven world a lot of advertising and promotion is done on the Internet. For instance, companies frequently make on social media the

following promotional campaigns: 'Press like and share and after [X] days we'll announce the winner who will win [X] prize'. Consumers often claim that they did not receive such a prize. The enforcement authority is then faced with an issue whether Clause 19 of Annex I of the UCPD would be applicable in this scenario. Thus, it should be considered whether Clause 19 or any other Clauses of Annex I of the UCPD should be revised or extended in connection with internet and social media driven advertising campaigns. There should also be a mechanism put in place to amend the black-list in response to new developments on the market.

Other respondents believe that the current black-list is broad enough and should not be either extended or modified.

- Are there other measures that could improve the effectiveness of the UCPD in establishing a high level of consumer protection in your country? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

According to the opinion of enforcement authorities, the following measures could improve the effectiveness of the UCPD: (i) education of consumers and traders, (ii) issuance of recommendations, (iii) effectively informing the public about fines imposed on the traders not only on the websites of enforcement authorities but also in other media. These steps should increase the protection of consumers afforded by UCPD and, possibly, reduce the amount of unintentional infringements of the UCPD requirements.

One ministry additionally noted that currently consumer associations in Lithuania are underfunded, fragmented and small. One consumer association confirmed that due to the lack of staffing and funding they mostly act as a routing point (reroute consumers to the respective enforcement authorities or lawyers) and do not by themselves provide any assistance to consumers.

One of the enforcement authorities also responded that in some instances consumers complain about the traders' unethical or rude behaviour and claim that it is an aggressive commercial practice. However, the authority doubts whether there is a need to regulate unethical or rude behaviour and foresees difficulties in the potential enforcement thereof.

### 1.1.2. Effectiveness of the PID in establishing 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;

The PID was transposed into the Civil Code, the Law on Consumer Protection of the Republic of Lithuania and the Rules on the Labelling of Goods and Indication of Prices (approved by the Order of the Minister of Economy of 15 May 2002 No 170).

The overall picture is that traders generally obey the PID rules. According to available data, there are no complaints and/or court cases pertaining to the current PID rules. Perhaps this is because unit pricing is mostly important in the sale of foodstuffs and other goods of daily use and the market for foodstuffs and such daily use goods is primarily dominated by large supermarket companies which try to maintain their reputation and would, most likely, not consider evading the PID rules. Perhaps, there may be the occasional infringement of the PID in smaller supermarkets or rural cities, however no practical data to support that is available.

However, according to the data provided by the enforcement authority, there are some complaints with other PID-related matters, which are not currently regulated by PID. For instance, consumers often complain of the following: (i) the prices are indicated not clearly enough during sales or discounts in the shopping centres, (ii) the discount is only applicable to the holders of a loyalty card and for people who do not

own a discount card a prior higher price will apply, (iii) a particular price or discount is applied only when the consumer is paying by a particular payment method, for instance, a discounted price applies when the consumer pays in cash.

- 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?

Respondents did not provide their opinion on this matter. As of November 2016 instead of indicating the unit price of detergents, the traders may indicate the price of one wash. However, due to the fact that little time has passed since this amendment entered into effect, there are no further data available to us to give rise to any conclusions on the effectiveness of such exception.

- The effects of the regulatory choices/derogations allowed by the Directive and applied by Member States. [*Note: Key aspects to consider are: Is the derogation relevant? Do companies make use of it? Are there consumer complaints because of this? If so, approximately how many per year?*]

According to the data available to us, there are no complaints and/or court cases related to the national derogation pursuant to Article 6 of PID.

### 1.1.3. Effectiveness of the MCAD in providing protection for businesses

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

- 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 was implemented in the Law on Advertising. The position of the Lithuanian legislature was to implement the MCAD in a broad sense. Under the Lithuanian law, 'advertising' means any information disseminated in any form and by any means and relating to a person's commercial and economic, financial or professional activities, where it promotes the purchase of goods or use of services, including the purchase of immovable property and the takeover of property rights and obligations. Thus, Lithuanian legislature moved far beyond the minimum harmonisation of the notion of advertising under the MCAD. Every trader can claim that another trader's commercial communication is advertising and thus the criteria of misleading advertising are applicable thereto.

Lithuanian courts of all instances, including the Constitutional Court of the Republic of Lithuania, tend to interpret the notion of advertising extremely widely. For instance, practically any information which encourages buying products or the use of services is considered to be advertising by the Lithuanian courts.<sup>6</sup> The information may be directed either at actual or potential consumers and still be considered advertising. Even if the information is provided after the consumer purchased the product, e.g. as an insert in the packaging of a product already bought, such an insert may still be considered advertising.<sup>7</sup>

According to the data obtained during the interviews, the experience of the stakeholders with this wide scope has been favourable.

<sup>6</sup> Order of the Constitutional Court of the Republic of Lithuania of 29 September 2005 in case No 15/02.

<sup>7</sup> Order of the Supreme Administrative Court of the Republic of Lithuania of 28 October 2013 in case No A-442-1781/2013.



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

According to the data obtained during the interviews, the experience of the stakeholders with the principle-based approach to misleading advertising is positive.

In addition, as described in Table 1, with regard to the notion of the misleading advertising, 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. This method maintains a principle-based approach and does not in any way narrow the scope of the notion of misleading advertising.

- The effects of the minimum harmonisation provisions on misleading advertising; [*Key aspects to consider are: 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)?*]

According to the data obtained during the interviews, most stakeholders believe that the current Lithuanian implementation of the MCAD provides for a sufficient level of protection.

A higher level of protection and legal certainty is provided by the three pillars – criteria of assessment – of misleading advertising under the Law on Advertising. Such criteria provide for more legal certainty to the advertisers. Due to the fact that businesses have such three criteria to rely on, they are able to evaluate by themselves, before the dissemination of the advertising, whether the particular piece of advertising poses any risks and may be considered as misleading. As a result, some pieces of possibly misleading advertising are not disseminated to the public, which ultimately benefits consumers and businesses.

A competitor or any other natural or legal person, including a consumer, is given a right to apply to the Competition Council (the enforcement authority under the MCAD) and request it to initiate an investigation regarding allegedly misleading or unlawful comparative advertising disseminated by a trader. However, the complainants must provide arguments explaining how the dissemination of that particular advertising violated their rights and interests. The Competition Council may also initiate investigation *ex officio*.

Any person (including consumers, competitors and any other persons) may also apply to a court with a claim on adjudication of damages sustained by dissemination of misleading advertising, as well as an injunction.

Attention should be drawn to the fact that according to Article 5(6) of the Law on Advertising, the advertising is considered to always be misleading if it corresponds to the black-listed unfair commercial activities. Thus, both theoretically and in practice, traders are able to apply to the Competition Council and claim that another trader (e.g. competitor) disseminates misleading advertising by using black-listed unfair commercial activities. As described above, such a trader would have to provide evidence that the dissemination of such advertising violated their rights and interests. However, one may conclude that Article 5(6) of the Law on Advertising provides a tool for traders to use the black-list of UCPD against another trader.

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

One of the ministries supports the consolidation of the legal framework and full harmonisation of comparative advertising and even advocates for full harmonisation of misleading advertising as well as other consumer-related rules. Full harmonization assists businesses in conducting multijurisdictional advertising projects and reduces

costs of adjusting advertising for each jurisdiction of other EU Member States. Thus full harmonization in all consumer-related matters would assist this aim even further.

One of the enforcement authorities further notes that full harmonisation assists companies from other Member States in doing business in Lithuania, i.e. facilitates cross-border commercial activities.

As mentioned in Table 1, the Lithuanian legislator to a certain extent deviated from the wording of the MCAD and slightly expanded the rules on misleading advertising.

- 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;

No specific experiences reported other than those stated above.

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

No specific experiences reported other than those stated above.

- Are there measures that could improve the effectiveness of the MCAD in providing protection for businesses (see also 1.1.6 below)? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

As specified above, one enforcement authority stated that there is a need for clarification in rules applicable to social media and other modern means of advertising, in particular, the situations of 'like and share for [X] prize'. No other specific experiences were reported other than those stated above.

#### 1.1.4. Effectiveness of current rules 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;

No specific experiences reported other than those stated above.

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

No specific experiences reported other than those stated above.

- Whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade. [*Do the national differences play a role in a business perspective? Have they caused problems?*]

No specific experiences reported other than those stated above.



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;

According to the relevant literature, it is concluded that considerable differences still exist between national laws relating to minimum harmonisation clauses of the MCAD, thus, creating barriers to cross-border advertising projects.<sup>8</sup>

In addition, the MCAD only provides for the notion of misleading advertising and does not indicate particular criteria, according to which the advertising must be evaluated. The determination of such criteria is left to the Member States. Such non-unification of criteria of misleading advertising has negative implications on cross-border trade.

- Whether the minimum harmonisation character of provisions on misleading advertising represents a barrier to cross-border trade;

No specific experiences reported other than those stated above.

- 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;

No specific experiences reported other than those stated above.

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

One of the enforcement authorities indicated that cross-border enforcement mechanism in B2B relations is necessary to ensure sharing of experiences in various EU Member States. No specific experiences were reported other than those stated above.

#### 1.1.5. Interplay amongst UCPD information requirements according to Article 7(4) with the information requirements in the horizontal consumer law instruments

Regarding the information requirements according to Article 7(4) UCPD ("invitation to purchase") in the advertising stage, please analyse:

- The level of awareness of traders as regards information requirements at the advertising stage, as in particular demonstrated by their practical application; [*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?*]

The level of awareness of individual traders corresponds with the level of organisation. In those industries and trades where traders are well organised and associated, they tend to have a better understanding of the regulatory boundaries. They also have a reputation which is at stake if they contravene the legal standards. From the practical perspective such bigger traders are rather responsible, attentive and are aware of the information requirements.

It was also reported that education by national organisations helps to improve business conduct. In particular one of the enforcement authorities constantly issues

<sup>8</sup> RIMKEVIČIUS M. Klaidinančios reklamos vertinimo kriterijai Lietuvoje ir ES. Vilnius, 2012, p. 127.

recommendations and advice to businesses in relation to the essential information to be disclosed to consumers.

Even though the information requirements under the UCPD and the CRD are implemented in different laws, the interviewees did not raise any issues with the increasing complexity of overlapping directives concerning (information) duties on businesses. An enforcement authority further confirmed that the information requirements under the UCPD are still useful and needed as the trader is made aware of a particular list of information which, under the circumstances, it needs to provide to the consumer.

It must be noted that the Law on Advertising provides that if the advertising contains an invitation to purchase, in that context, the trader must provide the essential information, prescribed by Article 7(4) of the UCPD, otherwise the advertising might be considered misleading due to infringement of comprehensiveness criterion. Thus, in practice, the businesses mostly provide the required information either in the advertising (if it contains an invitation to purchase) or when presenting goods.

The interviewed enforcement authority commented that they sometimes receive complaints of the consumers, that the businesses still do not provide enough information in advertising or in the point of sale, or the information is presented in a complex manner. In some instances the traders fail to provide their contact details.

- 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?

Overlap and conflict between the UCPD and E-commerce Directive is reported. For instance, Article 5 of the 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. Such overlap and conflict also still exists under national law, as different transposing laws provide for different requirements under these directives. Such discrepancies should be eliminated.

According to the data provided by the interviewees, the abundance of information requirements in general does not correlate to increased costs for the businesses or public authorities. However, the information requirements should be provided in a systematic, uniform and consolidated manner in order for the businesses to know particular requirements which should be followed.

#### 1.1.6. Relevance for business-to-business transactions

Regarding the area of unfair commercial practices/marketing, please analyse:

- 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 cross-border trade;

Currently one of the enforcement authorities receives complaints from traders that other traders (e.g. competitors) infringe the requirements of the UCPD as transposed to the national law. The enforcement authority reviews the complaint and evaluates whether the evidence and arguments provided in the complaint gives rise to a conclusion that the interests of the consumers were infringed. If the authority identifies that the interests of the consumers were infringed, it initiates investigation on its own motion (the investigation is considered to be initiated by the authority *ex officio*, not by the (complainant) trader). The authority considers that by doing so it does not defend the interests of a particular trader, but instead protects the public interests and defends consumers.

As mentioned in other parts of this report, with respect to the other enforcement authority and its investigations on misleading and unlawful comparative advertising, the complainants must show, amongst other things, that their interests were infringed in order for the enforcement authority to initiate investigation.

The authorities did not have any particular opinion on the need to extend or revise the UCPD and/or the MCAD in relation to B2B transactions.

Articles 6.301 – 6.304 of the Civil Code provide for a specific tort, related to adjudication of damages sustained in connection with misleading advertising, as well as a possibility of an injunction. This legal instrument may be used both by consumers and businesses.

According to legal scholars, the current division of B2B and B2C regimes in the field of fair commercial practices (marketing) is an artificial one. Commercial activities of the trader in general reach different addressees – a consumer, a competitor and the society at large. In other words, the behaviour of traders in the market by which the traders disseminate commercial information about their goods and/or services to consumers, competitors or other business subjects is an indivisible process. Since the behaviour of the traders in the market is an indivisible process, it should not be artificially split into several segments and thus, the assessment of the trader's commercial activities should be also performed in a uniform manner, without artificially splitting them into several 'autonomous' pieces. In other words, the commercial activities of the trader should be assessed systematically and integrally, including commercial activities' impact on the consumers, business clients and competitors.<sup>9</sup> This opinion is also supported by the Advocate General V. Trstenjak in the joined cases C-261/07 and C-299/07 *VTB-VAB* and *Galatea*.

One of the ministries also indicated that the extension of UCPD to also cover B2B relations would require notable additional resources for the SCRPA (enforcement authority) as currently they would not be equipped to handle the increased workload.

- 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;

No specific experiences reported other than those stated above.

- 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 also cover unfair commercial practices during and after the transaction;

No specific experiences reported other than those stated above.

- Whether there is a need to have a black-list of practices in the business-to-business marketing area;

No specific experiences reported other than those stated above.

- What should be the enforcement cooperation mechanism in the business-to-business marketing area;

No specific experiences reported other than those stated above.

<sup>9</sup> RIMKEVIČIUS M. Klaidinančios reklamos vertinimo kriterijai Lietuvoje ir ES. Vilnius, 2012, p. 150.

- Whether there is a need to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive;

No specific experiences reported other than those stated above.

- Whether there is a need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive.

No specific experiences reported other than those stated above.

#### 1.1.7. Relevance of contractual consequences of unfair commercial practices

Please analyse whether there are in your country:

- 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;

Lithuanian law does not provide for specific provisions which would allow for voiding any transactions concluded under the influence of unfair commercial practices. However, general private law instruments are used in practice. In particular, Article 1.91 of the Civil Code provides that a transaction may be declared voidable by a court on the action of the aggrieved party if it was entered into due to fraud, duress, economic pressure or real threatening, or if it was formed by a malicious agreement of the agent of one party with the other party, likewise if, by entering into the transaction by reason of abusive circumstances, one party assumes obligations under unfair conditions.

In addition, an unfair commercial practice is a tortious act which can result in damages, thus the consumer may seek redress by applying to the court of adjudication for damages or an injunction.

- Any case law (enforcement decisions, court rulings) providing for such consequences;

One case may be reported, in which the enforcement authority (the State Consumer Rights Protection Authority (hereinafter – the SCRPA) found that the trader liable for performing unfair commercial practices and imposed a fine of almost EUR 6000.

A consumer then, on the basis of the decision of the SCRPA, applied to a court seeking (i) invalidation of the sale – purchase contract, (ii) application of restitution and ordering the trader to pay back EUR 509.37 paid according to the contract, and (iii) adjudication of non-pecuniary damages in the amount of EUR 579.24. The claim was based on the fact that the contract was concluded due to the fraud of the trader (Article 1.91 of the Civil Code, as described in the answer above). The element of the fraud was proven by the decision of the SCRPA on performance of unfair commercial practice.

The court upheld the claim, invalidated the contract, applied restitution (returned EUR 509.37 paid under the contract) and adjudicated EUR 300 of non-pecuniary damages (slightly lower than requested). The court of appeal upheld the decision of the first instance.<sup>10</sup>

- Whether there is, based on past experience in your country, a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

According to the data available to us, Lithuanian consumers tend not to challenge contracts in court which were concluded under the influence of unfair commercial

<sup>10</sup> Decision of Kaunas County Court of 12 May 2016 in case No e2A-862-657/2016.

practices. Therefore, in order to decrease the negative effects suffered by the consumers due to unfair commercial practices of the traders, the laws should provide a specific clause allowing a direct possibility to avoid any transaction concluded under the influence of unfair commercial practices.

## 1.2. Contract conclusion and performance

### 1.2.1. Effectiveness of the current rules in establishing 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 transposed into Lithuanian law into the Civil Code of the Republic of Lithuania (mainly Article 6.228<sup>4</sup>) and the Law on Consumer Protection of the Republic of Lithuania. According to the stakeholder interviews, the provisions of the UCTD were transposed properly.

According to the practice of the Supreme Court of the Republic of Lithuania, in consumer-related cases, including ones on unfair contract terms, the court has an obligation to be active, because the protection of consumer interests is a part of the public interest.<sup>11</sup> It follows that if the court identifies that the case is related to a consumer contract, the respective provisions of the contract must be *ex officio* examined by the court in relation to their fairness<sup>12</sup>. Thus, the court must evaluate the compliance of the consumer contract with the laws transposing the UCTD on its own motion, regardless of the fact whether the consumer argues that such terms are unfair. This is in-line with the judgement of the Court of Justice of the European Union in joined cases C-240/98 – C-244/98 of 27 June 2000. In addition, the courts must also always apply *contra proferentem* rule when interpreting standard provisions of the consumer contracts.<sup>13</sup>

The principle of fairness is a general principle in the Lithuanian legal system. Article 6.158 of the Civil Code provides that each party of a contract is obliged to act in accordance with good faith in their contractual relationships. The parties by their agreement may not change or exclude a duty to act in good faith. This is reiterated in Article 6.228<sup>4</sup>, which transposes the principle of fairness established in the UCTD. In particular, provisions of a consumer contract may be declared null and void if they are (i) contrary to the principle of fairness and/or (ii) essentially violates the balance of rights and obligations of the parties to the detriment of the consumer. According to the practice of the Lithuanian courts, the contents and application of the fairness principle depends on the factual circumstances of each case.

According to the general principles of civil law, the fairness of a party is presumed unless the laws provide for a reversed presumption. Thus, with respect to the general principle based approach under the UCTD, the fairness of the trader is presumed unless proven otherwise. Thus, in this instance the burden of proof for the unfairness of the provision would fall on the consumer.

The reversed presumption is provided in Article 6.228,<sup>4</sup> which establishes a list of instances (provisions), which are by their nature presumed to be unfair. The list is transposed from the Annex of the UCTD. According to the legal literature<sup>14</sup> and court

<sup>11</sup> Consumer protection in consumer contractual relations: legal regulation and case law review of the Supreme Court of the Republic of Lithuania No 30 of 24 March 2009.

<sup>12</sup> Ruling of the Supreme Court of the Republic of Lithuania of 12 October 2016 in case No e3K-3-438-415/2016

<sup>13</sup> Ruling of the Supreme Court of the Republic of Lithuania of 7 October 2002 in case No 3K-3-1137/2002

<sup>14</sup> BUBLIENĖ D., ZEMLYTĖ E. Arbitražiniai susitarimai (arbitražinė išlyga) vartojimo sutartyse: per se nesąžininga sąlyga? Teisė, 2012, t. 84.

practice,<sup>15</sup> such list is to be considered as a grey-list, as the trader may still prove that a particular provision of the contract in a particular situation is still fair, regardless of the fact that it corresponds to the situation described in the grey-list. The reason behind this is that, firstly, the court must find a balance of rights and obligations of the parties and if it finds that in particular instance the parties (consumer and trader) have equivalent negotiating power, the court may consider the provision to be fair even if it falls inside the scope of the grey-list. Secondly, the court will refuse to protect the interest of an unfair consumer, thus if the consumer acts unfairly, the court most likely would not consider a particular provision as unfair.

Due to the *ex officio* application of the (un)fairness test, the principle-based approach is fairly effective, even taking into account the fact that the courts are required to evaluate the terms on a case-by-case basis, i.e. there is no black-list of terms that are considered to be unfair in all cases.

With respect to some regulated sectors, for instance, the energy sector, the sector-specific regulatory authority (ministry) approves standard clauses for contracts to be concluded with consumers, e.g. a standard set of clauses for energy supply agreements etc. Such standard terms, prior to their approval, are also reviewed by the SCRPA to ensure that they are not unfair. Standard terms are mandatory for traders of that specific sector. This is one of the examples of ultra-preventive control of unfair clauses in consumer contracts.

However, some consumer associations call for such strict control of unfair contract terms in other sectors. One consumer association suggested that all consumer contracts in the field of banking should be in prior reviewed for their compliance with the principle of fairness. However, the association elaborated that due to limited resources of the SCRPA (enforcement authority), such a review should be done by independent attorneys-at-law and the costs should be borne by the financial institutions. For instance, the financial institution should submit each standard agreement for review by independent attorneys-at-law, who should approve that "according to their opinion, this agreement does not contain any unfair terms". This would increase the confidence of consumers in the finance sector and would not call for any substantial investment from the part of the banks or other financial institutions.

- 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 your MS? Does this work in practice or are there problems?*]

The list created another layer of practical protection for consumers, since prior to the transposition of the UCTD, Lithuanian law did not have such an effective mechanism to combat unfair contract terms in consumer contracts. As described above, the indicative list of unfair terms annex to the UCTD was transposed as a grey-list of unfair terms, meaning that it provides presumptions on the unfairness of such terms. However, the trader may still argue that a particular term in a particular situation is considered to be fair. According to the responses and the relevant case law, this approach is effective, because, firstly, it affords a wide scope of protection for consumers and, secondly, shifts the burden of proof of the fairness of the term to the trader and only in exception cases such presumption can be rebutted.<sup>16</sup>

One of the issues with the grey list of unfair terms transposed to Lithuanian law is that such unfair terms, even if they are presumed to be unfair under the law, they are not null and void *per se*. Thus, consumer is left with two options: firstly, apply to the SCRPA for them to conduct an investigation and adopt a non-binding resolution on

<sup>15</sup> Consumer protection in consumer contractual relations: legal regulation and case law review of the Supreme Court of the Republic of Lithuania No 30 of 24 March 2009.

<sup>16</sup> Consumer protection in consumer contractual relations: legal regulation and case law review of the Supreme Court of the Republic of Lithuania No 30 of 24 March 2009.



standard contract terms, suggesting the trader to amend the standard contract term that the SCRPA considers to be unfair, also informing the trader that the SCRPA may apply to a court for invalidation of the unfair contract term, or, secondly, apply to a court in individual proceedings and request the court to recognise a particular clause as unfair. Thus, it should be considered whether an EU-wide black-list of unfair contract terms that in all instances are automatically considered unfair, thus null and void, should be adopted. Consumer associations would support the adoption of such list.

- 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; [*Note: If a black/grey list exists in your country, key aspects to consider are: How does the list work in practice? Does it make a difference to have such a list?*]

As described above, the consumer associations argue that the grey list of unfair terms that currently is implemented in Lithuania affords insufficient protection and a black-list should be adopted. They argue that a consumer's position would be much better if the term would be black-listed, as in such case the term would be considered unfair under all circumstances, irrespective of the circumstances of the case. Whereas under the grey list, the consumer would still have to show or argue that the term is unfair, i.e. even that the burden of proof is reversed and lies with the trader, the consumer would still have to respond to the arguments of the trader and the court thus would be required to test, on a case-by-case basis, whether the term may be justified given the specific circumstances of the case. Black-listing of a term also offers predictability and legal certainty to the parties. The national enforcement authority, however, claims that current legal framework (grey list) affords sufficient protection of consumer interests.

In addition, one must also note that any list in general, i.e. either the grey or black is a positive thing, because it allows the trader with some degree of certainty to create a basic checklist and thus such a list acts both as a preventative measure in the field of unfair consumer contract terms and as a measure strengthening the consumer's negotiating power.

- 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: In your country, have the effects of court decisions establishing the unfairness of an unfair term been extended to all contracts of the trader concerned or to the contracts of any other trader containing such a term? If so, how does this work in practice? What are the impacts on businesses? If there are no such effects of court decisions on unfair terms: what are the effects of this situation?*]

In individual proceedings, all circumstances of the case must be taken into account, including those that are particular to this specific consumer or that specific trader, provided that these specific circumstances were known to the other party at the time of the conclusion of the contract. The effect is, however, that a court's decision in such an individual case cannot be extended to all contracts of the trader concerned or even to the contracts of other traders, as the specifics of these contracts need to be taken into account instead of the specifics of the case that had been decided. This means that consumers and traders are uncertain as to the outcome of the unfairness test even in cases where the same or a similar term had been tested before and found to be fair or unfair. Notwithstanding what was said above, if a court is faced with a term which has been found unfair in an earlier case, there is a strong likelihood that the term will be found unfair in a later case as well, particularly if that term was used by the same trader.



However, in proceedings initiated by the SCRPA for protection of consumer public interest (abstract control), if the court satisfies the claim, the *res judicata* effect of the judgement applies to all the consumers having clauses in their contracts that have been declared void. The judgement becomes a legal precedent meaning that firstly, consumers cannot bring individual actions and secondly, the facts settled in the judgement become prejudicial facts and cannot be contested – therefore persons with the same or very similar factual circumstances may benefit from the decision of the court. Even though the court in its judgement declares the terms and conditions of the standard consumer contract as unfair, due to the contractual nature of the standard consumer contract, it would have to be amended individually. For example, a consumer may demand an amendment of the contract with reference to the judgement of the court declaring the particular terms and conditions unfair.

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

The requirement of contractual transparency is transposed into the Lithuanian laws, in particular in Article 6.228<sup>4</sup> of the Civil Code. It requires that each written clause of a consumer contract must be clear and comprehensible. If the clause is not clear and comprehensible it is considered to be unfair.

Legal scholars<sup>17</sup> by summarising the relevant practice of SCRPA conclude that in practice, the following transparency related issues are most common:

- Clauses contain unclear definitions or undefined definitions, especially in cases where the execution of the consumer's rights or the consumer's liability is based on such definitions;
- Failure to indicate terms (periods of time) for provision of specific documents, when consumer's liability is based on the provision thereof;
- Failure to clearly describe the product sold to the consumer (to indicate its characteristics);
- Provision of abstract references to legal acts;
- Provision of references to internal documents of the trader, without indicating how the consumer may obtain such documents (especially for financial sector);
- Failure to provide a clear procedure on the notification of the consumer in relation to changes to the contract (for instance, the SCRPA considers the term as non-transparent if it is indicated that the trader will inform the consumer in reasonable time prior to the changes to the contract on the website 'x' or with a prior notification).

The Supreme Court of the Republic of Lithuania established that non-transparent contractual clauses cannot be considered to be fair, because the consumer, who does not understand the conditions of contract or does not have all the necessary information, cannot make a proper decision.<sup>18</sup>

According to the responses from the most interviewees, the contractual transparency requirements under the UCTD are effective and sufficient. However, one of the consumer associations indicated that contracts in the financial (banking) sector are still not clear enough. The association indicated two main reasons behind this. Firstly, the agreements are too long – no consumer is expected to read through 10 – 15 pages of a contract written in small fonts. As a solution, the agreements should be shorter and contain only the main provisions. Secondly, the agreements are written in the 'lawyers' language'. Thus, even though the terms are legally correct and can be

<sup>17</sup> BUBLIENE D, *Vartotojų teisė į informaciją pagal naujaji vartotojų teisių direktyvos pasiūlymą: žingsnis pirmyn? Jurisprudencija*, 2011, t. 18(4)

<sup>18</sup> Consumer protection in consumer contractual relations: legal regulation and case law review of the Supreme Court of the Republic of Lithuania No 30 of 24 March 2009.

understood by lawyers, an average consumer cannot be expected to understand 10 – 15 pages of typical legal text.

Another issue this consumer association raised is that in some instances banks tend to withhold the standard (general) terms of the contract until the very last minute of the transaction. In particular, the consumer and the bank negotiate some individual terms of the contract, e.g. the interest rate, and only after the parties find mutually acceptable individual terms, only then the consumer is given the general (standard) terms. In these instances the consumer usually elects not to read the 10 – 15 pages of a standard contract when the individual terms are already negotiated. This consumer association thus believes that the banks should be obligated to provide the consumer with the general (standard) terms of a particular transaction during the beginning of the negotiations. They also noted that banks could go even further and make all general (standard) terms publicly available on their websites so that the consumers would always be able to familiarize themselves with the clauses prior to conclusion of the contract or agreeing on the individually negotiated terms or contacting the financial institution.

- 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. [*Note: Question only relevant for MS that have put in place extensions of application of UCTD*]

N/A.

- 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?*]

According to available data, national courts in Lithuania take up an active role in consumer related disputes. This obligation to be active in consumer related disputes was reaffirmed by numerous Supreme Court's rulings.

One of the enforcement authorities also welcomes all the guidance issued by the CJEU, because it provides concrete guidelines to be followed in a particular situation.

As discussed above, one of the issues with the grey list of unfair terms transposed to Lithuanian law is that such unfair terms, even if they are presumed to be unfair under the law, are not null and void *per se*. Thus, consumer is left with two options: firstly, apply to the SCRPA for them to conduct an investigation and adopt a non-binding resolution on standard contract terms, suggesting to the trader to amend the standard contract term that the SCRPA considers to be unfair, also informing the trader that the SCRPA may apply to a court for invalidation of the unfair contract term, or, secondly, apply directly to a court in individual proceedings and request the court to recognise a particular clause as unfair. The unfair consumer contract clause does not automatically become void, thus in order for the unfair clause to become non-binding, some additional steps have to be taken. Taking this into account, an introduction of a black-list of unfair terms, which would be unfair in all instances, should be considered.

One of the ministries informed us that national enforcement authorities are faced with some sanction-related difficulties. There are some dishonest market players who use unfair terms in their consumer contracts. The enforcement authority in these cases applied to court for the recognition of these particular terms as unfair and the court upheld the claim. However, the dishonest market player amended the wording of the term in such a manner that the clause is still unfair, i.e. the actual clause is changed in terms of its form, however from the substantive perspective the reformulation does

not change the unfair effects of the clause. Thus, the enforcement authority had to apply to the court once more.

- In a forward looking perspective: Are there other measures that could improve the effectiveness of the UCTD in establishing a high level of consumer protection in your country? Would a graphical presentation model improve the readability and comprehension by consumers of the T&Cs? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

One of the consumer associations confirmed that a graphical representation model of the most important terms of the consumer contract would improve the comprehension of the contract. No responses, other than already stated above, were received from the interviewees.

Legal scholars propose several improvements that could assist in establishing a high level of consumer protection in Lithuania:

- Publicity of violations. The SCRPA should inform the public about details of each violation. Currently the SCRPA publishes its decisions on unfair contract terms (non-binding resolutions), however, it does not provide (i) which particular clause was declared as unfair or (ii) detailed reasoning why this clause was considered as unfair. One of the ministries further noted that a registry of unfair consumer contract conditions should be established.
- Close contact with the SCRPA. Businesses and business organisations, especially sector specific ones, should have a close contact with the SCRPA, for instance, provide the SCRPA with their standard terms for SCRPA to review them with respect to unfair consumer terms. Cooperation with the SCRPA even during the drafting of the standard terms would also be welcome.
- The SCRPA should issue summaries of its practice and provide the list of the most popular unfair clauses found in consumer contracts. Such a list could assist the consumers in two ways. Firstly, the consumers could easily check whether their particular contract contains such an unfair clause. Secondly, this list could serve as a checklist for businesses when drafting their standard contracts. Furthermore, such list could be divided into separate sectors. List of common sector specific unfair clauses could further improve the effectiveness of the UCTD regime.

### 1.2.2. Effectiveness of the current rules 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 disparities have an impact on cross-border trade; [*Key aspects to consider are: Do national differences in the application/implementation of the Directive play a role for businesses? Have these differences led to changes in their business strategy? Have these differences caused problems?*]

Differences in legal regulation between EU Member States always provide a financial burden on the businesses. Thus, according to one of the ministries, maximum harmonisation clauses are always welcome due to their uniform application throughout the EU. No specific experiences were reported other than those stated above.

- 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;

No specific experiences reported other than those stated above.

- 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.

No specific experiences reported other than those stated above.

### 1.2.3. Relevance for business-to-business transactions

Regarding the area of contractual fairness and in relation to the Unfair Contract Terms Directive, please analyse:

- Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;

General contract law provides for two relevant instruments:

Firstly, Article 6.186 of the Civil Code of the Republic of Lithuania provides that surprising conditions contained in a standard contract, i.e. such conditions that the other party could not reasonably expect to be included in the contract, are not effective.

Standard conditions are not considered surprising if they were expressly accepted by the party when they were duly disclosed. In determining whether a condition is of surprising character, regard must be taken of its content, wording and form of expression.

A party who joins a standard contract where the standard conditions are drawn up by the other party has the right to claim for termination or modification of that contract in the event where, even though the standard conditions of the contract are not contrary to the law, they exclude the party's rights and possibilities that are commonly granted in a contract of that particular class, or exclude or limit civil liability of the party who prepared the standard conditions, or establish other provisions which violate the principle of equality of parties, cause imbalance in the parties' interests, or are contrary to the criteria of reasonableness, good faith and justice.

Secondly, Article 6.228 of the Civil Code of the Republic of Lithuania provides that a party may withdraw from the contract or its separate condition if at the time of the conclusion of the contract, the contract or its condition unjustifiably gave the other party excessive advantage. In such cases, among other circumstances, regard must also be paid to the fact that one party has taken unfair advantage of the other's dependent position, or of the other party's economic difficulties, urgent needs, or of the latter's economic weakness, lack of information or experience, their inadvertence or inexperience in negotiations; regard is also taken of the nature and purpose of the contract.

Upon the request of the party entitled to claim for invalidity of a contract or its separate condition on the grounds established above, a court may revise the contract or its condition and adapt them respectively in order to make the contract or its separate condition meet the requirements of fairness and reasonable standards of fair dealing practices.

Thus, there is no need to further strengthen the protection of businesses with regard to unfair contract terms. Interviewees did not provide dissenting views.

- 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;

No specific experiences reported other than stated above.

- 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;

No specific experiences reported other than stated above.

- 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;

No specific experiences reported other than stated above.

- Whether there is a need for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive;

Standard conditions prepared by one of the parties are binding to the other if the latter was provided with an adequate opportunity to become acquainted with the said conditions (Article 6.185 of the Civil Code of the Republic of Lithuania).

In the event where both parties to a contract are enterprises (businessmen), it is considered that the other party was provided with the opportunity referred to above if:

- The party who prepared the standard conditions delivered these in written form to the other party before or at the time of signing the contract;
- The party who prepared the standard conditions informed the other party before the signing of the contract that the contract would be formed in accordance with standard conditions which were accessible to the other party in the place indicated by the party who prepared the standard conditions;
- A copy of standard conditions was offered to be sent to the other party if requested.

Thus, there is no need to strengthen the protection of businesses with regard to contractual transparency. Interviewees did not provide dissenting views.

- Whether an extension of the Unfair Contract Terms Directive to B2B transactions can bring benefits for cross-border trade;

No specific experiences reported other than stated above.

- Whether the consequences of such an extension would have an effect on innovation by or market opportunities for SME providers/suppliers;

No specific experiences reported other than stated above.

- Whether the benefits of extending the scope to business-to-business transactions would exceed the negative consequences of such an extension.

No specific experiences reported other than stated above.

### 1.3. Injunctions

#### 1.3.1. Effectiveness of the current rules in establishing a high level of consumer protection

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

- To what extent is the use of the injunction procedure in your country contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment?<sup>19</sup>

According to the publicly available data, no cross-border injunction proceedings were initiated in Lithuania. In addition, Lithuanian consumer associations also did not initiate any legal injunction proceedings before the national courts of other EU Member States according to the ID. The main reason behind this is high costs of foreign litigation and unfamiliarity with foreign legal systems. Interviewees believe it is much more effective to cooperate directly with consumer associations and/or enforcement authorities of other EU Member States and persuade them to initiate investigation and/or file a claim.

With regard to national injunctions, the procedure is also rather rare. According to publicly available data, as well as reports from the interviewees, approximately five national injunction (general action for protection of consumer public interest) proceedings with no cross-border element have been initiated by consumer associations (defending the public interest). Four of these proceedings were initiated by the SCRPA (main consumer rights enforcement authority) and one by another consumer association, the association 'Consumer Voice'. Four of these cases were related to an injunction against the trader, which failed to provide goods (failure to act), or an organiser of events, which failed to return money for an event which did not take place (failure to act). The last case was related to a request for the court to terminate the actions of a trader, which unlawfully collected a debt administration fee.

According to the collected data, the injunction procedure in Lithuania in non-cross border matters works as means for protection of collective consumer interests, thus contributes to reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment, as the traders are aware that the respective consumer association will be ready to defend the public interest of the injured consumers.

- What measures in your national legislation on injunction procedure are considered to be particularly effective, if any: measures regarding the cost of the procedure, the 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?

According to the respondents, prior consultations and publications of the decisions are particularly effective tools.

- Has your country extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunction Directive? If yes, what are the additional consumer rights covered?

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.

<sup>19</sup> 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.



However, 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' only to Annex I of the Directive.

- Analysis of the obstacles to the effective use of the injunction procedure, in particular by analysing which progress in removing obstacles has been made and/or new difficulties that have emerged in your country since 2012.

Since 2012, an increase in injunction proceedings is visible. However, as described above, none of them have a cross-border element and are only concerned with defence of collective interest of Lithuanian consumers. One of the reasons for such increase in national injunction proceedings is increased education of consumers. Consumer associations and enforcement authorities are more active in informing the public about a possibility to apply to them in order for their rights be defended.

- In a forward looking perspective: Should the coverage of the Injunctions Directive be extended (by including additional legislation into Annex I to the Directive)? If so, which EU legislation should be included? Are there other measures that could improve the effectiveness of the ID in establishing a high level of consumer protection? Should the scope of the Injunctions Directive be extended to the protection of collective business' interests? Are there best practices in your country that could be relevant for other countries and considered as model for the injunction procedure at EU level?

According to the responses from the interviewees, the cross-border injunction procedure as prescribed by the ID is not effective whatsoever due to high financial costs and lack of knowledge of the legal system of another EU Member State. The Lithuanian enforcement authority and one ministry is of the opinion that it is much easier for enforcement authorities or consumer associations to co-operate directly with the authorities of another EU Member State and convince them to file an action. As described above, even national injunction procedures related to protection of collective consumer interests is rather rare in Lithuania.

One of the possible improvements would be to increase the education of the consumers, encouraging them to apply to the respective consumer association or enforcement authority, since on receipt of a sufficient number of complaints the consumer association or enforcement authority would be more inclined to initiate an injunction procedure. One must also note that Lithuanian national consumer associations often are under-funded, thus the enforcement authority is more likely to initiate an injunction procedure.

One consumer association noted that general consumer rights education is not effective because consumers generally are not willing to receive legal information when they do not need it. Thus, what the association proposed is having Consumer Information Points, where consumers either by phone, email or physically in place could consult with lawyers on their options in a particular case. That would most likely increase the general awareness and effectiveness of consumer rights in Lithuania.

### 1.3.2. 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:

- How effective is the injunction procedure in addressing infringements originating in another EU country?

The general impression we have on the basis of the interviews is that the obstacles for Lithuanian consumer organisations to access foreign civil courts are insurmountable. The same probably applies for foreign organisations who seek to address a Lithuanian court since no such actions have been brought to date.



It stands to reason it makes more sense to liaise with befriended associations in those countries where the claims need to be brought and to persuade those home associations to help out. It seems that there are occasional contacts to that effect, for instance, just recently a Portuguese tour operator went bankrupt and to that extent Lithuanian supervisory authorities liaised with the Portuguese ones and as a consequence, recommendations to Lithuanian consumers affected by the bankruptcy were published on the website of the SCRPA.

Thus, according to our impression and the interviews, cross-border cooperation between national supervisory authorities yields more tangible results.

- How effective is it to address infringements originating in another EU country that qualified entities in your country are enabled to seek injunctions in the other Member State (Article 4 of the Injunctions Directive)?

From a Lithuanian perspective, this option is not effective at all. The obstacles for Lithuanian consumer organisations to access foreign civil courts are insurmountable. Consumer organisations and enforcement authorities stress that the legal and financial obstacles for bringing claims to foreign courts are simply too great. We refer to the answers given above.

- In a forward looking perspective: Are there non-legislative or/and legislative measures that could improve the effectiveness of the injunction procedure in addressing infringements originating in another EU country? Are there best practices in your country that could be relevant for other EU countries and could be considered as a model for the injunction procedure at EU level?

According to the responses from the interviewees, the legal and financial obstacles for bringing claims to foreign courts are simply too great. From the practical perspective, cross-border cooperation between national supervisory authorities yields more tangible results.

### 1.3.3. Interplay between the Injunctions Directive and other enforcement instruments of consumer law

Please analyse:

- Is the injunction procedure as designed by the Injunctions Directive regulated separately in your country (in a separate legal act or as a separate procedure regulated within the same legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (UCPD, UCTD and by the Consumer Rights Directive)?

We refer to our answers above. The injunction procedure, as designed by the ID, related to either (i) foreign qualified entities or (ii) the right of Lithuanian qualified entities to initiate proceedings before the courts of other EU member states is regulated separately in the Law on Consumer Protection of the Republic of Lithuania. However, non-cross border injunction proceedings by a Lithuanian competent authority are regulated separately as a part of the defence of a consumer public interest.

The UCPD enforcement procedures are established in the LPUBCCP and the Law on Advertising. The enforcement procedures of the UCTD are established both in the Civil Code and the Law on Consumer Protection of the Republic of Lithuania (different provisions than the injunction procedure). The enforcement procedures of the CRD are provided in the Law on Consumer Protection of the Republic of Lithuania (different provisions than the injunction directive).

- If these procedures are regulated separately: What are the main differences between them? How is the coherence between these procedures ensured? If these procedures are regulated in a single legal act (possibly as a single procedure): In what way do these procedures (or this procedure) go beyond measures foreseen by the Injunctions Directive?

The procedures differ in time limits, sanctions, persons entitled to initiate proceedings and authorities conducting investigation. We refer to earlier answers.

## 1.4. Cross-cutting issues

### 1.4.1. Cost and benefits of the directives covered by the study

- To what extent is there evidence for benefits for consumers stemming from the protection provided by both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of benefits for consumers from the protection against unfair commercial practices and unfair standard terms in contracts; [*Note: a relevant aspect in this context is whether the costs for consumers in exercising their rights under these directives are limiting these benefits or not.*]

The interviewees confirm that the existence of the directives covered by this study clearly benefits the consumers. These directives create a high level of protection for consumers in the Republic of Lithuania, i.e. enforcement authorities actively defend the interests of the consumers against unfair commercial practices, unfair contract terms, unfair indication of prices. Furthermore, they grant a possibility (even if a theoretical one) that collective consumer interests (i.e. the interests of a large number of consumers) may be defended in cross-border infringement matters. Common set of rules and their uniform application gives consumers confidence in the consumer protection laws and authorities in general.

One must note that the costs for individual enforcement of consumer rights in courts are considerable due to lack of legal knowledge and possible financial implications, thus preventing consumers in many cases from actually benefitting from consumer protection measures. However, collective consumer protection mechanisms, e.g. injunctions procedures, investigations (administrative procedures) conducted by the enforcement authorities in the field of unfair commercial practices and unfair contract terms, provide sufficient assurances that interests of all or most of the consumers will be protected, since the consumer does not have to pay anything for the application to the enforcement authority with a complaint and, in case the complaint is unfounded, the consumer does not have to cover the legal expenses of the business (as opposed to individual enforcement).

On the other hand, enforcement authorities issue fines to the infringers, thus the existence of the respective directives of this study is also to some extent beneficial to the state.

- To what extent is there evidence for benefits for traders stemming from both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of creating a level playing field for honest traders by providing a legal basis to eliminate or at least constrain dishonest market practices, such as the use of unfair standard terms in contracts or unfair commercial practices, including through the application of the Injunctions Directive;

There is no concrete number based evidence on the benefits for traders. However, the interviewees believe that the existence of uniform sets of rules brings tangible benefits to the traders in two ways. Firstly, decreases costs of cross-border activities. Secondly, such rules indirectly protect the businesses that abide by the rules, as non-compliance with the consumer protection rules both implies negative publicity and considerable fines to infringers, thus encouraging fair competition.

- What are costs for traders due to the need to respect the requirements under the directives covered by the study? [*Note: Such as costs of research, legal advice and compliance as well as the amount of time necessary to comply with the directives*]

The costs for traders in order to respect consumer law legislation are difficult to quantify. However, according to the interviewees, it should save costs for the traders if they wish to conduct cross-border business. This would especially be true with regard to maximum harmonisation clauses of the directives. Lithuanian interviewees argue that the existence of uniform legal requirements minimises the expenses for foreign legal counsel, as well as investments and expenses related to adaptation of goods, services and marketing with legal requirements of other EU Member States.

- What are the costs involved in the public enforcement of these rules?

There are two main enforcement institutions related to the directives under this study. Firstly, the SCRPA, the primary objective of which is to ensure the consumer protection of Lithuania. Secondly, the Competition Council, which is the competent authority not only for misleading advertising matters, but also for investigations related to competition law and the law of protection against unfair competition. Thus, these state institutions were established to protect the interests of the consumers, as well as to perform other functions. The only related cost for the public enforcement of the directives covered by this study is the price for the maintenance of these public institutions. Other than that, the consumers do not have to pay anything (when either applying to the SCRPA or Competition Council, or the court) for the public enforcement of these rules.

- Are there indications that the directives covered by the study are not implemented in your country in a cost-effective manner?

No such data is available or was provided by the interviewees.

- Could the costs for implementing and enforcing the rules of the directives covered by the study be reduced without lowering the level of protection for consumers? If so, how?

One of the ministries advocates for the adoption of maximum harmonisation clauses, as such clauses would ensure lower costs for businesses, as well as greater benefits to the consumers due to their uniform interpretation by all the member states. One of the enforcement authorities indicated that the costs should not be lowered in order to maintain the current level of protection for the consumers. No other data is available or was provided by the interviewees.

#### 1.4.2. Interplay with EU sector-specific consumer protection legislation

Regarding the interplay of the horizontal EU consumer legislation [mainly UCPD and UCTD] with EU sector-specific consumer protection legislation in the areas of electronic communications, passenger transport, energy and consumer financial services, please:

- Analyse the levels of awareness of the requirements of the horizontal EU consumer legislation (mainly UCPD and UCTD) of businesses and consumers and the specific public enforcement bodies in the relevant sectors, as in particular demonstrated by their practical application; [*Note: Key question here is: Are UCPD and UCTD applied in practice by national authorities and courts as a legal basis to combat unfair commercial practices and unfair standard terms in contracts in the regulated sectors?*]

UCPD and UCTD enforcement authorities, as well as sectoral authorities and consumer associations are well aware of the requirements of the horizontal EU consumer

legislation. According to the data provided by one enforcement authority, the traders' knowledge of such requirements is also rather good. However, consumers lack knowledge that horizontal EU consumer legislation is also applicable in sector specific situations.

Every year the SCRPA conducts a consumer and trader survey. According to the data of 2015 study, 54 percent of traders acknowledged that they have good enough knowledge of consumer protection laws. 45 percent of consumers responded that they are happy about their knowledge in the field of consumer protection, whereas only 29 percent reported that they lack consumer protection knowledge. During last year an increasing number of consumers actively show interest in consumer protection, most likely due to recent active consumer protection related campaigns.

According to the data of the SCRPA's 2016 study, which was published in February 2017, 46 percent of consumers responded that they are happy about their knowledge in the field of consumer protection (1 percent increase compared with 2015 study). 16 percent of consumers answered that their consumer rights were infringed – this is the lowest percentage from the year 2008, thus the SCRPA assumes that the traders are carrying out their obligations more responsibly.

On the other hand, according to the data of Consumer Scoreboard 2015 (done by the European Commission), Lithuanian consumers have the second lowest level of knowledge of consumer rights in the EU. Lithuania also has the EU's third lowest score on the complaints and dispute resolution composite indicator.

Lithuanian laws, transposing the UCPD and UCTD, in particular, the LPUBCCP, the Civil Code and the Law on Consumer Protection of the Republic of Lithuania are applied in practice by the Lithuanian enforcement authorities as a legal basis to combat unfair commercial practices and unfair standard terms in contracts in the sectoral areas of electronic communications, passenger transport, energy and consumer financial services.

- Specify whether in your country the same authority is responsible for the enforcement of the horizontal EU consumer law 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 UCPD/UCTD in the regulated sectors, as specified in the previous bullet?*]

In Lithuania, different authorities are responsible for enforcement of horizontal EU consumer laws and the sector specific rules. According to Lithuanian law, for instance:

- The Communications Regulatory Authority (Lith. *Ryšių reguliavimo tarnyba*) is responsible for enforcement of sector specific rules in the field of electronic communications;
- National Commission for Energy Control and Prices (Lith. *Nacionalinė kainų ir energetikos kontrolės komisija*) and State Energy Inspectorate under the Ministry of Energy of the Republic of Lithuania (Lith. *Valstybinė energetikos inspekcija prie Lietuvos Respublikos energetikos ministerijos*) are responsible for enforcement of sector specific rules in the energy field;
- Lithuanian Bank (Lith. *Lietuvos bankas*) is responsible for enforcement of sector specific rules in the field of consumer finance;
- State Road Transport Inspectorate under the Ministry of Transport and Communications (Lith. *Valstybinė kelių transporto inspekcija prie Susisiekimo ministerijos*) is responsible for enforcement of sector specific rules in the field of passenger transport.

However, the enforcement of horizontal consumer protection directives, in particular, the UCPD and the UCTD is performed by the SCRPA and the Competition Council. In practice, the cooperation between institutions varies depending on particular situation:

- If the authority, responsible for the enforcement of sector specific requirements, receives a complaint, which mainly concerns the infringement of the requirements under the UCPD or UCTD, such authority passes the complaint to the SCRPA or the Competition Council;
- If the authority, responsible for enforcement of sector specific requirements, during the examination of consumer's complaint (if primarily it was not related to UCPD or UCTD) identifies that the requirements set forth by the UCPD and/or the UCTD were infringed, it stops the sector-specific examination and passes the complaint to SCRPA or the Competition Council to identify whether the requirements of UCPD or UCTD transposing laws were infringed. After they receive the response of the SCRPA or the Competition Council, the sector-specific examination is resumed;
- If the authority, responsible for enforcement of sector specific requirements, establishes that the requirements of UCPD or UCTD transposing laws were infringed absent of any consumer complaint, it may request the SCRPA or the Competition Council for 'institutional assistance', i.e. request to evaluate some specific situation in the light of UCPD or UCTD requirements as the enforcement thereof is the competence of the SCRPA and the Competition Council.

The cooperation between sector-specific institutions and the SCRPA and the Competition Council is rather active. According to the opinion of the interviewees, such a distinction between the functions of state institutions is not burdensome for the consumer, since there is a clear division of competence and the examination of the consumer's complaint is automatically shared by the institutions according to their competence. Such division does not have any negative impact on the effectiveness of the UCPD and/or UCTD. On the contrary, enforcement of the requirements of UCPD and UCTD is concentrated in two specialised institutions, thus allowing for the complaint to be examined effectively and professionally.

- Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning contractual fairness, 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.??]

Horizontal consumer provisions and sector-specific rules provide for a rather clear and coherent legal framework.

The LPUBCCP *expressis verbis* provides that the provisions of this law are applicable only if sector specific legislation does not provide for differing rules. Thus, if any sectoral legislation provides for any deviations, sector specific legislation would be applicable.

With regard to UCTD transposing laws, they are applicable in all instances with respect to all contracts (with exceptions, as provided by the UCTD). Thus, the SCRPA evaluates all contracts in the light of unfair contract terms, including ones of regulated sectors.

Attention should also be brought to the fact that with respect to some regulated sectors, for instance, the energy sector, the sector-specific regulatory authority (ministry) approves standard clauses for contracts to be concluded with consumers, e.g. standard set of clauses for energy supply agreements and etc. Such standard terms, prior to their approval, are also reviewed by the SCRPA to ensure that they are not unfair. Standard terms are mandatory for traders of that specific sector.

None of the interviewees reported any contradictory provisions.

- What are the benefits of the complementary application of the UCPD and UCTD in the regulated sectors? What are the costs due to the complementary application with the sectoral EU consumer protection legislation?

The UCPD and the UCTD provide for general concepts and their principle based approach helps to fill the gaps where there is no sectoral regulation.

There is no quantitative information pertaining to the costs of the complementary application of the UCPD and UCTD in the regulated areas.

- Assess any need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law.

None of the interviewees reported the need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law. According to both sector-specific actors and the general consumer enforcement authority the current rules are well balanced and no further interplay related regulation is needed.

#### 1.4.3. Relevance of consumer law directives for consumer-to-business transactions

- Please analyse the need and potential for the application of the consumer law directives (mainly UCPD and UCTD) to 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 Lithuanian experience, there is a growing number of cases in which the consumer purchases goods repeatedly, thus the enforcement authority must ascertain whether the activities of such a natural person are business-related, i.e. whether such a natural person may be considered a consumer or instead, should be considered a trader.

Regulation with respect to C2B relations would be necessary in the fast paced tech business world. For instance, consumer (a natural person) may be providing digital content to business (e.g. YouTube) for remuneration; however, a natural person would have no negotiating power against such businesses. The same could be said in instances when consumer sells gold jewellery to a trader, because such a transaction may be a rash one. There would also be a big imbalance of power between such a natural person ('consumer') and a trader. In both of these cases only general provisions of the Civil Code would be applicable, thus failing to afford any kind of special or additional protection to the weaker side (the natural person). Thus, in some C2B instances there rights and obligations might be heavily imbalanced and further regulation would be welcomed.

#### 1.4.4. Specific protection for vulnerable consumers

Please analyse:

- Whether the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined in the consumer law directives and relevant jurisprudence, and as applied by national authorities and courts in your country, continue to be valid and fit for purpose.

According to the interviewees, the notions of 'consumer' and 'average consumer' work fine in practice. However, the notion of a 'vulnerable consumer' is less clear.

In particular, one sectoral institution reported that sector-specific laws (energy sector) provide for their own notions of 'vulnerable consumer'. For instance, the Article 3(7) of the 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 provides that 'each Member State shall define the concept of vulnerable customers which may refer to energy poverty and, inter alia, to the prohibition of disconnection of electricity to such customers in critical times. Member States shall ensure that rights and obligations linked to vulnerable customers are applied'. This requirement was



transposed by the Government of the Republic of Lithuania by adopting the Act on Application of Additional Guarantees for Socially Vulnerable Electricity Consumers of 27 December 2015 No 527. The act provides that a socially vulnerable consumer means a consumer which in accordance with applicable laws is given monetary social aid. It is still unclear whether the SCRPA should apply the notion of 'vulnerable consumer' as provided by the UCPD (which does not evaluate financial situation of the consumer), or instead a sectoral one. The same issue is with the natural gas sector. Thus, the horizontal consumer protection directives and sectoral directives should be harmonised to that extent.

One enforcement authority further elaborated that according to their practice, the notion that the average consumers is informed, observant and circumspect means that such an average consumer is socially active, having the ability to think critically and absorb the information provided to them, however, not having special knowledge in some circumstances to make an informed decision. The authority argues that practically, it is very difficult to establish how particular consumers fit in the concept of an average consumer and how they would make a decision. Thus, the notions of 'average consumer' and 'vulnerable consumer' should not overshadow the properties of particular consumers at hand and their abilities to make an informed decision, i.e. the circumstances of each situation should be assessed individually.

According to statistical data and stakeholder opinions, Competition Council with regard to its misleading advertising investigations keeps raising the bar of the average consumer, i.e. the consumer under the notion of average consumer is getting more and more observant, circumspect and is able to evaluate the nature of the advertising without being misled. This is supported by the declining number of Competition Council's decisions on misleading advertising. For instance, in 2007 the Competition Council found 16 cases<sup>20</sup> wherein the traders disseminated misleading advertising or unlawful comparative advertising, compared with 5 cases in 2015.<sup>21</sup> This also may further be explained by the fact that the Competition Council approved its strategic objectives and criteria for minor infringements, under which the Competition Council refuses to launch an investigation if the infringements are minor or do not comply with the Competition Council's strategic objectives.

- To what extent the existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers and whether, based on the experiences in your country, specific provisions should be introduced in other directives concerned, in particular the Unfair Contract Terms Directive.

One enforcement authority argues that in practice, it is very difficult to establish that a commercial activity was directed at a particular group of people who are vulnerable. In most instances, the alleged unfair commercial activities are not apparently directed at vulnerable consumers, but instead, are directed at the general society, even though such activities factually affect only vulnerable consumers. Thus, one may argue the protection which is currently afforded to vulnerable consumers in accordance with the UCPD is most likely intended to cover only such instances where the unfair commercial activities are obviously (apparently) directed to vulnerable consumers. Therefore, additional protection should be afforded to such vulnerable consumers as they perceive traders' commercial activities (including advertising) very directly, and do not assess it critically or cautiously.

On the other hand, the traders are not able to always foresee whether their commercial activities will ultimately unfairly result in unfair commercial practices to vulnerable consumers. In other words, the traders, when considering their commercial practices, most likely, consider how their activities will affect an average consumer and do not assess the results of their activities to vulnerable consumers. Thus, any

<sup>20</sup>Competition Council's Annual Report for 2007  
([http://kt.gov.lt/uploads/publications/docs/745\\_7d7ac6cb3e3660489db75086ade2a70c.pdf](http://kt.gov.lt/uploads/publications/docs/745_7d7ac6cb3e3660489db75086ade2a70c.pdf))

<sup>21</sup>Competition Council's Annual Report for 2015  
([http://kt.gov.lt/uploads/publications/docs/2312\\_e79524c4b4631f9394ee9e8893882ed1.pdf](http://kt.gov.lt/uploads/publications/docs/2312_e79524c4b4631f9394ee9e8893882ed1.pdf))



legislative initiatives for increased protection for vulnerable consumers should also take into consideration the possibilities of traders to judge beforehand the impact of their commercial practices on vulnerable consumers, if it is not directly (apparently) directed at them.

#### 1.4.5. EU added value

- Overall, would you consider that protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in your country since the implementation of the UCPD and the UCTD in national legislation?

Yes, the adoption and implementation of the UCPD improved the protection of consumers, since prior to its implementation Lithuania did not have any specific public law provisions on protection of fair commercial practices.

With respect to the UCTD, also yes. Before the transposition of the UCTD, consumer law issues were regulated by the 7 July 1964 Civil Code (Soviet code) and since 1994 also by the Consumer Protection Act. But the Lithuanian law did not provide for a level of protection comparable to the UCTD.

- Overall, would you consider that the information of consumers regarding unit prices has improved since the implementation of the PID in national legislation?

Yes, the adoption and transposition of the PID into national legislation improved the provision of information on unit prices to consumers. This is confirmed by the interviewees.

- Overall, would you consider that the protection of businesses against unfair marketing in your country has improved since the implementation of the MCAD in national legislation?

Prior to the adoption and transposition of the MCAD in the Lithuanian law, the legal regulation of advertising was sporadic and fragmented in nature. The adoption of the Law on Advertising in the year 2000, which transposed the MCAD, greatly increased the protection of business against unfair marketing.

- Overall, would you consider that it has become easier for businesses in your country to directly trade cross-border to final consumers located in other EU countries in recent years? Has it become easier for consumers in your country to directly purchase cross-border from traders located in other EU countries?

Yes, due to harmonisation of requirements for commercial practices and advertising, the traders are able to carry out commercial cross-border activities more effectively and in a unitary manner.

- To what extent are these improvements, if any, due to the mentioned directives?

The positive effects are attributable to the implementation of, firstly, maximum harmonisation clauses, and, secondly, minimum harmonisation clauses at the least.

## Annex

## A. Transposition fact sheet

**Table 1: Fact sheet on transposition of directives in Member States' law – Lithuania**

Directive	Transposition legislation (National law, Article)	Specific provisions going beyond minimum harmonisation requirements/use of exemptions	Included in national legislation		Comments
<b>Directive 93/13/EEC on unfair terms in consumer contracts</b>	The Civil Code	'Black list' of terms considered unfair in all circumstances	No		
		'Grey list' of terms which may be considered unfair	Yes	Article 6.228 <sup>4</sup> (2) of the Civil Code	<i>A full list of terms (a – q) provided in the Annex of the UCTD is transposed as a 'grey-list'.</i>
		Extensions of the application of Directive to individually negotiated terms	No		
		Extensions of the application of Directive terms on the adequacy of the price and the main subject-matter	No		
		Lithuanian transposing law provides for a wider term established under point (a) of Annex of the UCTD	Yes	Article 6.228 <sup>4</sup> (2)(1) of the Civil Code	<i>Under the said article a term is considered unfair if it also excludes or limits the liability of a seller or supplier in the event of damage to the consumer's property.</i>
	Lithuanian transposing law provides for a narrower term established under point (b) of Annex of the UCTD		Article 6.228 <sup>4</sup> (2)(2) of the Civil Code	<i>The said article does not contain an example of offsetting a debt.</i>	

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		Lithuanian transposing law provides for a wider term established under point (f) of Annex of the UCTD	Article 6.228 <sup>4</sup> (2)(6) of the Civil Code	<i>Under the said article a term is considered unfair if it permits the seller or supplier to retain any sums received by the seller or supplier prior to execution of the contract (in comparison the UCTD only concerns sums paid for services).</i>
		Lithuanian transposing law provides for a wider term established under point (h) of Annex of the UCTD	Article 6.228 <sup>4</sup> (2)(8) of the Civil Code	<i>Under the said article the term is considered unfair if it sets forth a requirement for the consumers to express their assent or dissent upon the extension of the contract unreasonably early.</i>
		Lithuanian transposing law provides for a narrower term established under point (j) of Annex of the UCTD	Article 6.228 <sup>4</sup> (2)(10) of the Civil Code	<i>Under the said article a term is considered unfair if it enables the seller or supplier to amend the contract conditions unilaterally either (i) without there being any contractual grounds or (ii) sufficient grounds. (two alternative grounds).</i>
		Lithuanian transposing law provides for a narrower term established under point (q) of Annex of the UCTD	Article 6.228 <sup>4</sup> (2)(18) of the Civil Code	<i>Under the said article a term is considered unfair if it requires the consumer to take disputes exclusively to the court of the seller's or supplier's legal seat.</i>
		Lithuania did not transpose Article 1(a), 1(b) and 1(d) of Annex of the UCTD. Article 1(c) of Annex of the UCTD was transposed only partly, to exclude application only in relation to term (l).		
		Lithuanian transposing law provides for a deviating definition of a consumer	Article 6.228 <sup>1</sup> (2) of the Civil Code	<i>Under the said article a consumer also means any natural person who, in contracts covered by the UCTD, is acting for purposes which are outside their craft.</i>

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		Lithuanian transposing law provides for a deviating definition of a seller or supplier	Article 6.228 <sup>1</sup> (3) of the Civil Code	<i>Firstly, similarly as under the comment above, the definition includes the craft. Secondly, one is also a seller or supplier if it acts in the name or for the benefit of the seller or supplier. Thirdly, not only natural or legal person is considered to be a seller or supplier, but also other organisations or their departments.</i>
		Lithuanian transposing law transposed Article 5 of the UCTD expansively.	Article 6.228 <sup>4</sup> (6) of the Civil Code	<i>Under the said article if a term is not drafted in plain, intelligible language, it is considered to be unfair.</i>
		Lithuanian transposing law transposed Article 6(1) of the UCTD expansively.	Article 6.228 <sup>4</sup> (8) of the Civil Code	<i>Under the said article if the court declares the term as unfair, such term is considered to be null and void from the moment of the conclusion of the contract (ab initio).</i>
		Lithuanian transposing law transposed Article 6(2) of the UCDT expansively.	Article 1.39(2) of the Civil Code	<i>Under the said article the right to make a choice of the law applicable shall not result in depriving or restricting the consumers of the right to protect their interests by the remedies determined by the provisions of the law of the state of their domicile if: (i) the formation of the contract in the state of their domicile was preceded by a special offer or by advertising in that country; (ii) the consumer was induced by the other contracting party to travel to a foreign state for the purpose of forming the contract; (iii) the order was received by the other party or their agent from the consumer in the state of the latter's domicile.</i>

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	The Law on Consumer Protection				<i>If the parties to a consumer contract have not made a choice of the applicable law, the law of the state in which the consumer is domiciled shall apply. The provisions above do not apply to contracts for carriage, contracts for the supply of services where the services are to be supplied to the consumer exclusively in a country other than Lithuania.</i>
<b>Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market</b>	Law on Prohibition of Unfair Business-to-Consumer Commercial Practices	Provisions regarding financial services going beyond minimum harmonisation requirements	No		
		Provisions regarding immovable going beyond minimum harmonisation requirements	No		
		Application of UCPD to B2B transactions	No		
		Lithuania provided in the national law a broader definition of “code owner”, in comparison with one provided in Article 2(f) of the UCPD.		Article 2(11) of the Law on Prohibition of Unfair Business-to-Consumer Commercial Practices	<i>Lithuanian transposing law’s illustrative list of subjects contains an additional subject - an independent monitoring body established by any person, including a commercial operator, a group of commercial operators.</i>
		Lithuanian authorities support the code owners as provided under Article 10 of the UCPD.		Article 11 of the Law on Prohibition of Unfair Business-to-Consumer Commercial Practices	<i>Under the said article Lithuanian responsible authority (the SCRPA) encourages the creation of the codes of conduct and cooperates both with the code owners and traders, who wish to assume obligations thereunder. Traders must inform the responsible authority about the fact that a code of conduct was created and the code owner.</i>
		Lithuania did not transpose to national law the definition of “regulated profession” as provided in Article 2(l) of the UCPD.			

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		Different from the UCPD, Lithuanian law transposing the UCPD provides for a definition of an average consumer.	Article 2(13) of the Law on Prohibition of Unfair Business-to-Consumer Commercial Practices	<i>Under national law an average consumer means a consumer who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors.</i>
		Lithuanian law provides an exemplary list of situations in which statement, which are not meant to be taken literally, are considered not to be unfair commercial practices under the second sentence of Article 5(3) of the UCPD.	Article 3(6) of the Law on Prohibition of Unfair Business-to-Consumer Commercial Practices	<i>Under national law unfair commercial practices does not include statements, which are not meant to be taken literally due to used aphorisms, ethical, cultural traditions, formed customs and similar.</i>
		Lithuania transposed Article 7(4)(c) of the UCPD in an expansive manner.	Article 6(3)(3) of the Law on Prohibition of Unfair Business-to-Consumer Commercial Practices	<i>Under Lithuanian transposing law any additional expenses of the consumer are included (not only additional freight, delivery or postal charges as prescribed under the UCPD).</i>
		Lithuanian laws slightly deviate from Article 5(5) of the UCPD	Article 7 of the Law on Prohibition of Unfair Business-to-Consumer Commercial Practices	<i>Under Lithuanian transposing law the list provided in Annex I of the UCPD is <u>presumed</u> to be unfair. Thus, such presumptions might theoretically be rebutted. However, this conclusion is based only from linguistic point of view. From the practical perspective, this list is treated as a black-list.</i>
		Lithuanian laws slightly deviated from Article 20 of Annex I of the UCPD	Article 7(18) of the Law on Prohibition of Unfair Business-to-Consumer Commercial Practices	<i>Lithuanian transposing law contains a model list of unavoidable costs, for instance, postal or telephone costs under standard rates or similar.</i>

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		Lithuanian laws slightly deviated from Article 9(d) of the UCPD		Article 8(2)(4) of the Law on Prohibition of Unfair Business-to-Consumer Commercial Practices	<i>Under the UCPD only barriers imposed by the trader are taken into account, whereas under the Lithuanian transposing law not only imposed, but also intended to be imposed barriers must be taken into account.</i>
		Competitors are not allowed to initiate an investigation		Article 15(1) of the Law on Prohibition of Unfair Business-to-Consumer Commercial Practices	<i>Under the Lithuanian transposing law only consumers, consumer associations and state and municipal institutions and establishments may apply to the responsible authority in order to initiate an investigation. Thus, competitors are barred from formally initiating the investigation. The practical consequences of businesses submitting such complaints are explained in detail in the answer to first question in 1.1.6. above.</i>
	The Law on Advertising				
	The Civil Code				
<b>Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers</b>		Extension of the application to other sectors (e.g. for immovable property)	No		
	Civil Code	Broadening of the concepts of a consumer and a trader.	Yes	Articles 6.228 <sup>1</sup> (2) and (3) of the Civil Code	<i>Person's commercial, professional, trade and craft activities are taken into account when assessing whether the person is a consumer or a trader.</i>
		Article 4(2) of PID was not transposed to national law.			



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	<p>Rules on the Labelling of Goods and Indication of Prices (approved by the 2002-05-15 Order of the Minister of Economy No 170)</p>	<p>Lithuania waived the obligation to indicate the unit price of some products, as established in Article 5 of PID</p>	<p>Yes</p>	<p>Article 29(1) – (3) of the Rules on the Labelling of Goods and Indication of Prices</p>	<p><i>The obligation was waived in the following instances:</i>  <i>(1) if the product's selling price is the same price as the unit price;</i>  <i>(2) if the product's selling price does not depend on the weight, volume, length, area of the product or if the product's neto amount is less than 5 g or 5 ml</i>  <i>(3) if the product is sold using machines;</i></p>
		<p>Lithuania waived the obligation to indicate the unit price, as established in Article 6 of PID</p>	<p>Yes</p>	<p>Article 29(4) of the Rules on the Labelling of Goods and Indication of Prices</p>	<p><i>The obligation was waived in the following instances:</i>  <i>(1) when the product, except for products sold in bulk, is sold:</i>  <i>(1.1) in a market, kiosk or other temporary structure, from temporary sales facilities (stalls, carts), built outside, during activities of itinerant or deliverable trade, as well as trading venues, equipped to serve individuals only during ongoing entertainment, sports, cultural and other events;</i></p>

				<p><i>(1.2) by a legal entity, engaged in retail trade, whose annual net sales turnover, as understood under the Law on Financial Statements of Companies of the Republic of Lithuania, and by a natural person, whose individual activity taxable income, as understood under the Law on Personal Income Tax of the Republic of Lithuania, in the last fiscal year did not exceed EUR 2 million in a store with sales area not exceeding 120 sq. m.</i></p> <p><i>(1.3) when detergents are sold to the consumers and on their primary packaging the number of standard washing machine loads, as they are defined in the Regulation (EC) No. 648/2004, is indicated, which, if in accordance with recommended amount and (or) dosage instructions indicated on the primary packaging, are sufficient for the amount of detergent in the primary packaging. In this case, if the standard unit price is not indicated, the price of one wash, which is calculated by dividing the selling price of the detergent by the standard washing machine loads, indicated on the primary packaging, must be indicated.</i></p>
		Lithuania provided in the national law measures, going beyond minimum harmonisation, as allowed by Article 10 of PID	Article 32 of the Rules on the Labelling of Goods and Indication of Prices	<p><i>Prices must be indicated either on price labels or the product (the primary packaging). In some specific circumstances described in the provision, the prices are allowed to be shown in pricelists, electronic stands or other information presentation tools.</i></p>

		Lithuania provided in the national law measures, going beyond minimum harmonisation, as allowed by Article 10 of PID		Article 33 of the Rules on the Labelling of Goods and Indication of Prices	<i>Prices must be shown in large-sized bold fonts on a contrasting light-coloured background, if possible, by using Arial, Tahoma, Verdana, Helvetica fonts and avoiding the use of italic or handwriting-allusive fonts.</i>
	The Law on Consumer Protection of the Republic of Lithuania				
<b>Directive 2006/114/EC concerning misleading and comparative advertising</b>	The Law on Advertising	Lithuania provided in the national law a broader definition of “advertising”, in comparison with one provided in Article 2(a) of the MCAD.		Article 2(8) of the Law on Advertising	<i>Under national law, advertising means information disseminated in any form and by any means and relating to a person’s commercial and economic, financial or professional activities, where it promotes the purchase of goods or use of services, including the purchase of immovable property and the takeover of property rights and obligations.</i>
		Lithuania deviated in the national law from the definition of “misleading advertising”, in comparison with one provided in Article 2(b) of the MCAD.	Yes	Article 2(3) of the Law on Advertising	<i>Two main differences in the definitions can be seen. Firstly, the words ‘deceive’, as used in the MCAD were replaced with ‘mislead’. Such difference, supposedly, should have cleared any linguistic discrepancies and connotations between the words mislead and deceive. Secondly, the word ‘competitor’ was replaced with ‘another person’s opportunities to compete’. Thus, not only impact on an actual competitor, but also a potential one might be taken into account.</i>
		Lithuania did not transpose Article 2(e) of the MCAD.			

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		Lithuania deviated from Article 3 of the MCAD.	Yes	Articles 5(2) and 5(5) of the Law on Advertising	<p><i>Article 5(2) of the Law on Advertising establishes that in determining whether advertising is misleading, account shall be taken of the criteria of accuracy, comprehensiveness and presentation (not of all of the features of the advertising, as provided under Article 3 of the MCAD). There are some further deviations from Article 3:</i></p>
					<p><i>(1) Article 3(a) provides for a non-exhaustive list of characteristics of goods or services, whereas Article 5(5)(2) of the Law on Advertising provides for an exhaustive list of characteristics. Such national list contains only some of the characteristics provided in Article 3 of the MCAD, as well as some additional characteristics not foreseen in the MCAD.</i></p>
					<p><i>(2) With respect Article 3(b) of the MCAD, Article 5(5)(2) contains a non-exhaustive list of conditions on which the goods are supplied or the services provided.</i></p>
					<p><i>(3) Article 3(c) of the MCAD provides a non-exhaustive list of the nature, attributes and rights of the advertiser which should be taken into account. Article 5(5)(1) of the MCAD, firstly, provides an exhaustive list of specific characteristics which should be taken into account. Secondly, these characteristics could be attributed not only to advertiser, but also any other person mentioned in the advertisement.</i></p>

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					<i>(4) Article 5(5)(4) and 5(5)(5) provides additional criteria, absent in the MCAD, which should especially be taken into account, for instance, consumer rights, risks, complaints handling, sponsorship of the advertiser or of the goods or services advertised and etc.</i>
		Lithuania deviated from Articles 4(e) and 4(f) of the MCAD	Yes	Articles 6(6) and 6(7) of the Law on Advertising	<i>The scope of Article 4(e) of the MCAD includes not only products with designation of origin, but also services with designation of origin (Article 6(6) of the Law on Advertising) The scope of Article 4(f) of the MCAD includes not only competing products, but also competing services as well (Article 6(7) of the Law on Advertising).</i>
<b>Directive 2009/22/EC on injunctions for the protection of consumers' interests</b>	The Law on Consumer Protection of the Republic of Lithuania				
	The Civil Code				
	The List of European Union Legislation and Implementing Legislation of the Republic of Lithuania, Infringement of Which by the Actions of Sellers of Goods or Services (Suppliers) Acting in Lithuania Shall Allow European Union Member States' Institutions and Organisations to File Claims Before the Courts of the Republic of Lithuania (approved by the order of the Minister of Justice of the Republic of Lithuania of 1 March 2007 No 1R-91).				

**Table 2: Fact sheet on Injunctions Directive – Lithuania**

Issue	Answer	Comments
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)?	- Yes, separate procedures in separate legal acts	
Who is entitled to bring an action seeking an injunction?	<ul style="list-style-type: none"> <li>- the SCRPA (a designated public body)</li> <li>- consumer associations, complying with statutory requirements.</li> <li>- in cases prescribed by laws - other state or municipal institutions and legal entities</li> </ul>	<i>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.</i>
Is the injunction procedure a court or an administrative procedure? If your country legislation foresees both forms of the procedure, please explain in the comments column for which infringements the court or administrative procedure is foreseen	- Court procedure	
Who bears the costs of an injunction procedure? If qualified entities (or some of their categories e.g. consumer organisations are entitled to an exemption of some/all cost related to the procedure please explain the characteristic of such exemption in the comments column.	- The costs are as a rule borne by the losing party	<i>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.</i>

<p>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?</p>	<p>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.</p> <p>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”.</p>	<p><i>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)</i></p>
<p>Is protection of business' interests covered by the injunctions procedure? If scope of application extended to the protection of business' interests, please provide details in the comments column regarding type of business' interests covered by the injunctions procedure</p>	<p>- No</p>	
<p>Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations</p>	<p>- Yes</p>	<p><i>Legal acts transposing the Directive does not contain any additional provisions, however, filing a claim against several respondents is possible under general rules of Lithuanian civil procedure (Article 43 of the Civil Procedure Code of the Republic of Lithuania).</i></p>
<p>Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID)</p>	<p>- No</p>	
<p>Has your Member State taken specific measures regarding the prior consultation (Article 5 of the Injunctions Directive)?</p>	<p>- Yes, national qualified entities, before applying to a court with a claim for an injunction, must consult with the respondent.</p> <p>- Yes, qualified entities of other EU Member States: (i) must consult with the SCRPA and (ii) have a right (not an obligation) to consult with the respondent.</p>	



<p>Does the national legislation provide for measures ensuring summary procedure? Please specify main characteristics of the procedure (subject matter/time limits) in the comments column.</p>	<p>- No</p>	
<p>Are there sanctions for non-compliance with the injunction order (Article 2(1) of the Injunctions Directive)? If sanctions in form of penalty or fine foreseen please specify in the comments column to who exactly should they be paid</p>	<p>- Yes, penalty of a fine for each day of non-compliance</p>	<p><i>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 comply with an injunction, the court may issue a fine of up to EUR 289 for each day of non-compliance.</i></p>
<p>Has your Member State taken specific measures regarding the publication of the decision and/or the publication of a corrective statement?</p>	<p>- Yes</p>	<p><i>Consumer associations and other state or municipal institutions or other legal entities must:</i></p> <p><i>(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.</i></p> <p><i>(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.</i></p>
<p>Is it possible to claim within the injunction procedure for sanctions for the infringement?</p>	<p>- Yes</p>	<p><i>The legal acts transposing the Directive do not contain any specific provision. However, under general rules of Lithuanian civil procedure, the claimant may request the court to state in the decision that non-compliance with the injunction incurs a fine of up to EUR 289 for each day of non-compliance.</i></p>
<p>Can an action for the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to other beneficiary be brought within the injunction procedure?</p>	<p>- No</p>	
<p>Can an action for damages to be paid to the qualified entity or the public purse be brought within the injunction procedure?</p>	<p>- No</p>	<p><i>Unless entity suffered damage itself</i></p>

<p>Can an action for damages or redress to be paid to the consumers concerned be brought within the injunction procedure?</p>	<p>- Yes (theoretically)</p>	<p><i>4 cases cited in the report (1.4.1.) concerned a national injunction procedure against either a trader, which failed to provide goods (failure to act) or an organiser of events, which failed to return money for an event which did not take place (failure to act). In all these cases the SCRPA (enforcement authority) requested the court to order the respondent to stop the infringement of consumer public interest and return to the consumers money owed. All four decisions of the courts were interim, there is no data whether the courts rendered final decisions in these cases.</i></p>
<p>Can individual consumers base their individual claims for damages/remedies on the injunctions order?</p>	<p>- Yes</p>	<p><i>The facts settled in the judgement on injunction become prejudicial facts and cannot be contested - therefore persons with the same or very similar factual circumstances may benefit from the judgement of the court</i></p>
<p>Can the qualified entity claim other measures beyond the injunction, e.g. evidence of compliance with the judgment?</p>	<p>- No</p>	<p><i>Normal rules of enforcement of court judgements apply</i></p>
<p>Are the effects of individual injunctions orders extended to the future infringements and/or same or similar illegal practices (of other traders)?</p>	<p>- No</p>	<p><i>Injunctions only cover the actions indicated in the injunction and are only directed at a specific trade (respondent).</i></p>

## B. Data tables

*Number of B2C disputes*

Please indicate how many B2C disputes have been decided in your country on the basis of consumer law directives covered by this study (UCPD, UCTD, PID) as a proportion of the total number of B2C disputes decided on the basis of other national consumer legislation (based on statistics, or based on estimates by enforcement authorities and other stakeholders, where this is not the available).

**Table 3: B2C disputes decided on the basis of consumer law directives covered by this study in comparison with total B2C disputes decided on the basis of other legislation (most recent year for which data is available)**

Year	Type of data	Total number of B2C disputes (number of cases)	Share of B2C disputes decided on basis of ...					Comments
			UCPD	UCTD	PID	other EU consumer protection legislation (e.g. CRD, Sales Directive, sectoral legislation)	national consumer legislation not based on EU directives	
2015	The SCRPA's statistics	1284 cases	0.46 %	10.9 %	0.07 %	88.57 %	0 %	Total of percentages should add up to 100%

*Costs of obtaining redress for a hypothetical case of invoking unfairness of a standard contract term*

- Please estimate the costs, including time, for consumers in obtaining redress when invoking the unfairness, and thereby the non-binding character of standard contract terms in a contract they concluded. Please provide the estimate for the hypothetical example below, focusing on costs (and needed time) of a lower court procedure and the use of ADR or other relevant procedure (if applicable).<sup>22</sup>

<sup>22</sup> For the hypothetical example it is assumed that both the provider and the consumer are located in your country.

**Table 4: Estimate of costs for consumers in obtaining redress when invoking the unfairness of standard contract terms in a contract they concluded (for the hypothetical example provided in the box below)**

Redress mechanism	Estimated court fees (national currency)	Estimated lawyer's fees (national currency)	Other costs, if any (national currency)	Estimated time involved for consumer (hours)	Comments
<b>Lower court procedure</b>	EUR 0	EUR 0 if no lawyer is involved (lawyer's assistance not legally required). EUR 50 to EUR 700 if a lawyer is involved.	If the consumer loses, they must pay the litigation expenses of the trader.	Impossible to estimate, depends on knowledge, literacy, perseverance and experience of consumer.	
<b>ADR or other relevant procedure</b>	EUR 0	EUR 0 if no lawyer is involved (lawyer's assistance not legally required). EUR 50 to EUR 700 if a lawyer is involved.		Impossible to estimate, depends on knowledge, literacy, perseverance and experience of consumer.	

**Hypothetical example: Terms which inappropriately exclude/limit consumers' rights to compensation**

A consumer went on a package holiday with a friend to Kenya for which they paid € 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 €5,000 (€4,000 for the cost of the package and €1,000 for lost time and enjoyment). The tour operator agreed to compensate them €1,000 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/unfair-contract-terms/index\\_en.htm](http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-contract-terms/index_en.htm)]

- Please estimate how often court and ADR procedures are used in your country for invoking the unfairness, and thereby the non-binding character of standard contract terms (i.e. the number of cases per year)?

According to the data supplied by the SCRPA, the SCRPA in 2015 adopted 140 resolutions on standard contract terms (non-binding suggestions to the trader to amend the standard contract term that the SCRPA considers to be unfair, also informing the trader that the SCRPA may apply to a court for invalidation of the unfair contract term). In 2015 Lithuanian courts adopted 51 decisions on standard contract terms.

## C. Interviews conducted and literature reviewed

**Table 5: Interviews conducted for this study**

Organisation	Stakeholder type	Date
Lietuvos bankų klientų asociacija (Lithuanian bank customers association)	Consumer organisation	2016-08-05
Lietuvos vartotojų organizacijų aljansas (Lithuanian Consumer Organisation Alliance)	National consumer enforcement authority	2016-08-05
Lietuvos Respublikos teisingumo ministerija (Ministry of Justice of the Republic of Lithuania)	Ministry	2016-08-10
Lietuvos bankas (Bank of Lithuania)	Sectoral regulatory authority	2016-07-20
Lietuvos Respublikos susisiekimo ministerija (Ministry of Transport and Communications of the Republic of Lithuania)	Ministry	2016-08-26
Valstybinė vartotojų teisių apsaugos tarnyba (State Consumer Rights Protection Authority)	Enforcement authority	2016-08-24
Valstybinė Kainų ir Energetikos Kontrolės Komisija (National Commission for Energy Control and Prices)	Sectoral regulatory authority	2016-08-17
Lietuvos Respublikos konkurencijos taryba (Competition Council of the Republic of Lithuania)	Enforcement authority	2016-08-23

**Table 6: Literature reviewed for country report**

Author/Source	Year	Title of publication
RIMKEVIČIUS M.	2012	Klaidinančios reklamos vertinimo kriterijai Lietuvoje ir ES (eng. <i>Evaluation Criteria of Misleading Advertising in the European Union and Lithuania</i> )
RIMKEVIČIUS M.	2011	Sąžiningos ir nesąžiningos komercinės veiklos samprata (eng. <i>Fair and Unfair Commercial Practices Concept</i> )
RIMKEVIČIUS M.	2011	„Nacionalinės moralės“ išimtis Nesąžiningos komercinės veiklos direktyvoje (eng. <i>National Moral's Exception in the Unfair Commercial Practices Directive</i> )
BUBLIENĖ D., ZEMLYTĖ E.	2012	Arbitražiniai susitarimai (arbitražinė išlyga) vartojimo sutartyse: per se nesąžininga sąlyga? (eng. <i>Arbitration agreements (arbitration clause) in consumer contracts: unfair term per se?</i> )
BUBLIENĖ D.	2011	Vartotojų teisė į informaciją pagal naująjį vartotojų teisių direktyvos pasiūlymą: žingsnis pirmyn? (eng. <i>Consumer Right to Information according to the New Proposal for a Directive on Consumer Rights: the Step Forward?</i> )
BUBLIENĖ D.	2009	Vartojimo sutarčių nesąžiningų sąlygų kontrolė (eng. <i>Control of Unfair Consumer Contract Clauses</i> )
BUBLIENĖ D.	2009	Vartotojų teisių direktyvos perkėlimas į Lietuvos teisę – tolesnis vartotojų apsaugos teisės dekodifikavimas ar kodifikavimas? (eng. <i>Transposition of Consumer Rights Directive into Lithuanian Law – further codification of decodification of law on consumer protection?</i> )
BUBLIENĖ D.	2006	Skaidrumo principas ir Nesąžiningų sąlygų direktyva (eng. <i>Principle of Transparency and Unfair Clauses Directive</i> )
BUBLIENĖ D.	2007	Silpnesnės šalies apsaugos principo įgyvendinimas nesąžiningų sąlygų kontrolėje (eng. <i>Implementation of Principle of Protection of Weaker Party in Control of Unfair Conditions</i> )
KATUOKA S. et al.	2006	Vartotojų teisių apsauga Lietuvoje ir Europos Sąjungoje (eng. <i>Consumer Protection in Lithuania and in European Union</i> )
MARKAUSKAS L.	2008	Reklamos teisinis reglamentavimas: teorija ir Praktika (eng. <i>Legal Regulation of Advertising: Theory and Practice</i> )
MARKAUSKAS L.	2009	Reklamos kaip komercinės informacijos ribojimo doktrina Lietuvos Respublikos Konstitucinio Teismo jurisprudencijoje (eng. <i>Doctrine of Advertising as a Limitation of Commercial Information in the Jurisprudence of the Constitutional Court of the Republic of Lithuania</i> )
MARKAUSKAS L.	2009	Reklamos ribojimas: Lietuvos Respublikos Konstitucinio Teismo ir Vokietijos Federalinio Konstitucinio Teismo požiūris (eng. <i>Limitation of Advertising: Approach by the Constitutional Court of the Republic of Lithuania and Federal Constitutional Court of Germany</i> )
EUROPEAN COMMISSION	2008	Report from the Commission concerning the application of Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interest
EUROPEAN COMMISSION	2012	Report from the Commission to the European Parliament and the Council concerning the application of Directive 2009/22/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interest
EUROPEAN COMMISSION	2015	Notifications according to Article 32 and 33 of the CRD

## Study for the Fitness Check of EU consumer and marketing law

SCHULTE-NÖLKE H., TWIGG-FLESNER C., EBERS M.	2007	EC Consumer Law Compendium - Comparative Analysis -
STUYCK J., TERRY E., COLAERT V., VAN DYCK T., PERETZ N., HOEKX N., TERESZKIEWICZ P., GIELEN B.	2007	An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings
CIVIC CONSULTING	2011	Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU



## 1. Study to support the Fitness Check of EU Consumer law – Country report LUXEMBOURG

### 1.1. Unfair commercial practices and marketing

On a preliminary basis, it should be noted that, in its public session of 13 December 2016, the Chamber of Deputies of the Grand-Duchy of Luxembourg (the national Parliament) approved a draft law which abrogates the '*Loi du 30 juillet 2002 réglementant certaines pratiques commerciales, sanctionnant la concurrence déloyale et transposant la Directive 97/55/CE du Parlement Européen et du Conseil du 6 octobre 1997 modifiant la directive 84/450/CEE sur la publicité trompeuse afin d'y inclure la publicité comparative*' in order to substitute it with a new law entitled '*loi sur les ventes en soldes et sur trottoir et la publicité trompeuse et comparative*'<sup>1</sup> (hereafter, the 'new law').

By this substitution, the intention of the legislator is to bring the legislation of Luxembourg into full compliance with the UCPD after the EU Commission sent a formal notice dated 6 June 2016 in the course of the infringement procedure against Luxembourg.

In this respect, it is important to note that:

- The new law does not involve an extension of the rules of UCPD to B2B;
- In the explanatory statement of the draft law,<sup>2</sup> the legislator assesses that the concept of 'unfair commercial practices' in a B2B perspective as defined in the abrogated law is in principle still covered by the '*Code de la consommation*' in the UCP section which indirectly protects business from competitors who do not follow the rules of the UCPD,<sup>3</sup> as well as by the competition law;<sup>4</sup>
- This assessment is however not shared by the business representatives, both the '*Chambre de commerce*'<sup>5</sup> and the '*Chambre des métiers*'.<sup>6</sup>

Regarding the legislative process of Luxembourg, this new Law should be promulgated by the Grand-Duc within three months of the approval and should enter into force three days after its publication in the official journal (the 'Memorial').

As the draft law was introduced in Parliament on 31 August 2016, the answers given in this report by the stakeholders generally do not take into account this new legislative situation.

<sup>1</sup> See <http://www.chd.lu/wps/portal/public/RoleEtendu?action=doDocpaDetails&id=7038#>

<sup>2</sup> See page 6  
[http://www.chd.lu/wps/PA\\_RoleEtendu/FTSByteServletImpl/?path=/export/exped/sexdpata/Mag/149/601/164080.pdf](http://www.chd.lu/wps/PA_RoleEtendu/FTSByteServletImpl/?path=/export/exped/sexdpata/Mag/149/601/164080.pdf)

<sup>3</sup> Code de la Consommation, articles L.122-1 to L.122-8.

<sup>4</sup> Competition law in Luxembourg is mainly defined in the "Loi du 23 octobre 2011 sur la concurrence" (an unofficial coordinated and updated version can be downloaded at <https://concurrence.public.lu/fr/legislation/Version-coordonnee-de-la-loi-du-23-octobre-2011-relative-a-la-concurrence.pdf>)

<sup>5</sup> See  
[http://www.chd.lu/wps/PA\\_RoleEtendu/FTSByteServletImpl/?path=/export/exped/sexdpata/Mag/145/678/164747.pdf](http://www.chd.lu/wps/PA_RoleEtendu/FTSByteServletImpl/?path=/export/exped/sexdpata/Mag/145/678/164747.pdf)

<sup>6</sup> See  
[http://www.chd.lu/wps/PA\\_RoleEtendu/FTSByteServletImpl/?path=/export/exped/sexdpata/Mag/160/620/165199.pdf](http://www.chd.lu/wps/PA_RoleEtendu/FTSByteServletImpl/?path=/export/exped/sexdpata/Mag/160/620/165199.pdf)

### 1.1.1. Effectiveness of the UCPD in establishing a high level of consumer protection

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

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

Firstly, it seems useful to inform that, prior to the UCPD, Luxembourg had a tradition of regulating commercial practices mainly focused on B2B relations in order to avoid unfair commercial practices and unfair competition. This explains why the introduction of the UCPD was not a complete overhaul of the legal landscape of commercial practices. Nevertheless, the legal landscape of commercial practices of Luxembourg did have to be adapted to comply with the UCPD.

Luxembourg had a specific Act on Commercial Practices before the UCPD, the '*Loi du 30 juillet 2002 réglementant certaines pratiques déloyales et transposant la directive 97/55/CE du Parlement Européen et du Conseil modifiant la directive 84/450/CEE sur la publicité trompeuse afin d'y inclure la publicité comparative*' (here after '*Loi du 30 juillet 2002*').

This Act focused on B2B relations, but consumer associations had and still have the power to initiate an injunction procedure against an unfair commercial practice as defined in this Act, including misleading and comparative advertising.

Following the preliminary remark on this report, the new law will abrogate the '*Loi du 30 juillet 2002*' after the finalisation of this report.

The UCPD was first implemented by a specific Act: '*Loi du 29 avril 2009 relative aux pratiques commerciales déloyales et modifiant - la loi modifiée du 30 juillet 2002 réglementant certaines pratiques commerciales, sanctionnant la concurrence déloyale et transposant la directive 97/55/CE du Parlement européen et du Conseil modifiant la directive 84/450/CEE sur la publicité trompeuse afin d'y inclure la publicité comparative; - la loi modifiée du 28 décembre 1988 réglementant l'accès aux professions d'artisan, de commerçant, d'industriel ainsi qu'à certaines professions libérales et modifiant l'article 4 de la loi du 2 juillet 1935 portant réglementation des conditions d'obtention du titre et du brevet de maîtrise dans l'exercice des métiers; - la loi modifiée du 16 avril 2003 concernant la protection des consommateurs en matière de contrats à distance; - la loi modifiée du 18 décembre 2006 sur les services financiers à distance.*'

On 12.04.2011, this Act was repealed by the Act introducing a '*Code de la consommation*' ('*loi du 12 avril 2011 portant introduction d'un Code de la consommation*').

Concerning the practical experience with the principle-based approach of the UCPD in Luxembourg, stakeholders were generally of the opinion that this approach is important in providing a general framework, which has the great advantage of covering all practices and offers a way of covering both old/traditional commercial practices and new ones. The principle-based approach is in line with the approach of the juridical order in Luxembourg, a civil law country.

It seems that practitioners – both consumer and professional associations - welcomed the UCPD implementation and assess it as being effective. Having said that, the enforcement authority notes that the effectiveness of enforcement of the principle-based approach of the UCPD needs clarifications, and that the case-law of the Court of Justice of the European Union (CJEU) is necessary and useful in this regard. The CJEU case-law is probably particularly important for Luxembourg, a small country which does not have a significant body of important case-law in consumer matters, particularly in UCP matters.

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

All stakeholders are quite happy with the black list as it is. No one expresses the desire to modify it.

Regarding particularly the effectiveness, all stakeholders emphasise the legal certainty for both parties (consumers and professionals) offered by the black list. The black list also serves to clarify the principle-based approach by given examples which are like indicators to guide professionals to respect the implementation of the UCPD and, hence, to adopt fair commercial practices.

Thus, even if it is not very tangible or concrete (failing specific case-law in Luxembourg), the practical benefits for consumers of the black list seem real.

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

No answers from any stakeholders.

- 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 what 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?*]

No answers from any stakeholders.

- 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 your country rigidly?*]

The notion of the 'average consumer' already existed in Luxembourg before the UCPD as a criteria for unfair commercial practices under the 'loi du 30 juillet 2002', particularly regarding advertising.

- 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 in your country recognised new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted)?*]

The practical benefits for consumers seem close to zero in Luxembourg. There is no case law in Luxembourg and stakeholders are more of the position that this notion is not useful.

From the point of view of some stakeholders, the vulnerable person concept is not useful because similar concepts already exist in other legislation, e.g. a 'minor' or 'indebted person'. Nevertheless, it could simply reflect a poor understanding on the application scope of an unfair commercial practice (the action) and its juridical consequences (i.e. tort law).

One of the stakeholders is of the opinion that this notion is contrary to legal certainty, and that its application in practice for professionals would be in conflict with personal and individual data protection.

- 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?*]

Answers from stakeholders are that there are no such self or co-regulation actions. In Luxembourg, self and co-regulation actions are not very developed, especially in the consumer protection field.

- 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?

No need. Stakeholders seem quite happy with the current list.

- Are there other measures that could improve the effectiveness of the UCPD in establishing a high level of consumer protection in your country? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

Some measures put forward by stakeholders include:

- Dialogue between enforcement authorities, consumers' association, and business/professional associations;
- Enhancement of the power of the CPCs in context of the CPC network;
- The setting up of a consumer Ombudsman scheme.

Regarding the dialogue between stakeholders, it is relevant to focus on the existence of the '*Conseil de la consommation*', a committee with equal representation of consumer and professional interests.

### 1.1.2. Effectiveness of the PID in establishing 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;

The PID is implemented in the *Code de la consommation*, in the Legislative part (Book 1, Title 1, chapter 2) articles L.112-1 – L.112-9 and in the Regulatory part, articles R.112-1 to R-112-5.

The assessment of stakeholders is that consumers are effectively informed about the unit selling price. Very few complaints from consumers in this respect have been reported to the consumers association or enforcement authorities.

It seems there is a high level of control of businesses on this matter.

- 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?

This topic seems to have been well-considered in Luxembourg and every stakeholder is in favour of a recognised measurement unit.

Different opinions emerge on how to have an objective measurement unit and on setting up an independent organism. A project based on the method of measurement stated in the Regulation 648/2004 for detergents is in process.

- The effects of the regulatory choices/derogations allowed by the Directive and applied by Member States. [Key aspects to consider are: Is the derogation relevant? Do companies make use of it? Are there consumer complaints because of this? If so, approximately how many per year?]

The derogation for small businesses exists in Luxembourg (i.e., businesses whose sales area is less than 400 m<sup>2</sup> and itinerant traders).<sup>7</sup> No consumer complaints are reported.

### 1.1.3. Effectiveness of the MCAD in providing protection for businesses

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

- 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 is implemented by the '*Loi du 30 juillet 2002*', articles 15, 16 and 17.

Answers of stakeholders show that the notion of advertising provides protection for businesses.

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, 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.

As indicated above, the disappearance of this unfair commercial practices concept is not well received by business representatives, which consider that some unfair commercial practices recognised by case law as an infringement of article 14 of the '*Loi du 30 juillet 2002*' will no longer be illegal, regarding both legal provisions from '*Code de la consommation*' (transposition the UCPD) as well as legal provisions from the competition law.

It seems thus that the new law, which aimed to bring Luxembourg legislation into compliance with UCPD, may indirectly involve a decrease in B2B protection.

Business associations, especially SME associations (*Chambre des Métiers*) assess that it should have better sanctions against misleading advertising, i.e. cancellation or termination of a contract concluded on that basis.<sup>8</sup>

With respect to the legislative process of the new law, an SME association proposes to insert in the new law a general prohibition of misleading acts.<sup>9</sup>

<sup>7</sup> Code de la consommation, article L.112-5 « (1) L'indication du prix à l'unité de mesure des produits autre que ceux commercialisés en vrac, offert à la vente dans les commerces dont la surface de vente n'excède pas 400 m<sup>2</sup> ou dans un commerce ambulancier, est facultative. (2) La dérogation prévue au paragraphe premier est exclue lorsque plusieurs commerces sont exploités par une même personne, physique ou morale, et que la surface de l'un d'entre eux excède 400 m<sup>2</sup>. »

<sup>8</sup> It should be noted that it is already possible to cancel a contract under classical contract law in Luxembourg (Code civil, article 1103 and subsequent, but it is difficult to obtain mainly due by the fact of the burden of proof).

<sup>9</sup> "La Chambre des métiers propose que soit intégrée dans le projet de loi sous avis un principe général d'interdiction des actions trompeuses entre professionnels"

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

This approach is important in providing a general framework which has the great advantage of covering all practices and offers protection both against old or traditional commercial practices and new ones.

- The effects of the minimum harmonisation provisions on misleading advertising; *[Key aspects to consider are: Which national rules that go beyond the MCDA, 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)?]*

There are no national rules that go beyond the MCAD. In particular, there is no extension of the UCPD to B2B relations.

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

Comparative advertising is not in use in Luxembourg.

Luxembourg authorities are in favour of the principle of maximum harmonisation.

- 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;

No answer, mainly because comparative advertising is not in use in Luxembourg.

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

No answer. However, a business association said that advertising is mainly limited to specific national markets, and that businesses on either side of the border would have no interest in engaging in cross-border comparative advertising.

- Are there measures that could improve the effectiveness of the MCAD in providing protection for businesses (see also 1.1.6 below)? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

No answer from stakeholders.

#### 1.1.4. Effectiveness of current rules 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;

No relevant answers for this question. The impact on cross-border trade of these disparities, if it exists, should be minor.

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

Having a uniform black list in all Member States simplifies the life of the consumer. It is an advantage for Luxembourg as a small country. Professionals know the black list



already and the obligations deriving from it. It is an advantage for cross-border business. The effect on the free movement of goods and services is positive.

- Whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade. [*Do the national differences play a role in a business perspective? Have they caused problems?*]

No specific experiences reported

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;

No specific experiences reported

- Whether the minimum harmonisation character of provisions on misleading advertising represents a barrier to cross-border trade;

No specific experiences reported.

- 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;

No specific experiences reported.

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

No specific experiences reported.

#### 1.1.5. Interplay amongst UCPD information requirements according to Article 7(4) with the information requirements in the horizontal consumer law instruments

Regarding the information requirements according to Article 7(4) UCPD ("invitation to purchase") in the advertising stage, please analyse:

- The level of awareness of traders as regards information requirements at the advertising stage, as in particular demonstrated by their practical application; [*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?*]

The level of awareness of individual traders seems to be commensurate with the level of organisation of the branch involved; in those industries and trades where traders are well organised and associated, they tend to have a better understanding of the regulatory boundaries. They also have a reputation which is at stake if they contravene the legal standards.

Enforcement authorities pointed out that in the actions and advertising of businesses, the UCPD is respected most of the time, but that better information for professionals should be recommended, mainly by traders organisations.

It appears from the stakeholders' responses that there are disparities in the level of information between sectors and between SMEs and other enterprises. In the financial



sector, for example, almost all professionals have a juridical department and deal with pre-contractual information in a proper way. Very few complaints are reported in that respect.

SMEs consider in general that legislation is too complicated, with too much information. A good number of SMEs are not really conscious of the scope of their obligations regarding information. The level of bureaucracy required to comply with information obligations is criticised by SMEs.

Stakeholders overall assess that there is an overlapping of information requirements; a common point addressed at this point by the interviewees is the increasing complexity of overlapping Directives concerning information duties on businesses.

- 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?

Overlap and conflict between the UCPD and E-commerce Directive is not reported.

However, interviewees report overlap between the UCPD and CRD but they seem to say that such overlap can be justified.

Authorities and business representatives emphasize that the complexity of the various overlapping rules should be a concern to the EU – adding more rules will further increase this complexity.

#### 1.1.6. Relevance for business-to-business transactions

Regarding the area of unfair commercial practices/marketing, please analyse:

- 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 cross-border trade;

Whether the extension to B2B practices would benefit cross-border trade is uncertain. Interviewees are mainly in favour of the status quo. No academic articles were found.

Some argue that current legislative tools are sufficient and offer adequate protection in B2B transactions if they are properly enforced, especially competition law and the Services Directive. Regarding the Services Directive, it emphasizes that enforcement of the principle of prohibiting discrimination by nationality bring benefits for cross-border trade. This is particularly true for Luxembourg (as a small country), as it is reported by the Ministry of Economy that Luxembourg's traders are common victims of discrimination for supply of goods in the internal market.

- 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;

Interviewees are generally in favour of the status quo. No academic articles were found. Interviewees argue that the principles of freedom of trade and freedom of contract which regulate B2B and the regulation of the market by competition law are sufficient legislative tools.

SME representatives have divergent opinions, and it appears that a not negligible percentage of SMEs are victims of fraud, generally based on cross-border misleading practices.<sup>10</sup> An extension of misleading commercial practices to B2B (without

<sup>10</sup> See results of a 2013 Benelux study in this respect: <http://www.cdm.lu/news/fiche/2013/07/les-pratiques-frauduleuses-visant-les-professionnels-l-ampleur-du-probleme>.

distinction between SME and others) could be a solution to stop this cross-border fraud. A protection against aggressive practices is not relevant.

With respect to the legislative process of the new law, an SME association proposed to insert in the new law a general prohibition of misleading acts. This proposal will not be adopted by the Parliament and the new law does not include such a prohibition (see also above).

- 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 also cover unfair commercial practices during and after the transaction;

Interviewees are generally in favour of the status quo.

Even if SME representatives assess that it could be useful to extend protection against misleading practices to B2B transactions, this extension should cover only the pre-contractual stage (for misleading practices only).

- Whether there is a need to have a black-list of practices in the business-to-business marketing area;

Interviewees are generally in favour of the status quo. No black list is needed according to interviewees, except for an SME representative, which assessed that a black-list could be useful only to fraud, due to the fact that B2B frauds are mostly of the same type.

- What should be the enforcement cooperation mechanism in the business-to-business marketing area;

The SME representative assessed that it could be useful to combat cross-border fraud (see above). Other stakeholders were in favour of the status quo.

- Whether there is a need to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive;

The SME representative assess it could be useful only to combat cross-border fraud (see above). Other stakeholders were in favour of the status quo.

- Whether there is a need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive.

Stakeholders see no need for this.

#### 1.1.7. Relevance of contractual consequences of unfair commercial practices

Please analyse whether there are in your country:

- 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;

The *Code de la consommation* has a specific legal provision (article L.122-8) 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.<sup>11</sup> 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.

The Civil Code can also be used by a consumer to ask for the 'classical' avoidance of the entire contract by invoking substantial error, irresistible violence or deceit (article 1109 to 1117). In case of '*lésion*' (i.e. in case of obvious disproportion at the moment of the conclusion of the contract between reciprocal performance) or in case of a contract based on an illicit cause (e.g. usury or other moral behaviour), avoidance of the contract is also possible (Code civil, article 1118 and articles 1131 to 1133). But this will hardly ever be applicable to unfair commercial practices.

- Any case law (enforcement decisions, court rulings) providing for such consequences;

No case law based on the specific legal provision.

- Whether there is, based on past experience in your country, a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

There is no need for interviewees.

## 1.2. Contract conclusion and performance

### 1.2.1. Effectiveness of the current rules in establishing 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;

Luxembourg was one of the pioneers in this respect with the '*Loi sur la protection des consommateurs du 25 août 1983*'.

The national law transposing UCTD is the *Code de la consommation*, Partie 1, Livre 2 Titre 1 chapitre 1, section 2; articles L.-211-2 to 211-5.

The open clause defined in article L.211-2 of the *Code de la consommation* is not the same as the unfairness test under Art. 3(1) UCTD. In Luxembourg a 'significant imbalance' in the parties' rights and obligations arising under the contract is not required. An 'imbalance' in the parties' rights and obligations arising under the contract is enough.<sup>12</sup>

Following the case-law of the Court of Justice, the courts are required to apply the unfairness test of their own motion (i.e. *ex officio*). Nevertheless, the Supreme Court of the juridical order of Luxembourg ('*La Cour de cassation*') has not confirmed this requirement so far.

Due to the *ex officio* application of the unfairness test, the principle-based approach is fairly effective, even where the courts are required to evaluate the term on a case-by-case basis.

<sup>11</sup> Article L.122-8 (2) « Toute clause ou toute combinaison de clause d'un contrat, conclue en violation du présent titre, est réputée nulle et non écrite. Cette nullité ne peut toutefois être invoquée que par le consommateur. »

<sup>12</sup> On the notion of "imbalance", see following case law : Président du tribunal d'arrondissement de Luxembourg siégeant en matière commerciale, Ordonnance n° 480/10 du 26 mars 2010 et Ordonnance n° 199/11 du 18 février 2011 (referenced in page 114 of the following link : [http://www.legilux.public.lu/leg/textescoordonnes/codes/Code\\_de\\_la\\_Consommation/Code\\_de\\_la\\_Conso\\_mation.pdf](http://www.legilux.public.lu/leg/textescoordonnes/codes/Code_de_la_Consommation/Code_de_la_Conso_mation.pdf))

The usual situation is that the court must take into account all circumstances of the case, including specific circumstances that are to the advantage of the trader. However, under the open clause of article L.211-2 of the *Code de la consommation*, it is the consumer who bears the burden of proof that the term is unfair.<sup>13</sup>

Concerning the practical experience with the principle-based approach of the UCTD in Luxembourg, stakeholders were generally of the opinion that this approach is important in providing a general framework, with the advantage to cover all practices and offer a level playing field. The principle-based approach is in line with the approach of the juridical order in Luxembourg, a civil law tradition country.

The case law in Luxembourg, although rare in consumer protection matters, gives several examples of application of the open clause.<sup>14</sup>

- 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 your MS? Does this work in practice or are there problems?*]
- 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; [*Note: If a black/grey list exists in your country, key aspects to consider are: How does the list work in practice? Does it make a difference to have such a list?*]

A black list, including the indicative list of unfair terms annexed to the UCTD, is object of article L.211-3 of the *Code de la consommation*. There is no grey list.

The black list works in practice and all interviewees were quite happy with this tool. Traders' organisations consider that their members know this list and estimate that the sanction of avoidance of a clause or combination of clauses without avoidance of the whole contract is appropriate.

A black list represents an advantage both for traders and consumers due to the fact they both know whether a clause is unfair or not. It is an advantage when professionals write general terms and conditions, in terms of legal certainty. It is a huge advantage for consumers in terms of the burden of proof. A clause in the black list is unfair in all circumstances.

A black list is also an advantage for enforcement authorities, as they do not have to argue with professionals as to whether a clause falls under the scope of the open clause.

The case law in Luxembourg, although rare in consumer protection matters, gives several examples of application of this black list.<sup>15</sup>

<sup>13</sup> See Président du tribunal d'arrondissement de Luxembourg siégeant en matière commerciale, Ordonnance n° 480/10 du 26 mars 2010 et Ordonnance n° 199/11 du 18 février 2011 (referenced in page 114 of the following link : [http://www.legilux.public.lu/leg/textescoordonnes/codes/Code\\_de\\_la\\_Consommation/Code\\_de\\_la\\_Consommation.pdf](http://www.legilux.public.lu/leg/textescoordonnes/codes/Code_de_la_Consommation/Code_de_la_Consommation.pdf) )

<sup>14</sup> See pages 114 et 116 of the following link : [http://www.legilux.public.lu/leg/textescoordonnes/codes/Code\\_de\\_la\\_Consommation/Code\\_de\\_la\\_Consommation.pdf](http://www.legilux.public.lu/leg/textescoordonnes/codes/Code_de_la_Consommation/Code_de_la_Consommation.pdf)

<sup>15</sup> See, for example, Cour d'appel, 10/12/2011, ULC c. Luxembourg on line, n° 36.698, Pas. Lux. N° 1/2013, referenced in page 114 of the following link : [http://www.legilux.public.lu/leg/textescoordonnes/codes/Code\\_de\\_la\\_Consommation/Code\\_de\\_la\\_Consommation.pdf](http://www.legilux.public.lu/leg/textescoordonnes/codes/Code_de_la_Consommation/Code_de_la_Consommation.pdf)

- 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: In your country, have the effects of court decisions establishing the unfairness of an unfair term been extended to all contracts of the trader concerned or to the contracts of any other trader containing such a term? If so, how does this work in practice? What are the impacts on businesses? If there are no such effects of court decisions on unfair terms: what are the effects of this situation?]

In individual proceedings, all circumstances of the case must be taken into account, including those that are particular to the specific consumer or the specific trader, provided that these specific circumstances were known to the other party at the time of the conclusion of the contract.

In Luxembourg, a court decision has binding effects only for the parties in this specific proceeding: a court's decision in such an individual case cannot be extended to all contracts of the trader concerned or to the contracts of other traders, as the specifics of these contracts need to be taken into account instead of the specifics of the case that had been decided. This means that consumers and traders are uncertain as to the outcome of the unfairness test even in cases where the same or a similar term had been tested before and found to be fair or unfair.

This is different for terms that are black listed, as it may be assumed that another court would come to the same conclusion.

Notwithstanding what was said above, the *Consumentenbond* notes that if a court is faced with a term which has been found unfair in an earlier case, there is a strong likelihood that the term will be found unfair in a later case as well, particularly if that term was used by the same trader.

Nevertheless, the *Code de la consommation*, article L.211-4, provides that a professional who invokes against a consumer a clause or combination of clauses declared unfair by a court sentence which have force of *res judicata*, should be guilty of a (administrative) fine.<sup>16</sup> This sanction has plays a preventative role in avoiding unfair clauses in practice.

The case law against a professional can also be used by other consumers to invoke the avoidance of the unfair clause, especially if this case law is published by national newspapers, or by the consumer associations, for example.

The *Code de la consommation*, published by Legilux, contains a case law part.<sup>17</sup>

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

Interviewees assess the Directive to be effective in practice. A consumer association recalls that when a term is not transparent, its interpretation must be in favour of the consumer.

<sup>16</sup> Code de la Consommation, art. L.211-4 : « Le professionnel qui invoque à l'encontre d'un consommateur une clause ou une combinaison de clauses, déclarée abusive et comme telle nulle et non écrite, par une décision judiciaire ayant autorité de la chose jugée intervenue à son égard, est puni d'une amende de 300 à 10.000 euros. »

<sup>17</sup> [http://www.legilux.public.lu/leg/textescoordonnes/codes/Code\\_de\\_la\\_Consommation/Code\\_de\\_la\\_Consommation.pdf](http://www.legilux.public.lu/leg/textescoordonnes/codes/Code_de_la_Consommation/Code_de_la_Consommation.pdf)

- 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. [Note: Question only relevant for MS that have put in place extensions of application of UCTD]

Luxembourg law provides the extension to individually negotiated terms. There is no extension to terms on the adequacy of the price and the main subject-matter.

This extension is not a problem for business and represents a real advantage for consumers, who can ask avoidance of abusive clause even if it was negotiated.

The *ratio legis* is that, even if the consumer negotiates, they are not as well informed as the professional, so the consumer is still in a position of weakness.

Having said that, the *Cour de cassation* (Supreme Court of the juridical order in Luxembourg) by a Judgement of 5 December 2013, seems to avoid the extension made by the national legislator (by the law of 25 August 1983, so actually before the existence of UCTD). Following the Supreme Court, a contract concluded by the intermediary of a notary public is not a standard contract within the meaning of the law of 25 August 1983 regarding the protection of the consumer (now integrated in the *Code de la consommation*) and Directive 93/13/CEE on unfair terms in consumer contracts.

According to an author who comments on this Judgment<sup>18</sup> by reference to parliamentary works, this interpretation of the Supreme Court should not prevail and a contract concluded by a consumer does not have to be a standard contract to be in the scope of the national legislation (i.e. article L.211-2 and subsequent).

Another well-known author,<sup>19</sup> who based his opinion on two Judgments of the Court of appeal,<sup>20</sup> the scope of the *Code de la consommation* (and by consequence, the UCTD) does not involve real estate transactions with a public notary. Nevertheless, the same author quotes another Judgement of the Court of Appeal which sets aside a clause in a real estate contract concluded by the intermediary of a notary public as it was considered to be unfair.<sup>21</sup>

- 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?]

An unfair term may be avoided by the consumer. Technically, avoidance should take place by a court decision. However, in practice, a consumer can refuse to act as stipulated in the unfair term and ask for the avoidance of this term if a professional seeks to apply it. Traders will sometimes not accept the avoidance of the term, in which case the consumer needs to turn to a court or an ADR institution.

There is no information as to whether national courts take up the active role imposed by the Court of Justice. As mentioned above, as Luxembourg is a small Member State with a population of less than a million, case law in consumer protection is rare. There is no case law in which a court invokes unfairness *ex officio*.

There is no administrative authority or committee with equal representation dealing with unfair commercial practices.

<sup>18</sup> P. Goerens, *Observations sous Cass. 5 décembre 2013, n° 71/13*, Journal des Tribunaux luxembourgeois, 2014, n°34, p.109 et suivantes.

<sup>19</sup> G. Ravarani, *La responsabilité civil des personnes privées et publiques*, 3<sup>e</sup> édition, Pas. Lux. 2014, pages 788 à 810, see point 759.

<sup>20</sup> Court of appeal, 14.03.2011, n° 24 030 and Court of appeal, 19.12.2012, n° 38.550.

<sup>21</sup> Court of appeal, 27.11.2012 Pas. 32, p. 307.



- In a forward looking perspective: Are there other measures that could improve the effectiveness of the UCTD in establishing a high level of consumer protection in your country? Would a graphical presentation model improve the readability and comprehension by consumers of the T&Cs? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

Some interviewees are of the opinion that standard terms and conditions (including some obligatory terms and conditions while allowing for contractual freedom for another provisions) can be improved and could be very useful for SMEs. Nevertheless, professionals should still have the power to adapt a contract to their specificities.

### 1.2.2. Effectiveness of the current rules 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 disparities have an impact on cross-border trade; [Key aspects to consider are: Do national differences in the application/implementation of the Directive play a role for businesses? Have these differences led to changes in their business strategy? Have these differences caused problems? Please provide examples, if relevant]

No relevant experience was reported by authorities or associations.

- 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;

No relevant experience was reported by authorities or associations.

- 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.

No relevant experience was reported by authorities or associations. Associations of professionals have not reported any problem with the extension to individually negotiated terms.

### 1.2.3. Relevance for business-to-business transactions

Regarding the area of contractual fairness and in relation to the Unfair Contract Terms Directive, please analyse:

- Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;

Interviewees (authorities and associations) are of the opinion that the freedom of contract must prevail in B2B.

- 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;

Interviewees (authorities and associations) are of the opinion that it is not appropriate for B2B transactions.



- 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;

See above.

- 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;

Interviewees assess there are not such specific contractual terms often used in B2B transactions.

- Whether there is a need for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive;

No need. Authorities assessed that obligations of transparency play in favour of big companies (multinationals) and penalize small structures (which have fewer human resources and financial means).

- Whether an extension of the Unfair Contract Terms Directive to B2B transactions can bring benefits for cross-border trade;

Interviewees assess that there is no benefit 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;

No opinions

- Whether the benefits of extending the scope to business-to-business transactions would exceed the negative consequences of such an extension.

No opinions

### 1.3. Injunctions

#### 1.3.1. Effectiveness of the current rules in establishing a high level of consumer protection

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

- To what extent is the use of the injunction procedure in your country contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment?<sup>22</sup>

It is important to note that the injunction procedures relating to directives listed in Annex 1 of the ID which offer juridical protection of consumers take place in part 3 of the *Code de la consommation* (legislative part).<sup>23</sup>

There is one exception: the injunction procedure for some infringements (which offer protection not only to consumers) of the Directive on E-commerce (n° 8 of Annex I of ID) takes place in article 71-1 of the Law on E-commerce dated 14 August 2000 titled '*Loi relative au commerce électronique modifiant le Code civil, le Nouveau Code de*

<sup>22</sup> 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.

<sup>23</sup> Article L.320-1 to L.320-7

*procédure civile, le Code de commerce, le Code pénal et transposant la directive 1999/93 du 13 décembre 1999 relative à un cadre communautaire pour les signatures électroniques, la directive 2000/31/CE du 8 juin 2000 relative à certains aspects juridiques des services de la société de l'information, certaines dispositions de la directive 97/7/CEE du 20 mai 1997 concernant la vente à distance des biens et des services autres que les services financiers.'*

Persons, authorities or organisations who are legally allowed to introduce an injunction procedure depend on the infringement to the consumer protection rule affected.

Pursuant to the extension allowed by article 7 of ID, the injunction procedure for an infringement against the UCPD or UCTD (i.e. the national laws transposing), is the most open procedure and can be activated by any person (who can prove a right of action),<sup>24</sup> a professional organisation, a qualified organisation (both national<sup>25</sup> and foreign<sup>26</sup>) whose interests are injured, company/associations whose purpose justifies the legal action, the Ministry competent for consumer protection, the national financial sector enforcement authority ('*Commission de Surveillance du Secteur Financier*') and the national insurance sector enforcement authority ('*Commissariat aux Assurances*').<sup>27</sup>

The extent of contribution to the reduction in the number of infringements to consumer protection law is important for several reasons:

- An enlargement of *res judicata* offered by a Judgment rendered within the framework of the injunction procedure. Classically, *res judicata* of a Judgment is only binding for the parties involved in the procedure. But in case of a Judgment rendered within the framework of the injunction procedure, this effect is enlarged to every case of the trader.
- The case-law effect, which prevents similar infringement. This effect might be more effective if the possibility of publication of the Judgment (entire or a part) in a public location (with a large sovereign power of the Judge) at the infringer's cost is used;<sup>28</sup>
- The ability to couple with an order a periodic penalty payment (known as '*astreinte*' in Benelux) in case of non-compliance;
- The criminal sanctions provided for every injunction procedure in case of infringement of a Judgment rendered in the framework of the injunction procedure;
- Ministry of Economy and Foreign Affairs (currently competent for consumer's protection) and the consumer organisation can threaten a rebellious trader with an injunction procedure.

Stakeholders feel that the use and/or the threat of use of the collective injunctions procedure is highly relevant for national cases. Hence, stakeholders revealed that, when an injunction procedure is brought against a trader, a dialogue could start and an agreement can be found.

The instrument of cross-border injunction before civil courts has not proved relevant at all, due to the fact there have been no cross-border injunctions yet. It seems that foreign consumer associations are either unfamiliar with the legal possibilities or the obstacles are too high.

<sup>24</sup> Specifically a consumer who concluded a contract with the traders prosecuted

<sup>25</sup> Referred to in article L.313-1 of Code de la consommation

<sup>26</sup> Referred to in article L.313-2 of Code de la consommation, those association inscribed in the list published in OJEU pursuant to article 4, point 3 of the ID

<sup>27</sup> It is important to notice that the last two authorities are competent authorities in the framework of the CPC Regulation (see article L.311-5 of Code de la consommation)

<sup>28</sup> This possibility has not been used yet.

- What measures in your national legislation on injunction procedure are considered to be particularly effective, if any: measures regarding the cost of the procedure, the 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?

Mainly, the summons procedure: a first hearing is generally fixed after 2-3 weeks of the injunction procedure is initiated.

Criminal sanctions for non-compliance with the injunction order, which can be up to EUR 120 000, are particularly dissuasive. It is important to mention that criminal sanctions may have a direct impact on the incorporation permit of the trader.

- Has your country extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunction Directive? If yes, what are the additional consumer rights covered?

Yes, additionally consumer rights covered are:

- Protection in the indication of the prices of products and services offered to consumers (injunction procedure provided in article L.320-1 (refers to infringement of articles L. 112-1 to L.112-8);
- General obligation to provide consumers with information before they sign a contract (injunction procedure provided in article L.320-7 (refers to infringement of article L. 111-1).

Note that 'new' rights from the CRD are also covered.

- Analysis of the obstacles to the effective use of the injunction procedure, in particular by analysing which progress in removing obstacles has been made and/or new difficulties that have emerged in your country since 2012.

It seems that the legal landscape for injunctions is favourable in Luxembourg. The main obstacles seem to be financial rather than legal.

- In a forward looking perspective: Should the coverage of the Injunctions Directive be extended (by including additional legislation into Annex I to the Directive)? If so, which EU legislation should be included? Are there other measures that could improve the effectiveness of the ID in establishing a high level of consumer protection? Should the scope of the Injunctions Directive be extended to the protection of collective business' interests? Are there best practices in your country that could be relevant for other countries and considered as model for the injunction procedure at EU level?

For the enforcement authority, the summons procedure is a key point and focus should be placed on it.

Persons, authorities or organisations who are legally allowed to introduce an injunction could be extended (see above).

The scope of the Injunctions Directive could be extended to the protection of collective business' interests, especially regarding frauds described above.

### 1.3.2. 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:

- How effective is the injunction procedure in addressing infringements originating in another EU country?

Not applicable, as the cross-border injunction procedure has not been used in Luxembourg.

- How effective is it to address infringements originating in another EU country that qualified entities in your country are enabled to seek injunctions in the other Member State (Article 4 of the Injunctions Directive)?

Not applicable.

- In a forward looking perspective: Are there non-legislative or/and legislative measures that could improve the effectiveness of the injunction procedure in addressing infringements originating in another EU country? Are there best practices in your country that could be relevant for other EU countries and could be considered as a model for the injunction procedure at EU level?

Not applicable.

### 1.3.3. Interplay between the Injunctions Directive and other enforcement instruments of consumer law

Please analyse:

- Is the injunction procedure as designed by the Injunctions Directive regulated separately in your country (in a separate legal act or as a separate procedure regulated within the same legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (UCPD, UCTD and by the Consumer Rights Directive)?

Yes; see earlier answers as well as the following.

- If these procedures are regulated separately: What are the main differences between them? How is the coherence between these procedures ensured? If these procedures are regulated in a single legal act (possibly as a single procedure): In what way do these procedures (or this procedure) go beyond measures foreseen by the Injunctions Directive?

These procedures are regulated separately in a single legal act (*Code de la consommation*), for the satisfaction of consumers and traders (see answers above).

The main difference between procedures is the persons or entities that can bring the procedure. For the UCPD and UCTD, the injunction procedure is open to a large range of persons and entities (see earlier answers).

For the CRD: qualified entities (both national and foreign) and the Minister competent in consumer protection matters are the only entities that may bring the injunction procedure.

By this main difference, the UCTD and UCPD injunction procedures go beyond measures foreseen by the Injunctions Directive (see above answers).

## 1.4. Cross-cutting issues

### 1.4.1. Cost and benefits of the directives covered by the study

- To what extent is there evidence for benefits for consumers stemming from the protection provided by both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of benefits for consumers from the protection against unfair commercial practices and unfair standard terms in contracts; [*Note: a relevant aspect in this context is whether the costs for consumers in exercising their rights under these directives are limiting these benefits or not.*]

According to stakeholders, it is difficult to prove the benefits that consumers gain from European Union consumer rules, but they have no doubt that there are benefits.

Mainly, EU consumer rules offer a legal framework creating a level playing field, and as a consequence, offer legal certainty and confidence for consumers.

ECC Luxembourg points out that it is very often difficult to make traders admit their fault or illegal practices in an extrajudicial amiable approach (excluding both ADR and judicial schemes).

By consequence, consumers should bring a judicial action to claim the protection offered by EU consumer rules. This means of settlement is very often associated with lawyer fees that are very often disproportionate given what is at stake. This is the main aspect that limits benefits for consumers. In this respect, ECC Luxembourg points out the European procedure for small claims as representing progress in terms of the effectiveness of consumer rules.

- To what extent is there evidence for benefits for traders stemming from both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of creating a level playing field for honest traders by providing a legal basis to eliminate or at least constrain dishonest market practices, such as the use of unfair standard terms in contracts or unfair commercial practices, including through the application of the Injunctions Directive;

According to stakeholders, benefits of EU consumer rules result from a legal framework which creates a level playing field, and as a consequence, offers legal certainty and confidence for consumers and helps to eliminate practices harming the reputation of specific economic sectors.

- What are costs for traders due to the need to respect the requirements under the directives covered by the study? [*Note: Such as costs of research, legal advice and compliance as well as the amount of time necessary to comply with the directives*]

Types of cost faced by traders include legal advice to check the compliance of or write standard terms and pre-contractual information, for legal research, legal monitoring, and compliance.

- What are the costs involved in the public enforcement of these rules?

The Ministry of Economy assesses it to be important to have EU texts that are clear and coherent relative to the limited costs of public enforcement. Luxembourg enforcement authorities have no performance duty, contrary to some other EU Member States.

- Are there indications that the directives covered by the study are not implemented in your country in a cost-effective manner?

No indication from stakeholders.

- Could the costs for implementing and enforcing the rules of the directives covered by the study be reduced without lowering the level of protection for consumers? If so, how?

The Ministry of Economy points out the question of establishing the right balance between legal duties for traders and the cost of compliance and outlines Luxembourgish pleas to eliminate the cost for traders resulting from the need to adjust to 28 different laws, to the extent that there is no maximum harmonisation or minimum harmonisation with mutual recognition.

SME representatives and trader organisations recommend making the use of models (for example, indicating the right of withdrawal) more widespread in EU consumer rules.

ECC Luxembourg assesses that it should be set up a system in which consumers are not forced to bring an action, for example, in model similar to the EU small claims procedure.

Codification, a better coherence between EU consumer directives, and an effort of simplification were also indicated by interviewees.

#### 1.4.2. Interplay with EU sector-specific consumer protection legislation

Regarding the interplay of the horizontal EU consumer legislation [mainly UCPD and UCTD] with EU sector-specific consumer protection legislation in the areas of electronic communications, passenger transport, energy and consumer financial services, please:

- Analyse the levels of awareness of the requirements of the horizontal EU consumer legislation (mainly UCPD and UCTD) of businesses and consumers and the specific public enforcement bodies in the relevant sectors, as in particular demonstrated by their practical application; [*Key question here is: Are UCPD and UCTD applied in practice by national authorities and courts as a legal basis to combat unfair commercial practices and unfair standard terms in contracts in the regulated sectors?*]

According to stakeholders, the *Code de la consommation* is very important for the awareness of the consumer legislation for businesses, consumers and specific public enforcement bodies.

The Ministry Of Economy points out the website [www.guichet.lu](http://www.guichet.lu) that covers all useful information for citizens and businesses.

According ECC Luxembourg, difference of awareness may be found between SMEs and other businesses. SMEs are generally not as well informed as other businesses, due mainly to the fact that SMEs often do not have legal counsel.

- Specify whether in your country the same authority is responsible for the enforcement of the horizontal EU consumer law 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 UCPD/UCTD in the regulated sectors, as specified in the previous bullet?*]

As is explained by the Ministry of Economy, in Luxembourg there are several regulators competent to supervise and enforce consumer protection legislation in addition to the Ministry of Economy, which is the main regulator in this area.

The Authority of Financial Markets (*Commission de surveillance du secteur financier* - CSSF) is competent with regard to financial services.

The Authority of Insurance Market (*Commissariat aux assurances*) is competent with regard to insurance services.

The *Institut luxembourgeois de la Réglementation* (ILR) supervises compliance with regard to telecom services and energy services.

Cooperation between the regulators mentioned above works well and the share of responsibilities is defined in part 3 of the *Code de la consommation* (articles L.311-4 & L.311-5).

- Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning contractual fairness, 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.?.]

According to stakeholders, there are no issues, overlaps or conflicts.

CSSF points out that the Markets in Financial Instruments Directive rules are always compatible with EU consumer rules with the same aim, to protect the investor or consumer.

- What are the benefits of the complementary application of the UCPD and UCTD in the regulated sectors? What are the costs due to the complementary application with the sectoral EU consumer protection legislation?

No relevant answer.

- Assess any need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law.

The Ministry of Economy points out that, for coherence between specific sectors, the definition of consumer should be the same as the definition in horizontal EU consumer law. Otherwise, there is no need of clarification according to stakeholders.

#### 1.4.3. Relevance of consumer law directives for consumer-to-business transactions

- Please analyse the need and potential for the application of the consumer law directives (mainly UCPD and UCTD) to 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 Ministry of Economy, C2B relations are, in reality, B2C relations, since a consumer uses a service provided by a business. This position may be based on the definition of 'consumer' and 'professional' given by the *Code de la consommation* (Article L.010-1). Those definitions permit the identification of the application scope of the consumer law, which is every contract between a consumer and a professional, as defined in the *Code de la consommation*. As a consequence, consumer law rules are still applicable in C2B transactions in favour of consumers.

Although none of the stakeholders explicitly answered as such, precedent answers in this report would suggest that the professional does not need protection in C2B transactions (see above, section 1.2.3.).

There is no literature on this question.



#### 1.4.4. Specific protection for vulnerable consumers

Please analyse:

- Whether the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined in the consumer law directives and relevant jurisprudence, and as applied by national authorities and courts in your country, continue to be valid and fit for purpose.

The notions of 'consumer' and 'average consumer' work fine in practice, but the notion of a 'vulnerable consumer' is not actually used in practice.

According to stakeholders, the other concepts used continue to be valid. It may be pointed out that almost all stakeholders refer 'average consumer' to the classical civil law concept of '*bonus pater familia*'.

- To what extent the existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers and whether, based on the experiences in your country, specific provisions should be introduced in other directives concerned, in particular the Unfair Contract Terms Directive.

No answer available.

#### 1.4.5. EU added value

- Overall, would you consider that protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in your country since the implementation of the UCPD and the UCTD in national legislation?

According to the Ministry of Economy, there is a positive impact, even if it is difficult to quantify it. According to ECC Luxembourg, however, implementation of the UCPD and UCTD has no significant impact on the consumer's protection.

- Overall, would you consider that the information of consumers regarding unit prices has improved since the implementation of the PID in national legislation?

See precedent answer.

- Overall, would you consider that the protection of businesses against unfair marketing in your country has improved since the implementation of the MCAD in national legislation?

According to the Ministry of Economy, there is a positive impact, even if it is difficult to quantify it.

- Overall, would you consider that it has become easier for businesses in your country to directly trade cross-border to final consumers located in other EU countries in recent years? Has it become easier for consumers in your country to directly purchase cross-border from traders located in other EU countries?

According to the Ministry of Economy, consumers of Luxembourg have always been cross-border consumers, that is why it is difficult to assess whether Directives subject to this study have an impact. The fact that EU consumer law and contact points are developing is a positive sign for consumers.

According to ECC Luxembourg, introducing the Euro had probably more impact on cross-border consumption than the EU consumer rules.

- To what extent are these improvements, if any, due to the mentioned directives?

See answer above. The Ministry of Economy points out that European law permits a realisation for businesses of the advantages of the single European market with harmonised mutual recognition.

## Annex

## A. Transposition fact sheet

**Table 1: Fact sheet on transposition of directives in Member States' law – LUXEMBOURG**

Directive	Transposition legislation (National law, Article)	Comments	Specific provisions going beyond minimum harmonisation requirements/use of exemptions	Included in national legislation		Comments
<b>Directive 93/13/EEC on unfair terms in consumer contracts</b>	Code de la consommation, art. L.211-1 to L.211-7		'Black list' of terms considered unfair in all circumstances	Yes	Code de la consommation, art. L.211-3	
			'Grey list' of terms which may be considered unfair	No		
			Extensions of the application of Directive to individually negotiated terms	Yes	Code de la consommation, art. L.211-2	
			Extensions of the application of Directive terms on the adequacy of the price and the main subject-matter	No		

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<b>Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market</b>	Code de la consommation, art. L.121-1 to L.122-8		Provisions regarding financial services going beyond minimum harmonisation requirements	No		
			Provisions regarding immovable going beyond minimum harmonisation requirements	No		
			Application of UCPD to B2B transactions	No		

<b>Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers</b>	Code de la consommation, art. L.112-1 to art. 112-9		Extension of the application to other sectors (e.g. for immovable property)	Yes	Code de la consommation, art. L.112-8	<i>Extension to services, except liberal professions, of the obligation to indicate unit price for every professional of all usual services proposed by the professional</i>
			Use of specific regulatory choices/derogations	Yes	Code de la consommation, article L.112-3 (3), use of the option under Art. 5 (1) PID	<i>Point 1): derogation for enumerated food products to indicate unit price</i>
					Code de la consommation, article L.112-3 (3), use of the option under Art. 5 (2) PID	<i>Point 2) : mandatory indication of the price unit for enumerated non-food products</i>
					Code de la consommation, article L.112-3 (3), use of the option under Art. 3 (2) PID	<i>Points 3) : derogation to indicate the unit price for products supplied in the course of the provision of a service</i>

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<p><b>Directive 2006/114/EC concerning misleading and comparative advertising</b></p>	<p>Loi du 30 juillet 2002 réglementant certaines pratiques commerciales, sanctionnant la concurrence déloyale et transposant la directive 97/55/CE du Parlement Européen et du Conseil modifiant la directive 84/450/CEE sur la publicité trompeuse afin d'y inclure la publicité comparative, articles 15 - 19 (loi de 2002)</p>	<p>This law will be abrogated in the near future by a new law voted on 13 December 2016 titled « Loi sur les ventes en soldes et sur trottoir et la publicité trompeuse et comparative »</p>		<p>Loi de 2002, article 15 to 19 + 23</p> <p>Substituted in the near future by Loi du 13 décembre 2016 sur les ventes en soldes et sur les trottoir, articles 3 to 10</p>	
<p><b>Directive 2009/22/EC on injunctions for the protection of consumers' interests</b></p>	<p>Code de la consommation, articles L.320-2 to L.320-7</p>				
	<p>Loi du 30 juillet 2002 réglementant certaines pratiques commerciales, sanctionnant la concurrence déloyale et transposant la directive 97/55/CE du Parlement Européen et du Conseil modifiant la directive 84/450/CEE sur la publicité trompeuse afin d'y inclure la publicité comparative, articles 23 (loi de 2002)</p>	<p>This law will be abrogated in the near future by a new law voted on 13 December 2016 titled « Loi sur les ventes en soldes et sur trottoir et la publicité trompeuse et comparative » Articles 8 to 10</p>			
	<p>loi modifiée du 27 juillet 1991 sur les médias électroniques Article 28 – paragraphe 5</p>				
	<p>loi modifiée du 27 juillet 1991 sur les médias électroniques Article 28 – paragraphe 5</p>				
	<p>Loi du 11 avril 1983 portant réglementation de la mise sur le marché et de la publicité des «médicaments», article 19-1</p>				

**Table 2: Fact sheet on Injunctions Directive – LUXEMBOURG**

Issue	Answer	Comments
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)?	No, single procedure	
Who is entitled to bring an action seeking an injunction?	<ul style="list-style-type: none"> <li>- Designated public bodies</li> <li>- Specified consumer associations (see code de la consommation, articles L.313-&amp; L.313-2)</li> <li>- Individual consumers</li> <li>- Other : professional organisation</li> </ul>	<i>Individual consumers and professional organisation are entitled to bring an action seeking an injunction in UCPD and UCTD matters</i>
Is the injunction procedure a court or an administrative procedure? If your country legislation foresees both forms of the procedure, please explain in the comments column for which infringements the court or administrative procedure is foreseen	- Court procedure	
Who bears the costs of an injunction procedure? If qualified entities (or some of their categories e.g. consumer organisations are entitled to an exemption of some/all cost related to the procedure please explain the characteristic of such exemption in the comments column.	- Each party bears its own costs, the court estimate is inequitable to let a part of the costs to a party	
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?	<ul style="list-style-type: none"> <li>- Yes, scope of application extended to cover areas of consumer law that are not part of Annex I of the Directive</li> <li>- Yes, scope of application extended to cover consumer law in general</li> </ul>	<i>Code de la consommation, article L.320-1. Extension regarding price display</i>
Is protection of business' interests covered by the injunctions procedure? If scope of application extended to the protection of business' interests, please provide details in the comments column regarding type of business' interests covered by the injunctions procedure	Yes and no	<i>Business' interest is indirectly protect only for UCPD &amp; UCTD matters. Business' interests type protected is fair competition (injunction procedure is foreseen among others for B2B unfair commercial practices in the loi de 2002 but this law will be abrogated in the near future)</i>



Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations	Yes (UCTD)	<i>Possible only for UCTD matters</i>
Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID)	No	
Has your Member State taken specific measures regarding the prior consultation (Article 5 of the Injunctions Directive)?	No such requirement	
Does the national legislation provide for measures ensuring summary procedure? Please specify main characteristics of the procedure (subject matter/time limits) in the comments column.	Yes and no	<i>Luxembourg legislation foresees that the classical summary procedure rules govern, but this not guaranteed a time limit of the procedure</i>
Are there sanctions for non-compliance with the injunction order (Article 2(1) of the Injunctions Directive)? If sanctions in form of penalty or fine foreseen please specify in the comments column to who exactly should they be paid	Yes, penalty of a fine for each day of non-compliance	<i>Penalties should be paid to the plaintiff</i>
Has your Member State taken specific measures regarding the publication of the decision and/or the publication of a corrective statement?	Yes	<i>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</i>
Is it possible to claim within the injunction procedure for sanctions for the infringement?	No	
Can an action for the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to other beneficiary be brought within the injunction procedure?	No	
Can an action for damages to be paid to the qualified entity or the public purse be brought within the injunction procedure?	No	
Can an action for damages or redress to be paid to the consumers concerned be brought within the injunction procedure?	No	
Can individual consumers base their individual claims for damages/remedies on the injunctions order?	Yes and no	<i>Consumers may argue that the infringement initially leading to the injunction order caused damages, but there is no automatic causal link or assumption of liability</i>
Can the qualified entity claim other measures beyond the injunction, e.g. evidence of compliance with the judgment?	- Yes - No	

Are the effects of individual injunctions orders extended to the future infringements and/or same or similar illegal practices (of other traders)?	No	
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## B. Data tables

*Number of B2C disputes*

Please indicate how many B2C disputes have been decided in your country on the basis of consumer law directives covered by this study (UCPD, UCTD, PID) as a proportion of the total number of B2C disputes decided on the basis of other national consumer legislation (based on statistics, or based on estimates by enforcement authorities and other stakeholders, where this is not the available).

**Table 3: B2C disputes decided on the basis of consumer law directives covered by this study in comparison with total B2C disputes decided on the basis of other legislation (most recent year for which data is available)**

Year	Type of data	Total number of B2C disputes (number of cases)	Share of B2C disputes decided on basis of ...					Comments
			UCPD	UCTD	PID	other EU consumer protection legislation (e.g. CRD, Sales Directive, sectoral legislation)	national consumer legislation not based on EU directives	
n.a.	n.a.							

Neither the number of B2C disputes in court nor the legal basis of decisions is registered in Luxembourg, so it is very difficult to give either statistics or even an estimate for the stakeholders. Similarly, even if a number of B2C ADR decisions could be found, again the legal basis of decisions is not registered.

*Costs of obtaining redress for a hypothetical case of invoking unfairness of a standard contract term*

- Please estimate the costs, including time, for consumers in obtaining redress when invoking the unfairness, and thereby the non-binding character of standard contract terms in a contract they concluded. Please provide the estimate for the hypothetical example below, focusing on costs (and needed time) of a lower court procedure and the use of ADR or other relevant procedure (if applicable).<sup>29</sup>

**Table 4: Estimate of costs for consumers in obtaining redress when invoking the unfairness of standard contract terms in a contract they concluded (for the hypothetical example provided in the box below)**

Redress mechanism	Estimated court fees (national currency)	Estimated lawyer's fees (national currency)	Other costs, if any (national currency)	Estimated time involved for consumer (hours)	Comments
<b>Lower court procedure (Justice de paix)</b>	EUR 0	Assistance of a lawyer is not legally required. If any, as a minimum: EUR 800	Bailiff fees EUR 130 (required for the classical procedure)	As a minimum 4h (without assistance of a lawyer), depends on knowledge, literacy, perseverance and experience of consumer. No time needed in case court tests term of its own motion in the course of a procedure.	
<b>ADR or other relevant procedure</b>	EUR 0	Assistance of a lawyer is not legally required. If any, as a minimum: EUR 800	--	As a minimum 2h (contact with the ADR, fill in the questionnaire, possible hearing, etc)	The Luxembourg ADR scheme competent should be the 'Commission luxembourgeoise des litiges de voyages' <sup>30</sup>

<sup>29</sup> For the hypothetical example it is assumed that both the provider and the consumer are located in your country.

<sup>30</sup> <https://www.ulc.lu/fr/Organes/Detail.asp?T=1&D=descr&ID=5>

**Hypothetical example: Terms which inappropriately exclude/limit consumers' rights to compensation**

*A consumer went on a package holiday with a friend to Kenya for which they paid € 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 €5,000 (€4,000 for the cost of the package and €1,000 for lost time and enjoyment). The tour operator agreed to compensate them €1,000 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/unfair-contract-terms/index\\_en.htm](http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-contract-terms/index_en.htm)]*

- Please estimate how often court and ADR procedures are used in your country for invoking the unfairness, and thereby the non-binding character of standard contract terms (i.e. the number of cases per year)?

Neither the number of B2C disputes in court nor the legal basis of decisions is registered in Luxembourg, so it is very difficult to give either statistics or even an estimate for the stakeholders. Similarly, even if a number of B2C ADR decisions could be found, again the legal basis of decisions is not registered.

## C. Interviews conducted and literature reviewed

**Table 5: Interviews conducted for this study**

Organisation	Stakeholder type	Date
<b>ECC Luxembourg</b>	European Consumer Centre	5 September 2016
<b>Ministère de l'Economie et du Commerce extérieur – Direction du marché intérieur et de la consommation</b>	Ministry	13 September 2016
<b>Ministère de l'Economie et du Commerce extérieur – Direction générale PME et Entrepreneuriat</b>	Ministry	In writing
<b>Chambre des Métiers</b>	Business association	6 September 2016
<b>clc (Confédération luxembourgeoise du commerce)</b>	Business association	21 September 2016
<b>Union Luxembourgeoise des Consommateurs</b>	Consumer organisation	17 May 2016

**Table 6: Literature reviewed for country report**

Author/Source	Year	Title of publication
G. Ravarani / éd. Pasicrisie luxembourgeoise, 3e édition, p.788 à 810	2014	La responsabilité civile des personnes privées et publiques
P. Ancel, B. Christmann, X. Dieux, F. Kutscher-Puis / Annales de droit luxembourgeois n° 21 , p. 105-155	2011	Modalités de la réglementation des clauses d'indexation de prix au Luxembourg, en France, Belgique et Allemagne
Elise Poillot/ JTDE	2013	Droit de la consommation, Chroniques
Pierre GOERENS / JTL	2014	Note sous Cass. 5 décembre 2013 (JTL2014, page109)
N. Thieltgen, A-M KA / Bulletin droit et banque n° 42	2008	Chronique de jurisprudence de droit bancaire luxembourgeois
N. Thieltgen, A-M KA / Bulletin droit et banque n° 42, 44, 46, 50, 52, 54, 56, 58	2008 - 2016	Chronique de jurisprudence de droit bancaire luxembourgeois
Pasicrisie luxembourgeoise	2006-2016	Recueil de jurisprudence
Bulletin d'information sur la Jurisprudence	2005-2016	Recueil de jurisprudence
Code de la consommation / Service Central de Législation	2016	Partie VI. Jurisprudence
A. Prüm (sous la direction) / Collection de la Faculté de Droit, d'Economie et de Finance de l'Université de Luxembourg, Larcier	2009	La Codification en droit luxembourgeois du droit de la consommation
Chambre des Métiers <a href="http://www.cdm.lu/news/fiche/2013/07/les-pratiques-frauduleuses-visant-les-professionnels-l-ampleur-du-probleme">http://www.cdm.lu/news/fiche/2013/07/les-pratiques-frauduleuses-visant-les-professionnels-l-ampleur-du-probleme</a> .	2013	Les pratiques frauduleuses visant les professionnels, l'ampleur du problème
Chambre des députés	2016	Projet de loi n° 7038 sur les ventes en soldes et sur trottoir et la publicité trompeuse et comparative



## 1. Study to support the Fitness Check of EU Consumer law – Country report MALTA

### 1.1. Unfair commercial practices and marketing

#### 1.1.1. Effectiveness of the UCPD in establishing a high level of consumer protection

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

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

The UCPD was implemented as Part VIII of the Consumer Affairs Act (Chapter 378 of the Laws of Malta).<sup>1</sup> The inclusion of the provisions under Maltese law implementing the UCPD overall are a positive measure providing the competent national enforcement body namely the DG Consumer Affairs MCCA (Malta Competition and Consumer Affairs Authority) with an important tool in curbing unfair commercial practices.

It is only the DG Consumer Affairs who can take regulatory action if there is a breach of Part VIII of the Consumer Affairs Act. Sector specific regulators such as the Regulator for Energy and Water Services (REWS) or the Malta Communications Authority (MCA) may at most as 'qualified entities' under the Consumer Affairs Act (Cap. 378 of the Laws of Malta) request the DG Consumer Affairs to issue a 'compliance order' (which is the equivalent of an 'injunction' order under the ID) if they believe that an unfair commercial practice has been committed in relation to the sector that they oversee.<sup>2</sup>

To date this has occurred in one instance when the MCA in 2012 formally requested the DG Consumer Affairs to issue a compliance order in relation to alleged unfair practices by an electronic communications service provider.<sup>3</sup>

In practice recourse to the national provisions implementing the UCPD has been muted. This is confirmed both by the low number of regulatory measures taken by the competent authorities in relation to non-compliance with Part VIII of the Consumer Affairs Act (which implements the UCPD), and more so by the very few cases before the Maltese courts disputing regulatory measures taken based on alleged non-compliance with the provisions under Maltese law implementing the UCPD.

On the basis of the information available only two compliance orders with regard to alleged non-compliance with Part VIII of the Consumer Affairs Act have so far been issued.<sup>4</sup> The compliance orders issued in these two instances were contested in 2012 before the Consumer and Competition Appeals Tribunal (CCAT).<sup>5</sup> At the time of writing the case is still pending before the CCAT (which is the competent review tribunal) for a final ruling.

No information was provided on the actual number of requests for the issue of such orders (read 'injunction orders').

<sup>1</sup> As per Act II of 2008.

<sup>2</sup> See Chapter 378 article 2 the definition of "qualified entity". Under article 94 a qualified entity can as the DG Consumer Affairs to issue a compliance order in relation amongst other things if there is an unfair commercial practice.

<sup>3</sup> Two compliance orders were issued against two sister companies. The orders however related to the same issue – the use of misleading advertisements to describe products offered in the telecommunications sector.

<sup>4</sup> These two compliance orders related to the same issue and were issued against sister companies.

<sup>5</sup> The said orders are the subject of the same case currently pending before the CCAT.

Under the applicable provisions a compliance order comes into force 'with immediate effect'.<sup>6</sup> According to article 110G of the Consumer Affairs Act, any decision (including therefore a compliance order issued by the DG Consumer Affairs) even if contested before an appellate forum, stands and must be adhered by all the parties to whom the decision applies. The CCAT may however on the application of a party to the appeal suspend the regulatory decision – in this case the compliance order issued by the DG Consumer Affairs pending the final determination of the appeal.<sup>7</sup> The law further provides that in the case of a compliance order, the CCAT may instead of suspending the order modify the said order 'as it deems necessary instead of suspending it'.<sup>8</sup>

Some interviewees observed that in many instances compliance is obtained through negotiation, thereby avoiding the initiation of formal proceedings alleging non-compliance with the applicable provisions of Part VIII. This may serve to explain the small number of injunction orders issued to date.<sup>9</sup>

A consumer organisation said that the principle-based approach is laudable, however criticised what it described as the lack of pro-active vigilance by the competent authorities. Another consumer organisation noted that the DG Consumer Affairs MCCA has limited resources and powers.

A sector specific regulator said that overall the principle based approach of the UCPD is very effective and consumers have benefited from such an approach. Conversely a business organisation argued that UCPD is ineffective and that it has been asking the competent authorities to take action for some time, but to no avail.

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

The practical benefit of the inclusion of the black list is that it provides a specific and clear list of practices which can be referred to, therefore facilitating regulatory intervention by reference to a list of practices which complements the general concept of unfair commercial practices under UCPD.

Having a black list is a positive measure. However there should be some latitude for each Member State to revise such a list according to national circumstances, in particular to include any new practices as from time to time may emerge. In very small countries like Malta, where most of the commercial firms fall under the definition of micro-enterprises (coupled also with the consideration that Malta is a small island), markets operate differently from larger markets in larger Member States. In such circumstances lack of enforcement may have a greater impact on consumers.

A consumer organisation said that given that this is a maximum harmonisation directive, Malta consequently cannot add other practices to the list which may be particular to local circumstances. This organisation said that a Member State should have the faculty of adding to the list of practices considered as unfair in order to deal with practices that may be particular to that MS.

A public authority commented that the inclusion of a black list has proved to be very effective for consumers but did not amplify. No further specific comments were made.

<sup>6</sup> See article 96 of the Consumer Affairs Act.

<sup>7</sup> Ibid. article 110G.

<sup>8</sup> Ibid proviso to article 110G(2).

<sup>9</sup> Injunction orders are under Maltese law normally referred to as 'compliance' orders.

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

Such a measure is considered as beneficial by most interviewees especially with regard to financial services.

A consumer organisation remarked that this measure has the advantage of giving Member States some flexibility to deal with new unfair commercial practices relating to these two areas. This organisation suggested that minimum harmonisation should actually extend to all areas.

The consumer organisation argued that the Directive should overall be a minimum harmonisation directive whereby a Member State can impose measures which go beyond the practices listed in the Annex to 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 what 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?*]

To date the measures under the UCPD have not been applied in relation to either of these sectors. Therefore one cannot comment in depth on effectiveness or practical benefits in this context.

A consumer organisation observed that there is a need for genuine transparency on how the price of petrol and diesel in Malta is fixed, reflecting international rates which have been decreasing in recent years, and on the quality and grading of petrol or diesel. This organisation also referred to advertising and information relating to alternative sources of energy, remarking that should be a clear separation between what constitutes advertising material, and what constitutes accurate and objective information about the product in question.

A business organisation remarked that in the energy sector there is a dominant supplier and minimal effective enforcement, noting that in part at least, this stems from the fact that there is lack of competition.

- 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 rigidly?*]

This issue *per se* has not been considered in depth so far in Malta. No regulatory decisions have been given relating to the measures provided for under the national law implementing the UCPD dealing with the interpretation of the 'average consumer'.<sup>10</sup>

Some interviewees noted that there is a lack of information on the subject (business & consumer organisations), with one interviewee (a public advisory organisation) suggesting that there should be a clear definition of the term 'average consumer'.

A consumer organisation observed that the concept of 'average consumer' is not being applied realistically, adding that a substantial number of consumers cannot be termed as 'average consumers' unless they are adequately informed and educated. This interviewee suggested that the concept should be revised to reflect a wider range of individuals.

<sup>10</sup> The subject of the vulnerable consumer has however been dealt with in some court decisions relating to UCTD. See for example *F (Advertising) Limited (C27689) vs Joe u Nathalie konjugi Mifsud*, decided by the First Hall of the Civil Court on the 21 November 2014, and *Malta Property Auctioneers Limited vs Malcolm Becker et* decided by the First Hall of the Civil Court on the 29 November 2012.

Another consumer organisation noted that this point in practice to date has not arisen since neither the term 'average consumer' nor the term 'vulnerable consumer' have any precise and clear definition under Maltese law. According to this organisation the only exception in relation to the latter term is in the energy sector where those below a certain income are given a small subsidy on their bills.

- 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 in your country recognised new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted)?*]

To date no specific issues have been raised in this regard, though in certain areas there are vulnerable consumers in relation to whom specific protection and attendant measures should be considered. Hence for example in the area of electronic communications with the rapid changes being made and attendant increasing technological complexity, many elderly consumers risk being marginalised because of their difficulties in coping with new forms of communications. The UCPD seems to be oblivious to their plight and more consideration should be given to the needs of such consumers possibly within the context of new norms under the UCPD. It is relevant to note that sector specific regulation as provided for under Maltese law does recognise the need and importance of specific social groups.<sup>11</sup>

One sector specific regulator noted that new categories of vulnerable consumers have been recognised (mentioning pensioners and minors) but did not elaborate.

A consumer organisation noted that awareness has increased about the needs of such groups however practical suggestions for policies have not been put into action. It referred in particular to pressure on Government by NGOs involved in social assistance which organisations seek to address the needs of vulnerable groups in relation to such issues such as habitual household indebtedness and usury.

- 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?*]

In practice self-regulation and co-regulation in Malta are not exercised. Some sporadic attempts at self-regulation were made in the past, but none were of long lasting duration or effective as a means of self-regulation or of co-regulation.

The recent adoption of measures implementing the Consumer ADR Directive (Directive 2013/11/EU on alternative dispute resolution for consumer disputes) may lead to some developments in the near future in this regard.<sup>12</sup> It is however still early to comment given that the relevant legislation was introduced a few months ago.

It was observed that in certain sectors such as public transport and the electricity retail market there is only one operator involved. In these sectors it was further noted that to date no self-regulation or co-regulation initiatives have been undertaken.

A consumer organisation said that self-regulation and co-regulation are effectively non-existent, adding that regrettably Malta lacks a solid tradition of effective and meaningful self-regulation by the business sector.

<sup>11</sup> See for example Article 4(2)(v) of the Electronic Communications (Regulation) Act (Chapter 399 of the Laws of Malta) which article refers to the importance of "addressing the needs of specific social groups, in particular disabled end-users, elderly end-users and end-users with special social needs". This provision is based on Article 8 paragraph 4(e) of Directive 2002/21/EC.

<sup>12</sup> See Part VI of the Consumer Affairs Act entitled "Consumer Alternative Dispute Resolution" and the regulations made thereunder namely the [Consumer Alternative Dispute Resolution \(ADR\) \(General\) Regulations \(SL 378.18 of the Laws of Malta\)](#).

- 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?

A consumer organisation suggested that there should be a mechanism which periodically revisits the black list given continuous developments in many sectors and new unfair commercial practices that may consequently emerge. This organisation suggested that the black list in the Annex should not be a maximum harmonisation measure, arguing that each Member State should have the ability to update the list to reflect unfair practices specific to that Member State. In doing so it suggested that a notification requirement be introduced whereby the Commission and other Member States are duly notified of any new unfair practices. This would have the benefit of alerting all Member States of new practices considered as unfair which may possibly also impact other Member States. This organisation said that there should be an EU wide data base updated periodically to complement such a measure.

A public authority remarked that the list is exhaustive.

- Are there other measures that could improve the effectiveness of the UCPD in establishing a high level of consumer protection in your country? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

Some interviewees emphasised the importance of empowering sector specific regulators to have powers under horizontal consumer law in so far as UCPD and UCTD are concerned. Suggestions in this regard were made both by the consumer organisation and some of the sector specific regulators.

A consumer organisation remarked that sector specific public authorities should have the power to take regulatory measures directly possibly by having concurrent powers with the competent national consumer authority (DG Consumer Affairs - MCCA) so as to ensure more effective compliance with the measures under UCPD in so far as these relate to the specific sectors (e.g. financial services, the various utilities etc.). A similar comment was made by a sector specific regulator.

Under the current situation in Malta a sector specific authority has to request the national consumer authority – namely the DG Consumer Affairs - to take action. The same consumer organisation observed that it makes more sense if the sector specific regulator enjoys concurrent enforcement powers whereby it can take direct action itself against non-compliant traders if there is an unfair commercial practice relating to the sector/s it supervises.

A consumer organisation suggested that there should be an EU wide data base by subject matter, which lists the unfair practices in each Member State and the regulatory measures taken with regard to that practice. Such a data base should be accessible to all those entities listed as entities qualified to bring an action under Article 2 of the Injunctions Directive (ID).

Another consumer organisation remarked that there is a need for stronger and more effective enforcement measures by different authorities, with better coordination to ensure effective and prompt compliance.

Various sector specific regulators made different points. One emphasised the need for better and more information for consumers to know what their rights are, whereas another suggested that emphasis should be placed on professional diligence. A third regulator highlighted the importance of effective and timely action being taken in cases of identified breaches of these directives to mitigate any negative impact on consumers, suggesting that the opinion and position of the sector specific regulator

should be factored prior to the taking of any action by the national consumer authority (i.e the DG Consumer Affairs MCCA) to avoid overlap between the national consumer authority and the sector specific regulator.

### 1.1.2. Effectiveness of the PID in establishing 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;

There is a general consensus amongst both the consumer organisations and business lobby that consumers are not generally well informed about unit pricing, and that more needs to be done in this regard. Conversely a public authority felt that consumers are adequately informed.

A consumer organisation said that to date no surveys have been carried to establish the extent of the awareness of consumers about unit selling price, noting that it does not result that any extensive campaigns have been carried out in this regard to inform consumers other than occasional write-ups in the media or during talk shows on television or radio. The same organisation questioned the effectiveness of the PID as transposed and applied in Malta, contending that in practice consumers are not adequately informed about the norms relating to unit selling price. This organisation strongly criticised a provision under Maltese law which according to this organisation effectively means that a substantial percentage of retail outlets are exempted from some the requirements regulating unit pricing.

Another consumer organisation noted that generally consumers are not adequately informed and that better regulation and monitoring are needed.

Comments from other interviewees mentioned the need for an awareness campaign so that consumers can make informed choices, whereas conversely another interviewee (a public authority) said that consumers are adequately informed.

- 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?

The majority of interviewees (including consumer organisations and a public authority) argued that this should be per performance, arguing that ultimately this is what many consumers ask about.

Conversely one interviewee (a public consumer advisory organisation) argued in favour of a unit price.

- The effects of the regulatory choices/derogations allowed by the Directive and applied by Member States. [*Key aspects to consider are: Is the derogation relevant? Do companies make use of it? Are there consumer complaints because of this? If so, approximately how many per year?*]

A public authority noted that the option for a derogation was taken up in relation to Article 6 of PID in so far as it relates to the space available in the shop premises of the trader, whereas a consumer organisation strongly criticised this derogation since this effectively meant that a substantial number of commercial outlets were exempted from some of the requirements of the PID.

The same consumer organisation voiced strong reservations about the derogation under Article 6 of PID and contends that the derogation effectively undermines the



application of the PID depriving consumers of important consumer protection measures.<sup>13</sup>

No other comments were made, in particular no mention was made of the number of consumer complaints in relation to alleged non-compliance with the norms regulating unit pricing.

### 1.1.3. Effectiveness of the MCAD in providing protection for businesses

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

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

No comments were forthcoming whether the existing norms should be revisited and in particular extended beyond the notion of 'advertising'. The responses by those interviewees who replied were that the protection under MCAD is advantageous and that it encourages fair competition.

The measures introduced by MCAD (the measures under Maltese law are reflected in the Commercial Code – Chapter 13 of the Laws of Malta - notably in articles 32A to 37 thereof) has led to informative advertising by competing businesses notably in certain sectors such as telecommunications. Prior to the enactment of the applicable Maltese legislation, comparative advertising within the parameters set by the MCAD was not possible. To date there have been only a couple of lawsuits relating to the interpretation of the applicable comparative advertising provisions.<sup>14</sup>

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

Overall the current approach is considered to be effective (comments from business organisations and a public authority). There has been no call for any review of the existing legislative (national) norms.

There have been few lawsuits on the basis of which one can analyse the overall effectiveness in this regard (see also reply to previous question). In the case of business versus business disputes, the means of redress under current national law is based on purely civil remedies, and does not involve regulatory intervention by the competent national consumer authority (unless the issue also constitutes an unfair commercial practice under the Consumer Affairs Act, in which case the DG Consumer Affairs may then intervene).

If there is a breach of the relevant national provisions implementing the MCAD (namely articles 32A to 36A of the Commercial Code), then the injured trader can seek redress (and if applicable sue for damages) before the competent court of civil jurisdiction.

<sup>13</sup> Note: according to the feedback from the competent public authority Malta has in fact availed itself of the derogation under Article 6 of PID. See also comments to previous question by one of the interviewees.

<sup>14</sup> See for example *Kram Trading vs Oleg Barkov trading under the name Barkov Distribution* – decided by the First Hall of the Civil Court on the 28 May 2015.



- The effects of the minimum harmonisation provisions on misleading advertising; [Key aspects to consider are: Which national rules that go beyond the MCDA, 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 national law does not vary from the norms provided for under the MCAD. As explained above, the remedy available to the injured trader is to seek civil redress including damages, before the competent court of civil jurisdiction. In practice to date only a few lawsuits has been made even though the applicable measures under the Commercial Code were introduced in 2008.<sup>15</sup>

One business organisation argued that due to national circumstances the minimum harmonisation provisions should be retained. However it did not elaborate further. There were no other specific comments.

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

Overall the effects are positive, though use of comparative advertising in practice has been somewhat limited. The overall reaction to the introduction of the measures under national law transposing the MCAD is positive.

One business organisation remarked that MCAD provides protection for traditional marketing practices but has limited effectiveness because of modern digital means of communications (e.g. social media). There were no other specific comments.

- 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;

The rules are seen as providing an effective legal framework. To date the general reaction to the norms introduced on comparative advertising is positive. There were no specific comments.

Only a few lawsuits has been filed and decided based on the applicable provisions regulating comparative advertising.

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

No adverse comments were made on the current legislative framework under the Commercial Code whereby the remedies available are purely those of civil redress for the injured trader.<sup>16</sup> No comments were made by business organisations about the impact on cross-border transactions.

Until 2008, comparative and misleading advertising was regulated under the Consumer Affairs Act (Cap. 378), and regulatory intervention was then possible by the (then) Director of Consumer Affairs within the (former) Consumer and Competition Department. As explained earlier this is no longer the case.

<sup>15</sup> It is pertinent to note that prior to 2008, comparative and misleading advertising were regulated under the Consumer Affairs Act whereby the then Director of Consumer Affairs was empowered to take regulatory measures. With the amendments enacted in 2008 implementing the UCPD, the norms relating to MCAD were amended with new provisions of a purely private civil law nature introduced in the Commercial Code whereby private business can seek redress in accordance with articles 32A to 37 of that Code.

<sup>16</sup> See Commercial Code articles 32A et seq. Act II of 2008 amended the Consumer Affairs Act deleting former articles 48, 49 and 50 of that law whilst providing for the inclusion of new provision in the Commercial Code.

In the case of comparative advertising, following amendments in 2008 to the Commercial Code regulating comparative advertising under that Code, the competent national consumer authority (currently the DG Consumer Affairs) has no remit to regulate comparative advertising unless such advertising constitutes an unfair commercial practice under the Consumer Affairs Act (see also previous replies in this sub-section).

- Are there measures that could improve the effectiveness of the MCAD in providing protection for businesses (see also 1.1.6 below)? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

There were no specific remarks. The general attitude is that the existing legislative regime under Maltese law based on civil remedies for the injured trader coupled with the norms regulating unfair commercial practices, is adequate.

#### 1.1.4. Effectiveness of current rules 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;

No adverse comments were forthcoming from any of the interviewees – including from representatives of business organisations.

To date there have been no specific issues in this regard. Formal regulatory measures and litigation on the application and interpretation of UCPD has been restricted to a few cases. There has been no noticeable impact on cross-border trade.

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

A consumer organisation said that the list should be a minimum harmonisation measure, allowing Malta (and obviously other MS) to include other measures specific to national circumstances. It argued that the inclusion of such a measure would enable the competent authorities to control more effectively new unfair practices. No other specific comments were made.

- Whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade. [*Do the national differences play a role in a business perspective? Have they caused problems?*]

This point has not to date arisen.

A consumer association suggested that there was scope in considering whether the applicable rules allowing minimum harmonisation derogation should extend to sectors other than financial services and immovable property.

There were no adverse comments. The current minimum harmonisation character of MCAD is seen as adequate and does not present a barrier to cross-border trade. More specifically no instances were mentioned by any of the interviewees whereby the aforesaid provisions could be seen as representing a barrier to cross-border trade.

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;

The general reaction is that the MCAD is overall a positive measure and has helped to enhance competition. No disparities were identified which may have a negative impact on cross-border trade.

One business organisation said that the MCAD has been effective in eliminating obstacles in the internal market, observing however that it is difficult for some SMEs to understand the concept underlying the Directive.

No other specific comments were made.

- Whether the minimum harmonisation character of provisions on misleading advertising represents a barrier to cross-border trade;

This point does not appear to be of any particular concern. There is general satisfaction with the measures on misleading advertising as currently applied under national law. No adverse comments were made and no suggestions for change to the MCAD provisions were made.

- 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;

There is general satisfaction with the measures on comparative advertising as currently applied under national law. No adverse comments were made and no suggestions for change to the MCAD provisions were made.

There do not appear to be any concerns on the matter.

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

To date the lack of a cross-border enforcement mechanism is not perceived as a barrier to cross-border trade. Though it is pertinent to note that this may be due to the fact that no specific instances have been encountered which might therefore raise concerns in this regard.

1.1.5. Interplay amongst UCPD information requirements according to Article 7(4) with the information requirements in the horizontal consumer law instruments

Regarding the information requirements according to Article 7(4) UCPD ("invitation to purchase") in the advertising stage, please analyse:

- The level of awareness of traders as regards information requirements at the advertising stage, as in particular demonstrated by their practical application; [*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?*]

The general level of awareness of traders with regard to the aforesaid information requirements is poor among SMEs, though much better with the larger businesses. In some sectors – notably the telecoms and transport industries - there appears to be

more awareness of such requirements, and overall of the applicable provisions of the national provisions implementing UCPD.

Overall there has been little practical application of these rules, in part because general awareness is poor (see comments below by consumer organisations).

The information requirements under the UCPD are seen as useful. The issue however raised is that there is little awareness of their existence. The focus in the case of Malta should be on more information campaigns to alert businesses – especially SMEs – about the existence of these norms.

To date regulatory measures in relation to non-observance of the national provisions implementing these norms and indeed of UCPD in general has been minimal.

A sector specific regulator noted that according to its experience there was a high level of awareness amongst the traders it regulates, observing that the applicable rules are communicated through various forms of communication including dedicated sections on websites, and information boards in prominent public areas.

Another sector specific regulator noted that in the sector that it regulates, the major service providers have a dedicated regulatory team which monitors regulatory developments and obligations with regard to the services offered, including compliance with advertising requirements.

Business stakeholders took contrary positions on this topic. A business organisation noted that there is a poor level of awareness especially amongst SMEs, whereas another business organisation said that traders are aware of such requirements and that traders ensure their application through agreements and information in brochures.

A consumer organisation observed that whilst traders are very much aware of information requirements at the advertising stage, there is however lack of correct, unambiguous information in the advertising techniques used, mentioning specifically the use of small print for relevant essential information about for example product safety or prices. It argued that there should be a clear separation between what is purely advertising and what constitutes important information about the product.

Another consumer organisation said that awareness in general is poor, though in certain industries such as telecoms there is more awareness especially among the main communications service providers.

- 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?

Some overlap may arise given that the enforcement of UCPD and the measures applicable under the E-commerce Directive are enforced by two different enforcement authorities in Malta.<sup>17</sup> It was remarked that though, informally, co-ordination does exist, there are no formal Memoranda of Understandings (MoU) between the competent authorities concerned.

A consumer organisation remarked that enforcement should either rest with the same authority or alternatively there should be a structured formal mechanism which ensures that any regulatory action is undertaken in a timely and co-ordinated fashion ensuring that there is no overlap.

<sup>17</sup> In Malta the UCPD norms as implemented under Cap. 378 are enforced by the DG Consumer Affairs MCCA whereas the E-Commerce norms are enforced by the MCA (a sector specific regulator).

A business organisation remarked that there is overlap and that this leads to confusion as to which regime applies, whereas another business organisation said that there is no overlap.

#### 1.1.6. Relevance for business-to-business transactions

Regarding the area of unfair commercial practices/marketing, please analyse:

- 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 cross-border trade;

Two business organisations said that they are in favour of extending UCPD to B2B transactions. One of these organisations said that the extension of the UCPD to B2B transactions could have positive benefits for cross-border trade.

A concern expressed by a consumer organisation is that given the limited supervisory resources available to the competent regulatory authorities, these resources would be even more severely impacted if, in addition, their role is extended to the supervision of unfair practices which relate to B2B transactions. This Association argued that the resources of the competent national authority would be even more stretched thereby impacting its ability to deal with unfair practices which affect consumers negatively.

No other comments were made.

- 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;

For reasons stated in the previous reply, it would be more suitable to have separate regimes for B2B and B2C transactions. The main concern is that the extension of UCPD to B2B issues may severely impact the ability of the competent authorities to continue to deal with unfair practices which affect consumers. As discussed elsewhere, so far there have been few regulatory measures in relation to alleged non-compliance with the national norms implementing the UCPD. The possibility of extension to B2B transactions would probably reduce the capabilities of active regulatory action to protect consumers.

One option would be to devise specific norms – perhaps within a minimum harmonisation context - where negatively impacted businesses can seek civil redress (seeking damages, rescission of agreements etc.) and therefore lessen the burden and dependence on regulatory intervention. This would have the added benefit of having impacted businesses seek appropriate remedies against unfair practices and in doing so indirectly protect the interests of consumers.

Two business organisations said that they are in favour of aligning legal regimes for B2B and B2C transactions in the area of commercial transactions.

There were no other comments.

- 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 also cover unfair commercial practices during and after the transaction;

Business organisations said that they are in favour. One business organisation added that such transactions are normally covered by contractual agreements. No other specific comments were made.

- Whether there is a need to have a black-list of practices in the business-to-business marketing area;

If such measures are introduced the black-list of practices should be a minimum harmonisation measure, thereby allowing Member States to cater for other practices specific to national circumstances.

Three interviewees (business organisations and a public authority) remarked that they were in favour of such a measure. One of the business organisations added that it was in favour especially with regard to what it described as the 'supply chain management'.

- What should be the enforcement cooperation mechanism in the business-to-business marketing area;

Two business organisations replied they favour such a mechanism with one organisation stating that it was especially in favour when such a cooperation mechanism factors in the international supply chains. None however elaborated any further. No other specific comments were forthcoming.

- Whether there is a need to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive;

Under the current national regime the injured trader has the possibility of suing for civil damages and of asking for 'any other remedy' to remove the act contrary to the applicable provisions implementing the comparative or misleading advertisement norms.<sup>18</sup> The introduction of provisions providing for contractual consequences should also be factored.

No specific remarks were forthcoming from any of the interviewees.

- Whether there is a need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive.

The measures adopted appear to be sufficient. However (see previous reply) consideration should be given to the inclusion of civil remedies in a revised Directive providing redress to the injured business in relation to contractual consequences. Ultimately what the injured business is really concerned about is adequate redress in a timely manner, where it has incurred damages as a result of misleading or illegal comparative advertising.

One business organisation said that it favours adapting the rules on comparative advertising but did not elaborate. No other specific comments were made.

#### 1.1.7. Relevance of contractual consequences of unfair commercial practices

Please analyse whether there are in your country:

- 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;

There are no specific provisions under the Consumer Affairs Act (which implements the UCPD) that relate to the contractual consequences in the case of a breach of the provisions implementing the UCPD. Redress may be possible under general civil law –

<sup>18</sup> See article 37 of the Commercial Code – Chapter 13 of the Laws of Malta. To date there has only been one reported court decision in relation to the application of this provision (Kram Trading vs Oleg Barkov decided by the First Hall of the Civil Court on the 28 November 2015).

namely under the applicable provisions of the Civil Code (Cap. 16 of the Laws of Malta) - if for example consent to purchase was procured by fraud or violence.<sup>19</sup>

A consumer organisation suggested the inclusion of a measure under the Consumer Affairs Act providing for contractual nullity if an agreement was procured as a result of an unfair practice, arguing that such a measure would be beneficial for consumers. No other specific comments were made.

- Any case law (enforcement decisions, court rulings) providing for such consequences;

On the basis of the information available to date it appears that only two compliance orders (relating to the same issue) have been issued within the context of the UCPD. These orders are being contested and a decision (by the Consumer and Competition Appeals Tribunal) is scheduled for next October.

The Civil Courts have in some instances – within the context of civil damages sought by consumers - compensated consumers who were at the wrong end of an unfair commercial practice (see for example Evelyn Farrugia et vs Global Capital Financial Management Unit Limited decided by the First Hall of the Civil Court).<sup>20</sup>

- Whether there is, based on past experience in your country, a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

A public authority referred to a former practice whereby a service provider was over charging non-Maltese citizens and argued that there is a need to develop contractual consequences.

A sector specific regulator noted that sector specific rules in the sectors it regulates require that service providers establish compensation schemes applicable when quality of service standards is not met, this without prejudice to the right of an aggrieved consumer to seek civil redress. It was suggested by this regulator that consumers should be entitled to redress where it results that a service provider has been engaging in unfair commercial practices.

A consumer organisation said that it would be beneficial to provide for contractual consequences, where an unfair commercial practice has impacted negatively on the consumer's transaction to buy-particular reference was made to consumer credit and home loans.

<sup>19</sup> See Civil Code – Chapter 16 of the Laws of Malta – Part II, Title IV Sub-title I in particular article 974 et seq.

<sup>20</sup> See decision dated 11 July 2016 of the First Hall of the Civil Court in the names Evelyn Farrugia et vs Global Capital Financial Management Unit Limited, whereby the Court ordered defendant company to compensate consumers who had suffered substantial financial losses as a result of gross negligence and trickery by the said company.



## 1.2. Contract conclusion and performance

### 1.2.1. Effectiveness of the current rules in establishing 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;

There are two aspects to consider. One is regulatory intervention in curbing the use of unfair terms, and the other is the use of civil redress by consumers in relation to the use of such terms in contracts to which they are party to.

To date formal regulatory intervention has been minimal. However in some instances issues were resolved through negotiation between the competent regulatory authority and the non-compliant business. As a result various issues were resolved following voluntary compliance by the business concerned.

There have been some cases whereby consumers contested certain terms in contracts they were a party to and where a request for partial or full nullity of the contract was granted by the competent court.<sup>21</sup>

Overall the civil redress measures applicable are effective. However consumers have rarely utilized the possibility of making collective actions in seeking redress, including cases where consumers were collectively impacted negatively by the same term/s (the law introducing collective actions for consumers was introduced four years ago). Measures should be considered to facilitate such actions.

A consumer organisation observed that there may be a lack of awareness of the general remedies available at law in relation to unfair contract terms including even amongst the legal profession.

Other interviewees (a public authority and business organisations) said that a principle-based approach is effective, whereas another interviewee (a consumer organisation) noted that whilst the applicable norms were transposed correctly, in practice they are ineffective as there is simply no enforcement.

- 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 your MS? Does this work in practice or are there problems?*]

In the case of Malta, a black list approach has been adopted, therefore in practice one cannot comment about the effectiveness of an indicative (grey) list. The Minister responsible for consumer affairs after consultation with the (Maltese) Consumer Affairs Council has the faculty of amending this black list.<sup>22</sup>

The consumer organisation expressed its preference for a black list as this has the merit of providing certainty (see below next answer).

Some interviewees (businesses organisations and a public authority) consider that the indicative list of unfair terms in the Annex to the Directive works in practice.

Another interviewee (a consumer organisation) said that in the present circumstances it is not possible to comment about the practical effectiveness of the list, given the

<sup>21</sup> See for example *F(Advertising) Limited (C27689) vs Joe u Nathalie konjugi Mifsud* decided by the First Hall of the Civil Court on the 21 November 2014. In this case the Court specifically made reference to a term include in the 'black list' of terms under article 44 of the Consumer Affairs Act.

<sup>22</sup> See article 44 of the Consumer Affairs Act (Chapter 378 of the Laws of Malta).

very limited reference to the list whether by the competent public authority or in the course of civil lawsuits.

- 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; [*Note: If a black/grey list exists in your country, key aspects to consider are: How does the list work in practice? Does it make a difference to have such a list?*]

In the case of Malta, a black list has been adopted. The inclusion of such a list has been instrumental in providing clarity in relation to specific cases of unfair terms and is considered by the consumer organisation as an important measure in protecting the rights of consumers in such instances even though limited reference has in practice been made to the list.

A consumer organisation favours having a definitive list of terms which at law are considered as unfair as this facilitates matters effectively, serving to curb the use of the relevant terms. Conversely having an indicative list may give rise to doubt and conflicting interpretations.

A public authority noted that the black list serves for classification and guidance in identifying terms which are unfair, noting that such a list has a positive impact on consumers who can rely on a definitive (black) list rather than a purely indicative (grey) list.

No other specific comments were made.

- 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: In your country, have the effects of court decisions establishing the unfairness of an unfair term been extended to all contracts of the trader concerned or to the contracts of any other trader containing such a term? If so, how does this work in practice? What are the impacts on businesses? If there are no such effects of court decisions on unfair terms: what are the effects of this situation?*]

The effects of the court decisions given to date have been limited to the specific cases dealt with. Under Maltese law, the rule of precedent does not apply and a court is not necessarily bound to follow the same line of thought taken by another court deciding a similar case, though of course due weight is given to any previous judgements.

A consumer organisation noted that the number of cases is low, and there has been no general application in these cases. This association argued that this impacts on the effectiveness of the measures which though they exist on paper, are in practice never applied. The main issue appears to relate to the overall lack of awareness even amongst the legal profession, of the importance of the legal provisions on unfair terms.

This organisation further remarked that there are various useful tools at law which however are barely used, and which if used properly could serve to protect the legitimate interests of consumers. This situation is demonstrated by the few cases filed before the Maltese courts on this subject. Hence to take one example there has to be date been no lawsuits before the Competition and Consumer Appeals Tribunal dealing with an injunction order (compliance order) relating to the use of a term considered as unfair (this Tribunal was set up in 2011).

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

Under Maltese law – and case law interpreting that law – contractual transparency requirements when applied have proved to be effective in dealing with terms which were considered to be unfair.<sup>23</sup> Maltese law – notably articles 44 to 47 of the Consumer Affairs Act – applies to all types of terms in business to consumer contracts (B2C) including those which may have been individually negotiated.<sup>24</sup>

A public authority remarked that by ensuring contractual transparency in line with the UCTD, consumers are empowered and given the necessary information to exercise their rights. As a result overall effectiveness can be assessed throughout the complaint handling process and everyday dealings with consumers.

Two business organisations commented positively whereas a consumer organisation said that in practice there was no effect whatsoever.

- 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. [*Note: Question only relevant for MS that have put in place extensions of application of UCTD*]

The applicable provisions under Maltese law (see also previous reply) extend to individually negotiated terms. The law makes no exemption and simply applies the protection afforded under the norms regulating unfair terms to all contracts irrespective of whether the terms have been individually negotiated or not. This approach is seen by the consumer organisation as a positive measure in favour of consumers.

One interviewee (a public consumer advisory body) said that the extension to individually negotiated terms is a positive measure in favour of consumers, whereas another interviewee (a consumer organisation) observed that in Malta's case application of the UCTD as implemented under national law applies to all terms including those individually negotiated. This places consumers at an advantage doing away with possible issues as to whether the term was or was not individually negotiated.

- 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?*]

National courts have not undertaken an 'active role' by invoking the unfairness of a term *ex officio*. No reference has ever been made by national courts seeking guidance from CJEU in this regard.

An administrative remedy is applicable since the Director General Consumer Affairs (MCCAA) may issue a compliance order on any person (including any business) requiring the deletion or alteration of any terms in a consumer contract which the DG

<sup>23</sup> Vella Gera Ian thesis entitled *Unfair Terms in Standard Form Contracts under Maltese Law*, see pages 84 et seq.

<sup>24</sup> See articles 44 and 45 of the Consumer Affairs Act. See for example court decisions in *F Advertising Limited (C-27689) vs Anthony u Mary Rose konjugi Tabone* decided by the Court of Magistrates (Malta on the 4 October 201, *F (Advertising) Limited (C27689) vs Joe u Nathalie konjugi Mifsud* decided by the First Hall of the Civil Court on the 21 November 2014, and *F (Advertising) Limited (C27689) vs Anthony Falzon et* decided by the First Hal of the Civil Court on the 30 November 2012.

considers to be unfair in accordance with the provisions of articles 44 to 47 of the Consumer Affairs Act (Cap. 378). The DG is further empowered to incorporate any terms in a consumer contract which they consider to be necessary to better inform consumers, or for preventing a significant imbalance, for the benefit of consumers.<sup>25</sup>

Overall interviewees commented positively about the effectiveness of the sanction. One interviewee (a consumer organisation) commented however that sanctions work only if the case is taken to court, observing that very often consumers do not seek redress before the courts because of the money and time involved. This same organisation argued that there is an urgent need for better law enforcement by the competent public authorities. It further noted that conversely business is adequately resourced in dealing with court action that may arise in this regard whereas consumers are not.

Another interviewee (another consumer organisation) said that the sanction is laudable, however in practice if the issue is the subject of litigation, then court proceedings can be lengthy, time-consuming and (unless it is a claim under €3,500 in which the issue may end up before the CCT ('Consumer Claims Tribunal')) costly to pursue. In most cases where large commercial interests are involved, consumers invariably face an uphill struggle as such firms are supported by specialist lawyers.

- In a forward looking perspective: Are there other measures that could improve the effectiveness of the UCTD in establishing a high level of consumer protection in your country? Would a graphical presentation model improve the readability and comprehension by consumers of the T&Cs? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

The low level of litigation relating to unfair terms, reveals not that the use of such terms does not exist in Malta, but rather that limited recourse is made by aggrieved parties to the provisions at law which protect their rights in such instances. It is here not a question of the law being deficient, but of the need to promote more awareness about the practical application of the norms under national legislation which implement the UCTD.

A consumer organisation said that there is not enough awareness about the remedies provided for as a result of the national law implementing the UCTD, referring to the low number of compliance (injunction) orders issued, and the low number of lawsuits relating to the UCTD even within the context of purely civil lawsuits between consumers and traders. This organisation argued that the remedies at law are barely if ever used. It is not simply an issue of informing consumers, but possibly also of 'educating' the legal profession who ultimately in the case of civil disputes involving the use of unfair terms, advise consumers how best to proceed at law when seeking redress.

A public consumer advisory organisation said that a graphical (or visual) presentation would help. It did not however list any best practices in Malta. No other specific comments were made.

<sup>25</sup> See article 94(1)(a) of the Consumer Affairs Act – Chapter 378 of the Laws of Malta. To date no such orders have been issued, though in some instances informal negotiations were held and matters resolved accordingly. The various sector specific authorities who can, in relation to certain consumer laws that they enforce, issue similar compliance orders have similar though not identical powers. Of particular interest is the faculty of the DG Consumer Affairs in the case of unfair contract terms to incorporate terms which they consider to be necessary for the better information of consumers which is not applicable in the case of most of the sector specific authorities (other than the MFSA).

### 1.2.2. Effectiveness of the current rules 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 disparities have an impact on cross-border trade; [*Key aspects to consider are: Do national differences in the application/implementation of the Directive play a role for businesses? Have these differences led to changes in their business strategy? Have these differences caused problems?*]

There has been very little debate on this point as recourse to the general fairness clause has been minimal. The main concern is tied mainly to a lack of reference to the clause which might indicate also that there is no sufficient understanding of the principle underlying the application of such a clause.

On the basis of the responses given and of case law there does not appear to be an issue with regard to the above. In particular both the business sector and the consumer organisations in their responses did not remark or note any specific issues with regard to the general fairness clause and the understanding of the principle underlying such a clause.

- 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;

One interviewee (a business organisation) said that a barrier to cross-border trade may exist but did not elaborate. The other interviewees did not express any concerns or make any adverse comments.

- 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.

A consumer organisation was adamant on the importance of Malta's retaining the faculty to go beyond the minimum requirements and cater for individually negotiated contracts, and include other 'unfair' terms on the black list of terms applicable under Maltese law (as is currently the position under Maltese Law). No other specific comments were made by the other interviewees.

### 1.2.3. Relevance for business-to-business transactions

Regarding the area of contractual fairness and in relation to the Unfair Contract Terms Directive, please analyse:

- Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;

If such a measure is taken forward, then given the concerns expressed by the consumer organisations, the remedies available should at least initially be limited to purely civil redress by the aggrieved traders.

Two business organisations said that they believe that there is a need to strengthen the protection of businesses (especially SMEs). A consumer organisation noted that if such measure is taken forward, the rights and remedies that consumers enjoy must not be negatively impacted in so far as the competent regulatory authorities may consequently be unable to cope with effective monitoring of unfair terms that impact consumers. No other specific comments were made.

- 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;

Business organisations agree that such a system of protection would be appropriate for B2B transactions. One organisation observed that protection in the UCTD based on the concept of good faith and significant imbalance in the parties' rights and obligations would be a step forward.

Other interviewees did not make any specific comments.

- 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;

One business organisation argued that protection is required especially when there is an imbalance of power between the traders concerned, whereas another said that protection should be extended to all aspects referred to above.

- 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;

No remarks were forthcoming on this point.

If such a measure is taken forward then certain terms included in the Annex to the UCTD should be included (though obviously the wording should be amended where applicable) such as those listed in paragraphs (b), (c) and (d) of the Annex to the UCTD.

- Whether there is a need for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive;

A similar provision should be introduced given that in some instances there may be an evident imbalance of resources - for example contractual agreements between a large commercial bank and a SME with limited resources. It is suggested that the application of such requirements should be the norm in all transactions where there is a clear disparity between the parties involved including those relating to B2B.

Two business organisations said that there is such a need in B2B transactions. No other comments were made.

- Whether an extension of the Unfair Contract Terms Directive to B2B transactions can bring benefits for cross-border trade;

There is no reason why it would not bring such benefits. It would enable businesses especially SMEs to negotiate with more confidence even with regard to cross-border trade, in the knowledge that they too have certain remedies if such unfair terms are inserted in the contracts entered into. One cannot ignore the reality that in some commercial transactions there may be a considerable disparity between the businesses concerned – for example on the one hand a large multinational firm dealing with a small local SME with limited human and financial resources.

Two business organisations argued in favour of an extension, with one of these organisations emphasising that this would provide for a level playing field between different traders of possibly unequal resources.



- Whether the consequences of such an extension would have an effect on innovation by or market opportunities for SME providers/suppliers;

Such an extension should positively impact on SMEs, leading to innovation and new market opportunities as it would allow SMEs to conduct business with more confidence in the knowledge that they too have some protection at law in relation to the application of the norms under the UCTD at least in so far as civil redress is concerned. This consideration is particularly relevant in a small nation like Malta where many businesses are small undertakings.

One business organisation replied in the affirmative. No other specific responses were given.

- Whether the benefits of extending the scope to business-to-business transactions would exceed the negative consequences of such an extension.

Overall such an extension would have more positive than negative consequences. The sole reservation voiced by one of the consumer organisations, was that whilst protection by way of civil remedies should be considered vis-a-vis SMEs dealing with larger businesses, one should act with extreme caution in requiring regulatory intervention by the competent national consumer authorities if this impacts negatively on the regulatory role of such public authorities in protecting consumer rights.

A business organisation said that the benefits would exceed the negative consequences, but did not elaborate. No other specific points were made.

### 1.3. Injunctions

#### 1.3.1. Effectiveness of the current rules in establishing a high level of consumer protection

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

- To what extent is the use of the injunction procedure in your country contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment?<sup>26</sup>

To date the injunction procedure (under Maltese law the term used to refer to injunction procedure is 'compliance order') has been barely used. Moreover no cross-border injunction has to date ever been made by any Maltese qualified entity.

The transposition of the ID under Maltese law is in part catered for under the Consumer Affairs Act (Cap. 378) which is enforced by the DG Consumer Affairs within the MCCA, and in part by various sector specific public authorities or regulators administering other consumer protection laws relating to different sectors<sup>27</sup> (see below reply to 1.3.3.).

There is a lack of awareness, and possibly even some confusion, about the existing injunction procedure under Maltese law, by some interviewees including by some of the entities listed as 'qualified entities' and therefore entitled at law to seek the issue of an injunction order. This appears to be the main problem rather than the effectiveness or otherwise of the procedure per se. One also needs to take into account that some of the qualified entities – in particular the consumer organisations –

<sup>26</sup> 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.

<sup>27</sup> Hence for example the Malta Tourism Authority deals with injunctions – 'compliance orders' in so far as these relate to timeshare and package travel directives.



lack the human and financial resources to adequately pursue requests for the issue of an injunction order under Maltese law, let alone in other MS.

A sector specific regulator observed that in the sector it regulates the national measures implementing the ID have never been used. It remarked that an option to be considered would be to give it concurrent powers under the applicable provisions of the Consumer Affairs Act (Cap. 378) to enforce the relevant provisions implementing the UCPD and the UCTD in so as these related to that sector. This would have the merit of ensuring that enforcement measures are taken directly by the specialised sector specific regulator.

Another sector specific regulator said that under art. 94 of Cap. 378, as a qualified entity it may formally request the DG Consumer Affairs to issue a compliance order (injunction order) in relation to unfair commercial practices or unfair contract terms impacting the sector that it regulates. This regulator observed that it has on more than one occasion used this tool.

A public authority remarked that it considers the injunction procedure as a necessary tool to deal with consumer rights violations, and that such a procedure is an effective tool where other means of enforcement are less appropriate.

One of the consumer organisations said that it lacks practical experience, noting that injunctions are 'beyond' its remit.

Another consumer organisation said that the effect of the use of injunction procedure in contributing to a reduction in infringements is to date practically nil. This organisation referred to a request it had made to a public authority to issue an interim order on the basis of unfair commercial practices committed by a public transport service provider. The public authority in question declined on the basis of the principle of *lex specialis*, arguing that it had no remit to investigate the case and to consider the issue of a compliance order. The said consumer organisation then took the public authority to court. In 2014 the consumer organisation won the case but the public authority appealed this decision. The case is currently pending before the Court of Appeal.

- What measures in your national legislation on injunction procedure are considered to be particularly effective, if any: measures regarding the cost of the procedure, the 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?

The injunction procedure has rarely been used. Based on this consideration, it is difficult to establish whether the measures under national legislation implementing the ID have proved to be effective.

This said, in some instances issues of non-compliance were resolved without the need to have recourse to the issue of a formal compliance (injunction) order. It appears that in some cases the consequence of facing administrative fines coupled with the publication of corrective statements (and therefore negative publicity in the media), effectively acts to persuade some businesses to comply voluntarily rather than face a compliance order coupled with the attendant sanctions and negative publicity in the media. In a small country like Malta negative publicity rather than punitive sanctions can be much more 'persuasive' on non-compliant businesses.

A consumer organisation noted this procedure has barely been used and therefore it is difficult to gauge its effectiveness, noting that as far as it is aware this procedure has only been used once, adding that it has some concern as to whether enough is being done to make the most effective use of the available legal tools to protect consumer interests. No other specific comments were made.

- Has your country extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunction Directive? If yes, what are the additional consumer rights covered?

Under the Consumer Affairs Act (Cap. 378) the injunction procedure applies to all provisions of the said Act and any regulations made thereunder. Regulations made under the Act which are currently not listed in Annex I of the ID and in relation to which the injunction procedure applies, include:

- SL 378.10 – Home Loan Regulations;
- SL 378.14 – Denied Boarding (Compensation and Assistance to Air Passengers) Regulations (which relates to EU Regulation No. 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and repealing Regulation (EC) no. 295/91);
- SL 378.19 Consumer Rights Regulations (which transposes Directive 2011/83/EU on Consumer Rights).

Furthermore the Minister for consumer affairs may extend the application of the injunction procedure to any other laws dealing with consumer rights.

A consumer organisation noted that the injunction procedure covers most consumer laws enforced by the DG Consumer Affairs within the MCCA including the Consumer Rights Regulation and the Home Loan Regulations.

No other specific comments were made.

- Analysis of the obstacles to the effective use of the injunction procedure, in particular by analysing which progress in removing obstacles has been made and/or new difficulties that have emerged in your country since 2012.

Lack of awareness about the availability of the injunction procedure at law, and the rights that qualified entities enjoy thereunder, is one of the main 'obstacles' (see also previous replies in this Part). In one instance from the reply given during an interview it was obvious that the interviewee in question was not even aware of its right to ask for the issue of an injunction order under different consumer protection laws.

The other more practical issue is the lack of resources – both financial and human - especially in the case of consumer organisations to formally request the issue of injunction orders by the competent regulatory bodies.

The 'obstacle' at this stage is not the actual norms under national law which transpose the ID, but the lack of awareness about the said norms by some of the 'qualified entities' entitled under Maltese law to seek the issue of an injunction order.

A public authority said that a main obstacle is the time it takes for a case to be decided by the CCAT once a compliance order has been contested.

A consumer organisation referred to the lack of financial and human resources available to consumer associations as constituting an obstacle in its capacity to request the issue of injunction orders.

No other specific comments were made.

- In a forward looking perspective: Should the coverage of the Injunctions Directive be extended (by including additional legislation into Annex I to the Directive)? If so, which EU legislation should be included? Are there other measures that could improve the effectiveness of the ID in establishing a high level of consumer protection? Should the scope of the Injunctions Directive be extended to the protection of collective business' interests? Are there best practices in your country that could be relevant for other countries and considered as model for the injunction procedure at EU level?

A consumer organisation argued that the ID should apply as a matter of course to all consumer protection legislation, including laws in the sector specific areas such as energy, telecommunications and financial services which aim at providing measures to protect consumers. This organisation argued that this would be a positive measure, adding that there is no reason why this should not be the case. The same organisation added that one must ensure that there is adequate awareness about the existence of injunction procedure, the benefits of using such a procedure and the possible positive end results for consumers.

A public authority suggested the extension of ID to the Mortgage Directive 2014/17/EU. The same interviewee said that it did not agree that the ID should be extended to cover collective business interests, but did not explain why. It also observed that it is a standard practice that the injunctions procedure is availed of when other measures have not proved to be adequate or appropriate to address a specific issue. It did not however elaborate further on this practice.

A business organisation argued that the ID should be extended to collective business interests.

### 1.3.2. 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:

- How effective is the injunction procedure in addressing infringements originating in another EU country?

A consumer organisation said that the injunction procedure in such instances would be effective only if qualified entities had the adequate resources to act in such instances, adding that the consumer organisation lacks the adequate resources to deal with infringements in Malta.

A public authority noted that to date it does not result that the injunction procedure has ever been used in such instances.

- How effective is it to address infringements originating in another EU country that qualified entities in your country are enabled to seek injunctions in the other Member State (Article 4 of the Injunctions Directive)?

The main issue relates to the lack of resources - both financial and human - in dealing with the application of injunctions in another MS. This in practice applies to both consumer organisations and to the competent public authorities in Malta.

A consumer organisation said that lack of resources - both human and financial - is the main obstacle, adding that in practice it is practically impossible to undertake effective action in another Member State let alone in Malta (see previous answers in this subsection).

A public authority noted that any enforcement action is ultimately only effective if the trader has sufficient assets in that particular jurisdiction, hence in order to ensure that

enforcement action is effective one needs to be able to seek an injunction in that Member State where the trader is based/their assets are.

No other specific remarks were made.

- In a forward looking perspective: Are there non-legislative or/and legislative measures that could improve the effectiveness of the injunction procedure in addressing infringements originating in another EU country? Are there best practices in your country that could be relevant for other EU countries and could be considered as a model for the injunction procedure at EU level?

There are no best practices in Malta which could serve as a model for the injunction procedure at EU level. The approach from legislative and enforcement angles is to have the injunction procedure applicable to the various public authorities responsible for the different national laws which transposed the EU Directives listed in the Annex to the ID (see also replies below).

In some instances recourse requesting the issue of injunction order under the applicable injunction procedures in Malta was not undertaken as a result of informal negotiations between the competent public authority and the non-compliant business concerned whereby the latter agreed to voluntarily remedy matters rather than face the consequences of an injunction order, resultant sanctions and negative publicity.

A public authority noted that in the case of conflict of jurisdiction the 'lis pendens' rule should be followed in relation to concurrent measures.

A consumer organisation said that it lacks the effective capacity to be able to take action in other MS. At present this however is not a major issue. According to this organisation what is effectively the main concern in this context is the lack of adequate resources to take action in Malta.

### 1.3.3. Interplay between the Injunctions Directive and other enforcement instruments of consumer law

Please analyse:

- Is the injunction procedure as designed by the Injunctions Directive regulated separately in your country (in a separate legal act or as a separate procedure regulated within the same legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (UCPD, UCTD and by the Consumer Rights Directive)?

The transposition of the ID was made through various laws enforced by different public authorities and sector specific regulators depending on the subject matter as reflected in the Annex of the ID which lists the various consumer protection directives in relation to which the ID applies.

The majority of Directives as listed in the aforesaid Annex to the ID are catered for in the Consumer Affairs Act (Cap 378) which law is enforced by the DG Consumer Affairs within the MCCA. The Directives in relation to which the injunction procedure as applied under the Consumer Affairs Act are (or were in the case of those Directives which have since 2009 been superseded by other EU legislation):

- Council Directive 85/577/ECC (now superseded by the Directive 2011/83/EU on consumer rights);
- Council Directive 87/102/EC (now superseded by Directive 2008/48/EC on consumer credit);
- Council Directive 93/13/EEC;

- Directive 97/7/EC;
- Directive 1999/44/EC;
- Directive 2005/29/EC.

The other Directives listed in the Annex to the ID are dealt with by other public authorities or sector specific regulators who under the relevant legislation can issue injunction orders<sup>28</sup> or their equivalent. Hence with regard to:

- Council Directive 90/314/EEC (on package travel) and Directive 2008/122/EC (on timeshare) – the competent sector specific authority which can issue injunction orders is the Malta Tourism Authority;<sup>29</sup>
- Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities - the competent sector specific authority which can issue injunction orders is the Malta Broadcasting Authority;<sup>30</sup>
- Directive 2000/31/EC on certain legal aspects on information society services, in particular electronic commerce in the internal market - the competent sector specific authority which can issue injunction orders is the Malta Communications Authority;<sup>31</sup>
- Directive 2001/83/EC on the Community Code relating to medicinal products for human use - the competent sector specific authority which can issue compliance orders is the Medicines Authority;<sup>32</sup>
- Directive 2002/65/EC concerning the distance marketing of consumer financial services – the competent sector specific authority which can issue compliance orders is the Malta Financial Services Authority (MFSA).<sup>33</sup>

No specific comments were made by the interviewees.

- If these procedures are regulated separately: What are the main differences between them? How is the coherence between these procedures ensured? If these procedures are regulated in a single legal act (possibly as a single procedure): In what way do these procedures (or this procedure) go beyond measures foreseen by the Injunctions Directive?

The injunction procedures as explained in the previous reply are dealt with under different laws enforced by different public authorities depending on the subject matter in question.

The bulk of consumer protection legislation covered by the ID is dealt with under the Consumer Affairs Act enforced by the DG Consumer Affairs MCCA. The Directives covered under that law include the UCTD, the UCPD, the PID, the Consumer Credit Directive and the Consumer Rights Directive. The procedural norms followed by specific sector regulators stated in previous reply are in substance similar to those under the Consumer Affairs Act, in that qualified entities may ask for the issue of an

<sup>28</sup> The term used in Maltese law to refer to injunction orders is in most instances 'compliance order'. See for example Part XI of Chapter 378 of the Laws of Malta.

<sup>29</sup> See Subsidiary Legislation 409.17 entitled "Injunctions for the Protection of the Interests of Consumers (Package Travel and Protection of Buyers in contracts for time sharing of immovable property) Regulations.

<sup>30</sup> See Subsidiary Legislation 460.12 entitled "Advertising, Sponsorship and Teleshopping (protection of Consumers' Interest) (Television Broadcasting Injunction) Order.

<sup>31</sup> See the Electronic Commerce Act – Cap. 426 of the Laws of Malta.

<sup>32</sup> See Subsidiary Legislation 458.51 entitled "Medicines Products (Injunction to advertising) Regulations.

<sup>33</sup> See Subsidiary Legislation 330.07 entitled "Distance selling (Retail financial services) Regulations.

injunction order. The competent public authority has the faculty of issuing an injunction order and imposing penalties if the order is not complied with, also requiring publication where necessary of that order. There is also the right of appeal from the decision of the competent authority in deciding whether or not to issue an injunction order.

A consumer organisation noted that the measures give considerable leeway to the DG Consumer Affairs MCCA not simply in dealing with any act or omission in this regard, but actually empowering the DG to take measures to ensure compliance (see art. 94(1) of Cap. 378).

No other specific comments were made.

## 1.4. Cross-cutting issues

### 1.4.1. Cost and benefits of the directives covered by the study

- To what extent is there evidence for benefits for consumers stemming from the protection provided by both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of benefits for consumers from the protection against unfair commercial practices and unfair standard terms in contracts; [*Note: a relevant aspect in this context is whether the costs for consumers in exercising their rights under these directives are limiting these benefits or not.*]

No research has to date been conducted in this regard.

In practice there are no fees if a qualified entity decides to formally request the issue of an injunction order. Substantial litigation costs may however be incurred if the competent regulatory authority to whom a request for the issue of a compliance order is made, decides not to uphold a request and the qualified entity decides to contest that ruling before the competent adjudicative review forum.

A consumer organisation observed that in practice no benefits can be identified since there has been no pro-active enforcement. It added that there would be substantial benefits if there is pro-active enforcement, noting that these Directives are very important for a small country like Malta where competition is restricted due to the small size of the market. Effective enforcement of the norms reflected in these Directives in practice would result in great benefits to consumers and would make local markets more competitive.

This consumer organisation further noted that the costs to exercise these rights through the legal system are potentially high, adding however that in civil disputes where the amount of money involved is small, a consumer can make use of the Consumers Claims Tribunal (CCT) where costs are reasonable and the procedure relatively straight forward.

The same consumer organisation referred to its experience, whereby it requested the DG Consumer Affairs MCCA to initiate an investigation under article 12A and to issue an interim measure pending such an investigation.<sup>34</sup> The request related to allegations about the alleged shortcomings of a public transport service provider which - according to the consumer organisation in question - constituted an unfair commercial practice. This organisation said that the DG Consumer Affairs refused to take any

<sup>34</sup> The consumer organisation concerned did not actually ask for the issue of an injunction order but for an interim order. However the experience of this organisation is relevant in that it illustrates the difficulties that such organisations can face if the issue ends up in court.



measures as requested, with the end result that it had to undertake legal proceedings to contest the DG's position, taxing its limited resources in the process.<sup>35</sup>

A public authority noted that the benefits for consumers as a result of the protection provided by the UCPD and the UCTD are that consumers have their rights set out in a legal instrument which identifies and explicitly prohibits unfair commercial practices and unfair contract terms. In relation to the costs this authority observed that consumers can exercise their rights under these Directives by taking action before the CCT for a relatively small fee.

- To what extent is there evidence for benefits for traders stemming from both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of creating a level playing field for honest traders by providing a legal basis to eliminate or at least constrain dishonest market practices, such as the use of unfair standard terms in contracts or unfair commercial practices, including through the application of the Injunctions Directive;

No research has been conducted and no statistics are available on this point.

A public authority argued that compliance with the consumer protection norms that each trader should uphold, creates a level playing field, whereby traders compete in a competitive environment where due consideration is given in providing adequate customer care.

A business organisation said that the benefits for traders as a result of such measures militate in favour of a level playing level, whilst curbing dishonest practices, thereby enabling honest traders to expand their business.

- What are costs for traders due to the need to respect the requirements under the directives covered by the study? [*Note: Such as costs of research, legal advice and compliance as well as the amount of time necessary to comply with the directives*]

A public authority said that compliance with the requirements of the said Directives obviously meant additional costs on traders, adding however that consumers would be more inclined to deal with a trader who they know is fully compliant with the said requirements.

Similarly a business organisation noted that effective compliance leads to additional costs.

No research was undertaken and statistics are available.

- What are the costs involved in the public enforcement of these rules?

A public authority noted that in order to have fully effective enforcement one needs to have ample human and financial resources.

No other specific comments were made.

No statistical information or studies are available.

The costs involved would be that of the use of officers of the competent regulator in investigating the alleged non-compliance. If a regulatory measure such as injunction order is taken, and this is contested, one would need to factor in the litigation costs of defending before the competent court the regulatory decision taken.

<sup>35</sup> See Benny Borg Bonello nomine vs Awtorita ta' Malta ghall-Kompetizzjoni u ghall-Affarijiet tal-Konsumatur u d-Direttur Generali (Affarijiet tal-Konsumatur). The case was in substance decided in favour of the consumer association by the Competition and Consumer Appeals Tribunal on the 26 February 2014 and is now before the Court of Appeal following an appeal by the Director General of the decision given by the Tribunal.



- Are there indications that the directives covered by the study are not implemented in your country in a cost-effective manner?

From information available, no injunction orders have been issued by any of the competent public authorities (other than the DG Consumer Affairs MCCA) empowered to do so with regard to the sector specific laws that they enforce and which empower them to issue injunction (or 'compliance') orders.

A consumer organisation noted that a clear indication that the ID may not have been implemented in a cost-effective manner is the low number of injunction orders issued and of lawsuits before the CCAT since the establishment of this adjudicative review forum in 2011 with only one case being filed further to the issue of an injunction order.

A public authority noted that there is no indication that the directives in question have not been implemented. A similar response was given by a business organisation. No other specific comments were made.

- Could the costs for implementing and enforcing the rules of the directives covered by the study be reduced without lowering the level of protection for consumers? If so, how?

There does not appear to be any plausible possibility of lowering the costs involved.

The issue within a local context to date does not appear to relate to the costs incurred but to the lack of awareness about the measures available at law. In practice there are no significant costs for qualified entities in filing a formal request to a competent public authority to take regulatory measures, in particular to issue an injunction order. Costs will occur if regulatory measures taken by the competent public authority are contested in court and the qualified entity is a party to such proceedings.

There will also be costs related to the effective enforcement of any final orders issued. In practice however no measures can be identified that may significantly reduce such costs without compromising the effectiveness of the regulatory measures that need to be taken.

A public authority observed that effective enforcement comes at a price, whereas a consumer organisation suggested that a practical and simple measure would be to extend the upper limit of the sum of the claims made by consumers that may be referred to and determined by the CCT.

#### 1.4.2. Interplay with EU sector-specific consumer protection legislation

Regarding the interplay of the horizontal EU consumer legislation [mainly UCPD and UCTD] with EU sector-specific consumer protection legislation in the areas of electronic communications, passenger transport, energy and consumer financial services, please:

- Analyse the levels of awareness of the requirements of the horizontal EU consumer legislation (mainly UCPD and UCTD) of businesses and consumers and the specific public enforcement bodies in the relevant sectors, as in particular demonstrated by their practical application; [*Key question here is: Are UCPD and UCTD applied in practice by national authorities and courts as a legal basis to combat unfair commercial practices and unfair standard terms in contracts in the regulated sectors?*]

Formal enforcement proceedings relating to infringements of both the UCPD and the UCTD are rare.

In the case of injunction orders, to date only two have been issued (relating to alleged unfair practices in the telecoms sector). There was a case (in the transport sector) where a consumer organisation requested the initiation of investigations and the issue of an interim order by the competent national consumer authority (namely the DG Consumer Affairs – MCCA). The said authority declined to proceed arguing that the matter falls within the remit of the sector specific regulator. The consumer organisation contested this ruling with the court of first instance deciding in favour of the consumer organisation. The issue is currently pending before the Court of Appeal following an appeal for the decision of the court of first instance (in this case the CCAT).

In practice many issues investigated by the competent national consumer authority are resolved after informal negotiations with the businesses concerned, with such businesses preferring to rectify matters voluntarily rather than face formal regulatory measures (see above previous replies on the same subject).

A consumer organisation said that the level of awareness overall is weak, though there are specific sectors – such as telecommunications and transport – where the level of awareness amongst the service providers is much better.

Another consumer organisation noted that consumers are increasingly becoming more aware of the rights they have at law. However implementation is far from transparent and the terms of a contract not always understood properly by some consumers.

A sector specific regulator observed that the service providers it regulates are aware of the requirements emanating from the said two Directives.

Another sector specific regulator noted that in one of the sectors it regulates there is no specific data about the awareness of either business or consumers in relation to the UCPD or the UCTD, noting however that the MCCA does provide information over the various media about the norms applicable under horizontal national legislation.

A third sector specific regulator said that in the sectors that it regulates the major businesses have a dedicated regulatory team which monitors regulatory requirements closely. It added that in relation to the complaints/enquiries that it received from consumers about alleged non-compliance with the UCPD or the UCTD, it invariably has to provide further guidance.

A public authority said that despite its continuous efforts to inform traders about their obligations under the UCPD and the UCTD there are still traders – especially those operating small businesses – who are not well-informed.

A business organisation said that there is lack of awareness both amongst businesses and consumers about their rights and duties under these Directives. Conversely another business organisation said that businesses are aware of their rights and duties whereas there is not enough awareness amongst consumers.

- Specify whether in your country the same authority is responsible for the enforcement of the horizontal EU consumer law 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 UCPD/UCTD in the regulated sectors, as specified in the previous bullet?*]

The enforcement of UCPD, PID and UCTD is the sole responsibility of the DG Consumer Affairs MCCA, whereas the sector specific rules on consumer protection are the responsibility of the various sector specific regulators – Malta Tourism Authority (travel package, timeshare and tourism related issues), Malta Communications Authority (electronic communications, e-commerce and postal services), the Regulator for Energy and Water Services (energy including electricity

and gas, and water), the Malta Financial Services Authority (financial services), and the Authority for Transport in Malta (transport, including public transport).

There are no formal institutionalised cooperation agreements between the DG Consumer Affairs MCCA and any of the sector specific regulators. However most of the sector specific regulators cooperate informally with the DG Consumer Affairs communicating as necessary to take coordinated action where necessary.

Some of the aforesaid regulators are considered under Maltese law as 'qualified entities' and as such can request other public authorities – notably the DG Consumer Affairs – to issue injunction orders if there is a breach of UCPD or UCTD relating to the sectors that they supervise.<sup>36</sup> This to date has occurred at least in relation to one sector specific regulator – the MCA - which requested the issue of a compliance order (injunction order) by the DG Consumer Affairs for an alleged breach of the norms relating to UCPD.

A sector specific regulator said that it had as a qualified entity requested on 'several occasions' the DG Consumer Affairs MCCA (and before the MCCA, the former Consumer & Competition Department) to issue injunction orders in relation to infringements of the national law implementing the UCTD and the UCPD in relation to the sector it regulates. No specific figures were provided.<sup>37</sup> The same regulator said that it does not have any statistics on the application of UCTD or UCPD, as it is not the competent authority for the enforcement of these directives, adding that it is responsible for the enforcement of sector specific rules whereas the DG Consumer Affairs MCCA is responsible for horizontal consumer protection rules. It also noted that whilst it has no formal institutionalised agreement with the DG Consumer Affairs, it communicates regularly on an informal basis with the DG's office.

Other sector specific regulators noted that to date they have not requested the issue of any injunction orders by the DG Consumer Affairs MCCA.

One business organisation said that as far it is aware there is no formal institutionalised cooperation between the different public authorities and the sector specific regulators.

A consumer organisation said that different public authorities are responsible for these two sets of rules adding that sector specific regulators as qualified entities may apply with the national consumer enforcement authority if they consider that there is a breach of UCPD or UCTD in relation to the sectors that they supervise. It added that it is not aware of any memorandum of understanding or agreement for co-operation, between on the one hand the national consumer enforcement authority and on the other hand the various sector specific regulators.

<sup>36</sup> Article 2 of the Consumer Affairs Act interprets a qualified entity as meaning amongst other entities "an independent public body, having a legitimate interest in ensuring the protection of the collective interests of consumers in Malta". In the laws establishing some of the sector specific regulators such as the MCA and REWS one of the objectives listed is precisely the protection of consumer interests. See for example art 4 of the Malta Communications Authority Act (Cap.418) and article 4 of the Electronic Communications (Regulation) Act (Cap. 399) and article 5 of the Regulator for Energy and Water Services Act (Cap. 545).

<sup>37</sup> On the basis of the information available only two compliance orders (relating to the same issue but against different companies) have to date been issued by the DG Consumer Affairs MCCA. No information was provided as to the number of the actual formal requests for the issue of an injunction order.

- Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning contractual fairness, 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.?*]

The competent national consumer authority (MCCAA) and the sector specific regulators co-operate informally with each other when an issue arises which may be in breach of both horizontal consumer law (e.g. involves a breach of UCPD or UCTD) and sector specific consumer protection rules. This for example has occurred on various occasions in the telecoms sector where the two authorities concerned – namely the DG Consumer Affairs within the MCCAA and the MCA - acted in liaison to ensure that the issue was effectively dealt with, whilst avoiding overlap.

As stated elsewhere, there are no formal MoUs though in some instances such as in the telecoms sector the sector specific regulator and DG Consumer Affairs MCCAA are required by law to co-operate and share information within 'an appropriate timeframe taking into consideration the particular circumstances of the issues involved'.<sup>38</sup>

A consumer organisation referred to the Consumer Affairs Council which has the role of coordinating and enhancing cooperation, noting that to date there has not been much development in this area. It noted that some years back informal meetings were being held between different regulators and the MCCAA. This initiative however was discontinued. The same organisation suggested that sector specific regulators should be empowered (limitedly to the sectors that they are responsible for) to have direct enforcement powers in relation to the applicable national legislation relating to UCPD and to UCTD. Alternatively it suggested that one should consider having a comprehensive 'general' consumer authority which can take regulatory action both under the horizontal consumer law and under the sector specific consumer law. This would ensure for more effective regulatory action.

A public authority said that there are no conflicting provisions. In doing so it referred to the legal norm that 'lex specialis derogate generalis' – which provides that the sector specific rule prevails over any general rule which may be in conflict.

A sector specific regulator noted that under the Consumer Affairs Act it has as a qualified entity under that law on more than one occasion asked the DG Consumer Affairs to issue an injunction order in relation to UCPD and to UCTD, adding that the consumer horizontal rules and the sector specific rules do not overlap.

- What are the benefits of the complementary application of the UCPD and UCTD in the regulated sectors? What are the costs due to the complementary application with the sectoral EU consumer protection legislation?

A consumer organisation said that the taking of measures under the two directives ultimately lies with the DG Consumer Affairs, whereas sector specific consumer protection rules are enforced by the different sector specific regulators. This organisation argued in favour of sector specific regulators having direct powers to issue injunction orders in relation to both UCPD and UCTD in so far as they relate to their respective sectors rather than depending on measures taken by the DG Consumer Affairs. This would also do away with potential overlaps and (worse) the possibility of conflicting regulatory measures.

It further argued that direct application by the sector specific regulators would avoid overlap and lead to better co-ordination, avoiding the costs related to parallel investigations by different regulatory authorities in what (in substance) might be the same issue. It also suggested having in place a common data base of any regulatory measures taken, observing that this should help to minimise regulatory costs and

<sup>38</sup> See Article 4(9) of the Malta Communications Authority Act – Cap. 418 of the Laws of Malta.

allow for more coordination. This organisation argued that ideally there should be one focused national authority able to act in a comprehensive manner, applying where necessary the national norms which transpose both the UCPD and the UCTD, and the sector specific consumer protection norms. It observed that as much as possible one should strive to have a comprehensive well-resourced authority able to enforce the applicable legislation, arguing that having different authorities may lead to added costs and delay in addressing instances of non-compliance which may need to be dealt with in short order.

A public authority said that complementary application may be beneficial, whereas a business organisation said that this would be conducive to more transparency.

A sector specific regulator said that complementary application of UCTP & UCTD has the advantage of providing a comprehensive framework whereby consumers are consequently protected in most of their interactions with traders. It noted that there can be instances where aspects of the same practice are regulated by both sets of norms.

- Assess any need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law.

Clarification would help considering Malta's overall regulatory set-up given that the norms relating to UCPD and UCTD are the exclusive responsibility of the DG Consumer Affairs MCCA, whereas sector specific consumer protection measures are the responsibility of the various sector specific regulators. In practice regulatory issues which may cross the remit of the national consumer authority and a sector specific regulator are dealt with on an informal and practical basis where the public authorities concerned cooperate with each other.

From the responses provided, it emerges that there are no formal MoUs in place to date between on the one hand the DG Consumer Affairs MCCA, and on the other hand the sector specific regulators.

A consumer organisation said that this is an area which the European Commission should analyse carefully (taking into account particular national circumstances) with a view to eliminating duplication of effort whilst ensuring that practices detrimental to consumers are dealt with in a timely and effective manner.

A sector specific regulator said that clarification would be a positive measure, though there does not appear to be a pressing urgency for such a measure in the short term as there are no specific sector issues in the sector it regulates relating to either UCPD or UCTD.

Another sector specific regulator said that it regularly receives enquiries/complaints from consumers who do not distinguish between sector specific rules and horizontal consumer protection rules, and where consequently it has to direct them to the MCCA if the issue relates to a horizontal rule (i.e. involves a possible breach of the national law implementing UCPD or UCTD). It observed that more should be done to inform consumers about the interplay between sector specific rules and horizontal consumer law.

A public authority said that it is not aware of any need for clarification between the sector specific consumer law and horizontal consumer law (notably UCPD and UCTD).

A business organisation noted that there is a need for clarification with regard to the interplay between the sector specific rules and the horizontal rules, as there may be some confusion about the proper application of either regime.

#### 1.4.3. Relevance of consumer law directives for consumer-to-business transactions

- Please analyse the need and potential for the application of the consumer law directives (mainly UCPD and UCTD) to 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).

A public authority said that UCPD and UCTD directives should be limited to business to consumer transactions, whereas business organisations said that where a party to the transaction is a consumer then the UCPD and UCTD norms should apply.

A consumer organisation said that if a consumer is acting as a 'business' by providing services etc. then the same rules should apply. However, in practice a single consumer even when acting as a supplier, has minimal power in contrast to a business concern.

No further comments were made.

#### 1.4.4. Specific protection for vulnerable consumers

Please analyse:

- Whether the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined in the consumer law directives and relevant jurisprudence, and as applied by national authorities and courts in your country, continue to be valid and fit for purpose.

There are no precise definitions under Maltese consumer law in relation to any of these terms. There has been one court decision relating to unfair terms whereby the court expressly referred to the old age and low level of education of the consumers in determining whether the terms of a contract were unfair.<sup>39</sup>

There is a general consensus among interviewees that there is scope for a more detailed interpretation of such concepts.

A sector specific regulator commented that it is not aware of any instances whereby these concepts have been dealt with in relation to the sectors it regulates or by the competent courts. Another sector specific regulator said that to date it has not carried out any analysis to determine the use or definitions of such terms which result from laws which it does not administer.

A public authority argued that such terms allow for subjective interpretation and therefore further qualification is recommended.

A business organisation observed that there are different interpretations, noting that in Malta 'vulnerable consumers' for example are interpreted as including 'low income' earners. Another business organisation argued that there is scope for a definition of the term.

<sup>39</sup> See F(Advertising) Limited (C 27689) vs Joe u Nathalie konjugi Mifsud decided by the First Hall of the Civil Court on the 21 November 2014. The Court in deciding that various terms of the contract were unfair remarked also that from the evidence it was very clear that the consumers were an elderly couple with a basic level of education and were informed of the terms in what the court described as "l-aktar telegrafiku" (very telegraphic). The issue related to the agency fees in relation to the sale of a property and that the consumers were misled into believing that they were dealing with an estate agency and not an advertising firm. In another case again involving fees due to services provided in advertising a property – namely Malta Property Auctioneers Limited (C40799) vs Malcolm Becket et decided by the First Hall of the Civil Court on the 29 November 2012 – the Court. in determining whether a particular term was unfair or not, considered that the consumer in question was a person familiar with business transactions and involved in the trusts sector noting that the consumer had stated that he had contact with nine other estate agents.



A consumer organisation said that to date, in practice, the concepts of 'vulnerable consumer' and 'average consumer' do not effectively have any role in Malta. The only exception is in the electricity market where a certain number of low income consumers are given a subsidy. It commented that it is not aware of any case law on the subject.

- To what extent the existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers and whether, based on the experiences in your country, specific provisions should be introduced in other directives concerned, in particular the Unfair Contract Terms Directive.

There is a general consensus amongst interviewees that there is scope for more specific norms to protect vulnerable consumers providing for clear criteria to identify such consumers.

A consumer organisation emphasised that the UCPD should not be a minimum harmonisation version, in particular that the list of practices listed as unfair should be a minimum list to which Malta can add further practices particular to national circumstances. It emphasised that the UCPD should be a minimum harmonisation directive therefore allowing for a Member State to go beyond the consumer protection measures therein provided for. In the few cases relating to UCTD there have been instances where vulnerable consumers – in particular the elderly and those with a basic level of education – were considered to have been taken advantage of, and therefore the terms entered agreed to were considered to be invalid (see answer to previous question and reference to the case quoted in that reply). This organisation suggested that the concept of an unfair term should also factor in criteria such as the age and level of education which may render some consumers especially vulnerable.

A sector specific regulator remarked that on the basis of its experience specific provisions protecting vulnerable consumers should be introduced, notably in the UCTD. Another sector specific regulator said that it was not aware of any cases in this regard in relation to the sector it regulates.

A public authority suggested that vulnerability of consumers due to old or young age, disability etc., should be addressed in a specific manner thereby improving on the general rules of UCPD.

Business organisations noted that the existing rules under UCPD are not adequate vis-a-vis vulnerable consumers.<sup>40</sup>

#### 1.4.5. EU added value

- Overall, would you consider that protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in your country since the implementation of the UCPD and the UCTD in national legislation?

The introduction of national legislation transposing the UCPD and UCTD was a positive measure. The main issue is that overall there has been limited recourse to the protection afforded under the national law implementing these two directives especially with regard to UCPD.

As discussed elsewhere in this report very few regulatory measures have been taken despite the fact that the relevant laws have now been in place for several years (UCPD was implemented in 2008 and the UCTD in 2000). The consumer organisation expressed repeated concern on this point referring both to lack of awareness, possible lack of resources, with one of the consumer organisations remarking also that the competent authorities are not pro-active enough and should do much more.

<sup>40</sup> See comments Cutajar Sara in her thesis 'Maximum Harmonisation in EU Consumer Protection Legislation' at pages 106 et seq.



A sector specific regulator noted that the implementation of these two directives has led to less litigation, though it did not elaborate why. The same regulator said that overall protection of consumers has improved following the implementation of these directives.

Another sector specific regulator observed that to date there was no apparent impact consequential to these Directives in relation to the sector it regulates.

A third sector specific regulator said that the implementation of these Directives has significantly strengthened consumer protection in Malta by providing for a comprehensive framework to tackle unfair commercial practices. This regulator noted that before the implementation of these Directives, consumers could resort to a number of remedies which however existed on a piecemeal basis mainly under general civil law. It added however that there is room for more coordinated enforcement action by the public authorities and regulators concerned to tackle emerging practices which are potentially in breach of these Directives.

A public authority noted that the protection afforded to consumers as a result of the implementation of these Directives has led to significant improvement, but did not elaborate.

Business organisations commented positively about the impact of these two Directives in relation to consumer protection in Malta.

A consumer organisation commented positively on the impact of these Directives, however remarked that there is a lack of pro-active enforcement and monitoring by the competent authorities.

Another consumer organisation said that awareness and protection against unfair commercial practices has increased mainly because of more use of social media, referring to dedicated columns in the media and information sessions on the media. It further added that consumer organisations are working more closely with different sector specific regulators. It also referred to the increase in cross-border transactions using the internet, adding the importance of consumer organisations familiarising themselves with new EU laws regulating such transactions and of providing new means of redress (it mentioned ODR as an example).

- Overall, would you consider that the information of consumers regarding unit prices has improved since the implementation of the PID in national legislation?

Some information campaigns have been undertaken. However no surveys have been undertaken to establish the level of awareness of the relevant national legislation implementing the PID.

Business organisations replied in the affirmative. Conversely one of the consumer organisations replied that this is not necessarily the case, noting that whilst the norms in the Directive are positive, it has strong reservations about their effective implementation.

- Overall, would you consider that the protection of businesses against unfair marketing in your country has improved since the implementation of the MCAD in national legislation?

Overall protection has improved especially within the context of comparative advertising which until the introduction of the norms regulating such advertising was not expressly dealt with at law. However not that many businesses engage in comparative advertising. Furthermore there has only been a handful of lawsuits relating to the norms on comparative advertising.

Contrasting replies were given by the business organisations. One replied in the affirmative whereas the other replied in the negative. No specific reasons by either organisation were given for their respective positions.

No other comments were forthcoming.

- Overall, would you consider that it has become easier for businesses in your country to directly trade cross-border to final consumers located in other EU countries in recent years? Has it become easier for consumers in your country to directly purchase cross-border from traders located in other EU countries?

Overall there has been improvement in cross-border trade both in the case of businesses in Malta, and more so in the case of consumers in Malta to directly purchase cross-border from businesses in other MS, especially in relation to certain services such purchase of digital content, holidays (especially booking of accommodation) amongst other things.

A public authority remarked that it has become much easier for consumers to undertake cross-border transactions, noting that the Directives in question have undoubtedly contributed to improvements, providing consumers in Malta with a level of consumer protection when undertaking such transactions which is on a par with that provided on a national level.

A business organisation said that it was becoming easier for businesses to conduct cross-border trade. Another business organisation conversely replied in the negative. Neither organisation elaborated.

A consumer organisation replied that it is becoming easier for consumers to buy cross-border, however it remarked that practices such as geo-blocking should be curbed, as they contradict the principle of a single market to the detriment of consumers.

- To what extent are these improvements, if any, due to the mentioned directives?

A public authority noted that overall the implementation of the Directives has had a positive and significant impact on Malta.

A sector specific regulator suggested that the measures under the Directives – notably UCPD and UCTD – would be more effective if sector specific regulators had concurrent powers to enforce the national laws implementing these Directives in so far as these related to the sectors that it enforces. A business organisation remarked that the Directives have served as a catalyst for national legislation and other pro-consumer measures.

A consumer organisation said there is more uniformity in the norms applicable, though significant differences still exist. Improvements have also resulted due to the work done by the ECC (European Consumer Centre in Malta).

## Annex

## A. Transposition fact sheet

**Table 1: Fact sheet on transposition of directives in Member States' law – Malta**

Directive	Transposition legislation (National law, Article)	Comments	Specific provisions going beyond minimum harmonisation requirements/use of exemptions	Included in national legislation		Comments
<b>Directive 93/13/EEC on unfair terms in consumer contracts</b>	Consumer Affairs Act (Chapter 378 of the Laws of Malta) Part VII entitled "Unfair Contract Terms" – articles 44 to 47C	Was enacted as per Act XXVI of 2000 which law amended Cap. 378 introducing the measures implementing the UCTD	'Black list' of terms considered unfair in all circumstances	Yes	<i>Consumer Affairs Act Articles 44</i>	<i>Article 44(2) provides for a black list of terms  The list may be extended by the Minister responsible for consumer affairs after consultation with the Consumer Affairs Council [see Article 44(3) &amp; (4)]</i>
	not applicable		'Grey list' of terms which may be considered unfair	None	<i>none</i>	<i>Not applicable</i>
	Cap. 378	Provisions apply to all terms including those which are individually negotiated	Extensions of the application of Directive to individually negotiated terms	Yes	<i>Consumer Affairs Act Article 44</i>	<i>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.</i>

	Cap. 378		Extensions of the application of Directive terms on the adequacy of the price and the main subject-matter	No	<i>Consumer Affairs Act Article 45(2) proviso thereto</i>	<i>Article 45(2) provides that if the term is in plain intelligible language then the assessment of the term shall not relate to the adequacy of the price or remuneration as against the goods/services supplied.</i>
<b>Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market</b>	Consumer Affairs Act (Chapter 378 of the Laws of Malta) Part VIII entitled "Unfair commercial practices and illicit schemes", Title I " Unfair commercial practices"- articles 51A to 51J		Provisions regarding financial services going beyond minimum harmonisation requirements	Yes	<i>Article 51I(e) of Cap. 378</i>	<i>This article states that the provisions of Part VIII are without prejudice to any requirement imposed in any other law in the field of financial services which is more restrictive or prescriptive than those under the aforesaid Part VIII.</i>
	Same as above		Provisions regarding immovables going beyond minimum harmonisation requirements	Yes	<i>Article 51I(e) of Cap. 378</i>	<i>Article 51I(e) of Cap. 378 which states that the provisions of Part VIII are without prejudice to any requirement imposed in any other law in the field of immovable property which is more restrictive or prescriptive than those under the aforesaid Part VIII</i>
	Same as above		Application of UCPD to B2B transactions	No	<i>Not applicable</i>	<i>Measures apply only in relation to commercial practices which target consumers and not other businesses</i>

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<p><b>Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers</b></p>	<p>Consumer Affairs Act (Price Indication) Regulations Subsidiary Legislation (SL) 378.09 of the Laws of Malta</p>		<p>Extension of the application to other sectors (e.g. for immovable property)</p>	<p>No</p>	<p><i>Not applicable</i></p>	
	<p>Same as above</p>		<p>Use of specific regulatory choices/derogations</p>	<p>Yes</p>	<p><i>SL 378.09 – regulation 6</i></p>	<p><i>Reg. 6 of SL ('Subsidiary Legislation') 378.09 lists the instances to which the said norms do not apply namely:</i></p> <ul style="list-style-type: none"> <li><i>(a) goods supplied for the purpose of re-selling</i></li> <li><i>(b) goods sold in the course of the provision of a service</i></li> <li><i>(c) sales by auction or sales of works of art or antiques</i></li> <li><i>(d) advertisement for such goods unless the price is indicated in the advertisement</i></li> </ul>

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<p><b>Directive 2006/114/EC concerning misleading and comparative advertising</b></p>	<p>Commercial Code (Cap. 13 of the Laws of Malta)  Part I Title II sub-title III entitled "Limits of Competition" articles 32A, 32B, 36A and 37</p>		<p>None</p>	<p><i>See articles 32A, 32B and 37 of Chapter 13</i></p>	<p><i>The remedies available are of a civil nature where the injured trader may seek redress against the offending trader before the competent civil court.</i></p> <p><i>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. See art. 37 of Cap. 13.</i></p>
<p><b>Directive 2009/22/EC on injunctions for the protection of consumers' interests*</b></p>	<p>Affairs Act (Cap. 378 of the Laws of Malta) Part XI</p>				
	<p>Injunctions for the Protection of Interests of Consumers (Package Travel and Protection of Buyers in Contracts for Time Sharing of Immovable Property) Regulations – SL 409.17 of the Laws of Malta</p>				
	<p>Medicines Products (Injunctions to Advertising) Regulations - S.L. 458.51 of the Laws of Malta</p>				

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	<p>SL 460.12 of the Laws of Malta entitled: 'Advertising, Sponsorship Teleshopping (Protection of Consumers' Interest) (Television Broadcasting Injunction) Order.'</p>					
	<p>SL 330.07 of the Laws of Malta entitled "Distance Selling (Retail Financial Services) Regulations,</p>					
	<p>Electronic Commerce Act (Chapter 426 of the Laws of Malta)</p>					



**Table 2: Fact sheet on Injunctions Directive – Malta**

Issue	Answer	Comments
<p>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)?</p>	<p>- Yes, separate procedures in separate legal acts administered by different public authorities (see next column).</p>	<p><i>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 MCCA. The DG can issue compliance orders with regard to the national laws implementing the following directives:</i></p> <p><i>UCPD</i></p> <p><i>UCTD</i></p> <p><i>Consumer Rights Directive</i></p> <p><i>Consumer Credit Directive</i></p> <p><i>Services Directive (2006/123/EC).</i></p> <p><i>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.</i></p> <p><i>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.</i></p> <p><i>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.</i></p>

<p>Who is entitled to bring an action seeking an injunction?</p>	<p>In accordance with article 2 of the Consumer Affairs Act , a ‘qualified entity’ – namely:</p> <p>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,</p> <p>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,</p> <p>a voluntary organisation in any other MS whose purpose is to protect the collective interests of consumers</p> <p>Any qualified entity from any other MS including in the list of qualified entities published in the Official Journal of the EU.</p>	<p><i>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.</i></p> <p><i>In the other instances the approach taken in identifying which entities are entitled to make an action seeking 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).</i></p>
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<p>Is the injunction procedure a court or an administrative procedure?</p> <p>If your country legislation foresees both forms of the procedure, please explain in the comments column for which infringements the court or administrative procedure is foreseen</p>	<p>It is an administrative procedure with the right of review of the administrative decision taken by the competent regulatory body before an independent adjudicative or quasi-adjudicative body.</p> <p>Hence in the case of 'compliance orders' (the technical name used to describe 'injunction order' under Cap. 378) a request for a compliance order may be made to the DG Consumer Affairs MCCA. The DG's decision on whether or not to issue the order may then be contested by an aggrieved party (either the qualifying entity which asked for the issue of the order or the business against whom the order was requested) before the Competition and Consumer Appeals Tribunal.</p> <p>In the case of compliance orders issued under SL 330.07 the request for the issue of a compliance order is made to the Malta Financial Services Authority (MFSA) and that decision may then be contested before the Financial Services Tribunal. Similarly in the case of a compliance order issued by the Malta Communications Authority (MCA) in relation to the national provisions which implement the e-commerce directive, such an order can be contested before the Administrative Review Tribunal.</p>	
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<p>Who bears the costs of an injunction procedure?</p> <p>If qualified entities (or some of their categories e.g. consumer organisations) are entitled to an exemption of some/all cost related to the procedure please explain the characteristic of such exemption in the comments column.</p>	<ul style="list-style-type: none"> <li>- The costs are as a rule borne by the losing party</li> <li>- Each party bears its own costs</li> <li>-The qualified entities are exempted from costs</li> </ul>	<p><i>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.</i></p> <p><i>There are no exemptions as to who bears the costs in such proceedings</i></p>
<p>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?</p>	<p>- Yes, scope of application extended to cover areas of consumer law that are not part of Annex I of the Directive (see reply on the next column).</p>	<p><i>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).</i></p> <p><i>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:</i></p> <p><i>SL 379.10 ‘Home Loan Regulations’</i></p> <p><i>SL 378.14 ‘Denied Boarding (Compensation and Assistance to Air Passengers) Regulations</i></p> <p><i>SL378.17 Consumer Rights Regulations (which transposed the Consumer Rights Directive).</i></p>
<p>Is protection of business' interests covered by the injunctions procedure?</p> <p>If scope of application extended to the protection of business' interests, please provide details in the comments column regarding type of business' interests covered by the injunctions procedure</p>	<p>No</p>	<p><i>Not applicable</i></p>

<p>Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations</p>	<p>- debateable (see next column)</p>	<p><i>Law does not expressly envisage such a procedure in the context of the issue of a compliance order.</i></p> <p><i>There does not appear to be any express prohibition for a joint injunction.</i></p>
<p>Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID)</p>	<p>- Yes</p>	<p><i>The competent authority is before deciding whether or not to proceed with the issue of compliance order, is required to first seek voluntary compliance by the person/s concerned.</i></p> <p><i>See for example article 100 of the Consumer Affairs Act, whereby the DG Consumer Affairs is required to first consider seeking voluntary compliance.</i></p>
<p>Has your Member State taken specific measures regarding the prior consultation (Article 5 of the Injunctions Directive)?</p>	<p>- Yes, there is a requirement for party seeking injunction to undertake prior consultation with the defendant.</p>	<p><i>The qualified entity must satisfy the competent authority responsible for the issue of an injunctions order that it has tried to achieve cessation of the infringement in consultation with the business concerned</i></p> <p><i>[see for example art. 94(2) of Cap. 378 and reg. 13(1) of SL 330.07]</i></p>
<p>Does the national legislation provide for measures ensuring summary procedure? Please specify main characteristics of the procedure (subject matter/time limits) in the comments column.</p>	<p>- Yes</p>	<p><i>The DG Consumer Affairs in relation to a request to issue a compliance order is required in all cases to “act as expeditiously as possible” and in any case to give a decision within 15 days from the receipt of an application to issue such an order (see art. 95(4) of Cap. 378).</i></p>
<p>Are there sanctions for non-compliance with the injunction order (Article 2(1) of the Injunctions Directive)? If sanctions in form of penalty or fine foreseen please specify in the comments column to who exactly should they be paid</p>	<p>- Yes, penalty of a fine for each day of non-compliance - Yes, other sanction (please specify)</p>	<p><i>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).</i></p> <p><i>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. .</i></p>

<p>Has your Member State taken specific measures regarding the publication of the decision and/or the publication of a corrective statement?</p>	<p>- Yes</p>	<p><i>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’</i></p> <p><i>The DG may moreover require the publication of a corrective statement as may be required in the order.</i></p> <p><i>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.</i></p> <p><i>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).</i></p> <p><i>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).</i></p>
<p>Is it possible to claim within the injunction procedure for sanctions for the infringement?</p>	<p>- Yes</p>	<p><i>Yes it is.</i></p> <p><i>Failure to comply with a compliance order may lead to the imposition of one-off and/or daily administrative fines. The sanctions varies according the national law implementing the injunctions directive.(see for example art. 106A of Cap. 378).</i></p>
<p>Can an action for the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to other beneficiary be brought within the injunction procedure?</p>	<p>- No</p>	<p><i>Cap. 378 does not envisage any such action, though such action may be considered under general civil law provisions.</i></p> <p><i>The situation is similar in the other sector specific laws.</i></p>
<p>Can an action for damages to be paid to the qualified entity or the public purse be brought within the injunction procedure?</p>	<p>- No</p>	<p><i>Cap. 378 does not envisage such an action.</i></p>

Can an action for damages or redress to be paid to the consumers concerned be brought within the injunction procedure?	- No	<i>No under the context of the specific norms relating to the injunctions procedure</i>
Can individual consumers base their individual claims for damages/remedies on the injunctions order?	- No	<i>There are no specific norms in this regard</i>
Can the qualified entity claim other measures beyond the injunction, e.g. evidence of compliance with the judgment?	- No	<i>No</i>
Are the effects of individual injunctions orders extended to the future infringements and/or same or similar illegal practices (of other traders)?	- Debateable	<i>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).</i>



## B. Data tables

### *Number of B2C disputes*

There are no official statistics. Our understanding is that few cases have actually been decided.

One revealing statistic available is the low number of appeals from decisions taken by the DG (Consumer Affairs) before the Competition and Consumer Appeals Tribunal. This adjudicative forum has been in place since May 2011. According to the information available there have been only two cases contesting a compliance order before that Tribunal.

There was another case lodged by one of the consumer associations requesting the Director General Consumer Affairs to investigate alleged unfair practices by a public transport provider. The Director General declined to do so, this on the basis that this issue fell within the remit of the sector specific regulator. The case is currently before the Court of Appeal after the CCAT (the Tribunal of first instance) upheld the request of the association that the Director General should investigate the allegations made.<sup>41</sup>

**Table 3: B2C disputes decided on the basis of consumer law directives covered by this study in comparison with total B2C disputes decided on the basis of other legislation (most recent year for which data is available)**

Year	Type of data	Total number of B2C disputes (number of cases)	Share of B2C disputes decided on basis of ...					Comments
			UCPD	UCTD	PID	other EU consumer protection legislation (e.g. CRD, Sales Directive, sectoral legislation)	national consumer legislation not based on EU directives	

No statistics were provided or are available. We are aware of only one formal case before the CCAT relating to UCPD.

<sup>41</sup> See Benny Borg Bonello nomine vs Awtorita ta' Malta għall-Kompetizzjoni u għall-affarijiet tal-Konsumatur u d-Direttur Generali (Affarijiet tal-Konsumatur) decided by the Consumer and Competition Appeals Tribunal on the 26 February 2014.

*Costs of obtaining redress for a hypothetical case of invoking unfairness of a standard contract term*

- Please estimate the costs, including time, for consumers in obtaining redress when invoking the unfairness, and thereby the non-binding character of standard contract terms in a contract they concluded. Please provide the estimate for the hypothetical example below, focusing on costs (and needed time) of a lower court procedure and the use of ADR or other relevant procedure (if applicable).<sup>42</sup>

This depends on the quantum of the monetary values involved. If it is less than EUR 3 500, the case would be heard before the Consumer Claims Tribunal (CCT), if proceedings are filed by the aggrieved consumer.

If the amount is more than the case would be before the ordinary courts of justice – either before the Court of Magistrates (for values between EUR 5 000 up to EUR 10 000) or if more, then the case would have to be filed before the First Hall of the Civil Court.

If the monetary value is between EUR 3 500 and EUR 5 000 then the claim would have to be filed before the Small Claims Tribunal which is the lowest tier of courts of ordinary jurisdiction.

<sup>42</sup> For the hypothetical example it is assumed that both the provider and the consumer are located in your country.

**Table 4: Estimate of costs for consumers in obtaining redress when invoking the unfairness of standard contract terms in a contract they concluded (for the hypothetical example provided in the box below)**

Redress mechanism	Estimated court fees (national currency)	Estimated lawyer's fees (national currency)	Other costs, if any (national currency)	Estimated time involved for consumer (hours)	Comments
<p><b>Lower court procedure</b></p> <p><b>Court of Magistrates (cases between EUR 5000 to EUR 10 000)</b></p>	<p>minimum of EUR 150</p>	<p>Depends on the nature of the case and the number of sittings involved – would vary between EUR 50 up to EUR 500 [based on official court taxed fees]</p>		<p>Time that consumer would dedicate varies according to nature of claim. On an average anything between 10 to 50 hours factoring research, court attendance etc. Attendance in court would depend on the number of witnesses.</p> <p>There may also be some waiting time as the case may be scheduled for hearing with other cases. The current practice is to give an approximate appointment for each case.</p> <p>On a rough estimate anything between two to ten sittings spread over a couple of years if the case is contested and involves the hearing of evidence. Cases before the lower courts and CCT would generally be dealt with in much shorter time span (see below).</p>	<p>Sittings would be held on an average once every one to three months with circa 15 to 30 minutes per sitting</p>

<p><b>Small Claims Tribunal (lowest tier of the ordinary courts)</b> Up to EUR 5000</p>	<p>EUR 50</p>	<p>Minimum of EUR 80. Increases if the amount in dispute exceeds EUR 582 – then fees calculated according to rates applicable for proceedings before the Court of Magistrates</p>		<p>Period varies between three months to a year</p>	
<p><b>ADR or other relevant procedure</b></p>	<p>Consumer Claims Tribunal (CCT)</p>		<p>Varies according to amount in dispute from EUR 10 up to EUR 26 (may vary marginally according to the number of notifications that need to be made)</p>	<p>With the CCT one to three sessions on an average over a period of circa three months to a year</p>	<p>Procedure is relatively informal, not expensive &amp; relatively 'quick' when compared to the procedure before the ordinary courts.</p> <p>The only alternative effective procedure to date as an alternative to court proceedings is the procedure before the Consumer Claims Tribunal. ADR processes to date are still very much in their infancy and are restricted mainly to mediation</p>

**Hypothetical example: Terms which inappropriately exclude/limit consumers' rights to compensation**

*A consumer went on a package holiday with a friend to Kenya for which they paid €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 €5,000 (€4,000 for the cost of the package and €1,000 for lost time and enjoyment). The tour operator agreed to compensate them €1,000 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/unfair-contract-terms/index\\_en.htm](http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-contract-terms/index_en.htm)]*

- Please estimate how often court and ADR procedures are used in your country for invoking the unfairness, and thereby the non-binding character of standard contract terms (i.e. the number of cases per year)?

With regard to the hypothetical examples referred to above, given that the claim is for EUR 5 000 then it would have to be filed before the lowest tier of the ordinary courts – namely the Small Claims Tribunal which determines any type of civil disputes where the amount in contestation is of less than EUR 5 000. If the amount exceeds EUR 5 000 then the competent forum is the Court of Magistrates.

The claim cannot be presented before the Consumer Claims Tribunal which is an 'outside court' dispute resolution forum (a sort of ADR) as this tribunal is only competent to determine consumer versus trader disputes if the amount in dispute does not exceed EUR 3 500.<sup>43</sup>

No statistics are available for the number of court or ADR proceedings are used in relation to such cases.

<sup>43</sup> It is pertinent to note that the Consumer Claims Tribunal may also award up to EUR 500 as 'moral' damages for distress, inconvenience incurred by the consumer. This measure is unique to claims filed before the Consumer Claims Tribunal.

## C. Interviews conducted and literature reviewed

**Table 5: Interviews conducted for this study**

Organisation	Stakeholder type	Date
[1] General Retailers & Traders Union ('GRTU') (represents SMEs in Malta)	Business association	[1] 14 June 2016
[2] Malta Employers Association (MEA)		
[3] Malta Chamber of Commerce, Enterprise and Industry (MCCEI)		[2] 23 June 2016
[1] Malta Competition and Consumer Affairs Authority ('MCCAA')	National consumer enforcement authority	[1] 24 June 2016
[1] Malta Communications Authority ('MCA')	National sector specific regulatory authority National sector specific regulatory authority	[1] 16 June 2016
[2] Regulator for Energy and Water Services ('REWS')		
[3] The Authority for Transport in Malta ('Transport Malta' or 'TM')		[2] 21 June 2016
		[3] 13 June 2016
[1] European Consumer Centre – Malta	(Cross-border) European Consumer Centre	[1] 17 June 2016
[1] Għaqda tal-Konsumaturi (Consumer Association – Malta)	Consumer organisation	[1] 15 June 2016
[2] Association for Consumer Rights		[2] 20 June 2016

**Table 6: Literature reviewed for country report**

Author/Source	Year	Title of publication
<a href="http://www.justiceservices.gov.mt">www.justiceservices.gov.mt</a>	Ongoing website	Both for consolidated versions of the applicable Maltese law and court decisions.
Gixti Isabella (thesis submitted for LL.D. – University of Malta)	2006	‘The concept of ‘unfairness’ in commercial transactions in EC Consumer Law’
Vella Galea Ian (thesis submitted for LL.D. – University of Malta)	2006	‘Unfair terms in standard form contracts under Maltese Law’
Buttigieg Eugene (paper presented during Conference held in Malta in March 2006)	2006	‘Consumer Protection against Unfair Commercial Practices in Malta – the Impact of the Unfair Commercial Practices Directive’.
Cutajar Sara (thesis submitted for LL.D. – University of Malta)	2013	‘Maximum harmonization in EU Consumer Protection legislation. Its impact on the scope of the protection afforded to consumers by national law’.



# 1. Study to support the Fitness Check of EU Consumer law – Country report THE NETHERLANDS

## 1.1. Unfair commercial practices and marketing

### 1.1.1. Effectiveness of the UCPD in establishing a high level of consumer protection

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

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

Prior to the UCPD, the Netherlands did not have a rich tradition of regulating commercial practices outside private law. This explains why the introduction of the UCPD was not used to completely overhaul the legal landscape of commercial practices. The Netherlands did not have a specific Act on Commercial Practices, nor did it have statutory 'black lists' similar to the Annex to the UCPD. Instead, Dutch law relied on general tort and contract law as a source of private law remedies against unfair commercial practices.

Moreover, the Dutch legislature had already revoked most of its specific legislation on marketing and sales practices in the deregulation periods of the 1980s and 1990s. Much of the legislation on pricing and marketing (such as rules on sales periods, rebates, joint offers, gifts, et cetera) was thus abandoned and revoked. Meanwhile, the lengthy project of recodification of the Dutch Civil Code, which culminated in the introduction in 1992 of the New Dutch Civil Code (hereafter: DCC), was a powerful engine for the development of comprehensive consumer protection standards in civil law. Therefore, the 1984 Misleading Advertising Directive was implemented and assimilated within the new Civil Code framework (as were most other generic consumer protection Directives).

As far as unfair commercial practices were concerned, Dutch consumer protection was dominated for a long time by self-regulation. This involved the Dutch government stimulating or even informally brokering Codes of Conduct and other forms of alternative regulation between representative organisations from trade, industry and services on the one hand and consumer organisations on the other. Although these self-regulatory codes did not involve heavy-handed sanctioning, they were binding on most of the traders involved through their membership of the association who owned the Code and was held responsible politically for its success. The quality assurance through this modern day version of self-regulatory 'guilds' was and still is rather successful. For instance, most of the case law on the 1984 Misleading Advertising Directive did not come from criminal courts or civil courts but from the private ADR Complaints Board for the Advertising Industry (*Reclame Code Commissie*; RCC). It applied (and still does so) both the rules and standards derived from (now) the UCPD and autonomous standards on fairness and good taste.

This brief overview shows that the Dutch situation is complex in the sense that prior to the implementation of the UCPD, an extensive legislative body of law on unfair commercial practices did not exist. On October 15, 2008, the *Wet oneerlijke handelspraktijken* (*Wet OHP*; Unfair Commercial Practices Act 2008) came into force. The Act implemented the UCPD by amending the 1992 *Burgerlijk Wetboek* (the Dutch Civil Code; DCC) and the *Wet Handhaving Consumentenbescherming* (*Whc*; Consumer Protection Enforcement Act 2007). Thus, the UCPD was implemented generically. No explicit exceptions to the UCPD regimes were introduced.<sup>1</sup>

The Unfair Commercial Practices Act 2008 does two things: it treats unfair commercial practices as both wrongful acts in private law (tort law) and as administrative offences

<sup>1</sup> See Van Boom et al 2009; Verkade 2009; Loos & Van Boom 2009; Van Boom 2010.

in public law. As far as the private law aspects are concerned, private individuals may seek prohibitory and mandatory injunctions in civil court. Individuals affected by an unfair commercial practice may request a court order holding that the defendant who is pursuing such a practice is prohibited from continuing that practice and/or mandatorily ordering cessation of that practice (and possibly restoring the status *ex ante quo*). Failure of the defendant to comply with the court-ordered injunction results in recurring penalty payments due to the claimant. In practice, mere injunctions are rarely sought by individuals. Individuals usually pursue claims for damages in tort (and possibly also, as the case may be, avoidance and restitution). Representative associations and foundations may also seek prohibitory and mandatory injunctions in collective action proceedings pursuant to Art. 3:305a DCC. This is a method commonly employed by such bodies to enforce consumer law.

As far as the public law remedies are concerned, the Consumer Protection Enforcement Act 2007 provides literally that 'a trader shall abide by the provisions laid down in section 6.3.3A of the Civil Code'.<sup>2</sup> Offending against this provision constitutes an administrative offence. The Act lists the various available sanctions. The competent authority may, subject to judicial review,

- Impose a fine of maximum (as per 1 July 2016) EUR 900 000 per committed offense or 10 percent of annual turnover,<sup>3</sup>
- Issue a stopping order (an administrative order made by the competent public authority ordering the trader to stop a certain practice, on penalty of a fine),
- Issue a compliance order (an administrative order holding a positive mandatory duty to comply, issued either after commission of the offense or, by way of anticipatory remedy, where the offense is imminent), and
- May publish its order or a voluntary undertaking by the trader.

As far as public law enforcement of the Unfair Commercial Practices Act 2008 is concerned, either the *Autoriteit Consument en Markt* (Authority Consumer & Markets; ACM) or the *Autoriteit Financiële Markten* (the Netherlands Authority for the Financial Markets; AFM) is the competent authority.

Pursuant to the relevant parts of the Consumer Protection Enforcement Act 2007, the ACM can initiate legal action against unfair practices generally, with the exception of such practices pertaining to 'financial services and activities'. The Act exclusively burdens the AFM with enforcement in the area of such services and activities. Besides the ACM and AFM, there are some minor competent authorities for specific niche areas.

Concerning the practical experience with the principle-based approach of the UCPD, there are diverging experiences. For instance, private law practitioners seem to be more at ease with this approach than administrative law practitioners who adhere more strictly to the *nulla poena sine lege certa* principle. From the viewpoint of this 'lex certa' principle, the principle-based approach of using open-textured concepts of 'misleading' and 'aggressive' practices offers less legal certainty for traders in advance than the specific list of practices deemed unfair *per se* does. That said, as noted by the ACM and the ECC (*Europees Consumenten Centrum*, in charge of facilitating cross-border requests), the open textured approach of the UCPD nevertheless offers leeway to competent authorities to develop their enforcement strategy. Moreover, some report that this flexibility also offers room to traders to innovate. Consumer organisations, however, feel that the principle-based approach does not prevent certain sharp practices that border on unfairness but fall just outside the scope of what constitutes an UCP.

<sup>2</sup> See Art. 8.8 *Whc*.

<sup>3</sup> See Art. 2.15 (2) *Whc*.

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

The enforcement authority ACM is quite happy with the list as it is – although consumers will be mostly unaware of the list, it is considered to be a welcome addition to the toolbox for enforcement purposes. Consumer organisations point out that the black list is relatively short and the procedure for amending the list is not clear; they emphasize the need for a flexible and quick procedure for amending the list so that the list can be adapted to 'new' UCPs. Our overall impression is that all involved appreciate the concept of a list as such since it offers relative clarity, predictability and – simply put – examples and illustrations so that businesses can get a flavour of what is unacceptable behaviour.

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

The minimum harmonisation clause is said to allow more stringent rules concerning cold calling, faxing and spamming, investment solicitation, commission churning, dedicated and detailed rules on information transparency, standardised wealth warnings and the like. The minimum harmonisation clause is highly appreciated in these areas. This does not mean, however, that it is the use of the minimum harmonisation clause that has caused better protection of consumers in these areas; here, it seems to be a case of reversed order: the higher level of protection was (mostly) already in place when the UCPD 2005 was implemented.

- 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 what 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?*]

As of yet, the ACM has not applied the UCPD in the context of environmental claims. In the consumer energy market, however, several unfair practices have been exposed (by media) and the traders have been fined by the ACM. For instance, several energy suppliers have been fined for misleading and aggressive practices in telemarketing as well as in doorstep selling. The ACM reports a drop in consumer complaints as a result of this enforcement strategy. It was stressed by stakeholders that it was not always clear what the hierarchy was between the generic UCPD and the sectoral rules applicable to energy and also, e.g., telecom. Stakeholders in the energy retail business use the case law of the self-regulatory advertising standards body RCC as their point of reference more than the underlying UCPD itself. Note that the UCPD is enforced by the ACM (and AFM) and that there may exist the risk of divergence of interpretation by the RCC and the ACM (and courts).

- 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 your country rigidly?*]

The ACM is quite content with the concept of 'average consumer' but it does note that in some cases the bar is raised too high by the ECJ. A government representative of the Department for Economic Affairs suggested that the use of such abstractions has its advantages and drawbacks but remains unavoidable as the law must make use of such abstract concepts to operationalize the UCPD. However, consumer organisations are not happy with the way national courts use the 'average consumer test' to justify a lower level of protection than could otherwise be given. It seems, so it is said, that judges tend to overestimate the cognitive abilities of consumers and by referral to the

'average consumer', they can ignore dissonant evidence from consumer psychology. This issue has also been raised in scholarly writing.<sup>4</sup>

- 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 in your country recognised new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted)?*]

In its enforcement practices, the ACM informally distinguishes between groups of vulnerable consumers (senior citizens, youngsters) but it does not always include this analysis in its enforcement decisions. It would welcome guidance as to whether credulity as such constitutes vulnerability in the case of specific consumer groups. Stakeholders suggested that senior citizens as a group may merit further attention. However, the question was also raised whether the maximum harmonisation character of the UCPD allows for the extension of the concept of vulnerability. Note that there are also national rules on protection vulnerable individuals in the context of alcohol and gambling.

- 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*]

In the Netherlands, there is a longstanding tradition of self-regulation in consumer affairs.<sup>5</sup> This is also the case for the advertising industry. The Dutch Complaints Board for the Advertising Industry (RCC) is considered to be effective in 'regulating' the advertising industry to adhere to UCPD standards. There are, however, issues to consider.

For instance, the interpretation of the UCPD framework by the RCC may not always converge with the interpretation by the ACM or indeed the courts. Moreover, the enforcement of self-regulatory codes of conduct through Art. 6 (2) (b) UCPD hinges on whether a code of conduct is phrased firmly enough to produce actual commitments; this does not always seem to be the case.

Stakeholders pointed to the fact that there needs to be a common and shared understanding within a particular branch of business or industry of what constitutes fair and unfair practices. Without this shared responsibility, Codes will not work and regulation needs to intervene. Moreover, in the opinion of the authors of this report one should not overlook the fact that self-regulation cannot perform miracles: it has not prevented major catastrophes in the financial services markets such as mis-selling of financial products (e.g., endowment policies and swap contracts). Therefore, it seems that self-regulation may be useful (as long as it is not used to distort competition and raise barriers to entry)<sup>6</sup> but it cannot be expected to deliver miracles.

- 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?

Enforcement authorities do not suggest amendments and Ministry representatives are quick to emphasize that a balance is needed between open textured norms and concrete norms, and that a further increase of complexity of EU legislation should be avoided. Consumer organisations seem to favour extension of the list and a more transparent procedure for amending the list.

<sup>4</sup> See, e.g., Duivenvoorde 2013; Duivenvoorde 2015.

<sup>5</sup> See Pavillon 2014.

<sup>6</sup> See Van Boom et al. 2009.

- Are there other measures that could improve the effectiveness of the UCPD in establishing a high level of consumer protection in your country? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

In the Netherlands, there are plans to introduce the court adjudication of mass damages claims in a Dutch class action procedure. The Netherlands already has legislation in place to award damages to consumers through a collective settlement, which has been declared binding by the Amsterdam Court of Appeal. Also, it has been argued that enforcement authorities such as AFM and ACM should be given regulatory powers to impose compensation awards on regulated industries for the benefit of consumers.<sup>7</sup> Perhaps this could bolster the toolbox available to ACM and AFM in combating UCPs and in offering proper redress for consumers as an alternative to administrative fines.

Another point for reflection is the Dutch legal tradition of cooperative negotiation between trade and business associations and consumer associations. Within this legal culture, it has been possible to take significant steps towards better and fairer practices. That said, it is acknowledged that the market circumstances and the typically Dutch legal tradition play an important role in that respect; it cannot be guaranteed that using this as a template in other jurisdictions will actually work.

Finally, the point of access of consumer organisations to administrative proceedings against businesses was raised. One consumer organisation representative pointed out that in the Netherlands, the main consumer organisation CB has standing as an interested third party in administrative prosecution procedures; this might be an example for other EU countries to follow.

#### 1.1.2. Effectiveness of the PID in establishing 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;

The PID is implemented by means of the *Prijzenwet 1961* (Prices Act 1961), as amended in 2002 (*Staatsblad* 2002, 217), and the 2003 Royal Decree on Pricing of Products (*Besluit prijsaanduiding producten 2003*, amended in 2014, *Staatsblad* 2013, 146). Annex I to the 2003 Royal Decree lists a number of exceptions, where traders are not obliged to disclose unit prices (e.g., antiquities, auctioned goods).

The overall picture is that traders generally obey the PID rules; complaints or (criminal) court cases are rare. Perhaps this is because unit pricing is mostly important in the sale of foodstuffs and the market for foodstuffs is dominated by large supermarket companies who have reputational effects to take into consideration: they would not dare consider evading the PID rules. Perhaps, there may be the occasional infringement of the PID in open markets and fairs for foodstuffs but the authors of this report are not aware of such practices.

The real issues are with price obfuscation, price partitioning and other sharp practices which may bedazzle consumers and which may interfere with their ability to assess the full price.<sup>8</sup> There are numerous complaints raised with the RCC and ACM concerning air travel, magazine subscriptions and other revolving and/or fixed term contracts, 'free' deliveries and hidden surcharges. However, most of these complaints fall outside the scope of the PID and are mostly considered to fall within the UCPD framework. These practices are particularly difficult since they operate on the fringes of what is allowed under the UCPD; traders make clever use of these practices to

<sup>7</sup> See Van Boom et al. 2009.

<sup>8</sup> See generally Van Boom 2011.

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'.

A related practice which is not within the PID scope concerns dynamic pricing. A consumer organisation representative mentioned that some consumers mistakenly believe that this pricing practice constitutes an UCP. 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.

- 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?

The authors of this report have not noticed enthusiasm for this alternative. It seems that there is a fear of confusing consumers with alternative price indications. Since the concept of 'recognised measurement' is rather vague, the ACM prefers to have both indications displayed. Consumer organisations seem to favour the use of unit prices so as to avoid confusion.

- The effects of the regulatory choices/derogations allowed by the Directive and applied by Member States. [*Key aspects to consider are: Is the derogation relevant? Do companies make use of it? Are there consumer complaints because of this? If so, approximately how many per year?*]

No complaints received; the authors of this report think that the derogations under Dutch law cause hardly any problems given the fact that none of the stakeholders flagged (legislation implementing) the PID as problematic in any way.

### 1.1.3. Effectiveness of the MCAD in providing protection for businesses

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

- 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 was implemented in Art. 6:194 ff. DCC and so is the current MCAD. 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 (and obviously, nowadays the same applies to the application of the UCPD to B2C practices) to evaluate not only advertising but also annual business reports, investment documentation, flyers, folders, public statements on business results outlook etcetera.<sup>9</sup> 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. It is the impression of the authors of this report that the experience with this wider scope has been favourable, given the fact that the 1984 Directive has been used multiple times to address misleading prospectus and other written statements concerning financial products other than advertising *sensu stricto*.

<sup>9</sup> See generally Geerts & Vollebregt 2009; Verkade 2011.



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

See above.

- The effects of the minimum harmonisation provisions on misleading advertising; [*Key aspects to consider are: Which national rules that go beyond the MCDA, 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 position in the Netherlands, as described above, is one of a higher level of protection. It seems that Ministry spokesmen would not reject further harmonisation unless this meant that the level of protection in the Netherlands would have to be lowered. Business representatives seem to take a different stance; given the fact that the Netherlands is a small trade nation with a lot of foreign markets to serve, it would improve predictability and therefore lower the cost of doing business if rules on misleading advertising were truly uniform.

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

No specific effects of the full harmonisation character itself are known. In comparative advertising, the clarification by national courts and the ECJ as to what distinguishes lawful from unlawful comparison was welcomed by business. Some respondents raised the issue of obstacles for cross-border comparison (such as geoblocking, the practice where access to internet content is restricted based on geographical location of the internet user) which may stand in the way of true cross-border competition in some markets.

- 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;

No specific experiences reported other than those stated above.

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

No specific experiences reported other than those stated above.

- Are there measures that could improve the effectiveness of the MCAD in providing protection for businesses (see also 1.1.6 below)? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

No specific experiences reported other than those stated above.

#### 1.1.4. Effectiveness of current rules 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;

The principle-based approach leaves room for divergence between the approaches in different countries, as is demonstrated throughout the literature.<sup>10</sup> The experience of

<sup>10</sup> See, e.g., Van Boom et al. 2014.



businesses as reported in the interviews does not contradict this literature but the position seems to be that the differences between EU states are taken as a given and a cost of doing business. Whether these costs are considerable, is unclear since there are no tangible data on such costs. The interviewees do not report major problems.

Note that in certain markets such as energy supply, there is no real cross-border competition at the retail level.

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

No specific experiences reported other than those stated above.

- Whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade. [*Do the national differences play a role in a business perspective? Have they caused problems?*]

No specific experiences reported other than those stated above.

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;

No specific experiences reported other than those stated above.

- Whether the minimum harmonisation character of provisions on misleading advertising represents a barrier to cross-border trade;

No specific experiences reported other than those stated above.

- 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;

No specific experiences reported other than those stated above.

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

No specific experiences reported other than those stated above.

#### 1.1.5. Interplay amongst UCPD information requirements according to Article 7(4) with the information requirements in the horizontal consumer law instruments

Regarding the information requirements according to Article 7(4) UCPD ("invitation to purchase") in the advertising stage, please analyse:

- The level of awareness of traders as regards information requirements at the advertising stage, as in particular demonstrated by their practical application; [*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?*]

The level of awareness of individual traders seems to be commensurate with the level of organisation of the branch involved; in those industries and trades where traders are well organised and associated, they tend to have a better understanding of the regulatory boundaries. They also have a reputation which is at stake if they contravene the legal standards. However, several interviewees also point out that businesses are sometimes unaware of their duties under Art. 7 (4) UCPD and that guidance by the ACM is welcomed. Also, it is reported that 'education' by national and cross-border organisations such as ECC helps to improve business conduct. Other businesses knowingly ignore the rules of Art. 7 (4) UCPD.

A common point addressed at this point by the interviewees is the increasing complexity of overlapping Directives concerning (information) duties on businesses. In particular, the concept of 'invitation to purchase' is felt to be ambiguous and a cause of confusion among traders and the advertising industry. For instance, 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. Here, the CRD and the UCPD seem to diverge somewhat, notes the ACM.

- 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?

Overlap and conflict between the UCPD and E-commerce Directive is reported. For instance, 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. These discrepancies are not desirable, so the ACM holds; indeed, the ACM representatives even state that the legal framework is extremely complicated to operate for supervisory authorities such as the ACM itself.

Consumer organisations also report overlap and friction between UCPD and CRD but they seem less convinced that such friction should be removed since the goals of the UCPD and the CRD are different (preventing misleading practices vs having clarity on what the concluded contract actually entails), such overlaps can be justified. As far as overlap with the Services and the E-commerce directives are concerned, the position seems to be that these Directives could be brought more in tune so to avoid discrepancies.

Others, including business representatives and Department lawyers emphasize that the complexity of the various overlapping rules should be a concern to the EU – adding more rules will further increase this complexity.

### 1.1.6. Relevance for business-to-business transactions

Regarding the area of unfair commercial practices/marketing, please analyse:

- 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 cross-border trade;

Although in scholarly writing, some have propagated the extension of consumer protection to small and medium-sized businesses (SMEs), the Dutch lower courts have not developed a fixed position.<sup>11</sup> One business representative argued that such extension of protection runs counter to entrepreneurial self-responsibility. Yet, 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.<sup>12</sup> This statutory amendment is aimed at supporting traders who were duped by unfair commercial practices.

In our opinion, it is uncertain whether the extension to B2B practices would benefit cross-border trade. In the Dutch academic debate, this issue has not been raised let alone answered on a firm empirical basis.

- 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;

No specific experiences reported or literature to mention other than stated above.

- 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 also cover unfair commercial practices during and after the transaction;

No specific experiences reported or literature to mention other than stated above.

- Whether there is a need to have a black-list of practices in the business-to-business marketing area;

No specific experiences reported or literature to mention other than stated above.

- What should be the enforcement cooperation mechanism in the business-to-business marketing area;

No specific experiences reported or literature to mention other than stated above.

- Whether there is a need to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive;

No specific experiences reported or literature to mention other than stated above.

- Whether there is a need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive.

No specific experiences reported or literature to mention other than stated above.

<sup>11</sup> See the references above para 1.2.3 to the concept of *Indizwirkung*.

<sup>12</sup> See *Staatsblad* 2016, 133.

### 1.1.7. Relevance of contractual consequences of unfair commercial practices

Please analyse whether there are in your country:

- 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;

The DCC has a general clause on nullity of contracts contrary to good morals and public order,<sup>13</sup> but this will hardly ever be applicable to UCPs. The avoidance of contracts for misrepresentation, fraud or abuse of hardship seems more appropriate.<sup>14</sup> However, more specifically relevant are the remedies for UCPs. A UCP is a tortious act which can result in damages but since June 2014, Art. 6:193j (3) DCC also offers the possibility to avoid any transaction concluded under the influence of an UCP.

- Any case law (enforcement decisions, court rulings) providing for such consequences;

Art. 6:193j (3) DCC has been applied several times.<sup>15</sup> Note that consumer can also invoke Art. 6:193j (3) DCC without going to court; the possibility of avoidance is also available extra-judicially.

- Whether there is, based on past experience in your country, a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

Given that Dutch law has integrated the UCPD into both civil law and administrative law, the position is that there are already many remedies available. The main question that divides respondents from consumer organisations and business organisations is whether the existing remedies are applied correctly by courts. For instance, national legal doctrines of pre-contractual tort duties, avoidance for misrepresentation and liability for negligent selling already exist but they are not always applied to benefit the consumer – in many cases, the ‘caveat emptor’ doctrine remains potent. For instance, on numerous occasions banks and insurance companies have been taken to court for negligent mis-selling of inherently risky financial products to allegedly unsuspecting or ignorant consumers. In many of these cases, however, courts have held that consumers bear full or partial responsibility for their own investment decisions and that they are to be expected to actually process and comprehend the product information provided by sellers.

A further issue is whether supervisory authorities such as ACM should be given the (public law) powers to order reinstatement of consumers (payment of damages, restitution of amounts paid). The authors of this report refer to earlier remarks made on that issue.

<sup>13</sup> See Art. 3:40 DCC.

<sup>14</sup> See Art. 3:44 DCC and Art. 6:228 DCC.

<sup>15</sup> See District Court Noord-Holland 17 September 2014, ECLI:NL:RBNHO:2014:9422; District Court Midden-Nederland 30 September 2015, ECLI:NL:RBMNE:2015:6985.

## 1.2. Contract conclusion and performance

### 1.2.1. Effectiveness of the current rules in establishing 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 1992 DCC introduced a set of rules dedicated to the testing of fairness of general contract terms; these rules offer both a test of proper inclusion of the general contract terms and a substantive fairness test concerning the 'unduly onerous' character of the general contract terms involved. Art. 6:233 sub (a) DCC introduced a principle-based fairness test. Furthermore, art. 6:236 ('black list') and 6:237 DCC ('grey list') introduced lists with specific contract clauses deemed unfair ('black list') or presumed unfair ('grey list'). These lists need to be checked in case of fairness testing of general terms in contracts involving consumers.

The open clause of Art. 6:233 sub (a) DCC is interpreted as being equivalent to the unfairness test under Art. 3 (1) UCTD.<sup>16</sup> Following the case-law of the Court of Justice, the Dutch Supreme Court decided in *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*) that the lower courts are required to apply the unfairness test of their own motion (i.e. *ex officio*). This is true for cases where the consumer is not present, and for cases where the consumer was assisted by a lawyer who could have invoked the unfairness of the term but has failed to do so. The same is true for cases dealt on appeal, where the ordinary rules of civil procedure would not have allowed for that, provided that the claim which would be affected by the potentially unfair term would still be part of the legal dispute – implying that either the consumer or the trader would have had to appeal against the decision of the court of first instance, irrespective whether or not the lower court had in fact decided on the potentially unfair nature of the term. If it is unclear whether the term is invoked against a consumer (instead of against a trader), but there are indications that the party is a consumer, the court must determine of its own motion whether that party is indeed a consumer. In addition, the court must take measures of instruction necessary to determine whether the term is unfair, which may imply that the trader is required to submit the standard terms or to substantiate what the legal basis for a particular claim is.

Due to the *ex officio* application of the unfairness test, the principle-based approach is fairly effective, even where the courts are required to evaluate the term on a case-by-case basis. The ordinary situation is that the court must take into account all circumstances of the case – including specific circumstances that are to the advantage of the trader.<sup>17</sup> However, under the open clause of Art. 6:233 sub (a) DCC, it is the consumer who bears the burden of proof that the term is unfair.<sup>18</sup> Where the consumer does not prove the unfairness, and the court does not find proof thereof in the information provided by the parties, if need be after it has taken an instruction measure, the court will not find the term to be unfair.

In addition, it should be mentioned that it is common practice that consumer organisations and trade associations negotiate sets of standard contract terms within the framework of the Social and Economic Council (in Dutch: *Sociaal Economische*

<sup>16</sup> See Loos 2013, no. 169.

<sup>17</sup> See CJEU 14 March 2013, case C-415/11, ECLI:EU:C:2013:164 (*Aziz*); *Hoge Raad* 21 September 2012, ECLI:NL:HR:2012:BW6135, *NJ* 2013/431 (case note H.J. Snijders), *TvC* 2013/1, p. 30 (case note E.H. Hondius) (*Van Marrum B.V./Wolff*).

<sup>18</sup> See the parliamentary proceedings: Parl. Gesch. Inv. Boek 6 p. 1652. See also Court of Appeal 's-Hertogenbosch 17 March 2009, ECLI:NL:GHSHE:2009:BH6958, *NJF* 2009, 285, *JOR* 2009, 310 (*Van Bommel/Engelman Architecten B.V.*); District Court Gelderland (location Arnhem), 10 April 2013, ECLI:NL:RBGEL:2013:CA0523 (*X/Mactwin Security B.V.*).

*Raad*, SER). Such negotiated sets of standard contract terms are referred to in legal practice as two-sided standard terms. Where an agreement is reached as to the content of standards terms used in a branch of the economy, these consumer organisations lose their right to collective action combatting the relevant standard terms,<sup>19</sup> which guarantees that the consumer organisations do not agree too hastily. In turn, the trade associations agree to the installation of small claims tribunals (alternative dispute board, i.e. ADR), which ensures that consumers can actually submit claims against traders. The traders that are members of these trade associations are required by the by-laws of these associations to make use of the agreed sets of standard terms. The negotiations as to the standard terms obviously take the existing legislation into account, including the open clause of Art. 6:233 under (a) DCC. Where such agreements exist, there is therefore a good chance that the set of standard contract terms contains (at least primarily) terms that will not be considered unfair. However, in individual consumer cases the fact that a term is included in a set of two-sided standard contract terms is but one of many factors that is taken into account when assessing the unfairness of the term, albeit that the court may assume that an onerous term may be compensated by a particularly favourable term more easily.<sup>20</sup>

The industry is of the opinion that the general principles function properly, but argues the importance of a careful alignment of the enforcement of open clauses in order to prevent differences in the interpretation of these clauses in the Member States. In addition, the business associations ask for the possibility of *ex ante* testing of commercial practices and contractual terms. In particular regarding new practices and new types of contract it may also for *bona fide* businesses be difficult to determine what is allowed and what is not.

ACM, the principal regulator in the area of consumer law, confirms that the enforcement of the open clauses as such do not lead to problems.

- 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 your MS? Does this work in practice or are there problems?*]

Note that in 1992, the Dutch legislature had already introduced a set of lists (art. 6:236 ('black list') and 6:237 DCC ('grey list')) with specific contract clauses deemed unfair ('black list') or presumed unfair ('grey list'). The legislature felt that Dutch law already met the standards set by the UCTD and that it needed no further transposition concerning this issue.<sup>21</sup>

According to the business associations, the indicative list has also not proved to have much added value. This view is confirmed by the *Consumentenbond*, the largest consumer organisation in The Netherlands, which argues that this is caused by the abstract formulation of the terms on the indicative list. The formulation is cause for interpretation, which requires legal-technical knowledge that ordinary consumers do not possess, the *Consumentenbond* argues.

However, in lower case-law, the fact that a term that 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.<sup>22</sup> 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

<sup>19</sup> See Art. 6:240 (5) DCC.

<sup>20</sup> See *Hoge Raad* 3 February 2012, ECLI:NL:HR:2012:BT6947, *NJ* 2012, 261 (case note F.M.J. Verstijlen) (Dix q.q./ING Bank N.V.); see also Loos 2013, nos. 215-219.

<sup>21</sup> Cf. Kamerstukken II, 1998/99, 26470 nr. 3.

<sup>22</sup> See Loos 2013, no. 345.



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.<sup>23</sup>

- 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; [*Note: If a black/grey list exists in your country, key aspects to consider are: How does the list work in practice? Does it make a difference to have such a list?*]

The consumer's position is much better if the term is blacklisted under Art. 6:236 DCC, as in such case the term is considered unfair under all circumstances. An example may be article 6:236 under (b) DCC: a limitation or exclusion of the right to termination is considered unfair irrespective of the circumstances of the case, whereas under the UCTD the consumer would have to show or argue that the term is unfair and the court is required to test, on a case-by-case basis, whether the term may be justified given the specific circumstances of the case. Blacklisting of a term also offers predictability and legal certainty to the parties. Similarly, under the grey list of Art. 6:237 DCC a term is presumed unfair, unless the trader proves that under the circumstances of the case the term in fact is fair. Where the trader fails to provide any justification for the term, or does not convince the court of the fairness of the term, the term will be found unfair. Effectively, the grey list thus leads to a reversal of the burden of proof as to the (un)fairness of the term. Both the black list and the grey list therefore make it much easier for the court to determine that a term is unfair, and therefore provide far better protection to the consumer than the open clause does. The *Consumentenbond* remarks that traders have the tendency to avoid terms that are black or grey listed. Moreover, during the negotiations as to two-sided standard contract terms between consumer organisations and trade associations the black and grey lists function as a touchstone in the evaluation of terms. Finally, both courts and ADR institutions rule on the basis of the lists, the *Consumentenbond* remarks in the interview. The *Vereniging 'Consument & Geldzaken'* – a smaller consumer organisation in The Netherlands, active in the financial sector – indicates, however, that the Dutch legislator should evaluate and update the black and grey lists, but refrains from doing so. The ACM, the main regulator in the area of consumer law, is of the view that consumers would benefit from removing some terms from the grey list and placing them on the black list.

- 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: In your country, have the effects of court decisions establishing the unfairness of an unfair term been extended to all contracts of the trader concerned or to the contracts of any other trader containing such a term? If so, how does this work in practice? What are the impacts on businesses? If there are no such effects of court decisions on unfair terms: what are the effects of this situation?*]

In individual proceedings, all circumstances of the case must be taken into account, including those that are particular to this specific consumer or that specific trader, provided that these specific circumstances were known to the other party at the time of the conclusion of the contract.<sup>24</sup> The effect is, however, that a court's decision in such an individual case cannot be extended to all contracts of the trader concerned or

<sup>23</sup> 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, 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).

<sup>24</sup> See Loos 2013, no. 222.



even to the contracts of other traders, as the specifics of these contracts need to be taken into account instead of the specifics of the case that had been decided. This means that consumers and traders are uncertain as to the outcome of the unfairness test even in cases where the same or a similar term had been tested before and found to be fair or unfair. This is different for terms that are black listed, as it may be assumed that another court would come to the same conclusion. This is true to a much lesser extent also for grey listed clauses, as the trader may then argue that in his specific case the term is actually fair and that the earlier court's ruling on the same or similar term is not applicable to his contract in the latter case. Notwithstanding what was said above, the *Consumentenbond* notes that if a court is faced with a term which has been found unfair in an earlier case, there is a strong likelihood that the term will be found unfair in a later case as well, particularly if that term was incorporated by the same trader.

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

The effectiveness of the transparency requirement is unclear. The reason for this is that European law does not indicate explicitly what the consequences are when a term is not drafted in plain and intelligible language, and that this requirement is somewhat at odds with the *contra proferentem* rule mentioned in the same article of the directive. According to the *Consumentenbond*, the UCTD contains insufficient encouragement for traders to draft terms in an understandable manner. The *Consumentenbond* adds, however, that even two-sided contract terms are not always easily understandable to ordinary consumers as the terms often have a rather specific and technical meaning and may be very lengthy.

The Dutch Supreme Court seems to be of the opinion that the mere fact that a term is not drafted in plain and intelligible language is not a separate cause for avoidance of the term, but rather is a factor that is to be taken into account when determining the unfairness of the term.<sup>25</sup> In literature it is argued that the fact that a term is not drafted in plain and intelligible language should be taken into account as an important factor when assessing the unfairness of the term.<sup>26</sup> However, it has been noted that in practice the breach of the transparency requirements hardly seem to play a role in the application of the unfairness test (cf. Pavillon 2013, no. 31). This calls the effectiveness of the sanction for a breach of the transparency requirements into question (Loos 2013, no. 242). In this respect, it seems symptomatic that the regulator, the ACM, indicates that it does not have an opinion regarding the overall effectiveness of the contractual transparency requirements.

- 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. [Note: Question only relevant for MS that have put in place extensions of application of UCTD]

Under Dutch law, the scope of the unfairness test has not been extended to core terms, provided that they have been drafted in plain and intelligible language.<sup>27</sup> The Dutch legislator has refrained from extending the scope in order to prevent that a limited form of the *iustum pretium*-doctrine would be accepted.<sup>28</sup> That doctrine was rejected explicitly by the Dutch Supreme Court already in 1936.<sup>29</sup>

<sup>25</sup> See *Hoge Raad* 7 December 2007, ECLI:NL:HR:2007:BB5078 (X c.s./ABN Amro Bank N.V.).

<sup>26</sup> See Loos 2013, no. 241; Hijma 2010, no. 42; Asser-Hartkamp/Sieburgh 6-III, no. 482.

<sup>27</sup> See Art. 6:231 under (a) DCC.

<sup>28</sup> See Asser-Hartkamp/Sieburgh 6-III\*, no. 467.

<sup>29</sup> See *Hoge Raad* 13 November 1936, NJ 1937, 433 (Moorman/Bureau Materiaalstaat)

The legislator has chosen to extend the scope of the unfairness test to individually negotiated terms either: only standard contract terms may be subject to the unfairness terms, and the consumer invoking the unfairness is required to prove that the terms are intended for being used in a number of contracts. According to the parliamentary proceedings, this requirement is in any case met where it is proven that the terms have been used five times or more.<sup>30</sup> In doctrinal works it is argued that even if the terms have only been used once one may speak of standard contract terms if the party accepting the trader's terms could not have any influence on the pre-drafted terms,<sup>31</sup> if the trader indicates that it intends to use the terms in other contracts, e.g. by referring to the standard contract terms in the heading or footer of his company's stationary or by registering the terms at the Chamber of Commerce.<sup>32</sup> Where the terms are (substantially) *changed* during negotiations, they are no longer standard contract terms and they are no longer subject to the unfairness terms. Where the terms are discussed but remain the same, they are still considered to be standard contract terms and therefore subject to the unfairness test.<sup>33</sup> The fact that the parties have discussed the terms is, however, relevant when determining the (un)fairness of the term.<sup>34</sup> No negotiations have taken place where the consumer has merely been offered a choice between two different (sets of) pre-drafted terms, one where the term is substantively better but comes with a higher price, and one where the term is worse but the price for goods or services is lower.<sup>35</sup>

The ACM remarks that where foreign national law provide better protection than follows from the UCTD, enforcement of the additional protection offered by that legal system is difficult, time-consuming and not prioritised by the regulator.

- 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?*]

An unfair term may be avoided by the consumer. Technically, avoidance takes place by a declaration by the consumer towards the trader stating the avoidance, or by a court decision.<sup>36</sup> This implies that in theory it is rather easy for consumers to avoid an unfair term. However, in practice traders will often not accept the avoidance of the term, in which case the consumer needs to invoke legal assistance and turn to a court or an ADR institution. The *Consumentenbond* indicates that this is often too demanding of individual consumers. In order to prevent such discussions from occurring, the *Consumentenbond* takes part in negotiations in order to come to sets with two-sided standard contract terms.

Where the court has tested the term of its own motion, and has found the term to be unfair, it will avoid the term of its own motion as well, unless the consumer has opposed that sanction. The consumer is likely to oppose only in the case where the unfair term was a core term that had not been drafted in plain and intelligible language, as avoidance of the term would then lead to avoidance of the whole contract.<sup>37</sup> At the official website of the judiciary<sup>38</sup> many cases may be found where terms have been tested by courts of their own motion, in particular since the *Hoge*

<sup>30</sup> See Parl. Gesch. Inv. Boek 6, p. 1546-1547.

<sup>31</sup> See Hijma 2010, no. 10; Loos 2013, no. 6.

<sup>32</sup> See Parl. Gesch. Inv. Boek 6, p. 1538; Asser-Hartkamp/Sieburgh 6-III\*, no. 464.

<sup>33</sup> Asser-Hartkamp/Sieburgh 6-III\*, no. 465; Hijma 2010, no 15; Loos 2013, no. 7.

<sup>34</sup> Hijma 2010, no 15; Loos 2013, no. 7.

<sup>35</sup> Loos 2013, no. 7.

<sup>36</sup> See Art. 3:49 ff. DCC.

<sup>37</sup> See Art. 3:41 DCC; see further Loos 2013, nos. 425-427.

<sup>38</sup> [www.rechtspraak.nl](http://www.rechtspraak.nl)

*Raad* confirmed the Court of Justice's case-law and indicated how that case-law was to be applied in the Dutch legal context.<sup>39</sup> This view is also confirmed by the *Vereniging 'Consument & Geldzaken'* and the *Consumentenbond*.

An avoided term will generally be considered as void in its entirety. An exception may be made where the term in fact regulates two different matters which could just as easily have been regulated in two separate provisions and where only one part of it may be seen as unfair. In case of such 'dividable' terms, the avoidance of the term may be restricted to the unfair part.<sup>40</sup> A reduction of the unfair term to what would have been an acceptable term is not allowed under European law.<sup>41</sup> In *Unicaja Banco*,<sup>42</sup> the Court added that the unfair term may also not be replaced by the otherwise applicable default rule, unless this would lead to the avoidance of the whole contract. The Court of Appeal Arnhem-Leeuwarden confirmed that the contractual interest clause (which it had found to be unfair under the circumstances of the case) could not be replaced by the default rules on statutory interest.<sup>43</sup> Without explicitly stating so, the Court of Appeal Amsterdam<sup>44</sup> had come to the same result by simply denying claims based on an unfair contractual interest clause and an unfair clause on compensation for the costs for out-of-court procedures. Case-law to this extent is, however, still scarce. Moreover, courts sometimes come to a different conclusion. One case<sup>45</sup> involved a standard term in an insurance contract pertaining to medical health stating that if the consumer has wrongly informed the insurance company as to the facts of a claim, the insurance company was allowed to refuse the claim, to claim back any payments made to the consumer and to terminate the contract, even in the case where the wrong information was the result of a minor error on the part of the consumer and where these sanctions would not be proportionate to the consumer's mistake. This clause was in breach of mandatory insurance law, as Art. 7:961 (5) DCC allows these remedies for the insurance company only if the remedies are justified under the circumstances of the case. The Court of Appeal thus found that the term was in breach of mandatory insurance law and therefore unfair, and then ruled that the insurance company could rely on the provision of insurance law to claim back to amounts paid if the facts of the case would justify that. This appears not to be in line with the CJEU's case law in *Unicaja Banco*, quoted above, as that case-law seems to suggest that the Court of Appeal should have decided that the insurance company was not entitled to claim back these amounts irrespective of the circumstances of the case.

According to the *Vereniging 'Consument & Geldzaken'* the avoidance of only the unfair term in a contract pertaining to a financial product does not help consumers much as they remain bound by a contract which typically is very disadvantageous to them. Such contracts should be avoided in full, the *Vereniging* argues.

Both the *Consumentenbond* and the *Vereniging 'Consument & Geldzaken'* state that the guidance of the CJEU is useful, in particular where the court's decision is specific (concrete).

<sup>39</sup> See the case Heesakkers/Voets, mentioned above.

<sup>40</sup> See Loos 2013, no. 430.

<sup>41</sup> See CJEU 14 June 2012, case C-618/10, ECLI:EU:C:2012:349, Banco Español de Crédito; CJEU 30 May 2013, case C-488/11, ECLI:EU:C:2013:341, Asbeek Brusse.

<sup>42</sup> CJEU 30 April 2014, case C-26/13, ECLI:EU:C:2014:282, Kásler; CJEU 21 January 2015, joint cases C-482/13, 484/13, 485/13 and 487/13, ECLI:EU:C:2015:21, Unicaja Banco.

<sup>43</sup> Court of Appeal Arnhem-Leeuwarden, location Arnhem, 10 March 2015, ECLI:NL:GHARL:2015:2101 (X/NMT I); Court of Appeal Arnhem-Leeuwarden, location Arnhem, 21 July 2015, ECLI:NL:GHARL:2015:5453 (X/NMT II).

<sup>44</sup> Court of Appeal Amsterdam 3 February 2015, ECLI:NL:GHAMS:2015:165, *NJF* 2015/167, *WR* 2015/84, *Prg.* 2016/53,

<sup>45</sup> See for instance Court of Appeal Arnhem-Leeuwarden, location Leeuwarden, 15 March 2016, ECLI:NL:GHARL:2016:2196, *NJF* 2016/284 (Zorg en Zekerheid/X).

- In a forward looking perspective: Are there other measures that could improve the effectiveness of the UCTD in establishing a high level of consumer protection in your country? Would a graphical presentation model improve the readability and comprehension by consumers of the T&Cs? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

The *Vereniging 'Consument & Geldzaken'* indicates that a graphical presentation of the risks of investment products does have a profound effect on consumers. This could suggest that the same could be true with regard to standard contract terms. According to the *Vereniging*, this would require creativity, as sets with standard contract terms are often very lengthy and technical. The ACM confirms that if traders would be required to present their terms in shorter and more understandable language and in a better manner, this could help consumers.

Empirical research, however, suggests that simplifying and shortening standard terms results in higher trust and more positive attitudes towards the standard terms, and in increased readership and understanding of the terms. Moreover, this research also shows that although the standard terms are shortened, consumers do not feel that they miss relevant information, which suggests that, at least from consumers' viewpoint, short and simple standard terms can be at least as informative as long and complex standard terms. These effects were found to be similar for domestic and foreign online stores. Moreover, a second experiment showed that where a reading cost cue was added on a website indicating that reading the standard terms would take less than five minutes roughly doubled the number of consumers opening the standard terms (from 9.4% to 19.8%). Adding a reading cost cue thus seems to result in more consumers actually reading (parts of) the standard terms.<sup>46</sup>

In addition, as the *Consumentenbond* suggests, the European legislator could promote the Dutch practice of two-sided standard contract terms (and the prior negotiations between consumer organisations and trade associations) as a means to prevent unfair terms from being used in consumer contracts. It should be noted, though, that such action may require financial support for consumer organisations, as such negotiations take time and costs staff time – and therefore money. The *Vereniging 'Consument & Geldzaken'* indicates in this respect that consumer organisations lack the full capacity to follow the markets properly, and as a result are often reactive as regards unfair terms instead of proactive. The ACM, i.e. the public regulator, also admits that with regards to unfair terms it often is reactive.

The *Consumentenbond* further suggests the introduction of sector-specific black and grey lists (which may be better targeted than generic black and grey lists), and an overview of black and grey lists of terms, which could subsequently be added to the European list.

### 1.2.2. Effectiveness of the current rules 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 disparities have an impact on cross-border trade; [*Key aspects to consider are: Do national differences in the application/implementation of the Directive play a role for businesses? Have these differences led to changes in their business strategy? Have these differences caused problems?*]

According to the Ministry of Economic Affairs consumers shopping cross-border might be put on the wrong footing by the fact that other Member States have different rules for standard terms than the Netherlands have. However, there is no empirical evidence that unfair terms legislation- let alone diverging application or

<sup>46</sup> See Elshout et al. 2016.

implementation of the UCTD – plays any role in the decision of businesses or consumers to conclude cross-border contracts. It cannot be excluded that the *fear* of the existence of such differences may deter (some) consumers and businesses from contracting cross-border. Consumers are typically not aware of such differences and typically are not well-informed of the status of the law in any country, including their own. Much more important for the decision to conclude a contract with a particular trader, is whether or not a trader is 'familiar' to a consumer – which is more likely to be the case for a trader that is located in the consumer's own country and/or advertises in that country, and whether the contract can be concluded in the consumer's own language.

- 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;

Whereas traders could in theory be taken aback by extended indicative lists, black lists or grey lists, there is no empirical evidence that they indeed are. Since consumers typically do not read standard terms in the first place and are not aware of their consumer rights,<sup>47</sup> the existence of any type of list is unlikely to influence their decision to contract cross-border. According to stakeholders, however, consumers that do shop cross-border are relatively well aware of their rights, and as such they might be aware of a European list of unfair terms, whereas national lists in the trader's country might be less accessible to these consumers. The ACM, who is the primary regulator in The Netherlands, however, remarks that the fact that the indicative list differs from national black and grey lists in any case is very impractical – suggesting at least that enforcement of national black and grey lists is difficult and time-consuming.

- 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.

It seems highly unlikely that consumers or traders would be withheld from concluding contracts cross-border for the reason that core terms are exempted from the unfairness test in one Member State and not in another as neither consumers nor traders are generally aware of these differences or the current situation in their own legal system.

### 1.2.3. Relevance for business-to-business transactions

Regarding the area of contractual fairness and in relation to the Unfair Contract Terms Directive, please analyse:

- Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;

Under Dutch law, SMEs may invoke the open clause against unfair terms in standard terms used by their counterpart.<sup>48</sup> The SME bears the burden of proof that a term is unfair. This is the same system as the system of the Directive. SMEs cannot invoke the protection of the black list or the grey list; see also further below.

<sup>47</sup> See Elshout et al. 2016.

<sup>48</sup> See Art. 6:233 sub (a) DCC.

- 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;

Art. 6:233 sub (a) DCC is considered as the equivalent of Art. 3 (1) UCTD.<sup>49</sup> It is applied to B2C and B2SME contracts alike.<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup>

- 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;

Under Dutch law (apart from the restrictions indicated in the previous answer) 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.<sup>53</sup> In literature an extension to core terms or individually negotiated terms is not advocated either for B2C or for B2B contracts. Remarkably, the ACM remarked that the protection of SMEs should extend to the main subject-matter of the contract as '(m)ost SMEs and micro enterprises are not able to negotiate about terms and conditions'.

- 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;

Businesses cannot invoke the protection of the black list or the grey list. However, these lists may have an *Indizwirkung* (may provide an indication for the potential unfairness of the term) in B2SME-contract where the transaction could also have been concluded by a consumer and the SME in this particular case resembles a consumer (e.g. a micro-enterprise concluding a contract for the supply of energy under the same conditions as a consumer).<sup>54</sup> However, in practice (as in the two cases cited), *Indizwirkung* is hardly ever awarded to SMEs as typically the contract is too much related to the business activities of the SME to be seen as a consumer-like contract. In that case, only the open clause may be invoked by the SME.<sup>55</sup> The ACM suggests, however, that SMEs should be able to benefit from the protection of the black list or the grey list with regard to clauses that allow unilateral changes to the contract, to clauses that allow for unlimited price changes and to clauses relating to the duration of the contract.

<sup>49</sup> See above, 1.2.1.

<sup>50</sup> See the previous answer.

<sup>51</sup> See Art. 6:235 (1) and (3) DCC.

<sup>52</sup> See Art. 6:247 (2) DCC.

<sup>53</sup> See Art. 6:231 DCC.

<sup>54</sup> See for instance recently Court of Appeal Amsterdam 19 April 2016, ECLI:NL:GHAMS:2016:1548 (lease of business premises); Court of Appeal The Hague 5 July 2016, ECLI:NL:GHDHA:2016:1845 (Proximedia, business advertising on internet).

<sup>55</sup> See Hijma 2010, no. 32; Loos 2013, nos. 401-406.



- Whether there is a need for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive;

There is no convincing argument why the contractual transparency requirements should not equally apply to B2B transactions, apart from the general argument that businesses should take care of their own interests. The ACM indicates that it is of the view that the transparency requirement should be applicable also to B2B transactions as it may facilitate fair competition and stimulate a level playing field. The matter has, however, not received much attention in legal literature, given also the fact that the transparency requirements hardly play a role in the evaluation of the fairness of unfair terms in B2C contracts.<sup>56</sup>

- Whether an extension of the Unfair Contract Terms Directive to B2B transactions can bring benefits for cross-border trade;

It is uncertain whether the extension of the UCTD to B2B contracts would have much influence on cross-border trade. It seems that this may indeed be the case to some extent as it would be clear that the unfairness test would be applied in all Member States, and in (at least more or less) the same manner, whereas the unfairness test is currently applied to B2B contracts in some Member States and not in others. SMEs could thus be reassured that they would receive more or less the same protection as they would in their own country. On the other hand, consumer organisations are sometimes afraid that extending consumer protection to SMEs may result in watering down consumer protection measures, which would then lead to a decrease in protection of consumers.

- Whether the consequences of such an extension would have an effect on innovation by or market opportunities for SME providers/suppliers;

It seems unlikely that the introduction of the extension of the unfairness test to B2B contracts would have any influence on innovation, and it would seem to have little effect on market opportunities for SMEs, as typically price and performance capabilities are more important for trading parties than the content of standard terms.

- Whether the benefits of extending the scope to business-to-business transactions would exceed the negative consequences of such an extension.

There are not many negative effects that may be attached to unfairness protection in B2B-contracts as businesses may both benefit and suffer from such protection, depending on whose terms are applied in the contract. As a result, the fact that SMEs may be reassured that they would receive similar protection as in their own legal country may have some positive effects on their willingness to conclude cross-border contracts. This is likely to have some positive effects, outweighing the negative effects (if there are any).

<sup>56</sup> See Pavillon 2013, no. 31; Loos 2013, no. 242.



### 1.3. Injunctions

#### 1.3.1. Effectiveness of the current rules in establishing a high level of consumer protection

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

- To what extent is the use of the injunction procedure in your country contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment?<sup>57</sup>

In 1992, the DCC had already introduced a collective procedure for injunction in unfair contract terms.<sup>58</sup> In 1994, an additional, general collective injunction procedure was introduced.<sup>59</sup> Especially the latter one is highly relevant for the enforcement of consumer law.<sup>60</sup> So, the ID did not add or change much what was already there in place for purely national cases. The 1998 ID was implemented by means of the 2001 Act which introduced Art. 3:305c DCC. This provision opens up standing in Dutch courts to qualified entities from outside the Netherlands to lodge cross-border actions for the cessation of intra-community infringements of consumer rights derived from the List referred to in Art. 1ID. This system was obviously continued with the 2009 ID. So, the ID was implemented within civil procedure and the ID is therefore completely part of the standing in court of associations and foundations in civil procedure.

It is worth mentioning that for the purpose of national enforcement of consumer rights, the DCC does not distinguish between qualified and non-qualified entities. Any organisation or association which according to its articles of association or foundation purports to represent the collective interests of consumer generally or a specific group of consumers, has standing in court to file for prohibitive and positive injunction as well as for a declaratory judgment. Since 1 July 2013,<sup>61</sup> Art. 3:305a DCC has been fortified somewhat by providing that the claim of the organisation shall be struck out if the interests of the persons in whose interest the claim is lodged, are 'insufficiently served' by the claim. This test was introduced to counter frivolous demands by organisations with inadequate internal governance structures that lack a proper constituency.

Hence, Art. 3:305c DCC concerning qualified entities is only relevant in cross border claims before Dutch civil courts.

Stakeholders feel that the use of the collective injunctions procedure of Art. 3:305a DCC is highly relevant for national cases, the instrument of cross-border injunction before civil courts has not proved relevant at all. It seems, so it was said, that foreign consumer associations are either unfamiliar with the legal possibilities or the obstacles are too high. As one representative of consumer organisation noted: it is easier to go to court in your own country than elsewhere.

- What measures in your national legislation on injunction procedure are considered to be particularly effective, if any: measures regarding the cost of the procedure, the 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?

All of the elements stated above have a positive effect on the use of Art. 3:305a DCC. The available case law shows that the instrument is a useful addition to the tools

<sup>57</sup> 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.

<sup>58</sup> See Art. 6:240 DCC.

<sup>59</sup> See Art. 3:305a DCC.

<sup>60</sup> See, e.g., Weber & Van Boom 2011.

<sup>61</sup> See *Staatsblad* 2013/255.

available in civil procedure for collective redress. One of the relevant legal points decided by the Dutch Supreme Court in favour of representative organisations concerns the pre-summons costs of investigation and claim collection. In *Hoge Raad* 13 October 2006, ECLI:NL:HR:2006:AW2080, it was held that such costs – provided they are reasonable, it was reasonable to incur them and they directly relate to the case – 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. This decision was welcomed because it made it possible for these organisations to claim such pre-trial costs (which can run into ten thousands of Euros; e.g., consultants, evidence, experts, logistics).

- Has your country extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunction Directive? If yes, what are the additional consumer rights covered?

Yes, it has (or rather, it was the other way round: the DCC already had a collective injunctions procedure which was much broader than the ID offered). Given the open-ended nature of the Dutch civil procedural rules on standing in court of consumer associations and foundations who file a collective claim for injunction, the scope of application is fully open. Any and all relevant substantive rules of law (including contract, tort etc.) pertaining to consumer protection can be taken as a starting point for injunctive relief. This has been the case since 1994 when Art. 3:305a DCC was introduced (and even before that on the basis of case law) and ever since. The 2001 implementation of the ID merely meant the introduction of similar rights for cross-border injunctions filed by foreign entities. No particular requirements such as qualification through a state-backed listing of some sort are set. So: any organisation may claim on any basis.

- Analysis of the obstacles to the effective use of the injunction procedure, in particular by analysing which progress in removing obstacles has been made and/or new difficulties that have emerged in your country since 2012.

It seems that the legal landscape for injunctions is favourable in the Netherlands. The main obstacles seem to be financial rather than legal.<sup>62</sup> Consumer organisations point to the fact without financial means, no injunction procedure will be initiated; obviously, this is not a new problem. What is new, is the surge in commercially driven ad-hoc foundations 'representing' consumers in recent years. This development has prompted discussion whether the Dutch legal system should step away from the broad open access of any association/foundation to a more contained system of 'qualified entities' with pre-approval by relevant authorities. This discussion has not reached a final conclusion but it seems unlikely that the Dutch 'tradition' of this open access to courts for representative organisations will be abandoned. It seems more likely that in case of mass damages claims further restrictions to commercially driven damages actions will be introduced but that injunctive remedies will remain widely available to a broad range of organisations.<sup>63</sup>

<sup>62</sup> See Tillema 2016 and Faure & Visscher 2015.

<sup>63</sup> See Tillema 2016.

- In a forward looking perspective: Should the coverage of the Injunctions Directive be extended (by including additional legislation into Annex I to the Directive)? If so, which EU legislation should be included? Are there other measures that could improve the effectiveness of the ID in establishing a high level of consumer protection? Should the scope of the Injunctions Directive be extended to the protection of collective business' interests? Are there best practices in your country that could be relevant for other countries and considered as model for the injunction procedure at EU level?

The Dutch example shows that the use of pre-approved listing (qualification of entities) is not vital for the collective remedy of injunction in civil procedure. So, extending the coverage would probably not do harm but it would not do anything for purely national enforcement procedures concerning Dutch consumers. It would obviously be relevant for cross-border injunctions lodged before a Dutch court under the regime of Art. 3:305c DCC.

One representative of a consumer organisations argued that the ID should include damages actions as well, in order to enable representative organisations to claim for reinstatement and compensation of consumers who experienced detriment as well as allow them to invoke rescission, termination or enforced performance for the benefit of consumers.

### 1.3.2. 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:

- How effective is the injunction procedure in addressing infringements originating in another EU country?

The general impression of the authors of this report on the basis of the published case law and the interviews is that the obstacles for Dutch consumer organisations to access foreign civil courts are insurmountable. The same probably applies for foreign organisations who seek to address a Dutch court since no such actions have been brought to date (leaving aside highly exceptional cases – the authors of this report only know of one case where a foreign consumer authority (successfully) sought redress in The Netherlands: District Court Breda 9 July 2008, ECLI:NL:RBBRE:2008:BD6815 (Office of Fair Trading/Best Sales B.V.).

It stands to reason it makes more sense to liaise with befriended associations in those countries where the claims needs to be brought and to persuade those home associations to help out. It seems that there are occasional contacts to that effect.

Whether any cross-border activities concerning injunction – if they exist – would actually do any good to the internal market, is debatable. Our impression is that the cross-border cooperation between national supervisory authorities yields more tangible results.

- How effective is it to address infringements originating in another EU country that qualified entities in your country are enabled to seek injunctions in the other Member State (Article 4 of the Injunctions Directive)?

From a Dutch perspective, this option is not effective at all. The obstacles for Dutch consumer organisations to access foreign civil courts are insurmountable. Consumer organisations stress that the legal and financial obstacles for bringing claims to foreign courts are simply too great. The authors of this report refer to the answers given above.

- In a forward looking perspective: Are there non-legislative or/and legislative measures that could improve the effectiveness of the injunction procedure in addressing infringements originating in another EU country? Are there best practices in your country that could be relevant for other EU countries and could be considered as a model for the injunction procedure at EU level?

Consumer organisations stress that the legal and financial obstacles for bringing claims to foreign courts are simply too great. They do not offer concrete solutions. Here it is useful to note that Dutch consumer associations are not financed by the State for bringing claims to court – they mostly need to rely on private donations and their memberships. Hence, if the Injunctions Directive really aims to stimulate cross border litigation by qualified entities, they need to be financially compensated in some form or other.

### 1.3.3. Interplay between the Injunctions Directive and other enforcement instruments of consumer law

Please analyse:

- Is the injunction procedure as designed by the Injunctions Directive regulated separately in your country (in a separate legal act or as a separate procedure regulated within the same legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (UCPD, UCTD and by the Consumer Rights Directive)?

The authors of this report refer to earlier answers. All collective proceedings for the benefit of consumers are either based on the general principles of Art. 3:305a ff. DCC (or, as far as UCTD is concerned, Art. 6:240 ff. DCC). Therefore, the private law enforcement procedures for private associations and organisations are not separate but integrated into civil law and civil procedure. Note that claims brought by foreign qualified entities before Dutch courts are covered by Art. 3:305c DCC rather than Art. 3:305a DCC. However, these two provisions lead to identical procedural steps (provided the cross-border claim concerns issues covered by the List of Directives referred to in Art. 1 ID).

- If these procedures are regulated separately: What are the main differences between them? How is the coherence between these procedures ensured? If these procedures are regulated in a single legal act (possibly as a single procedure): In what way do these procedures (or this procedure) go beyond measures foreseen by the Injunctions Directive?

The authors of this report refer to earlier answers.

## 1.4. Cross-cutting issues

### 1.4.1. Cost and benefits of the directives covered by the study

- To what extent is there evidence for benefits for consumers stemming from the protection provided by both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of benefits for consumers from the protection against unfair commercial practices and unfair standard terms in contracts; [*Note: a relevant aspect in this context is whether the costs for consumers in exercising their rights under these directives are limiting these benefits or not.*]

According to the *Consumentenbond*, it is difficult to prove the benefits that consumers reap from European directives, but it has no doubt that there are benefits. Public enforcement certainly is of use to consumers, but does not lead to compensation for the detriment caused to individual consumers but to fines, which ultimately benefit the

State. The ACM confirms that its existence benefits consumers. The costs for individual enforcement of consumer rights, according to both the *Consumentenbond* and the ACM, are considerable, preventing consumers in many cases from actually benefitting from consumer protection measures.

- To what extent is there evidence for benefits for traders stemming from both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of creating a level playing field for honest traders by providing a legal basis to eliminate or at least constrain dishonest market practices, such as the use of unfair standard terms in contracts or unfair commercial practices, including through the application of the Injunctions Directive;

The *Consumentenbond* states that *bona fide* traders should profit from consumer protection rules, but that rogue traders need to be persuaded to abide by the law. Key here is the risk of 'getting caught', which should be increased.

- What are costs for traders due to the need to respect the requirements under the directives covered by the study? [Note: Such as costs of research, legal advice and compliance as well as the amount of time necessary to comply with the directives]

The costs for traders in order to respect consumer law legislation are difficult to quantify, according to the ACM. The ACM, however, remarks that at least theoretically it should save traders costs if they have clear checklists they need to abide by in order to be 'safe'. For this reason, the ACM has developed a checklist with regard to information obligations for webshops.

- What are the costs involved in the public enforcement of these rules?

At present it is not possible to calculate what the costs are for public enforcement of the UCPD and the UCTD, as the public enforcement agencies do not keep track of single enforcement instruments.

- Are there indications that the directives covered by the study are not implemented in your country in a cost-effective manner?

Both the Ministry of Economic Affairs and the Ministry of Security and Justice state in their interviews that they implement European directives as cost-effectively as possible, in particular by seeking to implement directives in existing legislation and by making use of existing instruments.

- Could the costs for implementing and enforcing the rules of the directives covered by the study be reduced without lowering the level of protection for consumers? If so, how?

It seems hard to cut implementation and enforcement costs without lowering consumer protection. Less enforcement implies also less risk for rogue traders of 'getting caught' and thus may serve as an incentive to take unfair advantage of consumers. The Ministry of Economic Affairs does point to the possibility to introduce fewer central general clauses and to replace them by more specific clauses, which may be easier and therefore cheaper to enforce. The ACM rather points to the possibility to restrict the overlap between European legislative instruments. However, if the ACM were smaller in size, it would not be able to deter traders from infringing consumer protection legislation sufficiently, the regulator indicates.

#### 1.4.2. Interplay with EU sector-specific consumer protection legislation

Regarding the interplay of the horizontal EU consumer legislation [mainly UCPD and UCTD] with EU sector-specific consumer protection legislation in the areas of electronic communications, passenger transport, energy and consumer financial services, please:

- Analyse the levels of awareness of the requirements of the horizontal EU consumer legislation (mainly UCPD and UCTD) of businesses and consumers and the specific public enforcement bodies in the relevant sectors, as in particular demonstrated by their practical application; [*Key question here is: Are UCPD and UCTD applied in practice by national authorities and courts as a legal basis to combat unfair commercial practices and unfair standard terms in contracts in the regulated sectors?*]

According to the Ministry of Economic Affairs companies active in regulated sectors tend to look at sector-specific legislation and may believe that horizontal EU consumer legislation such as the UCPD and the UCTD is not applicable to their sector. The *Consumentenbond* notes that consumers typically are aware of the content of the UCPD, even though they do not know the rules themselves, as the rules of the UCPD by and large are self-evident. The UCTD is less well-known by consumers as the contents of standard contract terms legislation are less apparent for consumers. As traders are professional parties, they are expected to be aware of the law, and ignorance thereof is not a valid excuse, the *Consumentenbond* argues.

According to the *Consumentenbond*, the Authority Consumers and Markets (ACM), which is the primary regulator in the area of consumer law is well aware of the requirements of the UCPD, but other regulators are less familiar with these requirements. In specific sectors, other regulators are charged with the enforcement of specific instruments, but not with the enforcement of the horizontal instruments. This is confirmed by the *Vereniging 'Consument & Geldzaken'*, which indicates that fines imposed by the financial markets regulator, the Authority Financial Markets (AFM), generally are not based on the UCPD, and that it is possible that these regulators work in isolation.

- Specify whether in your country the same authority is responsible for the enforcement of the horizontal EU consumer law 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 UCPD/UCTD in the regulated sectors, as specified in the previous bullet?*]

As is explained by the ACM, in The Netherlands are several regulators competent to supervise and enforce consumer protection legislation in addition to the Authority Consumers and Markets (ACM), which is the main regulator in this area. For instance, the Authority Financial Markets (AFM) is competent with regard to financial services (with the exclusion of the ACM). The Human Environment and Transport Inspectorate (*Inspectie Leefomgeving en Transport*, ILT) supervises compliance with passenger rights, the Netherlands Food and Consumer Product Safety Authority (*Nederlandse Voedsel- en Warenautoriteit*, NVWA) is competent with regard to food claims and labelling of products. In addition, where consumers are not merely misled but are subject to fraud, the police and the public prosecutor are competent to take action under criminal law. Cooperation protocols have been developed between regulators and there are regular contacts between the contact persons of these regulators within the *Markttoezichthoudersberaad* (Market supervisors deliberation). The cooperation protocols have been formally published.<sup>64</sup>

<sup>64</sup> See for instance that between ACM and AFM in *Staatscourant* 2014, no. 14473.



- Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning contractual fairness, 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.?.]

According to the Ministry of Economic Affairs traders that try to treat consumers fairly have no problem with the legal framework, but rogue traders may benefit from uncertainty as to the applicability of sector-specific or horizontal legislation. The *Consumentenbond* notices an overlap between the provisions on the supply of information under the UCPD and the provisions under sector-specific legislation. An example is Art. 23 of Regulation 1008/2008, which contains provisions on the pricing of airline tickets. That provision may be seen as a *lex specialis* of the UCPD. The Regulation led to an amendment of the Act on enforcement of consumer protection (*Wet handhaving consumentenbescherming*), but it remained unclear which regulator was competent for the enforcement of Art. 23 of the Regulation. Since then this has been repaired – now the ACM is competent to enforce this provision in the same manner as it is competent to enforce the implemented provisions of the UCPD. The *Vereniging 'Consument & Geldzaken'* remarks that the requirements of the UCPD and the UCTD do not match well with the sector-specific legislation for the financial sector, which is not developed with consumer protection as its primary goal. As a consequence, the instruments in part overlap and in part are contradictory. The AFM confirms this.

The ACM also confirms the overlap, but remarks that since it is competent to enforce both the UCPD and the UCTD, as well as sector-specific legislation in the area of telecom, transport, postal services and energy, this overlap may spring to mind more easily in The Netherlands than in Member States where these sectors are supervised by different supervisors.

- What are the benefits of the complementary application of the UCPD and UCTD in the regulated sectors? What are the costs due to the complementary application with the sectoral EU consumer protection legislation?

The *Consumentenbond* and the Ministry of Security and Justice are of the opinion that the general rules of the UCPD and of the UCTD should be applicable also in the regulated sectors as consumers have similar expectations of the commercial practices of airlines as of sellers of consumer goods, and a uniform application of these rules is beneficial from the point of view of legal certainty. Sector-specific legislation is added to this to cater for the specific characteristics of these markets, which imply that the horizontal instruments are not sufficient by themselves. The *Consumentenbond* points to the existence 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 *Consumentenbond* argues. The ACM confirms this, but remarks that too much overlap may prevent effective enforcement.

There is no quantitative information pertaining to the costs of the complementary application of the UCPD and UCTD in the regulated areas as these costs are not calculated separately. The costs of public enforcement in the financial sector are passed on to the financial institutions, the AFM remarks – and undoubtedly they are ultimately passed on to the consumer, as the *Vereniging 'Consument & Geldzaken'* points out.

- Assess any need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law.

In Dutch law, specific legislation normally takes precedence over generic (horizontal) legislation (*lex specialis derogat legi generali*). The Ministry of Economic Affairs indicates that at the European level this principle is not always explicitly applied. In this respect there is a need for clarification indeed, the Ministry argues. This is confirmed



by the *Vereniging 'Consument & Geldzaken'*, that indicates that the interplay is not transparent at the moment, which may cause problems when the rules are enforced, and which may prevent the (financial) regulator from timeously intervening in the market. The AFM, on the other hand, argues that it is clear that sector-specific legislation trumps horizontal legislation, but agrees that it sometimes may be difficult to determine which rules are applicable in a particular case. For that reason, it also requests clarification.

#### 1.4.3. Relevance of consumer law directives for consumer-to-business transactions

- Please analyse the need and potential for the application of the consumer law directives (mainly UCPD and UCTD) to 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 *Consumentenbond* argues that traders are not in need of protection in such cases, but consumers may be as the power balance between the parties is uneven also in these types of cases. The *Consumentenbond* is of the view that consumers indeed need the protection of the UCPD and the UCTD in these cases. At present, consumers are protected primarily by rules of general contract law, which largely are of a default nature only and from which the parties thus may derogate. In literature the question has been raised whether there is a need for consumer protection, in particular in the case where consumers sell their cars or motorcycles online to traders – which frequently occurs in situations where consumers are in need of ‘quick cash’ and may take rash decisions – and traders may take advantage thereof. In such cases, the rules implementing the Consumer Sales Directive do not apply as these provisions require the seller to be a trader and the buyer to be a consumer. For the same reason it seems unlikely that the rules implementing the CRD may be applied – which could otherwise offer the consumer a right of withdrawal. However, the rules implementing the UCPD may be applied in this situation. Moreover, also the rules implementing the UCTD, however, will apply in the case where the trader (the buyer) makes use of standard terms and introduces these terms into the contract. The Dutch black and grey lists,<sup>65</sup> however, primarily assume that the consumer is the buyer or the client instead of the seller or the service provider, and as a result often cannot help consumers in this situation. It has been argued that *Indizwirkung* should be considered, as the terms incorporated into C2B contracts often mirror terms listed on the black and grey lists.<sup>66</sup>

#### 1.4.4. Specific protection for vulnerable consumers

Please analyse:

- Whether the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined in the consumer law directives and relevant jurisprudence, and as applied by national authorities and courts in your country, continue to be valid and fit for purpose.

According to the Ministry of Economic Affairs, the notions of ‘consumer’ and ‘average consumer’ work fine in practice, but the notion of a ‘vulnerable consumer’ is less clear. Whether or not a consumer is vulnerable may determine on the nature of the transaction or the situation (e.g. doorstep selling). The Ministry does not suggest amending the notion, though. The ACM indicates that the notion of ‘credulity’ needs to be clarified.

<sup>65</sup> See Art. 6:236 and 237 DCC.

<sup>66</sup> See Loos 2015.

The *Consumentenbond* is rather of the opinion that particularly the 'average consumer'-notion is outdated as behavioural research has shown that consumers are much more vulnerable than the 'average consumer'-notion takes account of. The *Vereniging 'Consument & Geldzaken'* supports the *Consumentenbond's* view in this regard, specifically pointing to Duivenvoorde 2015.

- To what extent the existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers and whether, based on the experiences in your country, specific provisions should be introduced in other directives concerned, in particular the Unfair Contract Terms Directive.

According to the Ministry of Economic Affairs, the introduction of specific provisions protecting vulnerable consumers in the legislation on unfair terms would lead to further complexity which would not help consumers in practice. Similarly, business associations are of the opinion that there should not be specific legislation protecting vulnerable consumers. This is more or less confirmed by the *Vereniging 'Consument & Geldzaken'*, which indicates that it is difficult to develop a well-defined category of 'vulnerable consumers', with the possible exception of minors. Other underprivileged consumers, such as dyslexic consumers or consumers with a low IQ, are not as such recognisable to traders, and it seems difficult to develop legislation specifically for such groups. Similarly, the ACM indicates minors may, but need not, be vulnerable, and that there are huge differences between older people.

Instead, business associations argue that businesses should discuss with individual consumers whether or not tailored facilities are needed. The *Consumentenbond* comes to the same outcome, but based on the idea not that the 'vulnerable consumer'-notion should be extended, but instead that the 'average consumer'-notion should be amended to protect *ordinary* consumers instead of the cognitively highly developed consumer. This viewpoint is confirmed by the *Vereniging 'Consument & Geldzaken'*, which argues that all consumers concluding a contract for a complex financial product at some point may be seen as 'vulnerable'. The AFM more or less confirms this viewpoint where it states that consumers that conclude payday loans are vulnerable, but not within the meaning of the UCPD. Similarly consumers that invest their whole pension may be vulnerable given the importance of the transaction for their future financial well-being, but again they are not considered vulnerable within the meaning of the UCPD.

#### 1.4.5. EU added value

- Overall, would you consider that protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in your country since the implementation of the UCPD and the UCTD in national legislation?

In the area of unfair terms, before the implementation of the UCTD, Dutch law in many respects already offered better protection for consumers than the UCTD does. The most prominent examples thereof are the black and grey lists, which offer consumers better protection than the non-binding European list. However, in specific areas – such as the rule on transparency – the implementation of the UCTD has improved consumer protection, although it should be noted that in practice the breach of the transparency requirements hardly seems to play a role in the application of the unfairness test.<sup>67</sup> Similarly, the requirement that courts must test the unfairness of terms of their own motion, has improved consumer protection, in particular in those cases where the consumer does not appear in court.

With regard to unfair commercial practices, Dutch law did not have a similar instrument prior to the implementation of the UCPD, although a similar level of protection could be obtained through general tort law. Nevertheless, EU consumer law

<sup>67</sup> See Pavillon 2013, no. 31.

has certainly led to an improvement of consumer protection as the problem of commercial practices is much more recognisable. The Dutch legislator has recently added to this protection by introducing a provision indicating that where a contract was concluded under the influence of an unfair commercial practice, the consumer may avoid the contract.<sup>68</sup> The *Consumentenbond*, the largest consumer organization in The Netherlands, advocates the introduction of such a remedy at the European level to improve the effectiveness of the UCPD.

Business associations remark that the introduction of additional information obligations has not always been to the benefit of consumers. They argue that consumers typically spend only a limited amount of time when choosing a particular product. Within that time consumers cannot possibly digest all information that traders are legally required to provide them with.

- Overall, would you consider that the information of consumers regarding unit prices has improved since the implementation of the PID in national legislation?

Prior to the PID, there was already national legislation on pricing information. The authors of this report have no evidence of any improvement or deterioration after introduction of the PID regime.

- Overall, would you consider that the protection of businesses against unfair marketing in your country has improved since the implementation of the MCAD in national legislation?

Prior to the MCAD, there was already national tort law available. The authors of this report have no evidence of improvement after introduction of the MCAD regime but respondents do seem to think that, as concerns comparative advertising, the legal framework has improved since the MCAD regime was introduced.

- Overall, would you consider that it has become easier for businesses in your country to directly trade cross-border to final consumers located in other EU countries in recent years? Has it become easier for consumers in your country to directly purchase cross-border from traders located in other EU countries?

The development of e-commerce has significantly enhanced the possibilities of consumers and traders to conclude cross-border contracts, both as it has become easier to come into contact with foreign traders and to compare goods and services and prices.

- To what extent are these improvements, if any, due to the mentioned directives?

The creation of similar or the same protection measures throughout the European Union may have taken away (some of) the fear of consumers that consumer protection rules and rules on performance and remedies for non-performance differ radically, leaving them unprotected in case of problems. Similarly, businesses may feel more secure in taking advantage of the internal market, as the ACM observes. It is difficult, however, to prove whether this has had a profound influence on the willingness of consumers and traders to conclude cross-border contracts.

<sup>68</sup> See Art. 6:193j (3) DCC.

## Annex

## A. Transposition fact sheet

**Table 1: Fact sheet on transposition of directives in Member States' law – the Netherlands**

Directive	Transposition legislation (National law, Article)	Comments	Specific provisions going beyond minimum harmonisation requirements/use of exemptions	Included in national legislation		Comments
<b>Directive 93/13/EEC on unfair terms in consumer contracts</b>	<i>Burgerlijk Wetboek</i> (DCC), as enacted in 1992	The 1992 Dutch civil Code already met the requirements of the 1993 Directive, with minor exceptions that do not pertain to the elements discussed here. The provision of Art. 6:234 DCC discussed below has undergone changes in order to implement the (less-consumer friendly) Services Directive	'Black list' of terms considered unfair in all circumstances	Yes	<i>Art. 6:236 DCC</i>	
	<i>Burgerlijk Wetboek</i> (DCC), as enacted in 1992		'Grey list' of terms which may be considered unfair	Yes	<i>Art. 6:237 DCC</i>	
			Extensions of the application of Directive to individually negotiated terms	No		

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			Extensions of the application of Directive terms on the adequacy of the price and the main subject-matter	No		
	<i>Burgerlijk Wetboek (DCC)</i> , as enacted in 1992, and amended to conform with the Services Directive (Act of 12 November 2009, <i>Staatsblad</i> 2009, 503)		Trader's obligation to provide standard contract terms before or at conclusion of the contract (at penalty of avoidance of the terms)	Yes	<i>Art. 6:233 sub (b) and 234 DCC</i>	
<b>Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market</b>	Act of 25 September 2008, <i>Staatsblad</i> 20089, 397		Provisions regarding financial services going beyond minimum harmonisation requirements	Yes	<i>Art. 4:19, 20, 22, 25, 73 Financial Supervision Act 2006 jo. Besluit Gedragstoezicht financiële ondernemingen Wft (BGFO; Financial Supervision Act (Supervision of Financial Enterprises Conduct) Regulations.</i>  <i>Art. 3 Dutch Gambling Act</i>	
	<i>Wet Handhaving Consumentenbescherming</i> (Consumer Protection Enforcement Act 2006), Act of 20 November 2006, <i>Staatsblad</i> 2006, 591, in force as of 29 December 2006 ( <i>Staatsblad</i> 2006, 592)					
	<i>Wet Tegengaan acquisitiefraude</i> (Act Prevention Acquisition fraud), Act of 29 March 2016, <i>Staatsblad</i> 2016, 133		Application of UCPD to B2B transactions	Yes	<i>Art. 6:194 (2) and (3) DCC</i>	

<p><b>Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers</b></p>	<p><i>Prijzenwet 1961</i> (Prices Act 1961), as amended in 2002 (<i>Staatsblad</i> 2002, 217) and the 2003 Royal Decree on Pricing of Products (<i>Besluit prijsaanduiding producten 2003</i>, amended in 2014, <i>Staatsblad</i> 2013, 146).</p>		<p>Use of specific regulatory choices/derogations</p>	<p>Yes</p>	<p>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. Moreover, 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’</p>	<p>The following articles of the PID have been implemented without a specific focus on B2C transactions and therefore seem to apply to B2B transactions as well:</p> <ul style="list-style-type: none"> <li>- Art. 3 (1) PID, implemented in art. 3(1) of the 2003 Royal Decree on Pricing of Products (<i>Besluit prijsaanduiding producten 2003</i>)</li> <li>- Art. 3(3) PID, implemented in art. 3 (4) of the 2003 Royal Decree on Pricing of Products (<i>Besluit prijsaanduiding producten 2003</i>)</li> <li>- Art. 4(1) PID, implemented in art. 4 (2) of the 2003 Royal Decree on Pricing of Products (<i>Besluit prijsaanduiding producten 2003</i>)</li> </ul>
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<b>Directive 2006/114/EC concerning misleading and comparative advertising</b>	<i>Burgerlijk Wetboek (DCC)</i>			Art. 6:194-196 DCC	
<b>Directive 2009/22/EC on injunctions for the protection of consumers' interests</b>	<i>Burgerlijk Wetboek (DCC), as enacted in 1992</i>				
	<i>Wet Handhaving Consumentenbescherming (Consumer Protection Enforcement Act 2006)</i>				



**Table 2: Fact sheet on Injunctions Directive – the Netherlands**

Issue	Answer	Comments
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)?	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). <sup>69</sup>	<i>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.</i>
Who is entitled to bring an action seeking an injunction?	Foreign qualified entities <sup>70</sup> Other	<i>For national cases, any association or foundation with legal personality can bring claims.<sup>71</sup> For cross-border claims by foreign entities the requirement of qualified foreign entity listed in their country of origin applies.<sup>72</sup></i>
Is the injunction procedure a court or an administrative procedure?  If your country legislation foresees both forms of the procedure, please explain in the comments column for which infringements the court or administrative procedure is foreseen	Court procedure	
Who bears the costs of an injunction procedure?  If qualified entities (or some of their categories e.g. consumer organisations are entitled to an exemption of some/all cost related to the procedure please explain the characteristic of such exemption in the comments column.	The costs are as a rule borne by the losing party	<i>Cost shifting rules are operated on the basis of modest tariffs, not full cost orders</i>
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?	Yes, scope of application extended to cover consumer law in general	<i>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</i>

<sup>69</sup> See *Hoge Raad* 29 April 2016, ECLI:NL:HR:2016:769 (Stichting Erfpachtersbelang Amsterdam et al./Gemeente Amsterdam).

<sup>70</sup> Art. 3:305c DCC.

<sup>71</sup> Art. 3:305c DCC.

<sup>72</sup> Art. 3:305c DCC

<p>Is protection of business' interests covered by the injunctions procedure? If scope of application extended to the protection of business' interests, please provide details in the comments column regarding type of business' interests covered by the injunctions procedure</p>	No	<i>In principle no but if the organisation can show that a particular rule serves to protect business interests as well as consumer interests, the case may be heard.</i>
<p>Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations</p>	Yes	<i>Normal rules of joinder of defendants apply</i>
<p>Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID)</p>	No	
<p>Has your Member State taken specific measures regarding the prior consultation (Article 5 of the Injunctions Directive)?</p>	Yes, requirement for party seeking injunction to consult with the defendant	
<p>Does the national legislation provide for measures ensuring summary procedure? Please specify main characteristics of the procedure (subject matter/time limits) in the comments column.</p>	Yes	<i>Provisional injunction available usually within 1-2 month after summons issue (3 months at most)</i>
<p>Are there sanctions for non-compliance with the injunction order (Article 2(1) of the Injunctions Directive)? If sanctions in form of penalty or fine foreseen please specify in the comments column to who exactly should they be paid</p>	Yes, penalty of a fine for each day of non-compliance	<i>To be paid to claimant</i>
<p>Has your Member State taken specific measures regarding the publication of the decision and/or the publication of a corrective statement?</p>	No	<i>General rules apply</i>
<p>Is it possible to claim within the injunction procedure for sanctions for the infringement?</p>	No	
<p>Can an action for the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to other beneficiary be brought within the injunction procedure?</p>	Yes and no	<i>In theory an order to directly refund moneys paid by consumers without cause can be obtained; not that this is not an order for restitution of profits (disgorgement) but an order for restitution (refund) of moneys paid by consumers without legal justification.</i>
<p>Can an action for damages to be paid to the qualified entity or the public purse be brought within the injunction procedure?</p>	No	<i>Unless entity suffered damage itself</i>

Can an action for damages or redress to be paid to the consumers concerned be brought within the injunction procedure?	No	
Can individual consumers base their individual claims for damages/remedies on the injunctions order?	Yes	<i>The injunction claim can have informal res judicata effect on the points of law to benefit of individual consumers</i>
Can the qualified entity claim other measures beyond the injunction, e.g. evidence of compliance with the judgment?	No	<i>Normal rules of enforcement of court orders apply</i>
Are the effects of individual injunctions orders extended to the future infringements and/or same or similar illegal practices (of other traders)?	No	<i>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</i>

## B. Data tables

### *Number of B2C disputes*

Please indicate how many B2C disputes have been decided in your country on the basis of consumer law directives covered by this study (UCPD, UCTD, PID) as a proportion of the total number of B2C disputes decided on the basis of other national consumer legislation (based on statistics, or based on estimates by enforcement authorities and other stakeholders, where this is not available).

**Table 3: B2C disputes decided on the basis of consumer law directives covered by this study in comparison with total B2C disputes decided on the basis of other legislation (most recent year for which data is available)**

Year	Type of data	Total number of B2C disputes (number of cases)	Share of B2C disputes decided on basis of ...					Comments
			UCPD	UCTD	PID	other EU consumer protection legislation (e.g. CRD, Sales Directive, sectoral legislation)	national consumer legislation not based on EU directives	

B2C disputes are part of the total number of civil law claims at the level of the *sector kanton* (small claims section), but these include also family, labour and rental cases. Neither the number of B2C disputes nor the legal basis of decisions is registered in The Netherlands, so it is impossible to give either statistics or an estimate for the stakeholders.

### *Costs of obtaining redress for a hypothetical case of invoking unfairness of a standard contract term*

- Please estimate the costs, including time, for consumers in obtaining redress when invoking the unfairness, and thereby the non-binding character of standard contract terms in a contract they concluded. Please provide the estimate for the hypothetical example below, focusing on costs (and needed time) of a lower court procedure and the use of ADR or other relevant procedure (if applicable).<sup>73</sup>

<sup>73</sup> For the hypothetical example it is assumed that both the provider and the consumer are located in your country.

**Table 4: Estimate of costs for consumers in obtaining redress when invoking the unfairness of standard contract terms in a contract they concluded (for the hypothetical example provided in the box below)**

Redress mechanism	Estimated court fees (national currency)	Estimated lawyer's fees (national currency)	Other costs, if any (national currency)	Estimated time involved for consumer (hours)	Comments
<b>Lower court procedure</b>	EUR 223	EUR 0 if no lawyer is involved (lawyer's assistance not legally required). EUR 75 to EUR 700 if a lawyer is involved.	EUR 77.75 for introducing the claim by a bailiff; EUR 74.83 for serving the court's decision to the trader	Impossible to estimate, depends on knowledge, literacy, perseverance and experience of consumer. No time needed in case court tests term of its own motion in the course of a procedure.	
<b>ADR or other relevant procedure</b>	EUR 127.40	EUR 0 if no lawyer is involved (lawyer's assistance not legally required). EUR 75 to EUR 700 if a lawyer is involved.	--	Impossible to estimate, depends on knowledge, literacy, perseverance and experience of consumer. No time needed in case ADR institution tests term of its own motion in the course of a procedure (however: it is unlikely that this happens).	Competent ADR Institution: <i>Geschillencommissie Reizen</i> , part of De <i>Geschillencommissie</i> . Competence based on 2-sided standard terms, i.e. terms agreed by the <i>Consumentenbond</i> (the largest consumer organisation) and the <i>ANVR</i> (branch association of tour operators). Tour operators that are a member of ANVR are required to make use of these terms. The chances that the unfair term is included in these terms is (almost) 0. This may only be different if the tour operator is not a member of ANVR, but has accepted the competence of the <i>Geschillencommissie Reizen</i> nonetheless (and has paid the associated fees).

**Hypothetical example: Terms which inappropriately exclude/limit consumers' rights to compensation**

*A consumer went on a package holiday with a friend to Kenya for which they paid € 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 €5,000 (€4,000 for the cost of the package and €1,000 for lost time and enjoyment). The tour operator agreed to compensate them €1,000 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/unfair-contract-terms/index\\_en.htm](http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-contract-terms/index_en.htm)]*

- Please estimate how often court and ADR procedures are used in your country for invoking the unfairness, and thereby the non-binding character of standard contract terms (i.e. the number of cases per year)?

Neither the number of B2C disputes in court nor the legal basis of decisions is registered in The Netherlands, so it is impossible to give either statistics or even an estimate for the stakeholders. Similarly, even if a number of B2C ADR decisions could be construed, again the legal basis of decisions is not registered.

## C. Interviews conducted and literature reviewed

**Table 5: Interviews conducted for this study**

Organisation	Stakeholder type	Date
<b>Raad Nederlandse Detailhandel</b>	Business association	20 June 2016
<b>Detailhandel Nederland</b>	Business association	20 June 2016
<b>Energie Nederland</b>	Business association	N/A
<b>Authority Consumer and Markets (ACM)</b>	National consumer enforcement and regulatory authority	22 June 2016
<b>Netherlands Authority for the Financial Markets (AFM)</b>	National consumer enforcement and regulatory authority	7 July 2016
<b>Ministry of Security and Justice</b>	Ministry	11 July 2016
<b>Ministry of Economic Affairs</b>	Ministry	23 June 2016
<b>Europees Consumenten Centrum</b>	European Consumer Centre	24 June 2016
<b>Consumentenbond</b>	Consumer organisation	2 June 2016, 16 June and 28 June.
<b>Vereniging 'Consument en Geldzaken'</b>	Consumer organisation	6 June 2016
<b>Geschillencommissie</b>	ADR institution	N/A
<b>Complaints Board for the Advertising Industry (Reclame Code Commissie)</b>	National regulatory authority (self-regulation in the area of advertising)	30 June and 11 July 2016

Note: (i) The Geschillencommissie was not available for interviewing; (ii) The interview with business associations Raad Nederlandse Detailhandel and Detailhandel Nederland took place in a joint session. A third business association, VNO-NCW/MKB could not participate in the meeting; (iii) the Reclame Code Commissie communicated various issues but was unable to provide answers to the questionnaire.



**Table 6: Literature reviewed for country report**

Author/Source	Year	Title of publication
Asser-Hartkamp/Sieburgh 6-III*	2010	A.S. Hartkamp, C.H. Sieburgh, <i>mr. C. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht; Verbintenissenrecht, deel 6-III*: Algemeen Overeenkomstenrecht</i> , Deventer: Kluwer, 13th ed., 2010
Duivenvoorde	2013	B.B. Duivenvoorde, 'De gemiddelde consument als standaard bij misleiding. Een kritische blik vanuit de gedragswetenschappen', in: W.H. van Boom, I. Giesen & A.J. Verheij (red.), <i>Capita civilologie. Handboek empirie en privaatrecht</i> , Den Haag: Boom Juridische uitgevers 2013, p. 147-168
Duivenvoorde	2015	B.B. Duivenvoorde, <i>The Consumer Benchmarks in the Unfair Commercial Practices Directive</i> , Springer 2015 (dissertation University of Amsterdam 2014)
Elshout et al.	2016	M. Elshout, M. Elsen, J. Leenheer, M. Loos and J. Luzak, <i>Study on consumers' attitudes towards Terms and Conditions (T&amp;Cs), Final report</i> , 2016 (report on behalf of the European Commission, not made public yet)
Faure & Visscher	2015	M.G. Faure en L.T. Visscher, <i>Een rechtseconomische visie op collectieve actie (preadvies Vereniging voor Burgerlijk Recht)</i> , Zutphen: Paris 2015
Geerts & Vollebregt	2009	P.G.F.A. Geerts & E.R. Vollebregt, <i>Oneerlijke handelspraktijken, misleidende reclame en vergelijkende reclame</i> , Deventer: Kluwer 2009
Hijma	2010	Jac. Hijma, <i>Algemene voorwaarden</i> , Monografieën NBW nr. B-55, Kluwer, Deventer, 3rd edition 2010
Loos	2013	M.B.M. Loos, <i>Algemene voorwaarden</i> , The Hague: Boom, 2nd edition 2013
Loos	2015	M.B.M. Loos, 'Consumentenbescherming bij de consumentenverkoop van auto's', <i>WPNR</i> 2015/7062, p. 423-424
Loos & Van Boom	2009	M.B.M. Loos and W.H. van Boom, <i>Handhaving van het consumentenrecht - preadviezen Vereniging voor Burgerlijk Recht</i> , Deventer: Kluwer, 2009
Parl. Gesch. Inv. Boek 6	1990	W.H.M. Reehuis, E.E. Slob (red.); C.J. van Zeven, J.W. du Pon (eindred.), <i>Parlementaire geschiedenis van het nieuwe Burgerlijke Wetboek, Invoering Boeken 3, 5 en 6; Boek 6, Algemeen gedeelte van het verbintenissenrecht</i> ; Deventer: Kluwer, 1990
Pavillon	2013	C.M.D.S. Pavillon, 'De invloed van Europese richtlijnen op de Nederlandse regeling van algemene voorwaarden (afdeling 6.5.3 BW)', in: A.S. Hartkamp, C.H. Sieburgh, L.A.D. Keus (red.), <i>De invloed van het Europese recht op het Nederlands privaatrecht, deel II</i> , Deventer: Kluwer, 2nd ed., 2013
Pavillon	2014	C.M.D.S. Pavillon, 'The interaction between the Unfair Commercial Practices Directive and Self-Regulation: The Case of Codes of Conduct', in: W.H. van Boom et al., <i>The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems</i> (Series: Markets and the Law), Aldershot: Ashgate Publishing 2014, p. 137-172
Tillema	2016	I. Tillema, 'Commerciële motieven in privaatrechtelijke collectieve acties: olie op het vuur van de claimcultuur?', <i>Ars Aequi</i> 2016, p. 337-346

Van Boom et al.	2009	W.H. van Boom et al., <i>Handelspraktijken, reclame en zelfregulering – Pilotstudy Maatschappelijke Reguleringsinstrumenten</i> (WODC Rapport 1535) (BJU, Den Haag 2009)
Van Boom et al.	2009*	W.H. van Boom, B.J. Drijber, J.H. Lemstra, V.C.A. Lindijer, T. Novakovski, <i>Strooischade</i> (onderzoeksrapport, uitgebracht i.o.v. Ministerie van Economische Zaken), Rotterdam/Den Haag 2009
Van Boom	2010	W.H. van Boom, <i>Handhaving consumentenbescherming- Een toelichting op de Wet handhaving consumentenbescherming</i> , Zutphen: Uitgeverij Paris 2010
Van Boom	2011	W.H. van Boom, 'Country Report The Netherlands', in: Civic Consulting, <i>Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU - Part 2 – Country Reports</i> , Berlin 2011
Van Boom	2011*	W.H. van Boom, 'Price Intransparency, Consumer Decision Making and European Consumer Law', <i>Journal of Consumer Policy</i> 2011/3, p. 359-376
Van Boom et al.	2014	W. van Boom, A. Garde & O. Akseli (eds.), <i>The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems</i> (Series: Markets and the Law), Aldershot: Ashgate Publishing, 2014
Verkade	2009	D.W.F. Verkade, <i>Oneerlijke handelspraktijken jegens consumenten</i> (Mon. BW B49a), (Kluwer, Deventer 2009)
Verkade	2011	D.W.F. Verkade, <i>Misleidende (B2B) reclame en vergelijkende reclame</i> (Mon. BW B49b), Deventer: Kluwer 2011.
Weber & Van Boom	2011	F. Weber, W.H. van Boom, 'Dutch Treat: the Dutch Collective Settlement of Mass Damage Act (WCAM 2005)', <i>Contratto e impresa / Europa</i> 2011/1, p. 69-79

## 1. Study to support the Fitness Check of EU Consumer law – Country report POLAND

### 1.1. Unfair commercial practices and marketing

#### 1.1.1. Effectiveness of the UCPD in establishing a high level of consumer protection

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

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

In Poland, the Act on prevention of unfair commercial practices (*Ustawa o przeciwdziałaniu nieuczciwym praktykom rynkowym*, 23 August 2007, Dz.U. 2007 Nr 171 poz. 1206) implemented the UCPD. Article 4 of this Act contains a general clause that is based on the general clause prohibiting unfair competition in Polish law, as adopted in Article 3 para 1 of the Act on combating unfair competition (*Ustawa o zwalczaniu nieuczciwej konkurencji*, 16 April 1993, Dz.U. 1993 Nr 47 poz. 211). The principle-based approach is expressed through a requirement for the test of unfairness of a commercial practice to check whether the practice is 'contrary to the principle of good practices' (*zasada sprzeczności z dobrymi obyczajami*). On the face of it, there is thus a contradiction between the requirements for unfairness in Polish and EU law,<sup>1</sup> but the courts could interpret Polish provisions pursuant to the UCPD, thus using the unfairness test of a general clause (Article 5 UCPD).<sup>2</sup>

The compliance test of a given commercial practice to the principle of good practices is easier to conduct for Polish courts than the test of professional diligence from the UCPD. Polish courts are very familiar with the standards of 'good practices', as this test is long present in Polish law. The old Polish law regulating unfair competition (as old as of 1926) used this term as meaning the trader's honesty and fairness,<sup>3</sup> and generally it refers to ethical and moral standards of behaviour that could be expected from traders, and does not require the trader's fault to establish breach (fault could be required if the test of professional diligence was applied instead) (this interpretation has been upheld in the above-mentioned Act of 1993). The Polish Supreme Court applies this test, considering also the professional diligence standard as adopted in the UCPD, ensuring that the scope of the general clause of good practices is not broader.<sup>4</sup> From this perspective, the introduction thereof by the Polish legislator could be seen as an effective consumer protection tool.

It should, however, be mentioned that the scope of the application of the general clause has only recently been clarified in Polish law, following the CJEU's judgment in the case C-388/13 UPC Magyarország, with the change to the Act on prevention of unfair commercial practices applicable as of December 25, 2014 (Dz. U. 2014 poz. 827), establishing that it did not need to be conducted when the commercial practice also fell under the misleading or aggressive commercial practice test or was contrary to codes of conduct.<sup>5</sup>

Generally, stakeholders agree that the principle-based approach provides for an effective approach to consumer protection. It allows for courts and other national enforcement authorities to be flexible when deciding whether a given commercial practice could be perceived as unfair under the provisions of the Directive. This also

1 See e.g. Stefanicki 2010; Strzelecki.

2 See e.g.: III SK 47/14 of 9 April 2015; III SK 24/14 of 16 April 2015; III SK 80/13 of 27 August 2014; III SK 45/13 of 8 May 2014.

3 See e.g. Namysłowska & Piszcz (eds.), Strzelecki.

4 See e.g.: III SK 47/14 of 9 April 2015; III SK 24/14 of 16 April 2015; III SK 80/13 of 27 August 2014; III SK 45/13 of 8 May 2014.

5 See e.g. Polish Supreme Court case III SK 34/13 of 4 March 2014.

means that the protection against unfair commercial practices is capable of applying whenever modern technology is employed or whenever a new, unfair commercial practice appears on the market.

However, the consumer organisation sees principle-based approach as problematic before the dispute goes to court. They perceive consumers and traders as unaware of what this test could cover within its scope. Consumers are helpless to realize whether their rights have been infringed and even if they are aware thereof, they usually would not know what measures and remedies were available to them and had no resources to file a claim or a complaint. Consumer organisations are also often helpless since they have limited resources (both financially and with regard to staff).

In some sectors, e.g. energy, stakeholders underlined the fact that the amount of unfair commercial practices has risen in the past few years (since 2010), mainly, in their opinion, due to the change of market players on the market (third party access policy). New market players, who needed to win over clients when entering the market, have at times even adopted an unfair practices model as their business model. However, simultaneously, almost all stakeholders mentioned during the interviews that the enforcement of consumer protection against unfair commercial practices is strong and only getting better.

Another, briefly signalled problem by the consumer organisation, stems from the principle-based approach and flexibility, as well. Namely, the general notions used in the UCPD often provide opportunities for traders to claim that they may not be accused of an unfair commercial practice. For instance, they would claim that in the relation to the client their practice has been a 'one time' occurrence, and, therefore, it may not be called a 'practice', not to mention an unfair practice. Despite the recent judgment of the CJEU (C-388/13 UPC Magyarország) clarifying this issue to the benefit of consumers, it is unlikely that Polish consumers and their lawyers would know to invoke it any time soon, according to the consumer organisation. In this respect, the consumer organisation would appreciate more clarity and guidance from the legislators rather than the CJEU, as that would be easier to invoke and had a potential to reach more parties.

The consumer authority UOKiK (Polish Office of Competition and Consumer Protection – *Urząd Ochrony Konkurencji i Konsumentów*) mentioned here that they tend to base their cases, protecting collective interests of consumers, on the general clause of unfairness rather than on the black lists (please see the answer below on the two black lists binding currently in Poland). The reasons for it are uncertain (some practices might have been popular at the moment of writing the black lists, but then disappeared from the market, replaced by new modern practices; the lists are so clear that traders know not to use these practices anymore; etc.), but it seems that there are almost no practices on the Polish market that fall under the ones written on the black lists. The flexibility of the general clause allows, however, to protect consumers interests well in this area.

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

The Polish legislator introduced a black list of misleading commercial practices in Article 7 of the Act on prevention of unfair commercial practices and a black list of aggressive commercial practices in Article 9 of this Act. The black lists became thus an integral part of the system of consumer protection in Poland.

Just like the European legislator's, the Polish legislator's intention was to allow the black lists to alleviate the burden of proof on consumers claiming that a given trader's commercial practice is unfair, and to ensure that at least the 31 defined commercial practices are always perceived as unfair and prohibited. Although in Polish law there is also a reversal of the burden of proof when the consumer claims that the practice is a misleading one – it is for the trader to prove then that the practice was not misleading (Article 13 of the Act on prevention of unfair commercial practices). Still, due to the black lists the national court should start the unfairness' assessment by comparing the

practice to the black lists of unfair commercial practices, prior to asking traders to justify the fairness of their practices. This last step will not be necessary, if the practice is indeed on one of the black lists.<sup>6</sup> The presence of the black lists may thus avoid costly and timely litigation and facilitates court's assessment of unfairness.

The introduction of two black lists of unfair commercial practices contributed to the significant diminishment of the presence of such practices on the market, pursuant to the stakeholders representing traders. They also claim that it increases the awareness of traders of prohibited practices, which they are helped in due to information campaigns organized by the UOKiK and by the business associations.

The consumer organisation sees the black lists as also helpful in the enforcement, since it enables them to easier assess whether a particular case has more chances to be resolved to the consumer's benefit.

The UOKiK mentions indeed that the black-listed practices are rarely noticed on the Polish market, but is unsure as to the reasons for it. It could be that the black lists have had a deferring effect on Polish traders, but possibly these practices might also have become outdated and have been replaced by more modern ones.

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

N/A as Poland did not extend consumer protection in these areas.

- 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 what 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 UCPD as implemented by the above-mentioned Act on prevention of unfair commercial practices may be applied to protect consumers against misleading environmental claims and in addressing misleading practices in the energy market.<sup>7</sup>

The UCPD may be applied in the energy market and in tackling misleading environmental claims by the President of the UOKiK, but only to protect collective consumer interests against unfair commercial practices, based on Article 24 of the Act on protection of competition and consumers, last modified in August 2015 (*Ustawa o ochronie konkurencji i konsumentów, 16 luty 2007, Dz. U. 2015 poz. 184*). Stakeholders are of the opinion that the UOKiK is quite effective and active in its enforcement procedures. The UOKiK mentioned that a big problem in this area is the infamous Volkswagen case, where the authority is still working on the case against Volkswagen, but is likely to base it on the infringement of a prohibition of misleading commercial practices. The 'green claims' as part of the 'environmental claims' would likely be controlled for their fairness and non-misleading character by sector regulators, e.g. Agricultural and Food Quality Inspection (*Inspekcja Jakości Handlowej Artykułów Rolno-Spożywczych*) or State Sanitary Inspection (*Państwowa Inspekcja Sanitarna*). The President of the UOKiK has a horizontal competence to enforce UCPD also in case of such claims, but, due to limits in its capacity and resources, trusts that such agencies are performing their tasks on the market. These agencies are unlikely to use UCPD provisions, but would rather base their own cases on sector rules and regulations, e.g. on how information on dietary supplements is to be provided on a label.

Pursuant to ECC Poland the regulators of market sectors in Poland enforce legal provisions of a given sector and are less familiar with, and less interested in, general consumer protection rules, e.g. protection against unfair commercial practices.

<sup>6</sup> See e.g. Namysłowska 2014.

<sup>7</sup> Nestoruk.

Therefore, consumers are less protected in certain specific areas (health, transport, energy, etc.), since the UOKiK is more focused on general consumer protection and it may escape its attention that certain sectors' specific conditions may create new consumer issues. Consumers themselves are not unaware of the level of protection due to them, so they cannot enforce themselves their rights.

The regulator of the energy market *URE* (Polish Energy Regulatory Office – *Urząd Regulacji Energetyki*) may not start proceedings against traders in the energy market on the basis of Polish provisions implementing the UCPD and in the interview expressed the wish their competences were extended to this area.

Even if the enforcement by the President of the UOKiK of the UCPD in these matters may be effective,<sup>8</sup> stakeholders complained that it will rarely provide practical benefits to consumers. However, before the President of the UOKiK issues an administrative decision, it enables traders to negotiate a settlement, combined with the trader ceasing to continue with the unfair commercial practice. This settlement involves a trader suggesting a satisfying solution to the problem of the unfair commercial practice, e.g. introduction of a change in a consumer contract; lowering the price; repayment of undue collected fees; fulfilment of untrue promises; enabling consumers to terminate the contract or to file a complaint; providing required information. This solution presents thus a practical benefit for consumers (so-called in Polish *'przysporzenie konsumenckie'*).

Still, stakeholders identified as one of the problems in this area the lack of any (contractual) effects for individual consumers that could follow from the enforcement by the regulators/authorities of the UCPD in this sector. In their opinion, consumers, who are victims of misleading or aggressive commercial practices in the energy sector or with regard to misleading environmental claims, rarely will enforce any consumer protection in courts.

However, again, at least in theory consumers have such options, granted to them by Article 12 of the above-mentioned Act on prevention of unfair commercial practices to claim in court that an unfair commercial practice infringed their interests. They may claim from the trader: (1) cessation to continue with the unfair commercial practice; (2) removal of the consequences of this practice; (3) making a public statement; (4) compensating caused damage, especially by terminating the concluded contract with an obligation of mutual restitution and repayment of purchase-related costs; (5) awarding an appropriate sum of money for a social cause specified by the consumer, which may encompass financing further protection of consumers. If consumers are inactive, they may be represented by the Citizens Ombudsman, Financial Ombudsman, consumer associations or local consumer ombudsmen, however, only in raising above-listed claims (1), (3) and (5).

Stakeholders representing traders claim that most environmental and energy claims on the Polish market are verified prior to their publication. Consumer organisations mention that most unfair commercial practices in this area are a clear deceit, e.g. presenting a new contract with a new energy provider as an adjustment of an old contract, with consumers signing it unaware of the fact that they are concluding a new contract, until it is 14 days later and first bills from the new provider are arriving; often these contracts would also have a penalty in standard contract terms for annulling this contract. While there are provisions theoretically protecting consumers in such situations against unfair contract terms (against penalty clauses) and unfair commercial practices (against concluding a contract without realizing it), if a consumer organisation would like to protect consumers against such practices, they would get involved in a prolonged legal procedure (a couple of years duration) and that would tie up its resources.

<sup>8</sup> E.g. by fining energy providers for limiting consumer options to report faulty energy meters, which decision the trader appealed from in Polish courts, and which decision was finally upheld by the Polish Supreme Court, III SK 24/14 of 16 April 2015.

- 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 rigidly?*]

The average consumer notion as a person who is reasonably knowledgeable, observant and circumspect has developed gradually in Poland, also as a result of the influence of EU law and of the CJEU's case law. Prior to the implementation of the UCPD in Poland there were some judgments, especially in the area of misleading effect of trademarks on consumers, in which consumers have been perceived as knowledgeable and capable of protecting their interests on the market.<sup>9</sup> However, traditionally in Polish law average consumers were often seen as not careful and forgetful.<sup>10</sup> The average consumer notion has been correctly implemented in Article 2 para 8 of the Act on prevention of unfair commercial practices. Therefore, Polish courts are applying nowadays uniformly the model of an average consumer as defined in EU consumer law.<sup>11</sup> In another Polish Supreme Court judgment<sup>12</sup> it was also added that an average consumer should be a person acting rationally. He or she should also have certain knowledge of current economic market and its conditions.<sup>13</sup>

However, interestingly, an average Polish consumer can still be perceived by Polish courts as less knowledgeable and careful than other European average consumers, with Polish courts taking into account the possibility to account for social, cultural and linguistic factors as per Recital 18 of the UCPD and Art. 2 Para. 8 of the above-mentioned Act. In a case of the Court of Appeals in Warsaw<sup>14</sup> it was stated 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, pursuant to the Polish court.

With regard to how an average consumer is being defined, 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.<sup>15</sup> Polish courts stress the need to apply these two criteria in the above-mentioned order.<sup>16</sup> When applying the benchmark of an average consumer, Polish judges evaluate reasonable expectations as to consumer behaviour based on logic and their life experience, refusing to allow parties to provide empirical evidence as to consumer behaviour.<sup>17</sup>

In the judgment of the Polish Supreme Court,<sup>18</sup> an average consumer in a car market had an ability to read and understand advertising materials, is reasonably critical, mature, knowledgeable and careful, and thus could not be seen as not paying attention and likely to be confused as to who will take care for his or her car.

In the judgment of the Polish Supreme Court<sup>19</sup> an average consumer in the insurance market has been seen as one that would verify insurance agents' claims about future

<sup>9</sup> See Polish Supreme Court e.g. I CKN 1319/2000 of 11 July 2002.

<sup>10</sup> See on this Polish Supreme Court e.g. III CSK 377/07 of 23 April 2008.

<sup>11</sup> Idem. See also e.g. Court of Appeal in Warsaw, VI ACa 116/14 of 18 June 2015.

<sup>12</sup> See Polish Supreme Court I CSK 87/13 of 29 November 2013.

<sup>13</sup> See e.g. Polish Supreme Court III SK 34/13 of 4 March 2014.

<sup>14</sup> VI Aca 1069/12 of 17 January 2013,

<sup>15</sup> See Polish Supreme Court e.g. I CKN 1319/00 of 11 July 2002; I CK 358/02 of 2 October 2007; III CSK 377/07 of 23 April 2008.

<sup>16</sup> See e.g. Court of Appeal in Warsaw, VI ACa 1685/14 of 30 November 2015.

<sup>17</sup> See e.g. Court of Appeal in Warsaw, VI ACa 116/14 of 18 June 2015; Court of Appeal in Warsaw, VI ACa 1685/14 of 30 November 2015.

<sup>18</sup> I CK 358/02 of 2 October 2007.

<sup>19</sup> I CSK 43/15 of 14 January 2016.



profits and insurance conditions. However, even a reasonable average consumer would not be expected to check whether the insurance agent, remaining under the supervision of the insurance company, has indeed transferred consumer's money to that company.

In a case concerning advertising in online banking, the Court of Appeal in Warsaw decided that the average consumer would be an Internet user and a user of banking services, who is knowledgeable about banking services and banking products, as well as familiar with the online environment. Since online banking is not considered by the Polish court as an everyday transaction, potential consumers of such services should be perceived as being more circumspect than usual, and, therefore, more difficult to mislead.<sup>20</sup> This led the court to conclude that it could not have been misleading to the consumer that there were payments related to the use of an online banking account, when the advertisement promoted free online banking, since an average consumer is aware that there are many banking services that could not have been enumerated in the advertisement and that most banking services need to be paid for.

Consumer association claims that the 'average consumer' concept may be harmful since most consumers who fall victim to unfair commercial practices are often unaware, older, ill, etc.; these 'average' consumers should, therefore, more often qualify as vulnerable consumers, but this is not really acknowledged by courts, which continue to apply the 'average consumer' standard in such cases. This, among other things, also leads to a crisis of confidence of consumers towards traders that were traditionally perceived as trustworthy, e.g. banks. ECC Poland also mentions that the 'average consumer' notion as a norm is being invoked as a standard nowadays by Polish courts, while vulnerable consumers are still a relatively unknown and unused category (see also below).

- 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 recognised new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted)?*]

Vulnerable consumers are rarely referred to in case law and taken as a standard of consumer protection. There is, however, a judgment of the Polish Supreme Court,<sup>21</sup> in which a member of a specific group of consumers has been identified as an average consumer – a consumer of a medicine. Ill consumers have been perceived as having less awareness, less capability for rational and critical decision-making; when they are additionally elderly, this further weakens their transactional position, as they are more prone to suggestion. Often, Polish courts would reject the arguments of the President of the UOKiK that e.g. a given advertisement is directed at young or old, and, therefore, vulnerable, consumers, and instead would apply the average consumer benchmark.<sup>22</sup>

Pursuant to some stakeholders, the concept of the vulnerable consumer is not working well in practice. For example, in the energy sector it is often older, illiterate or handicapped consumers that have concluded contracts due to unfair commercial practices directed at them. Stakeholders believe that it is not sufficient to take the standard of the vulnerable consumer as a yardstick for the assessment of whether an unfair commercial practice took place, but rather that such consumers should be granted additional remedies; easier procedural options; etc. Consumer associations mention here that consumers would not be aware that they could ask for a different standard of protection by claiming that they belong to this vulnerable consumer category – they would not be aware that there is a difference in assessment there. Polish courts would not be likely to inform consumers of such an option or apply the vulnerability of a consumer as a standard of their own motion, as the contradictory

<sup>20</sup> Court of Appeal in Warsaw, VI ACa 1685/14 of 30 November 2015.

<sup>21</sup> II CSK 289/07 of 2 October 2007.

<sup>22</sup> See e.g. Court of Appeal in Warsaw, VI ACa 1685/14 of 30 November 2015.

process in Polish law is seen as prohibiting judges' intervention in such cases (see further on *ex officio* issues).

ECC Poland draws attention to the fact that Polish courts presiding over consumer claims are general district courts, not specialising in consumer protection and, due to their lack of experience with consumer cases and consumer protection, they will not provide additional protection to these consumers who should be classified as 'vulnerable'. This, while there is direct marketing targeted at vulnerable (especially old) consumers, which is commonly reported in the media, indicated by consumer organisations and ECC Poland, but this does not seem to influence courts. Again, likely due to the decentralisation of resolution of consumer law cases (they do not go to one, specialised court).

There is a difference in the administrative procedures, where the collective consumer interest is at stake. The UOKiK states that if during the procedure the President of the UOKiK manages to show that a given commercial practice was directed at a particular consumer group, a member of that group is then used as a representative 'average' consumer for this group. The main vulnerable consumers in Poland are old or young consumers – age remains the main vulnerability criteria. Based on the vulnerability, the level of knowledge and experience with contracting expected of the consumer would be lowered, e.g. old Polish consumers are still used to the concept of monopoly on the energy market and may not expect other companies to be active on that market. Therefore, a higher standard of carefulness would be expected from traders when providing consumers with information in such situations.

- 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?*]

Stakeholders representing traders believe that self-regulation, especially adoption of codes of conduct by business organisations, is crucial for the proper functioning of consumer protection against unfair commercial practices in Poland. First, they believe self-regulation adds another level of flexibility to the existing consumer law regulations, which allows individual sectors to promptly reply to current needs of the market, reacting to newly reported unfair commercial practices. Second, it seems that compliance with codes of conduct can be strictly monitored, on more than one level, as well. That is to say, when traders apply to join a business organisation they need to comply with their code of conduct, but also annually there are compliance audits taking place in some business organisations. Such compliance audits have proven to be a good incentive to follow the code of conduct. However, not all traders' associations implement such thorough compliance checks, as the interviews showed. Third, despite being competitors traders learn from one another through adopting and following self-regulation together, meeting together, discussing particular case scenarios. Sectoral regulators may also advise informally through the business organisations as to how practices of a particular trader should be adjusted. Finally, business organisations may also design education campaigns for their consumers.

In the energy sector, there are two main business organisations – one for more established, traditional energy and telecommunication companies; the other – newer, for more alternative, smaller energy providers. In the second case, self-regulation was more problematic at the beginning of the functioning of this organisation, pursuant to the stakeholders.

Aside from codes of conduct adopted by traders' associations, there are also many ethical pledge schemes available for traders to join (e.g. *Przedsiębiorstwo Fair Play* (Business Fair Play),<sup>23</sup> *Teraz Polska* (Now Poland)<sup>24</sup>, or *Rada Reklamy* (Union of Associations Advertising Council) with its *Kodeks Etyki Reklamy* (Code of Ethical

<sup>23</sup> See <http://przedsiębiorstwo.fairplay.pl/>

<sup>24</sup> See <http://www.terazpolska.pl/>

Advertising))<sup>25</sup> that have their own codes of conduct, regulations and organize competitions of best practices for their associated traders. Traders' incentive to join such schemes is to obtain a certificate that they can attach to their marketing materials (e.g. website) but also place on the packaging of their products. Traders' associations encourage such participation and claim that consumer awareness of many of these certificates and what they represent is good, as these have been used for many years now in practice. The last of the above-mentioned codes of self-regulation schemes – Code of Ethical Advertising – focuses specifically on ensuring fair advertising practices and has been adopted by, a very active in its enforcement, association of advertisers: Union of Associations Advertising Council. ECC Poland also mentions the importance of this last, specific self-regulation in the area of advertising practices, even though their activity is not seen as fully preventing advertisers from using misleading advertising. Their influence on the traders and advertisers is limited.

Moreover, ECC Poland and the UOKiK mention that there are still significant market sectors, e.g. air passenger transport, telecommunication, that are not regulated by a trader's association, which do not organize themselves.

Consumer association considers soft law as not effective for providing consumer protection in Poland. In many cases, pursuant to them, traders' codes of conduct would copy provisions of law and reaffirm the rights that consumers already have, instead of protecting them additionally. The UOKiK is of the same opinion about most codes of conduct in Poland. As an example of a good code of conduct and its enforcement, the UOKiK also mentioned the Code of Ethical Advertising. Moreover, they mentioned a new initiative on the financial market in Poland pertaining to the regulation of good practices in advertising consumer credits, which seems to provide more guidance to credit lenders in Poland than the current regulations, e.g. as to in what font size provide a consumer credit. Since, together with the UOKiK, it was the Association of Polish Banks (*Związek Banków Polskich*) that drafted this regulation, Polish banks will need to apply this guidance, but not all credit lenders. The adoption of these rules is new, thus it is yet not possible to assess their enforcement and compliance with them.

- 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?

Stakeholders did not express a wish for such an extension. Generally, current Polish law implementing the UCPD is perceived as satisfactory and in no need of additional changes. However, pursuant to the research of the European Commission Poland has not yet fully complied even with the existing black list, which suggests that there may be a general reluctance from prohibiting more commercial practices as unfair.<sup>26</sup>

ECC Poland and the consumer association see the two Polish black lists as well construed, but would like to see them better enforced in practice.

ECC Poland mentions that many of the blacklisted practices are focused on the pre-contractual relations with the consumer, as well as the moment of conclusion of a contract, while their concept should be applicable also to the performance of the contract. Even if the UCPD provisions should apply and regulate also this performance of the contract, the black lists are less helpful here.

Both the UOKiK and the regulators on the energy market draw attention to a recent problem in Poland with unfair door-to-door sale of energy and gas (targeting vulnerable, older consumers; not providing truthful, full information; clearly misleading consumers). They would see some general rules being adopted to remedy this situation, possibly a provision on one of the black lists prohibiting or at least

<sup>25</sup> See <https://www.radareklamy.pl/kodeks-etyki-reklamy>

<sup>26</sup> See [http://europa.eu/rapid/press-release\\_MEMO-15-5162\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5162_en.htm)

limiting such commercial practices. However, they also acknowledge that the interests of traders who have their business model set up on door-to-door practices and conduct fair commercial practices would need to be considered. It is expected that well-established traders in this sector would welcome such proposals, as well, since the bad reputation of such door-to-door unfair commercial practices also tarnishes the trust consumers have in them.

The mechanism of subsequent inclusion should be adopted to easier adjust to modern technologies and new practices appearing on the market, pursuant to the UOKiK.

- Are there other measures that could improve the effectiveness of the UCPD in establishing a high level of consumer protection in your country? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

Obtaining more financial resources for educational campaigns could contribute to raising consumer awareness, the lack of which is a major concern and a significant contributor to the rising number of unfair commercial practices. Sector regulators warn, however, that some educational campaigns may have backfired in the past and became a source of new unfair commercial practices on the market. E.g. when a brochure on consumer rights was sent out, some traders might have carried it around as 'proof' that they observe rules mentioned in this brochure; additionally, since the brochure mentioned that consumers should be active in comparing contract terms and not be afraid of switching service providers, traders were using this argument as a reason that consumers need to switch to their services. Stakeholders representing traders agree that additional educational campaigns tend to improve the effectiveness of consumer protection.

Sector regulators mention also the following: providing consumers with additional contractual remedies (despite Polish law already providing quite a few of these). Stakeholders representing traders favour more attention being placed on certificates confirming that a given trader follows codes of conduct.

Both sector regulators and the UOKiK also mention the need to further limit the option for concluding door-to-door contracts, especially since traders often target vulnerable consumers. Since this would limit trade options for some market players (some of them focus only on door-to-door sales), the consequences of such limitations should be considered (cost-benefit analysis, as well as the effect on the freedom of provision of services), but some further limitations, if not full prohibition, are definitely necessary. This view has also been supported by the consumer organisation, which stressed that they often encounter problems with consumer protection in door-to-door situations, especially with regards to unfair commercial practices being sold by door-to-door salesmen.

Consumer organisation focuses on the need to improve enforcement of consumer protection rather than to change the substance of these provisions. Pursuant to them, in Poland, attorneys rarely take on consumer cases, consumer organisations have resources to only take a few cases a year. Since consumers are unable to enforce their rights, they do not realize how Polish law works, and the legal system of consumer protection is also complex, consumers are usually unable to successfully represent themselves and have trouble finding representation. From a substantive point of view, further clarification of a few concepts could help, e.g., that an unfair commercial practice does not need to be repetitive, which means that a trader could not use a defence that this was not a 'practice' but rather an incident (there was a CJEU judgment in this area, but Polish judges would be more inclined to follow a legal provision that clarifies this).

Further education of judges on rules of consumer protection is also seen as desirable by consumer organisations. Especially with regards to rulings of the CJEU, which seem to be applied by Polish courts with quite a delay.

Furthermore, Polish law provides for a specific remedy in individual consumer cases; namely, it gives consumers an opportunity to demand that a trader who harmed their interests, aside individual damages for consumers, also pays a certain amount for a social cause,<sup>27</sup> which concept includes a possibility to finance activities of consumer associations (it is the consumer's choice what social cause will be financed). Consumers could, therefore, act socially and not only claim their own damages, but also improve the general consumer protection by contributing to consumer association's financing. However, Polish law seems to discourage them from doing so by estimating the value of the dispute, on the basis of which the procedural costs are calculated, as not only covering the damages claimed by the consumer but also these additional payments for a chosen by consumer social cause. Therefore, if consumers lose the case, they have to pay more for the procedure, if they asked not only for their individual damages to be compensated, but also for the trader to contribute to a social cause. Consumer organisations would be happy to see this provision changed.

ECC Poland mentions that it could be useful to have a 'name and shame' practice established, where decisions recognizing certain commercial practices as unfair or standard contract terms as abusive would be published and could be consulted easily by consumers, media etc. This could prove to be an effective consumer protection measure. Especially, since Polish court's judgments (especially of district courts, which preside over consumer cases in the first instance) are rarely made public, which means that courts in different towns may issue different decisions in similar cases; consumers are unaware of what they may expect, etc.

Moreover, ECC Poland mentions that it would be good to further finance activities of consumer organisations, e.g. to conduct more educational activities like having a radio or a TV show dedicated to consumer issues, writing regular columns for newspapers and blogs etc. Currently there are no resources for this in Poland. They compare Polish situation to the UK's, where "Which?" has such resources and consumers know to get in touch with them when they have issues, to consult their magazine and use their practical tips and guidance.

None of the stakeholders have mentioned the possibility to add consumer education to the school curriculum, but the introduction of such a measure could also increase the effectiveness of consumer protection.

### 1.1.2. Effectiveness of the PID in establishing 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;

A new law was adopted by the Act of 9 May 2014 on informing about prices of products and services (*Ustawa z dnia 9 maja 2014 r. o informowaniu o cenach towarów i usług*, Dz. U. 2014 poz. 915). The definition of the unit selling price (Art. 3 Para. 1 No. 2 and Art. 3 Para. 2 of this Act) does not deviate from the PID. The transparency requirements comply with the PID, as well. Polish legislator requires traders to inform consumers about the reason for a discount in price, when it applies (Article 4 of this Act). If there is a difference or confusion as to prices, consumers may demand that a product or a service is sold to them at the most favourable price (Article 5 of this Act).

This Act also 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 (with traders being given time till September 30, 2016, to adjust their practices to new rules). Pursuant to Article 4 of this Regulation the unit selling price refers to litres, cubic meters, kilograms, tonnes, meters, square meters or pieces, depending on what is being sold (e.g. by length or

<sup>27</sup> See e.g. Court of Appeal in Katowice, I ACa 648/15 of 22 January 2016.



surface). The unit selling price does not need to be disclosed (Article 7 of this Regulation) when: it is identical to the product's price; products are sold in sets due to their purpose; selling non-foodstuffs exclusively in pairs due to their purpose or characteristics; selling medicines.

Stakeholders representing traders are of the opinion that consumers are effectively informed about the unit selling price. There is no evidence of lack of compliance, pursuant to them, in this area, and consumers are paying more attention to this disclosed information. Consumer association mentions here that generally there are not so many consumer complaints about how consumers are informed about prices. Polish enforcement authority in this respect – Inspection of Commerce (*Inspekcja Handlowa*) – has had, however, a number of cases on misleading prices in 2015 – 625.<sup>28</sup> The Administrative Court in Warsaw has also adjudicated that there is a difference between indicating the goods' price and their unit selling price and that traders are obliged to indicate the unit selling price when the goods' packaging determines the content in grams or litres.<sup>29</sup>

A Consumer association has noticed, additionally, that consumers complain about the new change in Polish law that took away the obligation of big supermarkets to provide consumers with a price reader. A price reader in a big supermarket was seen by consumers as enabling them to verify displayed prices easily and prevented disputes at the cash register.

- 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?

As mentioned in the previous answer, Polish law defines specifically what measurement units may be referred to in a unit selling price (Article 4 of the Regulation).

Stakeholders representing traders do not see the need for a change of a designated unit price. Currently, traders may place information on performance measurement units on the product packaging, but they do not relate it to the price. Relating it to the price could potentially lead to a misleading commercial practice, pursuant to the stakeholders, as such performance measurement units are always estimates (e.g. number of washloads for detergents will depend also on consumer's water supply, hard vs. soft water causing a difference). Moreover, stakeholders do not believe that consumers would pay attention to this unit price or that it would influence their decision-making. The UOKiK is of a similar opinion, also fearing increased opportunities for a misleading commercial practice, increased confusion of a consumer and definitely would not advise introduction of such new measurement units instead of traditional ones, if anything, alongside them.

A consumer association mentions that due to the change in Polish law, e.g. gas provided to consumer homes stopped being calculated in cubic meters and the measurement started to be provided to consumers in kWh. This change has been criticised by consumers, who claim not to be mathematically capable to assess the value/quality/etc. of such gas units. Also, providing consumers with many different units adjusted per product category would add another complication, make the assessment less transparent. They also indicate as an example of such a complexity the change in the evaluation of the energy efficiency – where the introduction of more categories (from maximum A category to A+++ category) have proved to be less transparent for consumers, and might have contributed to more misleading practices.

<sup>28</sup> See: [https://www.uokik.gov.pl/aktualnosci.php?news\\_id=12210&news\\_page=6](https://www.uokik.gov.pl/aktualnosci.php?news_id=12210&news_page=6) .

<sup>29</sup> Administrative Court in Warsaw, VI SA/Wa 1406/15 of 19 November 2015.

- The effects of the regulatory choices/derogations allowed by the Directive and applied by Member States. [Key aspects to consider are: Is the derogation relevant? Do companies make use of it? Are there consumer complaints because of this? If so, approximately how many per year?]

N/A

### 1.1.3. Effectiveness of the MCAD in providing protection for businesses

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

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

Advertising that is prohibited by the provision of Art.16 Para. 1 of the Act of 16 April 1993 on combating unfair competition (*Ustawa z dnia 16 kwietnia 1993 r. o zwalczaniu nieuczciwej konkurencji*, Dz. U. 2003 Nr 153 poz. 1503 ze zm.) falls under the following (exemplary) categories: advertising that is illegal, contrary to the principle of good practices or infringing human dignity; misleading advertising that may influence transactional decision-making; advertising referring to emotions by instigating fear, praying on superstitions or children's gullibility; advertising that is framed as a provision of objective information; advertising that significantly infringes privacy, especially by bothersome approaching clients in public places, inertia selling or spamming. The Act implemented the MCAD and contains the same rules concerning unfair advertising as MCAD, including separate requirements for misleading advertising (Art. 16 Para. 2 of this Act) and comparative advertising (Art. 16 Para. 3 of this Act). The Act itself does not define the notion of 'advertising'. It has been, however, defined in another Act of 29 December 1992 on radio and television (*Ustawa z dnia 29 grudnia 1992 r. o radiofonii i telewizji*, Dz. U. 2004 Nr 253 poz. 2531 ze zm.), its Art. 4 Para. 6 defining it as any transmission not coming from the sender that aims at promotion of sale or other forms of benefitting from products or services, supporting specific issues, ideas or achieving other desired by an advertiser effects, that has been sent for any sort of payment. This definition applies to any advertising on radio or TV. Two elements are perceived by the scholars as necessary to recognize advertising in general: (1) information about the product or service and (2) encouragement to either purchase the product or service or use it otherwise (without purchasing it), but still in exchange for payment.<sup>30</sup>

Polish stakeholders do not see a reason to change the notion of 'advertising' applied in this law nor to extend protection granted to businesses, alike the model of consumer protection against unfair commercial practices. Their resistance in this area comes either from the conviction that current rules are sufficiently efficient (business associations) or that they do not feel competent to discuss these issues (e.g. the UOKiK).

The UOKiK mentions that traders are generally protected through private law measures, with traders able to go to court and enforce their protection on the basis of provisions of the Act on combating unfair competition. The President of the UOKiK could have some competence here if an unfair competition act would simultaneously infringe/harm collective consumer interests, which is feasible and the Act on combating unfair competition deliberately, through the use of general clauses, allows for such a situation to occur.

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

<sup>30</sup> See e.g. Jaworska-Dębska; Skubisz.



Misleading advertising test is defined in Art. 16 Para. 2 of the Act on combating unfair competition as requiring assessment of all elements of the advertising, especially concerning quantity, quality, ingredients, performance, suitability, applicability, repair options of the advertised goods or services, as well as the client's behaviour.

Stakeholders consider the flexibility granted by the principle-based approach as contributing to the increased effectiveness of these provisions, as well. Again, there is not much they could say about issues in this area in practice. The lack of administrative enforcement in this area has also not been seen as a problem for the protection of traders' interests.

- The effects of the minimum harmonisation provisions on misleading advertising; [*Key aspects to consider are: 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)?*]

There is no additional protection granted to traders in this area in Poland and stakeholders continue to see it as unnecessary to introduce additional protection.

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

Comparative advertising is seen as unfair competition, if it is contrary to the principle of good practices and Art. 16 Para. 3 of the Act on combating unfair competition lists requirements for this assessment. The full harmonisation in this area is seen as providing more legal certainty, especially for cross-border advertising. However, the use of a general clause, principle-based approach provides certain flexibility and may still lead to divergent evaluation of whether a given comparative advertising is unfair. Again, the interviews did not point out any specific issues in this area.

- 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;

Generally, stakeholders perceive this as an effective legal framework, but this is mainly the result of them not being able to name any issues in this area. Most interviews have been, however, conducted with experts on consumer protection and they have, therefore, less practical experience with enforcement of provisions protecting traders.

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

In case of unfair competition acts, traders, whose interests might have been harmed or infringed, may file a claim on the basis of Article 18 of the Act on combating unfair competition and demand from a trader: (1) cessation to continue with the unfair competition act; (2) removal of the consequences of this act; (3) making a public statement; (4) compensating caused damage; (5) returning unjustified enrichment; (6) awarding an appropriate sum of money for a cultural cause, but only if the unfair competition act was deliberate. The rights of traders in case of an unfair competition act and of consumers in case of an unfair commercial practice are, therefore, very similar.

Pursuant to Art. 25 Para. 2 of the Act on combating unfair competition, unfair competition acts in the sphere of advertising can also be penalized. At the moment, there is a case pending at the Polish Constitutional Court submitted by the Polish Citizens' Rights Ombudsman that this provision of law is not in compliance with the Polish constitution.

- Are there measures that could improve the effectiveness of the MCAD in providing protection for businesses (see also 1.1.6 below)? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

Stakeholders did not identify any such measures or best practices.

#### 1.1.4. Effectiveness of current rules 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;

The representatives of business associations in the financial sector in Poland did not feel like there is much cross-border trade in their market and, thus, could not address these questions. Other stakeholders representing traders consider the maximum harmonisation in the area of UCPD as effective and are not aware that any disparities between national laws of different Member States have caused problems for Polish traders.

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

The representatives of business associations in the financial sector in Poland did not feel like there is much cross-border trade in their market and, thus, could not address these questions. Other stakeholders representing traders consider the maximum harmonisation in the area of UCPD as effective and are not aware that any disparities between national laws of different Member States have caused problems for Polish traders.

- Whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade. [*Do the national differences play a role in a business perspective? Have they caused problems?*]

N/A as Poland did not extend consumer protection in these areas.

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;

The representatives of business associations in the financial sector in Poland did not feel like there is much cross-border trade in their market and, thus, could not address these questions. Other stakeholders representing traders also had no opinion on these issues.

- Whether the minimum harmonisation character of provisions on misleading advertising represents a barrier to cross-border trade;

The representatives of business associations in the financial sector in Poland did not feel like there is much cross-border trade in their market and, thus, could not address these questions. Other stakeholders representing traders also had no opinion on these issues.

- 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;

The representatives of business associations in the financial sector in Poland did not feel like there is much cross-border trade in their market and, thus, could not address these questions. Other stakeholders representing traders also had no opinion on these issues.

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

The representatives of business associations in the financial sector in Poland did not feel like there is much cross-border trade in their market and, thus, could not address these questions. Other stakeholders representing traders also had no opinion on these issues.

#### 1.1.5. Interplay amongst UCPD information requirements according to Article 7(4) with the information requirements in the horizontal consumer law instruments

Regarding the information requirements according to Article 7(4) UCPD ("invitation to purchase") in the advertising stage, please analyse:

- The level of awareness of traders as regards information requirements at the advertising stage, as in particular demonstrated by their practical application; [*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?*]

Art. 6 Para. 4 of the Act on prevention of unfair commercial practices transposes Art. 7 Para. 4 UCPD into Polish law. It has not been changed by the transposition of the Consumer Rights Directive in Poland. There is, thus, a certain overlap of information requirements at the moment. It is unlikely that this overlap would constitute a burden for traders or consumers, considering that traders by providing e.g. once information on their geographical address comply with both sets of rules at the same time. 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. However, considering that, pursuant to the Directive, Art. 6 Para. 2 of the Act on prevention of unfair commercial practices defines as material information any mandatory information requirement under other regulations, the list of Art. 6 Para. 4 of the Act will only be relevant for such practices that fall outside the scope of the CRD.

Stakeholders representing traders consider traders to be aware of these information requirements, especially since the UOKiK and traders' associations conduct educational campaigns any time there is a new provision introduced, placing additional information requirements on traders. In their opinion, the overlap between information requirements in UCPD and CRD is not problematic, as traders knowing what information to provide will provide it just once and fulfil both requirements at once. They do not see the need to change the law. The UOKiK confirms that many efforts have been made to educate traders and make them aware of information obligations upon the introduction of the CRD. Therefore, traders not complying with information duties would rather not do it due to awareness but rather wilfully. Perhaps with an exception of some incidental online traders, e.g. using online marketplaces like *Allegro* (Polish eBay) who may indeed still be unaware that these rules also may apply to them. Also, if traders had doubts as to how to provide particular information and whether they were compliant, they could have asked for explanation and guidance from the UOKiK, which was then provided. The UOKiK also does not think that much has changed with regard to information obligations of traders or that any changes

have caused them many problems (aside the cost to hire lawyers to adjust their standard terms and conditions, regulations).

If information from Art. 6 Para. 4 of the Act on prevention of unfair commercial practices is not provided to consumers in an online trader's regulation, in a way that would allow consumers to easily reach this information, and that regulation sets terms and conditions for provision of services by the trader, the trader is in breach of this provision.<sup>31</sup>

A consumer association pays most attention to whether consumers were provided with pre-contractual information, the lack of which could lead to the annulment of the contract. Inspection of Commerce (*Inspekcja Handlowa*) is the authority controlling the compliance of traders with information duties, but they are often more focused on other compliance issues than proper performance of duties to inform, pursuant to consumer associations.

Traders in Poland are mostly focused on conducting their business in the most cost-efficient way and less on the quality of provided services, which may lead them to either be unaware of information duties they are to provide consumers with or ignore these provisions, pursuant to the ECC Poland. As an example of improper provision of information, that is occurring regularly, ECC Poland mentions that Polish traders selling to foreign consumers often provide only the basic information in the language of the consumer (or English or German), and all the detailed standard terms and conditions would still be written in Polish, thus mostly illegible to foreign consumers.

The UOKiK mentions that the main problem in this area remains in the contracts concluded at a distance, e.g. via phone, where it is also more difficult to check for compliance and enforce it.

- 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 Services Directive has been transposed in Poland by the Act of March 4, 2010 on provision of services at the territory of Poland (*Ustawa z dnia 4 marca 2010 r. o świadczeniu usług na terytorium Rzeczypospolitej Polskiej*, Dz. U. 2010 Nr 47 poz. 278). Pursuant to its Article 10 the service provider has some information requirements that also overlap with the ones mentioned in the UCPD, with regard to: service description and price; trader's name and address.

The E-commerce Directive has been transposed in Poland by the Act of July 18, 2002 on electronic provision of services (*Ustawa z dnia 18 lipca 2002 r. o świadczeniu usług drogą elektroniczną*, Dz. U. 2002 Nr 144 poz. 1204). Pursuant to its Art. 5 Para. 1 the e-commerce service providers also needs to inform consumers about their name and address; Article 8 sets the need for the service provider to publish a Regulation that would define the services provided, as well as conditions of contract termination and complaint procedures. Again, thus, there is a certain overlap.

Stakeholders representing traders do not perceive any additional costs for businesses due to this overlap, since traders knowing what information to provide will provide it just once and fulfil both requirements at once. Stakeholders do not see the need to change the law.

ECC Poland states that all the information duties for traders towards consumers create a puzzle and take away clarity from traders as to their obligations. Especially considering that aside all EU consumer law-based information obligations, traders also have to comply with many national duties when setting-up a business.

The UOKiK mentions that there are some issues in the telecommunication sector due to divergent rules on information obligations between the telecommunication

<sup>31</sup> See e.g. Polish Supreme Court III SK 4/14 of 15 October 2014.

regulations and general consumer law provisions, especially after the adoption of the CRD. The UOKiK has prepared a common statement together with the regulator of the telecommunication sector UKE (Office of Electronic Communication – *Urząd Komunikacji Elektronicznej*) on information duties as to what provisions should be applicable and what traders' obligations in this area are, to avoid different assessment and simplify enforcement. They, otherwise, do not perceive the costs of enforcement to be higher due to different provisions providing information duties to traders in various regulations and acts. They do, however, state that if an information duty is unclear, they are less hesitant to enforce its compliance with traders.

#### 1.1.6. Relevance for business-to-business transactions

Regarding the area of unfair commercial practices/marketing, please analyse:

- 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 cross-border trade;

Currently, Polish law has two separate Acts in this area. While the Act on prevention of unfair commercial practices implements UCPD, it provides for remedies only for consumers as a result of an unfair commercial practice, as mentioned above. If traders want to invoke an unfair commercial practice, they should prove that it involves unfair competition acts, as well, pursuant to the Act on combating unfair competition (which might be the same material test, with just a different procedure). The second Act implements MCAD, but is still considered by scholars and courts as indirectly applicable also to relations B2C, as it was prior to the adoption of the UCPD. Consequently, currently, the legislative framework in Poland does not clearly distinguish between the two regimes of liability, from UCPD and MCAD. An unfair competition act may also be perceived as harming collective consumer interests, enabling the UOKiK to start an administrative procedure. Even though the protection of traders in the Act on combating unfair competition provides generally only for a civil procedure. The revision of the MCAD regime could be beneficial to the clarity of the Polish legal system.<sup>32</sup> This does, however, not necessarily need to imply granting more rights to traders in B2B situations and the effect of such a change on cross-border trade remains uncertain.

Business associations do not believe that the protection of B2C should be extended to B2B. They mention the problem of a 'slippery slope' – how could it be assessed to which trader this protection should be granted? They believe that consumer protection is a special regime, the justification for introducing it lies in the special needs of natural persons and their weak contractual position, and this justification does not apply, pursuant to them, even to micro-businesses, who have more resources than consumers. No signals have been received by stakeholders representing traders from traders engaging in cross-border trade on the need to extend this protection to B2B.

- 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;

In Poland the definition of the consumer was originally not limited to natural persons since the old Art. 384 Para. 3 of the Polish Civil Code identified a 'person' as a consumer, without excluding legal persons from this definition. On the basis of this provision consumer protection could, potentially, be extended to legal persons, even though some scholars questioned this interpretation.<sup>33</sup> In 2003 this provision has been adjusted, as was claimed – to better follow EU law, and now consumer notion refers only to natural persons. One of the justifications given was that a broader notion of a

<sup>32</sup> See e.g. Namysłowska 2015.

<sup>33</sup> See e.g. Gnela.

consumer led to the worsening of the legal position of Polish traders in comparison to foreign traders. Therefore, if the change came from the European level and required adjusting all national laws in the EU, this objection could be removed.

Moreover, if the definition of a consumer is not extended to cover legal persons, the separate legal regimes established by the UCPD and the MCAD could be abolished and be replaced by one common regime. This has been previously suggested in the scholarship as a solution that would introduce more legal certainty.<sup>34</sup> This certainty would be achieved by removing materially similar, but procedurally different regimes of liability for unfair commercial practices in B2C relations and misleading/comparative advertising in B2B relations.

In the opinion of some sector regulators the protection of weaker parties should be extended at least to some, smaller businesses since they are transactionally as weak as natural persons.

Business associations do not believe that the protection of B2C should be extended to B2B. They mention the problem of a 'slippery slope' – how could it be assessed to which trader this protection should be granted? They believe that consumer protection is a special regime, the justification for introducing it lies in the special needs of natural persons and their weak contractual position, and this justification does not apply, pursuant to them, even to micro-businesses, who have more resources than consumers.

The UOKiK mentions also that currently there is a draft law being discussed in Polish Parliament about unfair commercial practices between suppliers, distributors and traders in the sector of trade of food and agriculture products.<sup>35</sup> This suggests that current law does not provide sufficient clarity as to protection of traders' interests in such relations, even though the Act on combating unfair competition could cover these scenarios. For clarity sake, protection against unfair commercial practices in such relations would then be placed in this separate act and would be enforced by the UOKiK, provided that this law is adopted.

- 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 also cover unfair commercial practices during and after the transaction;

See previous answers – no stakeholder has expressed a need for such an additional protection in B2B transactions. Stakeholders representing traders are of an opinion that general contract law rules applicable in Poland are at the moment of a satisfactory quality and no additional protection should be introduced.

The UOKiK mentions the current works in the Polish Parliament on a new law that would regulate performance of contracts between traders and their suppliers and distributors,<sup>36</sup> to prohibit more clearly unfair commercial practices in such vertical relations, specifically in the sector of food and agriculture products. This suggests that eventually the adoption of new rules is more required at the transactional and post-transactional stage than pre-contractually.

- Whether there is a need to have a black-list of practices in the business-to-business marketing area;

See previous answers – no stakeholder has expressed a need for such an additional protection in B2B transactions. Stakeholders representing traders are of an opinion that general contract law rules applicable in Poland are at the moment of a satisfactory quality and no additional protection should be introduced. The current Act

<sup>34</sup> See e.g. Namysłowska 2015.

<sup>35</sup> See <http://www.sejm.gov.pl/sejm8.nsf/agent.xsp?symbol=RPL&Id=RM-10-82-16>

<sup>36</sup> See <http://www.sejm.gov.pl/sejm8.nsf/agent.xsp?symbol=RPL&Id=RM-10-82-16>



on combating unfair competition does contain specific provisions in its Chapter 2 on what constitutes an unfair competition act.

It remains to be seen whether the new law, if it is adopted, regulating the performance of B2B contracts between traders and suppliers/distributors would contain any black list.

- What should be the enforcement cooperation mechanism in the business-to-business marketing area;

See previous answers – no stakeholder has expressed a need for such an additional protection in B2B transactions. Stakeholders representing traders are of an opinion that general contract law rules applicable in Poland are at the moment of a satisfactory quality and no additional protection should be introduced.

However, the new rules that might be adopted in Poland would introduce a possibility of administrative enforcement of traders' interest, by giving the UOKiK authority to enforce its provisions.

- Whether there is a need to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive;

Also with respect to this question stakeholders representing traders do not see the need for an additional protection regime being introduced. Currently, Article 18 of the Act on combating unfair competition, as mentioned above, provides traders with remedies in case misleading or comparative advertising is found, as an example of an unfair competition act (see above for the list thereof).

- Whether there is a need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive.

Also with respect to this question stakeholders representing traders do not see the need for an additional protection regime being introduced. There is a general feeling of satisfaction with how the national law functions at the moment. No complaints from the traders suggest such a need for a change either.

#### 1.1.7. Relevance of contractual consequences of unfair commercial practices

Please analyse whether there are in your country:

- 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;

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, pursuant to Art. 12 Para. 1 of the Act on prevention of unfair commercial practices.<sup>37</sup> This was a novel remedy introduced for consumers in Polish law, not quite compatible with other forms of avoiding the contract from the Polish Civil Code and could be compared to putting consumers in the same position as if they were withdrawing from a contract.<sup>38</sup>

Before the President of the UOKiK issues an administrative decision while protecting the collective interests of consumers, it enables traders to negotiate a settlement, combined with the trader ceasing to continue with the unfair commercial practice. This

<sup>37</sup> See also e.g. Sieradzka 2008b; Nestoruk 2015.

<sup>38</sup> See e.g. Nestoruk 2015.



settlement involves a trader suggesting a satisfying solution to the problem of the unfair commercial practice, e.g. introduction of a change in a consumer contract; lowering the price; repayment of undue collected fees; fulfilment of untrue promises; enabling consumers to terminate the contract or to file a complaint; providing required information. This solution presents thus a practical benefit for consumers (so-called in Polish *'przysporzenie konsumenckie'*). It has yet not gone as far as to allow consumers to withdraw from a contract or to nullify the contract. This is seen by the UOKiK, as potentially beneficial for consumers in some cases, but also dangerous, as consumers might not want their contracts, even if concluded on the basis of an unfair commercial practice, annulled. Therefore, taking such a decision would require a careful balance of all the consequences of such an annulment, which would prolong the procedure, require individual consumers to become part of it and would defy the purpose of protecting collective consumer interests.

- Any case law (enforcement decisions, court rulings) providing for such consequences;

The consequences have been specified by the legislator for consumers claiming their rights in individual cases in front of district courts in Article 12 of the Act on prevention of unfair commercial practices, thus there is no need for additional protection being granted by the courts. Courts should apply the above-mentioned provision. However, this protection would only be applied when consumers claim it, and this does not happen often, as also mentioned by consumer organisations, mainly due to consumers' lack of awareness of their rights.

The President of the UOKiK's decisions do not have a direct effect on individual consumer contracts, but consumers could invoke decisions of the President of the UOKiK in front of district courts in their individual cases, the President of the UOKiK could then also provide explanations to the court. There is no data, how often consumers actually use decisions of the President of the UOKiK in their individual cases.

- Whether there is, based on past experience in your country, a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

Potentially, there is such a need with respect to the enforcement of sector specific rules protecting consumers, which e.g. in the energy sector does not provide sector regulators with an opportunity to intervene on behalf of individual consumers. Such individual consumer complaints would be re-directed to the UOKiK, which can then collect such complaints and its President may then act to protect collective consumer interests against a given trader on the basis of Article 24 of the Act on protection of competition and consumers. Individual consumers thus usually do not directly benefit from the proceedings conducted by the regulators that may fine (President of the UOKiK) or try to take away trader's concession or conduct mediation with traders (sector regulators).

However, individual consumers may either go to court or approach regional/local consumer ombudsmen, filing for individual consumer remedies, as described above, encompassed in Article 12 of the Act on prevention of unfair commercial practices. These individual remedies award consumers also with an option to annul the concluded contract, thus they are quite far-reaching. Plus, as described above there is an option for some interventions of the UOKiK to provide for contractual consequences to individual consumers, with traders voluntarily taking on an obligation to adjust consumer contract terms.

Stakeholders representing traders do not see the need to further develop these consequences. Consumer associations claim that these contractual consequences should go further, ensuring that traders do not benefit at all from breaking the law and disposing consumers of their rights and their protection. The general idea would be to ensure that traders are concerned about whether they are conducting an unfair

commercial practice, since currently they are not worried that much about the consequences. For example, a telecommunication provider would likely act differently knowing that if they provide misleading advertisement or coerce a consumer's signature on a contract, they would lose the mobile phone that was issued to the consumer with a contract, and not only have to admit their wrongdoing, cease the practice and potentially compensate some damages (if these can be proven).

## 1.2. Contract conclusion and performance

### 1.2.1. Effectiveness of the current rules in establishing 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;

UCTD has been transposed to Polish law by the Polish Civil Code and the Act on protection of competition and consumers, last modified in August 2015 (*Ustawa o ochronie konkurencji i konsumentów*, 16 luty 2007, Dz. U. 2015 poz. 184). Article 385<sup>1</sup> of the Polish Civil Code introduces the general test of unfairness, using the principle-based approach, that is prohibiting a standard term and condition that is contrary to the principle of good practices. In the individual consumer claims against unfairness of standard contract terms, this test replaces the 'good faith' requirement from the UCTD, but in practice there is not much deviation in understanding of these two principles. Accordingly, the Polish Supreme Court perceives a standard term and condition as contrary to the principle of good practices when it undermines the contractual balance of parties' rights and obligations.<sup>39</sup> The significant imbalance to the detriment of the consumer is a separate requirement that in the same judgment was interpreted as unjustified disproportion in the parties' rights and obligations to the detriment of the consumer<sup>40</sup>.

The Act on protection of competition and consumers also uses a principle-based approach when regulating a possibility of *in abstracto* control of standard contract terms, unrelated thus to an individual consumer claim. Pursuant to a new Article 99a of the Act on protection of competition and consumers it will be the President of the UOKiK who in an administrative procedure will decide on the abusive character of a standard term *in abstracto*. Consumers, consumer ombudsmen, ombudsmen of the insured, consumer associations and foreign organisations entitled to start injunction proceedings, may notify the President of the UOKiK about an infringement regarding a trader using an abusive clause, contrary to the prohibition in Article 23a of this Act. This last provision prohibits traders from conducting practices that harm collective consumer interests, meaning practices that are unlawful or contrary to the principle of good practices (Article 24 of the Act on protection of competition and consumers). In particular, this provision defines as a practice that harms collective consumer interests: the use of unfair commercial practices; the breach of the information duties, i.e. providing consumers with comprehensive, truthful and accurate information; as well as, offering consumers financial services that do not meet their needs, which were assessed pursuant to the information available to the traders. This provision used to refer also to a catalogue of unfair standard contract terms that was published by the District Court in Warsaw XVII Division of Consumer and Competition Protection (*SOKiK – Sąd Ochrony Konkurencji i Konsumentów*) (see below further on the change as to this catalogue that function as a sort of 'black list' in Polish law).

Again, stakeholders representing traders find that a certain level of flexibility, for which the principle-based approach allows, is a good addition to the unfairness test.

<sup>39</sup> See e.g. I CK 832/04 of 13 July 2005.

<sup>40</sup> See also e.g. I CSK 125/15 of 15 January 2016.

The UOKiK mentions that they are likely to base most of their cases on the grey list rather than on the general clause, as traders continue to make the same mistakes in practice and fall under one of the categories placed on the grey list. However, the general test of unfairness provides additional options for enforcement and is useful in practice.

- 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 your MS? Does this work in practice or are there problems?*]

The indicative list is not being used in practice by Polish courts during the individual control of unfairness, since the general clause described above is supplemented by the grey list of potentially unfair clauses in Article 385<sup>3</sup> of the Polish Civil Code. This provision transposed the indicative list from the Annex to the UCTD into Polish law. Stakeholders did not identify any Polish judgments where the indicative list of the Annex would be referred to rather than the grey list from the Polish Civil Code. A consumer association stressed that Polish judges would be more inclined to put more emphasis on Polish rather than European law. As a result, European law would be applied more indirectly.

The UOKiK mentions that in their administrative procedures they also tend to use the grey list from the Polish Civil Code rather than the indicative list of the Annex and they do not see the need to just repeat the same point from the indicative list in the Annex. They could not recall a case, when the indicative list would have been used. However, they did not exclude a possibility to invoke the Annex, if its interpretation in European law could guide Polish law in the future, e.g. if the Directive is more clear on a certain issue, especially as there are slight differences between the list in the Annex and the list from the Polish Civil Code.

Stakeholders did not have an opinion on this matter.

- 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; [*Note: If a black/grey list exists, key aspects to consider are: How does the list work in practice? Does it make a difference to have such a list?*]

Aside the grey list adopted in Polish Civil Code (as mentioned above), the UOKiK published decisions of the SOKiK that found certain standard terms unfair in *in abstracto* control of unfairness. The registry, in which these decisions were published, was perceived as a factual black list, prohibiting the use of certain standard terms against all consumers of a particular trader, but not against all traders (even though some scholars argued for giving it such an *erga omnes* effect). The rules on the control *in abstracto* have recently been changed and any cases started after April 17, 2016 will not have their decisions added to the registry (further explained later in this report). The registry consists of almost 2000 pages and 6597 entries. Instead of classifying a type of a contract term that has been considered unfair and organizing decisions pursuant thereto, it just lists specific clauses found unfair in particular cases. For example: 'Under circumstances not accounted for in a given Contract, decisions will be taken by MeCom in the form of a decree.'<sup>41</sup> or 'in case of the loss or damage to the client's wardrobe, damages will be limited to the amount representing its value, not exceeding, however, the 10-times worth of the price of the performed service'.<sup>42</sup>

Some of the contract terms that have been mentioned by stakeholders as often found in consumer contracts and leading to unfairness were e.g. penalty clauses;<sup>43</sup> exclusion

<sup>41</sup> Decision XVII Amc 27/01 of 27 February 2002.

<sup>42</sup> Decision XVII Amc 7/00 of 16 January 2002.

<sup>43</sup> See e.g. Court of Appeal in Warsaw, I ACa 125/13 of 17 July 2013.

of jurisdiction of courts (of consumer residence).<sup>44</sup> Both of these type of contract terms could fall under the scope of Article 385<sup>3</sup> of the Polish Civil Code, respectively its Paragraph 17 or 23. Scholarship mentions also: allowing businesses to adjust the price without notifying the consumer; providing improper notification of a change to standard terms and conditions to the consumer (e.g. announcing it on a poster in the business' offices); allowing business' to keep consumer money if the consumer overpaid (up to a certain amount); or placing a condition on providing a service to a consumer, from the consumer concluding more than one contract with the same provider. The last condition could fall under Art. 385<sup>3</sup> Para. 6 or 7 of the Polish Civil Code, but other of the above-mentioned type of terms are not directly prohibited. For example, Art. 385<sup>3</sup> Para. 20 of the Polish Civil Code prohibits contract terms that allow the trader to determine or raise the price or compensation after the conclusion of the contract without granting a consumer a right to terminate this contract. This provision does not specifically provide a duty to notify the consumer.

Stakeholders consider lists of unfair contract terms as helpful for increasing awareness of unfair contract terms among both businesses and consumers and consider it rather comprehensive and broad in protecting consumer interests.

The UOKiK considers the grey list as very effective, but would be concerned if a black list was introduced to the Polish Civil Code. It considers Polish traders as creative and adjusting their provisions only slightly when these are assessed as unfair, e.g. if a penalty clause of 15% would be assessed as abusive, traders would adjust it to 14.9%, which would require new evaluation as a new provision. Since a black list would need to be very precise, it would be difficult to place on it certain terms that are most problematic in practice.

- 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: Have the effects of court decisions establishing the unfairness of an unfair term been extended to all contracts of the trader concerned or to the contracts of any other trader containing such a term? If so, how does this work in practice? What are the impacts on businesses? If there are no such effects of court decisions on unfair terms: what are the effects of this situation?*]

In Poland there has been some extension of the effects of the court's assessment of an unfair character of a contractual term. Pursuant to Articles 479<sup>36</sup> – 479<sup>45</sup> of the Polish Civil Procedure Code, standard terms and conditions have been controlled for unfairness *in abstracto*. This means that a consumer, a consumer ombudsman or the President of the UOKiK could have claimed at the *SOKiK* that a certain clause in the standard terms and conditions was unfair in all circumstances, regardless of the individual situation of a given consumer. If a clause used by a particular trader has been assessed as unfair in all circumstances, it was published as such in the registry of the *SOKiK* and it may not have further been applied by the trader. Consequently, also in already concluded contracts, with other consumers, this clause should automatically be not binding. This last effect has recently been codified by the new Article 23d in the Act on protection of competition and consumers. This extended effect is not applicable to cases when consumers raised individual complaints at their district courts due to traders using unfair standard terms and conditions in light of performing specific contracts. While not all traders would automatically adjust contracts with all their consumers upon the issue of the decision on unfairness, this could lead to administrative penalties, as well as individual consumer claims, in which the administrative decision could be invoked.<sup>45</sup>

<sup>44</sup> See e.g. Court of Appeal in Warsaw, VI ACa 1571/12 of 26 April 2013.

<sup>45</sup> See e.g. Court of Appeal in Warsaw, I ACa 125/13 of 17 July 2013.

However, this effect did and does not stretch to other traders who may be using identical or similar clauses,<sup>46</sup> despite some claims having previously been made in the scholarship and in some judgments of the Polish Supreme Court about such a possibility.<sup>47</sup> Ultimately, the view that has prevailed is that the unfairness control *in abstracto* analyses unfairness of a clause in view of the whole contract, which may lead to different results for other traders.<sup>48</sup> The above-mentioned Supreme Court's judgment prohibits also that a claim is raised against a trader on the basis of the same standard term for a second time. This seems to suggest that even if the trader changed the set of standard terms and conditions, but placed the same perceived as unfair term in them, it would automatically be recognized as unfair.

The recent modernisation of the Act on protection of competition and consumers has given the authority to the President of the UOKiK to conduct unfairness control *in abstracto* and taken it away from the SOKiK. As it has previously been mentioned, the procedure is now administrative rather than judicial, more alike the protection of collective consumer interests against the use of unfair commercial practices. Since it is only very recently introduced in Poland, it is impossible to evaluate at this point its effectiveness and consequences.

Stakeholders representing traders mention that despite the lack of extended effect of decisions on unfairness of standard contract terms, traders who use clauses similar or identical to the ones that have been declared unfair, often in practice decide to change their standard terms and conditions.

Consumer association mentions that the previous system, of registering and publishing standard terms which have been assessed as unfair might have been abused, but was effective for consumer protection. The abuse could consist of some organisations approaching traders who apply similar or same provisions to the ones already assessed as unfair, and threatening them with starting procedures against them, while the unfairness assessment could be different in individual cases, when all circumstances of the case would be considered. Still, according to the consumer association some standard terms are so evidently and grossly unfair that there should be a possibility to use a decision in a particular case towards other traders using the same term. Currently, this option does not exist in Polish law, since there is no black list of unfair contract terms and courts, including the Supreme Court, are not allowed to extend the unfairness assessment to the whole sector.

The UOKiK also mentions that it would wish more consumers invoked the administrative decisions issued in their individual cases to support their individual claims and encourage them to do so. They also mention that if another trader just copies a standard term that has already been assessed as unfair in another administrative procedure, consumers should have an easier option to prove unfairness of such a term than just by following the whole procedure from the start. This would also take away some of the burden of the consumer authority, limiting the number of procedures that would need to occur. Although, if such an easier unfairness procedure were adopted, the trader should still be given an option to prove that a term is not unfair considering the contract as a whole.

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

In Polish law if a standard term and condition is not transparent, it may be seen as being contrary to the principle of good practices, which would make it unfair pursuant to Art. 385<sup>1</sup> Para.1 of the Polish Civil Code.<sup>49</sup> However, the consumer association mentions that they rarely see it that Polish courts would take into account the lack of

<sup>46</sup> See e.g. the Polish Supreme Court III CZP 17/15 of 20 November 2015.

<sup>47</sup> See e.g. III CZP 80/08 of 7 October 2008.

<sup>48</sup> See e.g. the Polish Supreme Court III CZP 17/15 of 20 November 2015. See also e.g. Namysłowska & Piszcz (eds.) 2016.

<sup>49</sup> See e.g. Polish Supreme Court I CSK 313/12 of 15 February 2013.

transparency as a reason to allow consumers to avoid a contract in practice. The UOKiK assesses the lack of precision of T&Cs as an indication of unfairness and potential non-binding character of a non-transparent term; but e.g. a term written in overly small font would be less likely to automatically lead to such a consequence, but would rather lead to the assessment that the information was not provided in a full form, thereby leading to the infringement of collective interests of consumers, or as a misleading commercial practice.

Transparency is perceived as providing consumers with understandable information (both as to content and as to the form, in which it is provided), as well as lack of ambiguity (referred only to the content). Both these conditions need to be simultaneously fulfilled to consider a term transparent.<sup>50</sup> Generally, and also in this judgment, a benchmark of an average consumer is used to assess the term's transparency. Interestingly, in this case the term was considered transparent, despite it using a notion that has been included in the Polish Civil Code in a different meaning than in this legal provision. The Polish Supreme Court did not think that average consumers would have legal knowledge that would lead to them being confused by this term and, thus, decided that the term was unambiguous. However, the Polish Supreme Court's assessment that average consumers lack legal knowledge may also lead to the finding of non-transparency of standard contract terms that may confuse consumers as to their legal rights.<sup>51</sup>

In another judgment the Polish Supreme Court decided that if the consumer correctly understands a standard term, it is irrelevant for the assessment of transparency, whether he or she also agrees with what the term states.<sup>52</sup>

Specifically, Art. 24 Para. 1 of the Act on protection of competition and consumers mentions as a practice harming collective consumer interests a trader's breach of providing consumers with reliable, truthful and full information. This means that a non-transparent (if considered: not reliable, not truthful or not full information) standard term may be controlled *in abstracto* for unfairness, which administrative procedure excludes the possibility to apply other individual sanctions from the UCTD, such as the use of the rule *contra proferentem*.<sup>53</sup>

In general, stakeholders perceive transparency requirements as having been given a proper sanction in Polish law.

Generally, sector regulators stated that in their own sectors the transparency of contractual terms and conditions has improved in recent years. They perceived unfair commercial practice to be more problematic in the market than unfair contract terms, at the moment.

Also stakeholders representing traders are confident that Polish traders provide all the required information and that the form, in which the information is provided, is satisfactory. They also mention that transparency requirements may have little practical relevance, considering that consumers do not usually read information that is provided to them. They did not, at the same time, consider it a priority to invest time and money in order to increase consumer's readership of standard terms and conditions.

A consumer association and the UOKiK consider lack of transparency to be a huge problem, especially in the financial system. Consumer contracts are too long, with many annexes, written in small print, too, and in a complex language. Often also the most important terms for consumers would be hidden somewhere in the text and written in smaller, less visible print. Traders may express here the willingness to provide transparent contract terms, but they lack more specific direction what would be perceived and assessed as transparent, e.g. how many pages a contract would

<sup>50</sup> See also Polish Supreme Court e.g. I CSK 72/15 of 4 March 2016.

<sup>51</sup> See e.g. I CSK 125/15 of 15 January 2016.

<sup>52</sup> See e.g. I CSK 531/13 of 10 July 2014.

<sup>53</sup> See also Polish Supreme Court e.g. I CSK 72/15 of 4 March 2016.



have, what size font is seen as transparent. No authority or legislator provides for specific information on what is perceived as transparent pursuant to the consumer organisation. The UOKiK gives an example here of the new code of conduct for credit lenders in Poland, that does provide such further guidance on transparency, including e.g. the use of what size font could be perceived as transparent. However, this code of conduct is quite novel and it is not yet certain how effective it will be. Moreover, it is exceptional in the level of details it provides to traders on how to provide (transparent) information to consumers.

The UOKiK mentions that it is difficult to combat too long T&Cs (since there is no standard on what is too long and there are many information obligations that need to be fulfilled) or T&Cs written in a complex language (since lawyers draft them and it can be expected they would use legalise). However, they often combat the use of imprecise language (the use of 'in particular' etc.) as well as the visibility of T&Cs (paying attention the font size and graphic display). The assessment of lack of transparency would rather be conducted *ad hoc*, there are no general indications of what is non-transparent. Different methods of display of information are accounted for to assess transparency, as well as the consumers themselves – e.g. for vulnerable consumers different font size may be required to make a term transparent.

- 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. [*Note: Question only relevant for MS that have put in place extensions of application of UCTD*]

N/A as Poland did not extend consumer protection to such terms.

- 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?*]

Stakeholders representing traders think that the decision on unfairness forces traders to remove unfair clauses from their contracts, which is a satisfactory and appropriate sanction and should discourage traders from using abusive clauses.<sup>54</sup> Stakeholders were, however, not convinced of the active role of Polish courts in enforcing consumer protection *ex officio*. On the contrary, they believe that if a consumer will not raise the possibility of unfairness of a contract term, the court will not look for it – due to the procedural rule of courts investigating only upon parties' complaints. Consumer organisations also see the conflict between the CJEU's rulings on *ex officio* taking into consideration of consumer interests and Polish procedural legal system that requires courts to remain neutral and only engage in arguments presented by both parties. Polish courts, generally, would only then provide procedural guidance to parties. Additional complication in taking into account consumer rights is that in Poland there are no courts that specialise in consumer protection. Consumer law cases go to all district courts' judges, who then have little experience in consumer law, as only a small percentage of their cases would pertain to consumer protection.

The administrative remedy for consumers is to notify the President of the UOKiK about an unfair contract term pursuant to the new Article 99a of the Act on protection of competition and consumers. The President of the UOKiK may protect collective consumer interests by instigating an *in abstracto* control of standard contract terms (see more in other paragraphs). The ECC Poland considers this administrative protection of consumer interests as the main advantage of the current system of

<sup>54</sup>See also e.g. Namysłowska & Skoczny 2015 at: [http://www.cars.wz.uw.edu.pl/tresc/badania/07/Ekspertyza\\_naukowa\\_dla\\_ZBP.pdf](http://www.cars.wz.uw.edu.pl/tresc/badania/07/Ekspertyza_naukowa_dla_ZBP.pdf)



consumer protection, since the UOKiK is active in enforcing protection of collective consumer interests and *in abstracto* control of standard terms and conditions. The judicial enforcement of individual consumer rights is perceived as less effective.

The new administrative procedure that started as of April 2016, has not yet been applied in practice and, therefore, it is impossible to assess its effectiveness. Previously, the enforcement of collective interests of consumers has been a judicial procedure, but as of April 2016 it became an administrative procedure, alike to the ones allowing the President of the UOKiK to protect collective interests of consumers against the use of unfair commercial practices. For now, only first explanatory proceedings have started. The UOKiK states that they will need time to assess the effectiveness of the new procedure. Especially with regard to the consumer benefits (*przysporzenie konsumentów*), they would need to act carefully, e.g. with regard how to annex consumer contracts when a certain provision would need to be removed or adjusted.

- In a forward looking perspective: Are there other measures that could improve the effectiveness of the UCTD in establishing a high level of consumer protection in your country? Would a graphical presentation model improve the readability and comprehension by consumers of the T&Cs? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

Consumer association considers that, generally, it would be useful to adopt some general rules on unfairness, e.g. either adoption of a black list of unfair contract terms or providing courts (Supreme Court) with a possibility to ban the use of grossly and evidently unfair contract terms from the whole market and not just by a specific trader. There should be an easier possibility to prohibit the use of certain categories of contract terms, without the need to adjust legislation. The UOKiK agrees here that consumers should be able to more easily claim unfairness of a contract term that has already previously been assessed as unfair towards another trader, even if the whole T&Cs differ from each other.

The last modification to the Act, established a new enforcement procedure for the President of the UOKiK. Namely, identified in Article 99a of the Act on protection of competition and consumers entities (see above) may notify the President of the UOKiK on the existence of potential unfair standard terms and conditions. The President of the UOKiK has discretion whether to start a formalized unfairness control *in abstracto* as a result of such a notification.

Another new enforcement tool enables consumers who started an individual case at their district courts against a trader for the use of an unfair standard term, to ask the President of the UOKiK to intervene in their case. Pursuant to the new Article 31d of the Act on protection of competition and consumers, the President of the UOKiK will do so, if the public interest demands this. This new possibility allows the President of the UOKiK to share his experience with the court. The UOKiK mentioned that it would wish individual consumers paying more attention to the decisions of the President of the UOKiK, invoking more often its decisions in individual cases. This would, however, be likely to require the use of legal aid by consumers.

ECC Poland mentions that it could be useful to have a 'name and shame' practice established, where decisions recognizing certain commercial practices as unfair, or standard contract terms as abusive, would be published and could be consulted easily by consumers, media etc. This could prove to be an effective consumer protection measure. Especially, since Polish court's judgments (especially district courts which preside over consumer cases) are rarely made public, which means that courts in different towns may issue different decisions; consumers are unaware of what they may expect, etc.

Moreover, ECC Poland mentions that it would be good to further finance activities of consumer organisations, e.g. to conduct more educational activities like having a radio or TV show dedicated to consumer issues, writing regular columns for newspapers and blogs etc. Currently there are no resources for this in Poland. They compare Polish

situation to the UK's, where 'Which?' has such resources and consumers know to get in touch with them when they have issues, to consult their magazine and use their practical tips and guidance.

Another point raised by ECC Poland is that there should be more attention given to the fact that unfair contract terms could be found in other traders' communication to consumers than just their regulations, codes of conducting business. Most complaints submitted to national courts and the UOKiK, pertain to unfairness of terms in these regulations and the public opinion would, thus, be likely to ignore the fact that also other terms could be unfair.

One possibility is to establish a black list with a provision, pursuant to which consumers may terminate a contract concluded for a definite period of time, but only if they pay a penalty fee (any penalty fee). Currently, consumers are often dissuaded from terminating contracts by such penalty clauses finding their way into standard terms and conditions and being invoked by the trader. Polish law prohibits at the moment through the grey list in the Polish Civil Code such penalty clauses as unfair, but only if they are one-sided or if they are exorbitant, which estimation depends on the enforcement authorities. On the one hand, instead of introducing a blacklisted prohibition of the use of penalty fees, the enforcement authorities could interpret the notion 'exorbitant' broadly and factually prohibit the use of most penalty clauses. On the other hand, since any such fee may, however, discourage consumers from terminating the contract, a complete prohibition was argued for by the stakeholders.

#### 1.2.2. Effectiveness of the current rules 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 disparities have an impact on cross-border trade; [*Key aspects to consider are: Do national differences in the application/implementation of the Directive play a role for businesses? Have these differences led to changes in their business strategy? Have these differences caused problems?*]

None such disparities have either been reported to or noted by the stakeholders representing traders.

- 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;

None such barriers have either been reported to or noted by the stakeholders representing traders.

- 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.

None such barriers have either been reported to or noted by the stakeholders representing traders.

#### 1.2.3. Relevance for business-to-business transactions

Regarding the area of contractual fairness and in relation to the Unfair Contract Terms Directive, please analyse:

- Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;

Also with respect to this question stakeholders representing traders do not see the need for an additional protection regime being introduced.

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.

- 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;

Stakeholders representing traders generally believe that the general contract law rules are sufficiently protecting traders at the moment. They consider consumer law to specifically be designed to protect weaker transactional parties, consumers, which system would then, according to them, not suit protection of traders and their interests. They would not welcome the same standards being applied to B2B relations as to B2C.

- 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;

Also with respect to this question stakeholders representing traders do not see the need for an additional protection regime being introduced. Based on the available evidence and the interviews, it is concluded that such an extension is not needed.

- 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;

None such terms have been reported to stakeholders representing traders.

- Whether there is a need for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive;

Also with respect to this question stakeholders representing traders do not see the need for an additional protection regime being introduced. Based on the available evidence and the interviews, it is concluded that an introduction of this principle in B2B transactions is not needed.

- Whether an extension of the Unfair Contract Terms Directive to B2B transactions can bring benefits for cross-border trade;

No such benefits have been observed by the stakeholders.

- Whether the consequences of such an extension would have an effect on innovation by or market opportunities for SME providers/suppliers;

Stakeholders perceive any such extension to be problematic for businesses, as consumer regime has not been drafted with them in mind. They have not, however, mentioned any specifics.

- Whether the benefits of extending the scope to business-to-business transactions would exceed the negative consequences of such an extension.

Based on the available evidence and the interviews, it is concluded that such an extension is not desired.

### 1.3. Injunctions

#### 1.3.1. Effectiveness of the current rules in establishing a high level of consumer protection

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

- To what extent is the use of the injunction procedure in your country contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment?

ECC Poland does not perceive the injunction procedure as particularly beneficial to consumers in cross-border disputes. This lack of effectiveness is related to the fact that often, even if an action is taken, the trader may be difficult to find in another country, thus a decision rarely leads to practical benefits for consumers. ECC Poland has also limited resources to act on a particular case – only a few cases a year are being picked up. On national level, the injunction procedures are perceived as more beneficial, even if they may take too long, and even if the President of the UOKiK has discretion as to when to act (which means that not all infringements of consumer rights are being picked up).

The UOKiK does not have an opinion on whether there is a reduction in the number of infringements as a result of them applying the injunction procedure. They state that they are active in this field; they have also sufficient work in this area. There is definitely some positive effect of the injunction procedure - discouraging traders from infringing consumer interests, but new infringements continue to occur.

- What measures in your national legislation on injunction procedure are considered to be particularly effective, if any: measures regarding the cost of the procedure, the 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?

The UOKiK mentions here the financial penalties as sanctions for non-compliance with the injunction that discourage traders from further infringing consumer interests, as one of the effective elements of the procedure. Moreover, the possibility to publish the decision or have the trader issue a public corrective statement acts in a discouraging way, as traders fear the effect this may have on their reputation on the market and consumer trust. Of course, the sole possibility to issue an injunction is already an effective enforcement measure.

There are three phases of the administrative procedure. The first one is not formalized, where the UOKiK issue a light statement to the trader notifying him, when the infringement is slight and could easily be remedied, that certain incorrectness has been found and should be remedied. The notification contains a list of sanctions that may be applied if the infringement is not corrected. Usually traders act upon these notifications, as they are often directed at traders who were not aware of their obligations, rather than those who have acted wilfully. The second phase is the explanatory procedure, started when the case is bigger and when the UOKiK needs more information to proceed with the case. The UOKiK demands then information from traders and the traders are obliged to provide it. This second phase also often leads to traders receiving an incentive to change their practices and results in traders ceasing with the infringement. This means that statistics on issued decisions do not reflect the actions of the UOKiK. Most procedures would end on the second, explanatory stage.

The third, actual injunction procedure would then only occur when the trader really 'insists' on it, pursuant to the UOKiK.

- Has your country extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunction Directive? If yes, what are the additional consumer rights covered?

Yes, the President of the UOKiK has authority to act on any infringement of collective consumer interests, not only pertaining to the infringement in the areas listed in the Annex I to the Injunction Directive. E.g. there are proceedings protecting collective consumer interests in the consumer construction area, pertaining to contracts concluded with developers.

- Analysis of the obstacles to the effective use of the injunction procedure, in particular by analysing which progress in removing obstacles has been made and/or new difficulties that have emerged in your country since 2012.

A consumer association mentions that the injunction procedure may take too long and could, therefore, due to this lengthy process be ineffective, since often when the decision is published, it is too late to fully reverse the negative effect of a concluded contract for consumers. The new change in the provisions of the Act on the protection of competition and consumers is yet too recent to evaluate its effectiveness in correcting this obstacle.

The UOKiK mentions that the biggest obstacle to the effectiveness of the injunction procedure is that the traders may be registered nowadays anywhere and it is difficult to 'catch' them. Even if the UOKiK knows that certain Polish traders conduct e.g. unfair commercial practices, if these traders have their commercial online activity registered outside Poland it is more difficult to start effective injunction proceedings against them (even though theoretically in the EU it should not matter where the registered seat is). In cross-border cases, the President of the UOKiK's decisions may be effective towards foreign traders, but only if these traders take their business and the regulators seriously. If they do not, they may just not pick up the decision of the President of the UOKiK and act as if they are unaware thereof.

- In a forward looking perspective: Should the coverage of the Injunctions Directive be extended (by including additional legislation into Annex I to the Directive)? If so, which EU legislation should be included? Are there other measures that could improve the effectiveness of the ID in establishing a high level of consumer protection? Should the scope of the Injunctions Directive be extended to the protection of collective business' interests? Are there best practices in your country that could be relevant for other countries and considered as model for the injunction procedure at EU level?

Stakeholders representing traders do not report any need for the protection of collective business' interests to be introduced.

ECC Poland mentions that it would be useful to look more closely into which parties have a right to notify the President of the UOKiK that there was an infringement and that there is a need for the injunction procedure to be started by the President of the UOKiK. While it is reasonable to grant this right to consumers, consumer organisations' motions should be treated differently than these of consumers. That is to say, consumer organisations' motions should be seen less like an indication of an infringement that could or could not be acted upon by the President of the UOKiK, and more as a direction to do so.

The UOKiK mentions that in Poland e.g. there are many regulations, regulating different sectors and protection of consumers in these different sectors, that would not directly indicate the applicability of the procedure of injunction in this area. This means that sector regulators enforcing consumer protection in this area may not know

that there could also be an option of the President of the UOKiK starting an injunction procedure on the basis of Polish law in this area – to protect collective consumer interests there. This does not flow from the EU law, this is the extension applied in Polish law, so the UOKiK does not quite see how the EU legislator could help here.

### 1.3.2. 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:

- How effective is the injunction procedure in addressing infringements originating in another EU country?

ECC Poland does not perceive the injunction procedure as particularly beneficial to consumers in cross-border disputes. This lack of effectiveness is related to the fact that often, even if an action is taken, the trader may be difficult to find in another country, thus a decision rarely leads to practical benefits for consumers. ECC Poland has also limited resources to act on a particular case – only a few cases a year are being picked up. On average, each year ECC Poland notifies the President of the UOKiK of about five to six practices, as potentially infringing consumer protection in cross-border transactions. The President of the UOKiK may decide to act upon such a notification and instigate protection of collective consumer interests. The President of the UOKiK has discretion in this.

The UOKiK again mentions here the problem with the enforcement of such injunction proceedings against foreign traders, if these are not well-known traders or traders who take their business and compliance obligations seriously. However, the UOKiK considers that in most injunction cases against foreign traders, these cease with the infringements upon notification.

- How effective is it to address infringements originating in another EU country that qualified entities in your country are enabled to seek injunctions in the other Member State (Article 4 of the Injunctions Directive)?

ECC Poland does not perceive the injunction procedure as particularly beneficial to consumers in cross-border disputes. This lack of effectiveness is related to the fact that often, even if an action is taken, the trader may be difficult to find in another country, thus a decision rarely leads to practical benefits for consumers. ECC Poland has also limited resources to act on a particular case – only a few cases a year are being picked up. On average, each year ECC Poland notifies the President of the UOKiK of about five to six practices, as potentially infringing consumer protection in cross-border transactions. The President of the UOKiK may decide to act upon such a notification and instigate protection of collective consumer interests. The President of the UOKiK has discretion in this.

- In a forward looking perspective: Are there non-legislative or/and legislative measures that could improve the effectiveness of the injunction procedure in addressing infringements originating in another EU country? Are there best practices in your country that could be relevant for other EU countries and could be considered as a model for the injunction procedure at EU level?

Currently, mostly due to the increased relevance of e-commerce, it is easy for traders to disguise where they are located. This hinders enforcement process of injunction proceedings, pursuant to the UOKiK.



### 1.3.3. Interplay between the Injunctions Directive and other enforcement instruments of consumer law

#### Please analyse:

- Is the injunction procedure as designed by the Injunctions Directive regulated separately in your country (in a separate legal act or as a separate procedure regulated within the same legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (UCPD, UCTD and by the Consumer Rights Directive)?

The injunction procedure as regulated by the Injunctions Directive is split between the provisions on the injunction procedure in cases falling under the UCTD and all other consumer protection issues. Article 99a (and further) of the Act on protection of competition and consumers regulates injunction proceedings against traders using unfair contract terms. Article 100 (and further) of this Act regulates injunction proceedings when traders harm other collective consumer interests.

- If these procedures are regulated separately: What are the main differences between them? How is the coherence between these procedures ensured? If these procedures are regulated in a single legal act (possibly as a single procedure): In what way do these procedures (or this procedure) go beyond measures foreseen by the Injunctions Directive?

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).

Previously, collective consumer interests in UCTD cases have been protected through judicial procedures. The recent change in Polish law, adding an administrative procedure for protecting collective consumer interests against abusive standard terms and conditions, brought thus these two injunction procedures together, establishing an administrative mode for both of them. Generally, the explanatory procedure will be likely to look the same way now in Polish law (although the change is recent and it remains to be seen how the new provisions will be applied in practice).

The protection of collective consumer interests is very broad in Polish law and goes in its scope beyond the list of the Injunctions Directive.

## 1.4. Cross-cutting issues

### 1.4.1. Cost and benefits of the directives covered by the study

- To what extent is there evidence for benefits for consumers stemming from the protection provided by both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of benefits for consumers from the protection against unfair commercial practices and unfair standard terms in contracts; [*Note: a relevant aspect in this context is whether the costs for consumers in exercising their rights under these directives are limiting these benefits or not.*]

Consumer association perceives as a definite benefit for consumers that the whole consumer protection system has been improved in past years, thanks to the Europeanization of consumer law. This system is imperfect, but it is still an improvement. The cost thereof is that the legal system became more complex and that the consumer has to now have more extensive knowledge thereof than in the



1990s in Poland. However, this cost pursuant to the consumer association is difficult to avoid. One tip could be to look more into effectiveness of consumer protection and whether consumers make use of the highly complicated provisions. It is highly unlikely that it would be possible to make these procedures so transparent that all consumers would benefit from them and understand them; but it could be feasible to educate at least some consumers better, and to improve at least some enforcement procedures. This would lower the cost of consumer protection while keeping its benefits.

The UOKiK's opinion is that the consumers' costs of enforcement of consumer rights are not high, thus consumers should be benefitting significantly from the established consumer protection. However, the question remains whether consumers actually enforce their rights.

- To what extent is there evidence for benefits for traders stemming from both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of creating a level playing field for honest traders by providing a legal basis to eliminate or at least constrain dishonest market practices, such as the use of unfair standard terms in contracts or unfair commercial practices, including through the application of the Injunctions Directive;

Stakeholders representing traders find the harmonized rules beneficial. They assess Polish traders to be more aware and better informed about consumer needs and their rights, since the introduction of the legislation based on EU law to Poland. Moreover, they think that cross-border trade became easier due to consumer protection measures becoming increasingly more subject to full harmonisation.

- What are costs for traders due to the need to respect the requirements under the directives covered by the study? [*Note: Such as costs of research, legal advice and compliance as well as the amount of time necessary to comply with the directives*]

Stakeholders representing traders do not perceive these costs (legal advice mostly in order to assure compliance) to be substantial.

- What are the costs involved in the public enforcement of these rules?

Sector regulators mention that they have few means given to them to publicly enforce consumer protection. They could potentially take away concession of a particular trader, for non-compliance with consumer rights, the few that there are, expressed in the sector legislation. This court procedure is, however, perceived as a last resort measure, that, in practice, is rarely taken, since it also harms consumers if their service provider disappears from the market. Moreover, Polish courts require strong evidence of continuous breaches of legislation, before they would issue an order to take away the concession.

The UOKiK cannot estimate the costs involved in the public enforcement of consumer protection, but it establishes that there are more cases submitted to it with every year; these cases are more and more complex; and the cases are more and more relevant, where the intervention of the President of the UOKiK is indeed then actually necessary.

- Are there indications that the directives covered by the study are not implemented in your country in a cost-effective manner?

Not one stakeholder has mentioned this. Based on the available evidence and the interviews, it is concluded that there is no indication of the implementation being not cost-effective.

- Could the costs for implementing and enforcing the rules of the directives covered by the study be reduced without lowering the level of protection for consumers? If so, how?

See above. The UOKiK mentions that one of the measures that could improve cost-effectiveness of their work would be to allow for decisions on abusive clauses to have an effect *erga omnes* or at least to allow such a decision to simplify following procedures against other traders that are using the same standard terms.

#### 1.4.2. Interplay with EU sector-specific consumer protection legislation

Regarding the interplay of the horizontal EU consumer legislation [mainly UCPD and UCTD] with EU sector-specific consumer protection legislation in the areas of electronic communications, passenger transport, energy and consumer financial services, please:

- Analyse the levels of awareness of the requirements of the horizontal EU consumer legislation (mainly UCPD and UCTD) of businesses and consumers and the specific public enforcement bodies in the relevant sectors, as in particular demonstrated by their practical application; [*Key question here is: Are UCPD and UCTD applied in practice by national authorities and courts as a legal basis to combat unfair commercial practices and unfair standard terms in contracts in the regulated sectors?*]

In the energy sector, pursuant to the stakeholders, traders are quite aware of consumer rights, aside the new players on the market, who sometimes learn as they go. The business organisations also provide information to traders on what rules they should be compliant with, audit their members. Consumer awareness is really low – regulators constantly receive individual complaints, without specific rights being mentioned in them, and then need to direct consumers either to starting a legal action in court (rarely occurs) or to the UOKiK. Unfair commercial practices are often based on consumer unawareness, especially with regard to traders targeting in door-to-door sales vulnerable consumers, e.g. older consumers.

Pursuant to ECC Poland the regulators of market sectors in Poland enforce legal provisions of a given sector and are less familiar with, and less interested in, general consumer protection rules, e.g. protection against unfair commercial practices. Therefore, consumers are less protected in certain specific areas (health, transport, energy, etc.), since the UOKiK is more focused on general consumer protection and it may escape its attention that certain sectors' specific conditions may create new consumer issues. Consumers themselves are not aware of the level of protection due to them, so they cannot enforce themselves their rights. The UOKiK to an extent agrees that sector regulators would be more likely to apply sector rules to protect consumers and could be less active in invoking general consumer protection rules (also often would not have a competence to do so), but they are cooperating with the UOKiK, may refer consumers to the UOKiK and often attend trainings etc. organized by the UOKiK on general consumer law-related issues.

The UOKiK generally would not welcome being more involved in consumer protection in particular sectors as that would likely increase the financial and resources' burden for it. However, it does mention that currently it cooperates with sector regulators and that some more visibility of general consumer rights could be useful there.

- Specify whether in your country the same authority is responsible for the enforcement of the horizontal EU consumer law 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 UCPD/UCTD in the regulated sectors, as specified in the previous bullet?*]

Only the President of the UOKiK is competent to enforce horizontal EU consumer law with regard to protection of collective interests of consumers. Enforcement of sector specific rules lies in the competence of sector regulators, thus whenever consumer complaint is based on horizontal EU consumer law, sector regulators refer consumers to the UOKiK, which then accumulates consumer complaints and its President may act in protecting their collective interests.

The cooperation between sector regulators and the UOKiK is very good, pursuant to stakeholders. They often informally cooperate in motivating traders to observe consumer rights. For example, sector regulators may collect consumer complaints and publish a list of service providers that consumers report as using unfair commercial practices. Upon publication of such a 'blacklist', talks are holding place with traders to convince them to change their practices. UOKiK takes part in these meetings and if traders will not adjust their practices may act instead of sector regulators against them. Moreover, when there is an overlap of information obligations in sector regulations and in the general consumer protection provisions, the UOKiK would agree with sector regulators on the interpretation thereof. The UOKiK mentions, however, that all this cooperation is incidental and not institutionalized. Sometimes this cooperation is friendly and on equal footing, sometimes the UOKiK subtly indicates that certain consumer protection measures are not sufficiently protected in a given sector and they inquire then why this is so. The last situation is very delicate and all regulators and authorities attempt then not to close the open door of cooperation between them due to an overlap in their competences.

- Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning contractual fairness, 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.?*]

As mentioned in the answer to question 1.1.5 there is some overlap between consumer provisions in horizontal and sector-specific rules, but this follows from the overlap between European provisions that had to be transposed to the Polish legal system. The Polish legislator did not significantly extend further information requirements or provide for more consumer protection rules in sector-specific legislations.

Stakeholders mention that while currently there may not be much overlap or problems with the existing overlapping provisions, which suggests that the system is coherent, it could be desirable to provide for more consumer protection in sector-specific rules. Especially sector-specific regulators would appreciate receiving more enforcement tools.

- What are the benefits of the complementary application of the UCPD and UCTD in the regulated sectors? What are the costs due to the complementary application with the sectoral EU consumer protection legislation?

The benefit thereof is that sector-specific regulators may direct and instruct consumers who come to complain about unfair commercial practices or unfair contract terms about remedies they could use, authorities (the UOKiK) they could approach. Pursuant to the stakeholders, there are costs related to the fact that consumers tend to think that in sector-specific issues, it is the sector-specific regulator that they should approach first. This means that manpower, time and money are devoted to re-

directing consumers to the UOKiK or informing them that their only option is to start a judicial procedure. Stakeholders suggest thus that these costs could be avoided in the future, if consumers were better educated on their rights and better knew which authorities could help them.

The UOKiK appreciates the possibility to protect collective consumer interests on the basis of general consumer protection provisions allowing for the protection of consumer collective interest, also in cases, where there are sector-specific rules applicable. This supplements the activity of sector-specific regulators that often may be focused on other matters than consumer protection. However, simultaneously the UOKiK does not express a wish to be further involved in the enforcement of consumer protection in sector-specific matters (see above).

- Assess any need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law.

This hasn't been brought up by the stakeholders. Based on the available evidence and the interviews, it is concluded that such a clarification is not needed.

#### 1.4.3. Relevance of consumer law directives for consumer-to-business transactions

- Please analyse the need and potential for the application of the consumer law directives (mainly UCPD and UCTD) to 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).

Stakeholders representing traders have not encountered this as an issue in Polish law. General contractual rules should be applicable in such situations and are perceived as sufficiently protective of parties' interests.

Consumer associations perceive any extension of B2C protection – whether to C2B or B2B relations – as impractical, since consumer associations already do not have enough resources to protect consumers and this extension would only provide more subjects that would need to be protected. Moreover, this could further complicate the understanding of traditional legal definitions (such as 'consumer'), introduce distinction between distributors that could even be perceived as discrimination between traders (depending on the type of conducted commercial activity) or as an unfair competition act (since it could distort market conditions, providing more incentives to only trade with bigger companies).

#### 1.4.4. Specific protection for vulnerable consumers

Please analyse:

- Whether the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined in the consumer law directives and relevant jurisprudence, and as applied by national authorities and courts in your country, continue to be valid and fit for purpose.

Most stakeholders perceive the notion of a consumer and of an average consumer as working well and having been fully adopted in Polish law. The notion of a vulnerable consumer provides some difficulties in practice, as in individual cases Polish courts seem not likely to change the level of consumer protection, if the issue is that of a vulnerable consumer. The President of the UOKiK tries to take the special position of vulnerable consumers into account during collective consumer protection proceedings.

Sector regulators are helpless in protecting small businesses, since consumer protection is not extended to them. They would like to see the definition of consumer

being widened. Stakeholders representing traders, however, consider the currently binding definitions satisfactory and would not want them changed.

- To what extent the existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers and whether, based on the experiences in your country, specific provisions should be introduced in other directives concerned, in particular the Unfair Contract Terms Directive.

Sector regulators do not consider the level of protection of vulnerable consumers as adequate, since they are more prone to be victims of unfair commercial practices, some market players specifically take as their clients only such consumers. Still, they have the same remedies as other consumers and often are helpless in enforcing their individual rights. Consumer association, the ECC Poland and the UOKiK – all mention the problem of Polish traders often targeting vulnerable consumers, especially older consumers in door-to-door sales and targeting young consumers through advertisement. It seems, however, that the level of protection would not increase just by changing legal provisions and, e.g., introducing a concept of vulnerable consumers to the UCTD. Rather, it would be more necessary to improve enforcement of the application of a different standard for assessment of commercial practices, if a vulnerable consumer is a target thereof.

#### 1.4.5. EU added value

- Overall, would you consider that protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in your country since the implementation of the UCPD and the UCTD in national legislation?

All stakeholders think that consumer protection has improved due to Europeanisation of consumer law. Sector regulators believe, however, and are adamant about it, that there are still too few individual remedies available to consumers. Moreover, consumer organisation claims that consumers could easier claim remedies on the basis of general contract and consumer law rather than provisions about protection against unfair commercial practices, e.g. they would rather try to terminate a contract as concluded under mistake, than invoke unfair commercial practices. The latter is due to the complex system of unfair commercial practices and its enforcement.

- Overall, would you consider that the information of consumers regarding unit prices has improved since the implementation of the PID in national legislation?

Stakeholders representing traders and consumers both believe this is so. Generally, not many issues have been noticed with regard to the proper provision of a price per unit to consumers.

- Overall, would you consider that the protection of businesses against unfair marketing in your country has improved since the implementation of the MCAD in national legislation?

Stakeholders did not have an opinion on this topic.

- Overall, would you consider that it has become easier for businesses in your country to directly trade cross-border to final consumers located in other EU countries in recent years? Has it become easier for consumers in your country to directly purchase cross-border from traders located in other EU countries?

Stakeholders representing traders believe it is easier to trade cross-border nowadays and for consumers to purchase from foreign traders. There is even special advice given online by these stakeholders to traders inquiring about how to set up cross-border trade. Any problems that traders or consumers may encounter during their

cross-border experience are not, however, being reported back to traders' associations.

- To what extent are these improvements, if any, due to the mentioned directives?

All stakeholders think that consumer protection has improved due to Europeanisation of consumer law.

## Annex

## A. Transposition fact sheet

**Table 1: Fact sheet on transposition of directives in Member States' law – Poland**

Directive	Transposition legislation (National law, Article)	Comments	Specific provisions going beyond minimum harmonisation requirements/use of exemptions	Included in national legislation	Comments
<b>Directive 93/13/EEC on unfair terms in consumer contracts</b>	Article 385 <sup>1</sup> (and further) Polish Civil Code		'Black list' of terms considered unfair in all circumstances	No	<i>On the basis of old provisions of the Act on protection of competition and consumers (prior to April 2016), the UOKiK published a registry of decisions of the Court Protecting Competition and Consumers (SOKiK) on these standard terms and conditions that have been assessed as unfair in abstracto; this worked a de facto black list – even though only a given trader was prohibited from applying this term</i>
	Act on protection of competition and consumers, last modified in August 2015 ( <i>Ustawa o ochronie konkurencji i konsumentów</i> , 16 luty 2007, Dz. U. 2015 poz. 184)		'Grey list' of terms which may be considered unfair	Yes	Polish Civil Code, Article 385 <sup>3</sup>
			Extensions of the application of Directive to individually negotiated terms	No	



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			Extensions of the application of Directive terms on the adequacy of the price and the main subject-matter	No		
			Assessment of unfair contract terms <i>in abstracto</i>	Yes	Act on protection of competition and consumers, Article 23a, 24 & 99a	<i>Consumers, consumer ombudsmen, ombudsmen of the insured, consumer associations and foreign organisations entitled to start injunction proceedings, may notify the President of the UOKiK about an infringement regarding a trader using an abusive clause.</i>
			Contractual consequences of lack of transparency	Yes	Polish Civil Code, Article 385 <sup>1</sup>	<i>Non-transparent standard terms and conditions perceived as contrary to the principle of good practices and thus unfair</i>
<b>Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market</b>	Act on prevention of unfair commercial practices ( <i>Ustawa o przeciwdziałaniu nieuczciwym praktykom rynkowym</i> , 23 August 2007, Dz.U. 2007 Nr 171 poz. 1206)		Provisions regarding financial services going beyond minimum harmonisation requirements	No		
			Provisions regarding immovable going beyond minimum harmonisation requirements	No		
	Act on protection of competition and consumers, last modified in August 2015 ( <i>Ustawa o ochronie konkurencji i konsumentów</i> , 16 luty 2007, Dz. U. 2015 poz. 184)		Application of UCPD to B2B transactions	No		<i>Act on combating unfair competition (Ustawa o zwalczaniu 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.</i>

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			Enforcement of protection of collective consumer interests		Act on protection of competition and consumers, Article 24	<i>Generally, unfair commercial practices harming collective interests of consumers are prohibited by this provision and the President of the UOKiK is entitled to protect these collective interests (also implementation of the Injunctions Directive).</i>
<b>Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers</b>	Act of 9 May 2014 on informing about prices of products and services ( <i>Ustawa z dnia 9 maja 2014 r. o informowaniu o cenach towarów i usług</i> , Dz. U. 2014 poz. 915)		Extension of the application to other sectors (e.g. for immovable property)	No		
			Use of specific regulatory choices/derogations	Yes	Act of 9 May 2014 on informing about prices of products and services, Article 4	<i>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 (with traders being given time till September 30, 2016, to adjust their practices to new rules).</i>
<b>Directive 2006/114/EC concerning misleading and comparative advertising</b>	Act on combating unfair competition ( <i>Ustawa o zwalczaniu nieuczciwej konkurencji</i> , 16 April 1993, Dz.U. 1993 Nr 47 poz. 211)		Penalization of unfair competition acts, including misleading and comparative advertising	Yes	Act on combating unfair competition, Article 25	<i>Pursuant to Article 25 para 2 of the Act on combating unfair competition, unfair competition acts in the sphere of advertising can also be penalized. At the moment, there is a case pending at the Polish Constitutional Court submitted by the Polish Citizens' Rights Ombudsman that this provision of law is not in compliance with the Polish constitution.</i>

<b>Directive 2009/22/EC on injunctions for the protection of consumers' interests</b>	Act on protection of competition and consumers, last modified in August 2015 ( <i>Ustawa o ochronie konkurencji i konsumentów</i> , 16 luty 2007, Dz. U. 2015 poz. 184)				
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**Table 2: Fact sheet on Injunctions Directive – Poland**

Issue	Answer	Comments
<p>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)?</p>	<p>- Yes, separate procedures in a single legal act</p>	<p><i>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 injunction 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.</i></p> <p><i>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).</i></p>
<p>Who is entitled to bring an action seeking an injunction?</p>	<ul style="list-style-type: none"> <li>- Designated public bodies</li> <li>- Specified consumer associations</li> <li>- Individual consumers</li> <li>- Other</li> </ul>	<p><i>Under Article 100 of the above-mentioned Act – anyone may notify the President of the UOKiK, who then may seek an injunction.</i></p> <p><i>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.</i></p>
<p>Is the injunction procedure a court or an administrative procedure?</p> <p>If your country legislation foresees both forms of the procedure, please explain in the comments column for which infringements the court or administrative procedure is foreseen</p>	<p>- Administrative procedure</p>	<p><i>It is an administrative procedure, however, the appeal from the administrative decision is to be submitted to the District Court in Warsaw – Court Protecting Competition and Consumers (SOKiK) pursuant to Article 81 of the above-mentioned Act.</i></p>

<p>Who bears the costs of an injunction procedure?</p> <p>If qualified entities (or some of their categories e.g. consumer organisations are entitled to an exemption of some/all cost related to the procedure please explain the characteristic of such exemption in the comments column.</p>	<p>- The costs are as a rule borne by the losing party -The qualified entities are exempted from costs</p>	<p><i>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.</i></p> <p><i>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).</i></p> <p><i>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.</i></p>
<p>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?</p>	<p>- Yes, scope of application extended to cover consumer law in general</p>	<p><i>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</i></p>
<p>Is protection of business' interests covered by the injunctions procedure?</p> <p>If scope of application extended to the protection of business' interests, please provide details in the comments column regarding type of business' interests covered by the injunctions procedure</p>	<p>- No</p>	
<p>Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations</p>	<p>- No</p>	
<p>Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID)</p>	<p>- Yes</p>	<p><i>Prior to the injunction procedure, pursuant to Article 47 para 2 of the above-mentioned Act the President of the UOKiK may conduct an explanatory procedure to e.g. establish whether there is an infringement justifying beginning of injunction procedures (Article 48).</i></p> <p><i>Additionally, pursuant to Article 49a of this Act, the President of the UOKiK does not need to start an injunction procedure but instead may address the trader and the trader may provide a statement on the matter</i></p>

<p>Has your Member State taken specific measures regarding the prior consultation (Article 5 of the Injunctions Directive)?</p>	<p>- Yes, requirement for party seeking injunction to consult with the defendant and a qualified entity</p>	<p><i>Yes, before the UOKiK issues an administrative decision, it enables traders to negotiate a sort of settlement combined with the trader ceasing to continue with the unfair commercial practice. This settlement involves a trader suggesting a satisfying solution to the problem of the unfair commercial practice, e.g. introduction of a change in a consumer contract; lowering the price; repayment of undue collected fees; fulfilment of untrue promises; enabling consumers to terminate the contract or to file a complaint; providing required information. This solution presents thus a practical benefit for consumers (so-called in Polish “przysporzenie konsumenckie”).</i></p>
<p>Does the national legislation provide for measures ensuring summary procedure? Please specify main characteristics of the procedure (subject matter/time limits) in the comments column.</p>	<p>- Yes</p>	<p><i>Pursuant to Article 99e of this Act an injunction procedure against unfair contract terms should be completed within 4 months (5 months if the issue is complex). The same timeframe is granted to other injunction procedures in Article 104.</i></p> <p><i>One month is granted for appealing from the decision of the President of the UOKiK in Article 81. The documents of the case need to be transferred to the SOKiK within 3 months. The documents need not be transferred if, notified about the appeal, the President of the UOKiK changes or annuls its administrative decision.</i></p>
<p>Are there sanctions for non-compliance with the injunction order (Article 2(1) of the Injunctions Directive)? If sanctions in form of penalty or fine foreseen please specify in the comments column to who exactly should they be paid</p>	<p>- Yes, penalty of a fine for each day of non-compliance</p>	<p><i>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</i></p>
<p>Has your Member State taken specific measures regarding the publication of the decision and/or the publication of a corrective statement?</p>	<p>- Yes</p>	<p><i>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.</i></p>
<p>Is it possible to claim within the injunction procedure for sanctions for the infringement?</p>	<p>- Yes</p>	<p><i>In its decision the President of the UOKiK may state what measures should be taken by the trader to remove consequences of the infringement of collective consumer interests (also Article 23b and 26 of the Act).</i></p>

Can an action for the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to other beneficiary be brought within the injunction procedure?	- No	
Can an action for damages to be paid to the qualified entity or the public purse be brought within the injunction procedure?	- No	
Can an action for damages or redress to be paid to the consumers concerned be brought within the injunction procedure?	- No	
Can individual consumers base their individual claims for damages/remedies on the injunctions order?	- Yes	<i>Pursuant to Article 23b of the Act the decision of the President of the UOKiK may oblige traders to inform their consumers about the findings of unfairness of a standard contract term by the President of the UOKiK.</i>
Can the qualified entity claim other measures beyond the injunction, e.g. evidence of compliance with the judgment?	- No	
Are the effects of individual injunction orders extended to the future infringements and/or same or similar illegal practices (of other traders)?	- Yes - No	<i>The injunction order is extended to past and future practices of the same trader against other consumers, but not to practices of other traders.</i>



## B. Data tables

*Number of B2C disputes***Table 3: B2C disputes decided on the basis of consumer law directives covered by this study in comparison with total B2C disputes decided on the basis of other legislation (most recent year for which data is available)**

Year	Type of data	Total number of B2C disputes (number of cases)	Share of B2C disputes decided on basis of ...					Comment
			UCPD	UCTD	PID	other EU consumer protection legislation (e.g. CRD, Sales Directive, sectoral)	national consumer legislation not based on EU directives	
2015	Inspection of Commerce ( <i>Inspekcja Handlowa</i> ) statistics				625*			

Note: There is no statistical data on this available. The UOKiK does not gather such data; Polish district courts pertinent to adjudicate in individual consumer cases do not generally publish their judgments; etc. there is little transparency of the individual consumer law enforcement in Poland. \*Decisions regarding improper information about prices.

*Costs of obtaining redress for a hypothetical case of invoking unfairness of a standard contract term*

- Please estimate the costs, including time, for consumers in obtaining redress when invoking the unfairness, and thereby the non-binding character of standard contract terms in a contract they concluded. Please provide the estimate for the hypothetical example below, focusing on costs (and needed time) of a lower court procedure and the use of ADR or other relevant procedure (if applicable).<sup>55</sup>

<sup>55</sup> For the hypothetical example it is assumed that both the provider and the consumer are located in your country.

**Table 4: Estimate of costs for consumers in obtaining redress when invoking the unfairness of standard contract terms in a contract they concluded (for the hypothetical example provided in the box below)**

Redress mechanism	Estimated court fees (national currency)	Estimated lawyer's fees (national currency)	Other costs, if any (national currency)	Estimated time involved for consumer (hours)	Comments
Lower court procedure					
ADR or other relevant procedure					

Notes: There is no statistical data on this available. Consumer cases are not standard and may take from months to (more likely) years, at different courts, with different representation fees being applicable.

**Hypothetical example: Terms which inappropriately exclude/limit consumers' rights to compensation**

A consumer went on a package holiday with a friend to Kenya for which they paid € 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 €5,000 (€4,000 for the cost of the package and €1,000 for lost time and enjoyment). The tour operator agreed to compensate them €1,000 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/unfair-contract-terms/index\\_en.htm](http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-contract-terms/index_en.htm)]

- Please estimate how often court and ADR procedures are used in your country for invoking the unfairness, and thereby the non-binding character of standard contract terms (i.e. the number of cases per year)?

There is no statistical data on this available.

## C. Interviews conducted and literature reviewed

**Table 5: Interviews conducted for this study**

Organisation	Stakeholder type	Date
<b>KPF (Conference of Polish Financial Businesses)</b>	Business association	05-07-2016
<b>KIG (Polish Chamber of Commerce)</b>	Business association	12-07-2016
<b>UOKiK (Office of Competition and Consumer Protection)</b>	National consumer enforcement authority	27-07-2016
<b>UKE (Office of Electronic Communication)</b>	National regulatory authority	27-06-2016
<b>URE (Office of Energy Regulation)</b>	National regulatory authority	06-07-2016
<b>European Consumer Centre</b>	European Consumer Centre	19-07-2016
<b>Federacja Konsumentów (Consumer Federation)</b>	Consumer organisation	18-07-2016

**Table 6: Literature reviewed for country report**

Author/Source	Year	Title of publication
M. Namysłowska & A. Piszcz (eds.)	2016	<i>Ustawa o zmianie ustawy o ochronie konkurencji i konsumentów z 5.8.2015 r. Komentarz.</i> C.H. Beck
M. Namysłowska	2015	'O konieczności uchylecia ustawy z dnia 16 kwietnia 1993 r. o zwalczaniu nieuczciwej konkurencji' in: J. Ożegalska-Trybalska, D. Kasprzycki (eds.) <i>Aktualne wyzwania prawa własności intelektualnej i prawa konkurencji. Księga pamiątkowa dedykowana Profesorowi Michałowi du Vallowi.</i> Warszawa.
M. Namysłowska	2014	<i>Czarna lista nieuczciwych praktyk handlowych a granice prawa zwalczania nieuczciwej konkurencji w Unii Europejskiej. Analiza prawnoporównawcza.</i> Wolters Kluwer
M. Namysłowska	2014	'Stosowanie dyrektywy 2005/29/WE o nieuczciwych praktykach handlowych w świetle pierwszego sprawozdania Komisji' in: <i>Europejski Przegląd Sądowy</i> vol. 2
K. Horubski	2014	'Nieuczciwość praktyki rynkowej w świetle ustawy o przeciwdziałaniu nieuczciwym praktykom rynkowym' in: <i>Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu</i> vol. 372
K. Kopaczyńska-Pieczniak	2012	'Czyn nieuczciwej konkurencji a nieuczciwa praktyka rynkowa' in: <i>Monitor Prawa Handlowego</i> vol. 3
I.B. Nestoruk	2011	'Marketing ekologiczny w prawie polskim – przegląd regulacji' in: <i>Prace z Prawa Własności Intelektualnej</i> vol. 113
R. Stefanicki	2010	'Wymogi staranności zawodowej przedsiębiorcy (w świetle dyrektywy o nieuczciwych praktykach handlowych)' in: <i>Panstwo i Prawo</i> vol. 3
M. Namysłowska	2010	'Znaczenie czarnej listy nieuczciwych praktyk handlowych – uwagi na tle orzecznictwa TS' in: <i>Europejski Przegląd Sądowy</i> vol. 8
G. Rączka	2010	'Niedozwolone postanowienia umowne w umowach rachunku bankowego' in: <i>Przegląd Prawa Handlowego</i> vol. 4
W. Jarosiński & B. Widła	2009	'Odpowiedzialność cywilna według ustawy z dnia 23 sierpnia 2007 r. o przeciwdziałaniu nieuczciwym praktykom rynkowym w świetle dyrektywy 2005/29/WE o nieuczciwych praktykach handlowych' in: <i>Transformacje Prawa Prywatnego</i> vol. 1-2
M. Grochowski	2009	'Wadliwość umów konsumenckich (w świetle przepisów o nieuczciwych praktykach rynkowych)' in: <i>Panstwo i prawo</i> issue 7
D. du Cane	2009	'Nieuczciwa konkurencja a dobre obyczaje oraz class action po polsku' in: <i>Przegląd Prawa Handlowego</i> vol. 3
R. Stefanicki	2009	'Dyrektywa 2005/29/WE o nieuczciwych praktykach handlowych i jej implementacja do krajowego systemu' in: <i>Przegląd Prawa Handlowego</i> vol. 1
M. Namysłowska	2008	'Reklama porównawcza w orzecznictwie ETS' in: <i>Europejski Przegląd Sądowy</i> vol. 1
M. Namysłowska & K. Sztorbyn	2008	'Ukryta reklama po implementacji dyrektywy o nieuczciwych praktykach handlowych' in: <i>Panstwo i prawo</i> vol. 11
M. Sieradzka	2008	'Prawnkarne aspekty stosowania nieuczciwych praktyk rynkowych' in: <i>Nowa Kodyfikacja Prawa Karnego</i> vol. XXIII; Wrocław (2008a)
M. Sieradzka	2008	'Actio popularis jako instrument ochrony interesów konsumentów przed nieuczciwymi praktykami rynkowymi' in: <i>Przegląd Prawa Handlowego</i> vol. 3 (2008b)

M. Strzelecki	2008	'Klauzula generalna nieuczciwej praktyki rynkowej' in: <i>Przegląd Prawa Handlowego</i> vol. 11
B. Gliniecki	2008	'Ustawa o przeciwdziałaniu nieuczciwym praktykom rynkowym' in: <i>Monitor Prawniczy</i> vol. 1
M. Jagielska	2007	'Skutki wpisu postanowienia wzorca umownego do rejestru niedozwolonych postanowień' in: <i>Europejski Przegląd Sądowy</i> vol. 5
B. Gnela	2007	'Pojecie konsumenta w prawie wspólnotowym i prawie polskim' in: B. Gnela (ed.) <i>Ochrona konsumenta usług finansowych. Wybrane zagadnienia prawne</i> (Warsaw)
J. Szwaja & A. Tischner	2007	'Implementacja dyrektywy 2005/29/WE o zwalczaniu nieuczciwych praktyk rynkowych do prawa polskiego' in: <i>Monitor Prawniczy</i> vol. 20
M. Namysłowska	2007	'Nowa ustawa o przeciwdziałaniu nieuczciwym praktykom rynkowym' in: <i>Monitor Prawniczy</i> vol. 23
A. Kunkiel-Krynska	2007	'Nowe rozwiązania prawa ochrony konsumenta w dyrektywie o nieuczciwych praktykach rynkowych' in: <i>Europejski Przegląd Sądowy</i> vol. 8
Ł. Wściubiak	2007	'Dobre obyczaje w ustawie o przeciwdziałaniu nieuczciwym praktykom rynkowym' in: <i>Przegląd Prawa Handlowego</i> vol. 11
R. Skubisz	2006	In: J. Szwaja (ed.) <i>Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz.</i> (Warszawa)
B. Gawlik	2006	'Skutki wyroku w sparach o uznanie postanowień wzorca umowy za niedozwolone' in: <i>Zeszyty Naukowe Uniwersytetu Jagiellońskiego</i> vol. 5
M. Jagielska	2005	'Niedozwolone klauzule umowne' in: E. Nowińska & P. Cybula, <i>Europejskie prawo konsumenckie a prawo polskie</i> (Zakamycze)
J. Pisuliński	2005	'Niedozwolone klauzule umowne w obrocie bankowym na wybranych przykładach' in: <i>Prawo Pankowe</i> vol. 6
K. Kruszewska-Sobczyk & M. Sobczyk	2004	'Niedozwolone klauzule w umowach zawieranych przez konsumenta' in: <i>Radca Prawny</i> vol. 4
M. Jagielska	2000	'Niedozwolone klauzule umowne: nowelizacja kodeksu cywilnego' in: <i>Monitor Prawniczy</i> vol. 11
F. Zoll	1993	'Niedozwolone klauzule w umowach konsumenckich' in: <i>Kwartalnik Prawa Prywatnego</i> vol. 2
B. Jaworska-Dębska	1993	'Wokół pojęcia reklamy' in: <i>Przegląd Ustawodawstwa Gospodarczego</i> vol. 12

## 1. Study to support the Fitness Check of EU Consumer law – Country report PORTUGAL

### 1.1. Unfair commercial practices and marketing

#### 1.1.1. Effectiveness of the UCPD in establishing a high level of consumer protection

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

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

The UCPD was transposed into Portuguese law by Decree-Law no. 57/2008 (March 26). There were no specific rules for unfair commercial practices prior to the transposition. Decree-Law no. 57/2008 was amended recently so as to include some protection for B2B relations.

Several authors argue that the complexity of the UCPD and of Decree-Law no. 57/2008, coupled with the several requirements and definitions that must be taken into account (commercial practice, professional diligence and to materially distort the economic behaviour of consumers) make it almost impossible to apply the general clause of Decree-Law no. 57/2008 (article 5).<sup>1</sup> This conclusion also applies to articles 6 (misleading actions) and 9 (misleading omissions) of Decree-Law no. 57/2008, since they are worded in very broad terms.

Jorge Pegado Liz states that the definitions in article 3 are 'subjective and cannot be verified objectively based on scientific or verifiable standards'.<sup>2</sup>

Overall, the interviewed stakeholders share this view. A public authority emphasizes that there are difficulties in applying Decree-Law no. 57/2008 due to the use of vague concepts. The regulatory authorities and a consumer association agree with this perspective, arguing that the use of vague concepts undermines the existence of a clear and complete legal framework and raises problems for punitive actions. A business association adds that the use of vague concepts is not desirable and considers that they should be replaced whenever possible but recognizes that in some situations it would be difficult to do so.

There is not a single reference to Decree-Law no. 57/2008 in a brief search of the Supreme Court of Justice's case law database<sup>3</sup> and in the five courts of appeal there are only three references to this legislation. Considering that it came into force eight years ago, this data points to a very limited application of the regime.

However, a public authority stresses that the UCPD is the most important consumer directive involved in the study, not only because of its full harmonisation approach but also because it involves practices that are extremely important for consumer protection.

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

Generally, the stakeholders think that the black list is very useful and that it should be extended.

However, some stakeholders also claim that the list should be more specific instead of relying on vague concepts that are difficult to apply.

<sup>1</sup> Jorge Morais Carvalho, *Manual de Direito do Consumo*, 2016, p. 82.

<sup>2</sup> Jorge Pegado Liz, "Práticas Comerciais Proibidas", 2014, p. 107.

<sup>3</sup> Available in <http://www.dgsi.pt/jstj.nsf?OpenDatabase>.

A regulatory authority gives the example of a practice that consisted in presenting as an advantage something that is imposed by law (e.g. para 10 refers to 'Presenting rights given to consumers in law as a distinctive feature of the trader's offer'). The trader argued that it was simply information and not an advantage. This regulatory authority defends that, in order to avoid any doubts there should be a clear distinction between advantages and commercial information in the leaflets. Such a practice may be addressed without any amendment to the current wording of the UCPD.

An enforcement authority states that the 'black list' of unfair commercial practices is out-dated, since it relies on a closed set of practices.

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

No data is available in Portugal for immovable property.

As for financial services, the conclusions in another study show that sectoral national legislation has provided for control of commercial practices that were not set out in the UCPD, for example tying different contracts, or the calculation of interest.<sup>4</sup> In addition, the rules on misleading actions and omissions and aggressive practices in the financial sector are not entirely based on EU Directives.<sup>5</sup>

- 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 what 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?*]

A regulator reports that complaints about advertising in the energy sector are mostly related to cases where minors take part in an advertisement (since article 14, no. 2, of the Advertisement Act, limits their involvement), and with tying (e.g. different products are sold together and one or all of them are not available separately). Misleading practices may be at stake in the latter case.

As for environmental claims, a few years ago there was an advertisement concerning natural gas where water was wasted. Although this advertisement did not involve any misleading practice, it is the only example of an environmental claim gathered during the interviews.

In general, Portuguese consumers still show little sensibility in this regard. The country's economic situation probably explains why this is so, as consumers focus on saving and, thus, traders build their message around the price.

<sup>4</sup> Article 28 of Decree-Law no. 133/2009 (June 2) deals with usury. Under this provision, the credit agreement will be usurious if the annual percentage rate of charge exceeds a certain limit, calculated according to the medium annual percentage rate of charge offered in consumer credit agreements during the previous trimester. In this case, the annual percentage rate of charge set out in the credit agreement is automatically reduced to half of the maximum limit.

<sup>5</sup> *Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU*, Civic Consulting, 2011, pp. 38-56.



- 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 your country rigidly?]

A national authority points out that the concept of average consumer, as established by the case law of the Court of Justice of the European Union, is hardly applicable to Portuguese consumers.

There is some debate in Portugal concerning this concept.

Particularly when cheap and mass-consumption goods are involved, Portuguese case law defines the average consumer as hasty and distracted<sup>6</sup> or absent-minded<sup>7</sup> and it also takes into account the targeted population group.<sup>8</sup>

On the other hand, an author states that the average consumer is a normal consumer, e.g. with a medium level of information and regularly diligent. According to this perspective, consumers with a low level of information or that fail to be diligent are not average consumers.<sup>9</sup>

The concept of average consumer presents several disadvantages when used as the standard to assess whether a commercial practice is unlawful.

First, it fails to take into account the effect of Decree-Law no. 57/2008 covering specific circumstances that reveal weakness on the part of the consumer, even when they are known and used by the trader to distort the consumers' economic behaviour, in violation of the professional diligence. This means that the trader may take advantage of the consumer's weakness in order to unduly influence him or her, as long as the average consumer would not be affected by that practice.<sup>10-11</sup>

Second, this standard sets a very low standard for the trader. The law does not appropriately protect those consumers that are less capable and more careless, since it does not take into account their economic behaviour when faced with the commercial practice. The average consumer concept does not provide sufficient protection to a significant number of consumers.<sup>12</sup>

The average consumer can be used with positive results in competition law or in industrial property (B2B relations), with the objective to determine whether a certain commercial practice affects another trader. In consumer law, it is inadequate as an effective safeguard of consumers, as it denies protection to those that need it the most.<sup>13</sup>

<sup>6</sup> Supreme Court of Justice (26/9/1995); Lisbon Court of Appeal (19/1/2010); Lisbon Court of Appeal (15/4/2010); Supreme Court of Justice (13/7/2010).

<sup>7</sup> Lisbon Court of Appeal (25/2/2014).

<sup>8</sup> Lisbon Court of Appeal (28/5/2013).

<sup>9</sup> Ana Maria Guerra Martins, "O Direito Comunitário do Consumo", 2002, p. 78.

<sup>10</sup> Jorge Morais Carvalho, *Manual de Direito do Consumo*, 2016, p. 85.

<sup>11</sup> Sara Fernandes Garcia, *As Práticas Comerciais Desleais*, 2014, p. 58.

<sup>12</sup> Jorge Morais Carvalho, *Manual de Direito do Consumo*, 2016, p. 85.

<sup>13</sup> Luís Silveira Rodrigues, "Tendências Recentes sobre a Protecção do Consumidor na União Europeia", 2003, p. 315; Jorge Pegado Liz, "A «Lealdade» no Comércio ou as Desventuras de uma Iniciativa Comunitária", 2005, p. 77.

- 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 in your country recognised new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted)?*]

A national authority argues that the concept of vulnerable consumer is very important, particularly when economic vulnerability is at stake. This concept must be considered in a case-by-case basis, thus making it difficult to extract conclusions in the abstract.

There is a widespread view that this concept should be extended to cases of economic vulnerability. Over-indebtedness is a serious problem in Portugal and a cause of added vulnerability to those affected by it.

- 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?*]

For some regulators, even when the law provides for it, there is no self-regulation. Apart from internal codes of conduct (mainly, in some big companies) and internal procedures based on international standards (in the electronic communications sector), as a rule there are no codes of conduct.

There are, however, some exceptions. In advertising, the Civil Institute of Advertising Self-Regulation (ICAP, in Portuguese) has issued a code of conduct for advertising and other means of commercial communication.<sup>14</sup>

An enforcement authority reports that it carried out a recent initiative together with the ICAP regarding symbols of quality (such as 'Product of the Year' or 'Flavour of the Year'). In addition to an information sheet detailing the symbol– the Product of Year takes into account the packaging, while a small group had tasted the Flavour of the Year – this authority prepared a recommendation on the information that should be conveyed to consumers on these symbols. Some traders voluntarily comply with this recommendation.

The business associations have a very different perspective. In addition to their self-regulation instruments, these associations report that there are also sectoral self-regulations mechanisms for agriculture and alcoholic beverages, among others. At the European level, the 'Supply Chain Initiative'<sup>15</sup> has been a success in Portugal: with about 1200 companies registered, Portugal was the first country to meet its registration threshold.

- 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?

A consumer association points out that commercial practices are rapidly evolving and suggests the creation of a mechanism designed to allow the list's update over time. It also argues that the list should include practices that involve an artificial reduction of prices (e.g. 'Black Fridays').

The same association adds that some sectoral legislation already includes lists of specific unfair commercial practices that go beyond the UCPD and Decree-Law no. 57/2008.

<sup>14</sup> Available in [http://www.icap.pt/images/memos/Novo\\_CodConduta\\_ICAP\\_Pub\\_ComComercial.pdf](http://www.icap.pt/images/memos/Novo_CodConduta_ICAP_Pub_ComComercial.pdf).

<sup>15</sup> See <http://www.supplychaininitiative.eu>

- Are there other measures that could improve the effectiveness of the UCPD in establishing a high level of consumer protection in your country? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

A consumer association argues that the good results that have been obtained with the implementation of other EU Directives on consumer protection, were a result of the minimum harmonisation approach. The full harmonisation on the UCPD does not allow Member-States to go further in the protection of consumers.

Drawing on the Portuguese legislation on unfair contract terms (Decree-Law no. 446/85), the same association defends the creation of a 'grey list' with commercial practices that may be considered unfair depending on the specifics of the case. From its perspective, experience gathered from the application of the national legislation on UCT suggests that this 'grey list' could further consumer protection.

For two enforcement authorities, the main problem of UCP national legislation is related to proof. This is particularly striking when the question involves circumstances that are prior to the conclusion of the contract.

In the energy sector, there are several complaints about cases where a trader's representative presents him or herself as a representative of another trader. Since the contract is concluded with a certain trader and the documents have the symbol of that trader, the question hinges on proof and it is very difficult to apply the UCP rules. To avoid this situation, it would be necessary to impose certain additional duties on traders (such as better documentation and identification of their representatives), but that would imply additional costs and, consequently, reflect on prices.

As for electronic communications, a regulatory authority emphasizes the importance of creating an obligation on the traders to deliver the recording of telephone calls to the competent regulatory authority, as well as the communication of some internal procedures, in order to facilitate supervision.

Other authorities emphasize the difficulties in articulating the rules on advertising and UCT national legislation, as some unfair commercial practices are connected to advertising. Each of these aspects is regulated in a different Directive (UCPD and MCAD) and the scope of application of these Directives differs greatly. In Portugal, advertising is under the supervision of the Directorate General for Consumers (in Portuguese DGC), while the supervision of the UCP in all matters not connected to advertising is carried out by the Food and Health Security Authority (ASAE) or by regulatory authorities.

#### 1.1.2. Effectiveness of the PID in establishing 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;
- 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?

The PID was transposed into Portuguese law by Decree-Law no. 138/90 (April 26), amended by Decree-Law no. 162/99 (May 13). There were pre-existing rules on price indication in Portugal.

The stakeholders do not identify any major problems concerning the indication of prices in business premises. The data gathered by an enforcement authority between 2010 and 2016 shows a steady decrease in processes issued on the basis of the PI national legislation (Decree-Law no. 330/90): 1222 processes in 2010 and only 90 processes in 2016.

A consumer association's perspective points to a widespread indication of prices, although the measurement unit is not always the same (while some traders use kilos, others use grams, which makes it harder for the consumer to compare prices). An indication such as '100 washloads per package in our container' must be accompanied by the size of the container in order to be measurable. This association considers that it would be important to adopt a common measurement unit so that the consumer would be able to compare all products available in the market.

A business association reports that many traders indicate several prices for the same good (e.g. price per pack and per litre), even though it is not very clear if this information is necessary or relevant for consumers. Another business association argues that the price per unit of the measurement is often not indicated, namely when the goods are sold in a pack. This association agrees with the possibility of indicating the price by reference to a recognised unit of measurement.

Several stakeholders point out that Decree-Law no. 330/90 goes beyond the PID, as it applies to both goods and services (article 10). In one of the interviews, it was suggested that the PID should be amended in order to include the indication of prices in services contracts.

However, in E-commerce, particularly in international websites, prices are sometimes indicated in a misleading way. For instances, in contracts related to air transport, some components of the price are not presented transparently. In both these contracts and accommodation contracts, there are cases where traders indicate a non-final price or a price that will only apply if a certain method of payment is used (without prior information to consumers). There are also cases of error in the indication of prices, mainly in online platforms.

- The effects of the regulatory choices/derogations allowed by the Directive and applied by Member States. [*Key aspects to consider are: Is the derogation relevant? Do companies make use of it? Are there consumer complaints because of this? If so, approximately how many per year?*]

In Portugal, 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.

### 1.1.3. Effectiveness of the MCAD in providing protection for businesses

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

- The scope of protection under the Directive, in particular whether the scope limited to the notion of 'advertising' provides effective protection for businesses;
- The overall effectiveness of the principle-based approach to misleading advertising under this Directive;
- 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;

Decree-Law no. 330/90 (October 23) set out special rules for misleading and comparative advertising. The MCAD was transposed into Portuguese law by Decree-Law no. 57/2008, through an amendment to pre-existing legislation.

In Portugal, comparative advertising is an unusual practice and, as a rule, it complies with the applicable rules (article 16, Advertising Act). However, there was recently a problem with an advertisement concerning a deodorant that made references to another brand. The enforcement authority fined the trader. This advertisement is common in other EU countries, but this authority does not know of other decisions.

- The effects of the minimum harmonisation provisions on misleading advertising; [Key aspects to consider are: 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)?]

A business association points out that, as a rule, minimum harmonisation is especially problematic for cross-border trade and E-commerce and so EU Directives on consumer law should be based on full harmonisation, as is the case for comparative advertising.

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

An enforcement authority emphasizes that full harmonisation is essential for the development of the common market. According to the same authority, the harmonisation of procedural rules is more important than the harmonisation of substantive rules, in order to grant a minimum and homogeneous set of powers to regulatory and enforcement authorities.

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

An enforcement authority reports that 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, 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. This example illustrates the need to simplify the procedural rules applying to cross-border infringements.

- Are there measures that could improve the effectiveness of the MCAD in providing protection for businesses (see also 1.1.6 below)? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

A business association emphasizes that the positive effects stemming from full harmonisation on comparative advertising is thwarted by the lack of application and supervision of the legislation and also by the lack of punishment for violations to these rules.

#### 1.1.4. Effectiveness of current rules 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;
- The effects of the uniform black list of unfair commercial practices annexed to this directive on the free movement of goods and services;
- Whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade. [Do the national differences play a role in a business perspective? Have they caused problems?]

As a rule, business associations seem to prefer a legal framework that is clear and easy to apply, in order to reduce uncertainty and costs. Therefore, these associations would prefer a rule-based approach, even if they recognize that in some cases vague concepts cannot be replaced.

The black list of unfair commercial practices has the advantage of detailing some of the more harmful practices and the fact that this list is uniform in EU Member States, leads to a single legal framework. This means that companies know, *a priori*, that

certain practices are forbidden in the common market. By reducing uncertainty, the uniform black list is a helpful tool for fostering cross-border trade.

There was no feedback on the effects (positive or detrimental) of the derogation from full harmonisation in financial services and immovable property, as this is a very specific question and the business associations that were interviewed do not deal in great detail with these sectors.

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

Again, as a rule, business associations seem to prefer a legal framework that is clear and easy to apply, in order to reduce uncertainty and costs. Therefore, these associations would prefer a rule-based approach, even if they recognize that in some cases vague concepts cannot be replaced.

A business association argues that minimum harmonisation is particularly problematic for cross-border trade and E-commerce, since it means that different rules may apply inside the common market. However, another business association points out that full harmonisation is not always the solution, as in some cases it is necessary to consider the particular circumstances of each Member State

Specifically for comparative advertising, a business association praises the full harmonisation approach, while also adding that its effects are thwarted by the lack of application and supervision of the legislation and also by the lack of punishment for violations of these rules.

No specific reference was made in the interviews to the need to create cross-border enforcement mechanisms, although one of the business associations points out that the lack of coordination between regulators may explain, to some degree, the problems in applying the legislation.

#### 1.1.5. Interplay amongst UCPD information requirements according to Article 7(4) with the information requirements in the horizontal consumer law instruments

Regarding the information requirements according to Article 7(4) UCPD ("invitation to purchase") in the advertising stage, please analyse:

- The level of awareness of traders as regards information requirements at the advertising stage, as in particular demonstrated by their practical application; [*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?*]

A regulatory authority points out that there is a clear contrast between oral and written information. As a rule, there are no problems when information is provided in writing; on the contrary, when the information is oral, there is a perception that not all pre-contractual information is communicated to the consumer.



For a business association, EU consumer law Directives have intensified the traders' duties of information. Sometimes, excessive information is required - for example, the label on a bottle of water must contain a series of indications that, normally, consumers do not read. This association argues that information to consumers should be more focused on their rights and on mechanisms of dispute resolution.

The Portuguese Government appears to be concerned with the various duties of information that result from legislation aimed at protecting consumers, as they may represent an excessive burden on traders. In the near future, a legislative initiative may be taken in order to simplify and/or organize these information duties. It is important to stress that in Portugal consumer protection policy is assigned to the Ministry of Economy.

- 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?

During the interviews no problems were identified in this regard.

#### 1.1.6. Relevance for business-to-business transactions

Regarding the area of unfair commercial practices/marketing, please analyse:

- 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 cross-border trade;

As indicated before, the UCPD was implemented into national legislation by Decree-Law no. 57/2008, which initially only applied to consumer contracts.

In 2015, Decree-Law no. 205/2015 amended Decree-Law no. 57/2008 and, among other aspects, broadened its scope of application to some B2B relations. Article 1, no.2, determines that national legislation on unfair commercial practices now applies to some misleading actions in B2B relations.

Article 7, no. 3, clarifies that those misleading actions include misleading actions relating to the existence or nature of the product; its characteristics; the extent of the trader's commitments, the motives for the commercial practice and the nature of the sales process, any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product; the price or the manner in which it is calculated, or the existence of a specific price advantage and the nature, attributes and rights of the trader or of a trader's agent.

In the interviews, two public bodies emphasize that this amendment to Decree-Law no. 57/2008 came as a reaction to misleading practices involving business directories that affected mainly small companies. A regulatory authority points out that it has received complaints on other unfair commercial practices in B2B relations (affecting primarily SME'S) that are still not included in Decree-Law no. 57/2008.

The MCAD applies only to B2B relations. The Directive was implemented through the Advertising Act (Decree-Law no. 330/90, in its current wording). The full harmonisation approach adopted in the MCAD for comparative advertising means that these rules could not apply to B2C relations (article 43 of the Advertising Act). By contrast, misleading advertising is established by reference to the notion of misleading actions as set out in Decree-Law no. 57/2008 (article 11 of the Advertising Act).



- 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;

With the exception of article 7, no. 3, of Decree-Law no 57/2008, B2B relations are governed by the general rules of the Civil Code, of the Penal Code and of other legal acts. These rules also apply to B2C relations when they are more favourable for consumers or in the absence of special rules.

Thus, there are no specific rules for commercial practices in B2B relations. This raises some difficulties, particularly when it is impossible or ineffective to address certain unfair commercial practices directed at small businesses in accordance with the general rules of civil and/or criminal law.

An additional amendment to Decree-Law no. 57/2008 in order to cover more aspects of B2B relations would involve, as stressed by some stakeholders, deciding whether the scope of protection would be micro-enterprises (for example) or all companies, regardless of their size. There is some concern among stakeholders that large companies would monopolize the regulator's activity.

- 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 also cover unfair commercial practices during and after the transaction;

The problems, although relevant, are not frequent. The best solution might be to create rules that cover all possible situations, regardless of the moment in which they occur (e.g. in the pre-contractual, contractual or post-contractual stage).

- Whether there is a need to have a black-list of practices in the business-to-business marketing area;

In B2B relations, it is easier for traders affected by unfair commercial practices to react, in comparison with the typical lack of reaction by consumers. For this reason, a black list of unfair commercial practices might be less relevant in B2B relations. However, one must keep in mind that experience in Portugal, particularly regarding unfair contract terms, shows that judges are more likely to apply the prohibitions that are included in a list rather than the general clause.

- What should be the enforcement cooperation mechanism in the business-to-business marketing area;

An enforcement authority considers that the creation of a centralised mechanism of enforcement for cross-border infringements, might be a good idea.

- Whether there is a need to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive;

In Portugal, misleading advertising is simultaneously an unfair commercial practice, which means that contractual consequences may apply.

On the contrary, rules on comparative advertising are not aimed at protecting the consumer and so no contractual consequences apply. When a lack of conformity results from comparative advertising, the Directive on the sale of consumer goods provides an appropriate answer. Between competing traders, contractual consequences are not in question.

- Whether there is a need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive.

The only problem identified in the interviews is the need to clarify the interplay between the rules on comparative and misleading advertising and the rules on unfair commercial practices. It would be important to clarify whether certain practices (such as business directories) should be dealt with by the UCPD or by the MCAD.

#### 1.1.7. Relevance of contractual consequences of unfair commercial practices

Please analyse whether there are in your country:

- 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 14, no. 1, Decree-Law no. 57/2008 provides that contracts concluded under the influence of an unfair commercial practice are voidable on the consumer's initiative, in accordance with the rules of the Civil Code. The consumer has one year to act (article 287, no. 1, Civil Code) and the decision that annuls the contract has retroactive effects (article 289, Civil Code).

- Any case law (enforcement decisions, court rulings) providing for such consequences;

Most case law of the Portuguese higher court is available in an online database.<sup>16</sup> A search of this database came up with no decisions annulling a contract on the basis of unfair commercial practices. In a brief search of the website of several consumer arbitration centres, no decisions were found on unfair commercial practices.

In Portugal, public bodies may not impose civil penalties.

During the interviews, stakeholders described having received several complaints about some of the following unfair commercial practices: pyramid selling, aggressive sale of mattresses or cookware, omission of pre-contractual information and practices that involve falsely informing that binding periods are not admissible (specific of contracts concerning electronic communications) or that a certain product is able to cure illnesses, dysfunctions or malformations.

- Whether there is, based on past experience in your country, a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

A consumer association criticizes the option to render the contract voidable, since this sanction is less strong compared to both the invalidity (unfair contractual terms) or the rights conferred to the consumer in the event of lack of conformity of consumer goods. For this association, this might be one of the reasons behind the limited practical application of the unfair commercial practices rules, together with the costs of bringing a judicial action.

A regulatory authority emphasizes that the abstract nature of Decree-Law no. 57/2008 may lead to the conclusion that nullity would not be an easy or proportionate sanction. For this authority, the key issue is to guarantee that sanctions create an effective protection for consumers. Nullity was introduced for some distance contracts in legislation aimed specifically at electronic communication (article 48, no. 3, Law no. 25/2004).

A consumer arbitration centre considers that the sanction of article 14 is sufficient, since enforcement and regulatory authorities may apply fines and interim measures.

<sup>16</sup> See [www.dgsi.pt](http://www.dgsi.pt)

## 1.2. Contract conclusion and performance

### 1.2.1. Effectiveness of the current rules in establishing 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;

Article 15, Decree-Law no. 446/85, sets out that 'standard contract terms contrary to good faith are illegal'. This provision relies on a fundamental principle that applies to all private law, expressed through a vague concept ('good faith'),<sup>17</sup> in order to overcome the difficulties in an abstract determination of all the situations where the content of a contractual clause may be unbalanced.<sup>18</sup> A consumer organisation praised this solution.

The main problem in using a vague concept is not so much in its interpretation (although this does bring a degree of uncertainty concerning the applicable rules), but in the knowledge of the law by the public and, namely, the party that is faced with standard contractual terms. This explains the relatively little use of the general clause.<sup>19</sup>

The criterion set out in article 3 of the UCTD was not expressly implemented into Portuguese law, although it is clearer and more in line with the objective to guarantee some balance between the parties. This criterion must also be assessed on a case-to-case basis.

The significant (or disproportionate) imbalance<sup>20</sup> to the detriment of the party that is faced with standard contractual terms should also be used in interpreting the Portuguese law,<sup>21</sup> even though the imbalance concept is not expressly set out, along with other criterion,<sup>22</sup> always by reference to the contents of the contract as a whole.<sup>23</sup> In consumer relations, this solution results from article 9, no. 2, par. b), of the Consumer Protection Act (Law no. 24/96).

<sup>17</sup> Joaquim de Sousa Ribeiro, "O Controlo do Conteúdo dos Contratos", 2005, p. 5.

<sup>18</sup> Jorge Morais Carvalho, *Manual de Direito do Consumo*, 2016, p. 104.

<sup>19</sup> Ana Prata, *Contratos de Adesão e Cláusulas Contratuais Gerais*, 2010, p. 323; José Manuel de Araújo Barros, *Cláusulas Contratuais Gerais*, 2010, p. 181.

<sup>20</sup> Supreme Court of Justice (10/4/2014).

<sup>21</sup> José de Oliveira Ascensão, "Cláusulas Contratuais Gerais, Cláusulas Abusivas e Boa Fé", 2000, p. 589; Almeno de Sá, *Cláusulas Contratuais Gerais e Directiva sobre Cláusulas Abusivas*, 2001, p. 72; Ana Prata, *Contratos de Adesão e Cláusulas Contratuais Gerais*, 2010, p. 341. Case law: Coimbra Court of Appeal (23/1/2008); Supreme Court of Justice (27/5/2010); Lisbon Court of Appeal (10/10/2013); Lisbon Court of Appeal (20/2/2014); Supreme Court of Justice (27/9/2016).

<sup>22</sup> Mário Júlio de Almeida Costa, *Síntese do Regime Jurídico Vigente das Cláusulas Contratuais Gerais*, 1999, p. 24, n. 25; Yara Miranda, "As Cláusulas Contratuais Abusivas em Matéria de Relações de Consumo", 2007, p. 716.

<sup>23</sup> Jorge Morais Carvalho, *Manual de Direito do Consumo*, 2016, p. 107.

- 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 your MS? Does this work in practice or are there problems?*]
- 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; [*Note: If a black/grey list exists in your country, key aspects to consider are: How does the list work in practice? Does it make a difference to have such a list?*]

Decree-Law no. 446/85 includes four lists of unfair terms (articles 18, 19, 21 and 22). These lists are aimed to help interpreting articles 15 and 16 of the Decree-Law<sup>24</sup>, since they provide several examples of terms that may be considered unfair. They are not exhaustive, meaning that even if a certain contractual term is not included in a list, it may still be considered unfair, on the basis of the general clause of article 15. Even so, Portuguese courts tend to apply the lists without directly invoking the general clause.

These lists implement the two annexes to the UCTD with three exceptions: pars. c) and d) of Annex I and par. a) of Annex II were not transposed into Portuguese law. The rules of Annex II do not apply to B2B contracts. In addition, the lists also contain other terms that are not set out in the Directive – for example, terms that impose permanent obligations or that set out a competent jurisdiction that is highly inconvenient for one party when the interests of the other party do not justify it.

The lists are organized, firstly, by taking into account the relation between the parties to the contract. In accordance with article 17, in B2B relations only the lists in articles 18 and 19 may apply. In all other cases, namely in B2C and C2C contracts, all four lists may apply (article 20). This means that the lists in articles 21 and 22 are aimed at consumer contracts and, in general, to all other contracts that do not involve a B2B relation.

The lists are then organized in accordance with the intensity of the prohibition. Thus, the black lists contain terms that are absolutely banned (articles 18 and 21) and the grey lists include terms that are relatively banned (articles 19 and 22).

The terms included in the black list are considered unfair in all circumstances. There is no need to analyse the context that underlies the term or the circumstances of the contract and of its conclusion or even to determine whether the term is contrary to good faith. In these cases, the law considers that the terms are always contrary to good faith,<sup>25</sup> namely because it causes or is likely to cause a substantial imbalance between the rights and obligation of the parties.

On the contrary, the terms included in the grey lists are unfair in accordance with “the standardised framework of negotiation” (see below). While the terms in the black lists are automatically considered unfair, those in the grey lists may be considered unfair but only after being analysed.<sup>26-27</sup>

Unlike the black lists, the grey lists use many vague concepts that must be interpreted in accordance with the standardised framework of negotiation.<sup>28</sup> Articles 19 and 22 include terms that provide for excessive deadlines, disproportionate penalty clauses or cause severe inconvenience, among others.

<sup>24</sup> Lisbon Court of Appeal (19/1/2016).

<sup>25</sup> António Pinto Monteiro, “Contratos de Adesão”, 1986, p. 755; Almeno de Sá, *Cláusulas Contratuais Gerais e Directiva sobre Cláusulas Abusivas*, 2001, p. 76; Joaquim de Sousa Ribeiro, *O Problema do Contrato*, 2003, p. 455, n. 503.

<sup>26</sup> Guimarães Court of Appeal (10/7/2008).

<sup>27</sup> Almeno de Sá, *Cláusulas Contratuais Gerais e Directiva sobre Cláusulas Abusivas*, 2001, p. 77.

<sup>28</sup> Filipe Vaz Pinto, “Os Limites à Liberdade de Estipulação em Matéria de Denúncia”, 2007, p. 60.

The “standardised framework of negotiation” does not involve a case-by-case approach that takes into account the specific circumstances of each contract in order to conclude whether a certain term is unfair.<sup>29</sup> This concept entails an analysis in abstract of the typical context in which a certain term is inserted into the contract,<sup>30</sup> in order to allow its assessment in the injunction procedure.<sup>31</sup>

Such an analysis shall take into account good faith and, specially, the (im)balance<sup>32</sup> between the parties arising from the term in question.<sup>33</sup> This approach is compatible with articles 19 and 21.<sup>34</sup>

The lists of unfair contract terms are a success in Portugal.

For a consumer association, the courts have tested these lists and there was a clear evolution in the terms used in some types of contract (for example, in banking contracts). However, this association argues that the lists should be updated.

A regulatory authority emphasizes that there have been no problems with unfair contractual terms in the energy sector.

There is an on-line database<sup>35</sup> with several contractual terms that have been declared unfair by the courts. This database contains about 294 decisions and includes contractual terms used in different sectors (banking, insurance, electronic communication and fitness centres, for example).

A consumer arbitration centre states that terms allowing for an automatic increase of prices depending on inflation or for the renewal of a contract’s binding period, are very frequent in electronic communications.

- 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: In your country, have the effects of court decisions establishing the unfairness of an unfair term been extended to all contracts of the trader concerned or to the contracts of any other trader containing such a term? If so, how does this work in practice? What are the impacts on businesses? If there are no such effects of court decisions on unfair terms: what are the effects of this situation?*]

The decision establishing the unfairness of a contractual term may be raised as an incidental question by any counterpart to the trader concerned in future proceedings (article 32, no. 2, Decree-Law no 446/85). However, the decision has no *erga omnes* effect, meaning that other traders using the same term are not bound by it.

A consumer association argues that an *erga omnes* effect of the decision would be important to increase its effectiveness (since it would avoid the need to start new proceedings against another trader), but raises questions related to the adversary principle. As a rule, the association issues proceedings against all traders that use the term in question.

<sup>29</sup> Hugo Ramos Alves, “Nótula sobre a Venda à Distância”, 2012, p. 287.

<sup>30</sup> António Pinto Monteiro, “Contratos de Adesão”, 1986, p. 755; Almeno de Sá, *Cláusulas Contratuais Gerais e Directiva sobre Cláusulas Abusivas*, 2001, p. 260; Joaquim de Sousa Ribeiro, *O Problema do Contrato*, 2003, p. 455, n. 503.

<sup>31</sup> António Menezes Cordeiro, *Tratado de Direito Civil Português*, Vol. I, Tomo I, 2005, p. 630.

<sup>32</sup> Jorge Morais Carvalho, *Manual de Direito do Consumo*, 2016, p. 109.

<sup>33</sup> Lisbon Court of Appeal (2/3/2010); Lisbon Court of Appeal (27/4/2010).

<sup>34</sup> Jorge Morais Carvalho, *Manual de Direito do Consumo*, 2016, p. 109.

<sup>35</sup> See <http://www.dgsi.pt/jdgpj.nsf?OpenDatabase>

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

Decree-Law no. 446/85 provides a complete and effective protection to consumers in relation to the inclusion of terms that are not individually negotiated in the contract. These rules also apply to B2B and C2C relations.

A standard contractual term will only be included in the contract if it meets three requirements. First of all, there must be some connection between the term and the contract (article 4).<sup>36</sup> Secondly, the term shall be communicated in an appropriate and timely manner, considering its complexity and the relevance of the contract (article 5). Finally, there is a duty of clarification (article 6). If one of these requirements is not met, the term is immediately excluded from the contract without the need to assess the other requirements.<sup>37</sup>

A consumer arbitration centre stresses that most complaints about Decree-Law no. 446/85 are related to contractual transparency. There are also numerous decisions from Portuguese courts excluding terms from a contract based on articles 4 to 6. A regulator reports that there have been some problems in electronic communications related to transparent information in the digital market.

- 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. [*Note: Question only relevant for MS that have put in place extensions of application of UCTD*]

Authors sometimes discuss whether Decree-Law no. 446/85 should also apply to terms covering the contracts' main or characteristic aspects (e.g., in the more usual scheme, the main goods and services, on the one hand, and the price, on the other hand). The UCTD excluded such terms, but this rule was not implemented into Portuguese law.<sup>38</sup> As Decree-Law no. 446/85 was approved prior to the Directive and no subsequent amendment was made to exclude those terms, the rules on unfair contract terms apply to them. There is no Portuguese case law on this specific topic.

- 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?*]

Unfair contractual terms are null (article 12, Decree-Law no. 446/85), a sanction that, in the opinion of a consumer association, is appropriate. The consumer may invoke the nullity at any time (article 286, Civil Code). Portuguese higher courts follow the case law of the Court of Justice of the European Union, in deciding that the court may assess the nullity *ex officio*.<sup>39</sup> However, the party that uses the standard contractual terms may not invoke the nullity, as article 12 is aimed exclusively at protecting the counterpart in the contract. Article 13 points to such conclusion when it confers on the party that was confronted with standard contractual terms the option between invoking the nullity or maintaining the contract, without the unfair term.<sup>40</sup>

<sup>36</sup> Pedro Caetano Nunes, "Comunicação de Cláusulas Contratuais Gerais", 2011, p. 518.

<sup>37</sup> Jorge Morais Carvalho, *Manual de Direito do Consumo*, 2016, p. 73.

<sup>38</sup> Jorge Morais Carvalho, *Manual de Direito do Consumo*, 2016, pp 70 e 71.

<sup>39</sup> Lisbon Court of Appeal (18/6/09); Lisbon Court of Appeal (19/11/2013); Supreme Court of Justice (27/9/2016).

<sup>40</sup> António Menezes Cordeiro, *Tratado de Direito Civil Português*, Vol. I, Book I, 2005, p. 626; Cláudio Petrini Belmonte, *A Redução do Negócio Jurídico e a Protecção dos Consumidores*, 2003, p. 147.



There are no administrative sanctions, but a periodic penalty payment may be applied to the defendant if he continues to use or recommend a contractual term that has been found unfair by a decision with *res judicata* effect (article 33).

- In a forward looking perspective: Are there other measures that could improve the effectiveness of the UCTD in establishing a high level of consumer protection in your country? Would a graphical presentation model improve the readability and comprehension by consumers of the T&Cs? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

A consumer association argues that, in addition to the judicial control, there should be mechanisms that would allow a subsequent administrative control of the same or similar contract terms in other contracts involving the same trader or different traders. The obligation to deposit a draft contract with the regulatory authority had important results for electronic communication, but not in banking.

Although an obligation to deposit the draft contract exists for electronic communications, since 2011 the regulatory authority may only engage in the assessment of the terms following a complaint and the analysis takes into account sectoral legislation. In some cases, this authority has forced traders to replace or amend certain terms.

#### 1.2.2. Effectiveness of the current rules 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 disparities have an impact on cross-border trade; [*Key aspects to consider are: Do national differences in the application/implementation of the Directive play a role for businesses? Have these differences led to changes in their business strategy? Have these differences caused problems?*]
- 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;
- 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.

As stated above, Portuguese courts tend to apply the lists without directly invoking the general clause. This rule-based approach seems to be more beneficial for reducing costs and uncertainty as to the applicable rules.

However, the extension of Decree-Law no. 446/85 to terms dealing with the adequacy of the price and main subject matter and the extended lists of unfair contract terms, lead to a legal framework that might be different from that in other Member-States.

This is connected to the more general question of minimum vs. full harmonisation: a business association points out that minimum harmonisation is especially problematic for cross-border trade and E-commerce, thus concluding that EU Directives on consumer law should be based on full harmonisation. However, another business association argues that in some cases it is necessary to consider the particular circumstances of each Member-State, which would be more difficult under a full harmonisation framework.



### 1.2.3. Relevance for business-to-business transactions

Regarding the area of contractual fairness and in relation to the Unfair Contract Terms Directive, please analyse:

- Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;

Decree-Law no. 446/85 applies almost entirely to B2B relations (as well as to C2C contracts), meaning that SMEs and micro-enterprises are already protected.

- 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;

The system of protection set out in the UCTD is not seen as problematic in Portugal.

- 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;

Decree-Law no. 446/85 applies to terms covering the contracts' main or characteristics aspects and no problems have been detected.

- 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;

During the interviews, no such contractual terms were mentioned. This may be due to the very specific nature of the question.

- Whether there is a need for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive;

The rules on the inclusion of standard contractual terms in a contract (articles 4 to 8, Decree-Law no. 446/85) apply to B2B relations. No problems have been identified until now.

- 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 Portugal, as Decree-Law no. 446/85 applies to B2B relation, these questions may be asked in the present tense: in practice, whether this option has more positive or negative consequences?

The rules on unfair contract terms are based on the existence of contractual terms that one of the parties does not have the possibility to negotiate. Thus, it seems appropriate to apply the regime to B2B relations where terms are not negotiated individually, as there is an imbalance between the parties.

### 1.3. Injunctions

#### 1.3.1. Effectiveness of the current rules in establishing a high level of consumer protection

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

- To what extent is the use of the injunction procedure in your country contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment?<sup>41</sup>

Following a recent problem with a trader, a regulatory authority recommended consumers that were affected to present the case to a public body with legal standing to start an injunction procedure. The regulator has not received any further information on whether an injunction procedure was brought against this trader.

- What measures in your national legislation on injunction procedure are considered to be particularly effective, if any: measures regarding the cost of the procedure, the 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?

The rules that exempted injunction procedures from costs (articles 11, no. 1, Consumer Protection Act, and 29, no. 1, Decree-Law no. 446/85) have been tacitly repealed in 2008. In fact, article 25, no. 1, Decree-Law no. 34/2008, repealed all existing cost exemptions that were not specifically set out in that legal act.

Consequently, the cost exemption only applies to the Public Prosecutor's Office [article 4, no. 1, par. a), Decree-Law no. 34/2008] and to the Directorate General for Consumers [article 4, no. 1, par. g)].

Before 2013, injunction procedures followed the summary procedure. The Code of Civil Procedure of 2013 created a single form of process (article 548), thus eliminating summary procedure. However, the judge may use the case management powers to adapt the pace or structure of proceedings to the case at hand (article 547), in order to create a more flexible procedure.

A consumer association praises the elimination of the rules that imposed a summary procedure for injunctions, as they applied regardless of the claim's value or the specific characteristics of the case. Rules shortening most procedural time limits or limiting the number of witnesses could be appropriate in some cases and inappropriate in others.

The Consumer Protection Act provides for the mandatory publication of decisions concerning practices that violate consumers' rights (article 11, no. 3).

It is discussed whether the same rule applies to unfair contractual terms. Despite the fact that article 30, no. 2, Decree-Law no. 446/85, refers to a "request by the applicant", this provision must be interpreted in accordance with the Consumer Protection Act (which was approved subsequently). Thus, the decision establishing the unfairness of a contractual term is also automatically published.<sup>42</sup>

If the injunction order is not complied with, the court may apply, on request, a periodic penalty payment (article 10, no 2, Consumer Protection Act, and article 829-A, Civil Code). This penalty is not aimed at compensating for any damage caused, but at forcing the trader to comply with the order or, in other words, not to use nor

<sup>41</sup> 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.

<sup>42</sup> Ana Prata, *Contratos de Adesão e Cláusulas Contratuais Gerais*, 2010, pp. 627-628; José Manuel de Araújo Barros, *Cláusulas Contratuais Gerais*, 2010, p. 383.

recommend terms that were considered unfair. Damage can only be compensated for through civil liability.

There is no mechanism of prior consultation in Portuguese law.

- Has your country extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunction Directive? If yes, what are the additional consumer rights covered?

Law no. 25/2004 implemented into national legislation the ID. Article 2, no 2, of the Law, applies to injunction procedures concerning any violation of consumers' rights. These include both the injunction procedure of the Consumer Protection Act and of Decree-Law no. 446/85 (unfair commercial terms). The list of EU Directives in the Annex to Law no. 25/2004 is merely illustrative, since the law applies to all consumer legislation.

As a rule, stakeholders praise this approach (namely, a consumer association and a national authority), since it does not involve a permanent adaptation of the list of legislation, in contrast to the ID. Cross-border injunctions have still not been used by the qualified entities in Portugal.

- Analysis of the obstacles to the effective use of the injunction procedure, in particular by analysing which progress in removing obstacles has been made and/or new difficulties that have emerged in your country since 2012.

As for national injunctions, the main difference since 2012 is that they no longer follow the summary procedure. A consumer association considers that this is more beneficial, as it allows the court to tailor the procedure to the specific circumstances of the case.

- In a forward looking perspective: Should the coverage of the Injunctions Directive be extended (by including additional legislation into Annex I to the Directive)? If so, which EU legislation should be included? Are there other measures that could improve the effectiveness of the ID in establishing a high level of consumer protection? Should the scope of the Injunctions Directive be extended to the protection of collective business' interests? Are there best practices in your country that could be relevant for other countries and considered as model for the injunction procedure at EU level?

A consumer association points out that injunction procedures are appropriate to prevent or cease certain harmful practices, but inadequate for compensating for any damage caused. For this purpose, it suggests that it would be important to focus on collective actions.

This association adds that the major difficulty in European injunction procedures lies in the great disparity between injunction orders in the several Member-States. In a recent concerted effort between different consumer associations, injunction procedures were started against the same company in some Member-States. However, both the decisions and the arguments were different in each Member-State.

Finally, this association also argues that the list of qualified entities (articles 3 to 5, Law no. 5/2004) is only useful for cross-border injunctions, since consumer associations are entitled to start injunction proceedings in Portugal in accordance with Portuguese law [article 26, no. 1, par. b), Decree-Law no. 446/85, and article 13, par. b), Consumer Protection Act.

A business association claims that injunction procedures are working well in Portugal and should be extended to collective business' interests.

### 1.3.2. 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:

- How effective is the injunction procedure in addressing infringements originating in another EU country?

The data collected in the interviews suggests that the cross-border injunction procedure has still not been used by any of the qualified entities in Portugal.

- How effective is it to address infringements originating in another EU country that qualified entities in your country are enabled to seek injunctions in the other Member State (Article 4 of the Injunctions Directive)?

The list of qualified entities in Portugal is composed of four entities: two consumer associations (the Portuguese Association for Consumer Protection – DECO - and the Association of Portuguese Consumers - ACOP) and two public authorities (the Directorate General for Consumers and the Prosecutor's Office). While the public authorities were automatically included in the list, both consumers associations had to submit an application (article 5, Law no. 25/2004).

A consumer association points out that cross-border injunctions are as of yet a field to explore in Portugal. However, there is an intention by several consumer associations to issue a cross-border injunction in one of the Member-States to test how the procedure works. For a national authority, the very limited application of Law no. 25/2004 is related to a lack of knowledge of its existence.

- In a forward looking perspective: Are there non-legislative or/and legislative measures that could improve the effectiveness of the injunction procedure in addressing infringements originating in another EU country? Are there best practices in your country that could be relevant for other EU countries and could be considered as a model for the injunction procedure at EU level?

In the perspective of a national authority, the European Commission's Recommendation of 11 June 2013, on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, raises some problems of compatibility with the ID. For the same authority, this is particularly the case concerning the legal standing to start an injunction procedure (article 4 of the Recommendation).

### 1.3.3. Interplay between the Injunctions Directive and other enforcement instruments of consumer law

Please analyse:

- Is the injunction procedure as designed by the Injunctions Directive regulated separately in your country (in a separate legal act or as a separate procedure regulated within the same legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (UCPD, UCTD and by the Consumer Rights Directive)?

Law no. 25/2004 is specifically aimed at transposing the ID's provisions on cross-border injunctions (articles 3 to 5). As for national injunctions, the procedural rules are set out in the Consumer Protection Act (articles 10, 11 and 13) and in Decree-Law no. 446/85, for unfair commercial terms (articles 24 and following). Decree-Law no. 57/2008, on unfair commercial practices, refers to the Consumer Protection Act (article 16).

- If these procedures are regulated separately: What are the main differences between them? How is the coherence between these procedures ensured? If these procedures are regulated in a single legal act (possibly as a single procedure): In what way do these procedures (or this procedure) go beyond measures foreseen by the Injunctions Directive?

There is an interesting difference between the Consumer Protection Act and Decree-Law no. 446/85: trade unions' legal standing to start an injunction procedure is limited to unfair contractual terms (article 26, no. 1, par. b), Decree-Law no. 446/85), as they are not included in the list of qualified entities set out in the Consumer Protection Act (article 13).

## 1.4. Cross-cutting issues

### 1.4.1. Cost and benefits of the directives covered by the study

- To what extent is there evidence for benefits for consumers stemming from the protection provided by both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of benefits for consumers from the protection against unfair commercial practices and unfair standard terms in contracts; [*Note: a relevant aspect in this context is whether the costs for consumers in exercising their rights under these directives are limiting these benefits or not.*]

In Portugal, the implementation of EU Directives based on minimum harmonisation has made it possible to grant more protection to consumers: as seen above, this was so for the UCTD (Decree-Law no. 446/85 includes four broad lists of unfair terms) or the PID (Decree-Law no. 138/90 extended the rules on indication of prices to services).

A consumer association also argues that the minimum harmonisation allows the legislator to go further in the protection of consumers and criticizes the full harmonisation approach in the UCPD.

A regulator does not share this view, as it emphasizes that full harmonisation guarantees that consumers have the same level of protection within the internal market. This perspective seems to focus on the market and not on the consumer.

- To what extent is there evidence for benefits for traders stemming from both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of creating a level playing field for honest traders by providing a legal basis to eliminate or at least constrain dishonest market practices, such as the use of unfair standard terms in contracts or unfair commercial practices, including through the application of the Injunctions Directive;

Portuguese implementation of EU Directives based on minimum harmonisation has granted an increased protection in B2B relations. This is particularly clear both for unfair commercial terms, since Decree-Law no. 446/85 also applies to B2B relations, and for misleading advertising, which is established in Decree-Law no. 57/2008 by reference to the broader concept of misleading actions.

Even in the case of UCPD (full harmonisation), Decree-Law no. 57/2008 applies partly to B2B relations, in order to protect SMEs.

However, one must take into account that a substantial number of traders operate at EU level. This is why business associations prefer a legal framework based on full harmonisation, with one of them adding that minimum harmonisation is especially problematic for cross-border trade and E-commerce.

- What are costs for traders due to the need to respect the requirements under the directives covered by the study? [*Note: Such as costs of research, legal advice and compliance as well as the amount of time necessary to comply with the directives*]

A business association argues that the lack of clarity in legislation results in litigation costs. The instability of the legal framework also leads to costs, since changes in internal procedures or in the production process require the acquisition of new equipment and the training of human resources. Bureaucracy also has significant costs, so legislation should be simplified.

For another business association, procedural costs are considerable and in many cases judicial fees serve as a deterrent to start judicial proceedings. Information costs do not seem to be relevant.

- What are the costs involved in the public enforcement of these rules?

Regulators and enforcement authorities have several costs with the enforcement of consumer law. These costs involve human and material resources, as well as investment in technical knowledge and in continuous training.

- Are there indications that the directives covered by the study are not implemented in your country in a cost-effective manner?
- Could the costs for implementing and enforcing the rules of the directives covered by the study be reduced without lowering the level of protection for consumers? If so, how?

It was not possible to gather any indication on these questions from the interviews. This is probably due to the fact that there is no numerical data on the concrete costs and benefits stemming from the implementation of EU Directives.

#### 1.4.2. Interplay with EU sector-specific consumer protection legislation

Regarding the interplay of the horizontal EU consumer legislation [mainly UCPD and UCTD] with EU sector-specific consumer protection legislation in the areas of electronic communications, passenger transport, energy and consumer financial services, please:

- Analyse the levels of awareness of the requirements of the horizontal EU consumer legislation (mainly UCPD and UCTD) of businesses and consumers and the specific public enforcement bodies in the relevant sectors, as in particular demonstrated by their practical application; [*Note: Elaborate based on stakeholder assessment. Key question here is: Are UCPD and UCTD applied in practice by national authorities and courts as a legal basis to combat unfair commercial practices and unfair standard terms in contracts in the regulated sectors?*]

The stakeholders' assessment of consumer awareness on the national legislation transposing EU Directives varies greatly. There is a perception that consumers are more aware of the rules on unfair contract terms. On the contrary, they seem to be unfamiliar with the legislation on unfair commercial practices, as several stakeholders still report receiving complaints about scams. Nevertheless, in the energy sector, some consumers are very conscious of the rules applicable to the social tariff for energy and gas.

As for traders, a regulator claims that they have a better knowledge of the sectoral legislation by comparison with horizontal rules. While a regulatory authority suggests that they are unfamiliar with the unfair commercial practices regime, another regulator argues traders have been developing training courses on this subject and, as a rule, know the applicable rules. A business association states that SMEs have little information about consumer law legislation and suggests that it is necessary to carry out initiatives aimed at informing both consumers and SMEs.



In what concerns regulators, the major complaint by a business association is not related to their knowledge of the legislation, but with the lack of application.

- Specify whether in your country the same authority is responsible for the enforcement of the horizontal EU consumer law 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 UCPD/UCTD in the regulated sectors, as specified in the previous bullet?*]

In Portugal, there are several authorities responsible for enforcing the horizontal rules. Sectoral legislation is enforced as follows:

Sector	Regulatory authority
Energy	Energy Services Regulatory Authority (ERSE)
Electronic communications	National Communications Authority (ANACOM)
Passenger transport	Mobility and Transports Institute (IMT)
Financial services	Bank of Portugal (BdP), Portuguese Insurance Institute (ISP) and (Securities and Exchange Commission)

Legislation	Enforcement authority
Unfair contractual terms (Decree-Law no. 446/85)	Not applicable, as this is a contractual matter
Unfair commercial practices (Decree-Law no. 57/2008)	Authority For Economic and Food Safety (ASAE) in the absence of a sectoral regulator
Price Indication (Decree-Law no. 138/90)	Authority For Economic and Food Safety (ASAE) in the absence of a sectoral regulator
Comparative Advertising (Decree-Law no. 330/90)	Directorate General for Consumers

A national authority criticizes this option, arguing that it affects consistency in the application of the legislation, as the regulators have different procedural rules, and suggests that a single point of enforcement should be created for consumer law.

The data collected in the interviews suggests that there are no formal coordination mechanisms in place between these authorities. However, the authorities that were interviewed admit using informal mechanisms, such as bilateral meetings or meetings within the Centre of Studies on Public Law and Regulation (CEDIPRE).

In a more general perspective, the different stakeholders have mixed feelings on how this coordination works: while some point to problems in specific areas (e.g., unfair commercial practices, complaints book), some regulatory and enforcement authorities do not detect any problems.

This is particularly so for business associations. One association emphasizes that there are no problems of lack of coordination between regulators. However, it also reports that sometimes, within the same authority, there are different interpretations of the same rule and, consequently, uncertainty as to the applicable rules.

On the contrary, another business association argues that there is a lack of coordination between regulators, partly due to the dispersion that underlies regulation



in Portugal, and that difficulties increase when the regulators are not subordinated to the same ministry.

- Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning contractual fairness, 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.?*]

The assessment on the combination between sectoral and horizontal legislation varies greatly.

For a regulatory authority, as a rule there is no need to articulate Decree-Law no. 57/2008 with sectoral legislation, since they are not applied simultaneously. In fact, this authority claims that the rules on unfair commercial practices are broader and, therefore, include more practices, while sectoral legislation sets out more detailed information duties. For this reason, each set of rules has a favoured scope. Another authority claims that there is a tendency to apply sectoral rules instead of horizontal legislation as a result of the dispersion of enforcement powers.

These statements point to the fact that sectoral regulators tend to apply almost exclusively sectoral legislation.

A consumer association points out that there are difficulties in combining the rules on unfair commercial practices and distance and off-premises contracts (namely, the right of withdrawal, its effects and consequences) with sectoral legislation applying to the energy sector.

A business association recognizes the importance of sectoral legislation, as some sectors have particularities that demand specific responses, but adds that sometimes it is hard to coordinate sector-specific rules with horizontal rules.

- What are the benefits of the complementary application of the UCPD and UCTD in the regulated sectors? What are the costs due to the complementary application with the sectoral EU consumer protection legislation?

As regulators tend to apply sectoral legislation instead of the UCT or UCP national legislation, it is unclear whether complementary application in fact exists.

Even so, a business association emphasizes that the existence of horizontal rules and sectoral legislation results in costs for traders. These rules should be coordinated, in order to avoid overlaps and conflicts.

- Assess any need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law.

Several stakeholders report that there are problems with the application of the rules on distance and off-premises contracts (CRD, implemented into national law by Decree-Law no. 24/2014) to the energy and electronic communications sector.

Specifically regarding the Directives included in this study, it would be important to clarify whether sectoral legislation may set out specific unfair commercial practices going beyond the UCPD. While this would allow considering the specificities of each (or some) sector, it is important to assess whether it could frustrate the full harmonisation approach.

### 1.4.3. Relevance of consumer law directives for consumer-to-business transactions

- Please analyse the need and potential for the application of the consumer law directives (mainly UCPD and UCTD) to 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).

In Portugal, the more frequent C2B relations involve the sale of used cars or gold (a practice which developed as a consequence of the economic crisis).

A consumer association stresses that consumer law is specifically aimed at B2C relations, which makes it difficult to consider its application, as a whole, to C2B relations. However, it recognizes the importance of extending some consumer law rules to both B2B and C2B relations.

On the contrary, an enforcement authority defends that it might make sense to grant a specific protection to consumers in C2B relations, even though they act as sellers.

Portuguese law has shown this concern for unfair contractual terms (Decree-Law no. 446/85 applies to C2B relations and, in a large part, to B2B relations) and for the sale of consumer goods (Decree-Law no. 67/2003 confers upon the seller a right of recourse against the producer in the event of lack of conformity).

### 1.4.4. Specific protection for vulnerable consumers

Please analyse:

- Whether the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined in the consumer law directives and relevant jurisprudence, and as applied by national authorities and courts in your country, continue to be valid and fit for purpose.

While EU Consumer Directives adopt, as a rule, a narrow definition of consumer (excluding legal persons), the Portuguese Consumer Protection Act relies on a broad notion of consumer. Article 2, no. 1, Law no. 24/96, provides that consumer is anyone that acquires goods, services or rights outside the scope of a professional activity from someone acting within a professional activity aimed at obtaining profits. Under this definition, an association (legal person) may be a consumer if it concludes the contract for its daily activity.

In the interviews, there was a clear division between stakeholders on the possibility of including micro-enterprises or self-employed professionals on an even broader notion of consumer.

Some regulators and a business association defend this perspective, arguing that sometimes their vulnerability brings them closer to consumers than to traders. A regulatory authority adds that in its sector the legislation protects the user, which includes all persons, irrespective of the destination (professional or private) of the service that is provided.

However, a consumer arbitration centre and a consumer association stress that such an option could jeopardize the concept of consumer, although recognizing that micro-enterprises or self-employed professionals must be protected by other means.

- To what extent the existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers and whether, based on the experiences in your country, specific provisions should be introduced in other directives concerned, in particular the Unfair Contract Terms Directive.

The concept of vulnerable consumer set out in Decree-Law no. 57/2008 includes mental or physical infirmity, age or credulity [article 6, par. a)] but does not mention economic vulnerability. In fact, economic vulnerability is only relevant in the energy

sector, where Decree-Laws no. 138-A/2010 and 101/2011 (social tariff for electricity and gas, respectively) use the concept of “economically vulnerable final customers” as a basis for a discount in energy tariffs.

Once again, stakeholders have contrasting opinions on the importance of economic vulnerability in unfair commercial practices.

An enforcement authority stresses that the special protection for vulnerable consumers should not be extended to cases of economic vulnerability. A national authority and a business association take the opposing view. A consumer association defends that consumers are, by definition, vulnerable. According to this association, protection should be increased for essential public services (water, electricity, electronic communications, among others) and financial services; in all other cases (including unfair contractual terms), the key element should be the consumer’s level of information.

#### 1.4.5. EU added value

- Overall, would you consider that protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in your country since the implementation of the UCPD and the UCTD in national legislation?

Decree-Law no. 446/85 was approved prior to the UCTD and already conferred a high level of protection to both consumers and traders in contracts with general contract terms, by setting out requirements for the inclusion of a term in a contract, lists of unfair commercial terms and an injunction procedure. The implementation of the UCTD broadened its scope of application to pre-formulated standard terms, which meant a higher level of protection in these cases.

On the contrary, national legislation had no specific rules for unfair commercial practices, thus making it necessary to apply the general rules of the Civil Code or other consumer legislation. The UCPD, implemented by Decree-Law no. 57/2008, increased the consumers’ level of protection.

A consumer association considers Decree-Law no. 57/2008 as an essential piece of legislation, since it applies to situations where the problem is not in the good or service that is provided, but rather in a commercial practice. This association adds that the experience gathered from injunction procedures based on an unfair commercial practice is very positive. Its experience with the unfair commercial terms regime is also relevant and globally positive.

An enforcement authority states that the legal framework for misleading advertising seems to have improved with Decree-Law no. 57/2008, even though the Advertising Act already protected consumers sufficiently.

However, some stakeholders are less enthusiastic about Decree-Law no. 57/2008. A regulator argues that the substantial reduction of complaints received in 2014 and 2015 (between 17% and 37%, depending on the subject-matter) is more related to the specific dynamics of the market and less to the application of the rules on unfair commercial practices. Another national authority adds that the effect of EU Directives is mainly indirect (traders voluntarily comply with the legislation) since the lack of awareness by consumers limits a direct impact.

- Overall, would you consider that the information of consumers regarding unit prices has improved since the implementation of the PID in national legislation?

Decree-Law no. 138/90 confers a high level of protection to consumers concerning price indication. Among other aspects, it has a specific provision on the indication of prices in services contracts (article 10). This article sets out that prices must be indicated through lists or posters in the business premises; when there are numerous services with different clauses, the indication may be included in a catalogue. If the service is provided hourly or by task, the price shall be indicated per hour or per task.

The PID was implemented into national legislation through minor amendments to Decree-Law no. 138/90.

A national authority argues that the PID should be extended to services contracts, in order to create consistency between the legislation of EU Member-States and, consequently, to better promote the internal market. A consumer association notes that the existence of several EU Directives applying to price indication has rendered the PID less important.

- Overall, would you consider that the protection of businesses against unfair marketing in your country has improved since the implementation of the MCAD in national legislation?

In Portugal, comparative advertising is an unusual practice and, as rule, it complies with the rules of the Advertising Act.

A business association emphasizes that the positive effects on costs and certainty as to the legal framework that stem from the full harmonisation envisaged by the EU Directives are thwarted by the lack of application and supervision of the national legislation and also by the lack of punishment for violations to these rules. This situation seems to be a consequence of several factors, including costs, lack of knowledge and lack of coordination between regulators.

- Overall, would you consider that it has become easier for businesses in your country to directly trade cross-border to final consumers located in other EU countries in recent years? Has it become easier for consumers in your country to directly purchase cross-border from traders located in other EU countries?

EU Directives on consumer law have played an important role in providing for a more clear and consistent legal framework. This is considered essential for the development of cross-border trade.

Although not all Directives are based on full harmonisation, which means that the legal framework is not uniform, and despite the problems detected by business associations in both the application and quality of national legislation, the differences between the Member-States' legislation seem to be reducing. If this is so, a growth in cross-border trade should be expected.

The Flash Eurobarometer 396 on Retailers' Attitudes towards Cross-Border Trade and Consumer Protection (conducted between March and April 2014) shows that Portuguese traders report a percentage of cross-border transactions that is within EU average: 29%.<sup>43</sup>

On the contrary, there seems to be some problems on the consumers' side. The Flash Eurobarometer 397 on Consumer Attitudes towards Cross-Border Trade and Consumer Protection (conducted in April 2014) shows that Portugal is one of the countries with the lower percentage of purchases made via the Internet (only 38%), which is the main channel for cross-border trade. Cross-border trade through other channels is only 7%.<sup>44</sup>

<sup>43</sup> *Flash Eurobarometer 396 on Retailers' Attitudes Towards Cross-Border Trade and Consumer Protection*, 2015, TNS Political & Social.

<sup>44</sup> *Flash Eurobarometer 397 on Consumer Attitudes Towards Cross-Border Trade and Consumer Protection*, 2015, TNS Political & Social.

- To what extent are these improvements, if any, due to the mentioned directives?

Most stakeholders seem to agree that consumer law legislation has improved following implementation of the EU Directives included in this study.

It is important to stress that Portugal already had very advanced legislation in some areas: for example, Decree-Law no. 446/85 created a special regime for some unfair contractual terms, Decree-Law no. 138/90 provided for a wide-ranging obligation to indicate the prices and Law no. 24/96 contained special procedural provisions for injunction procedures.

## Annex

## A. Transposition fact sheet

**Table 1: Fact sheet on transposition of directives in Member States' law – Portugal**

Directive	Transposition legislation (National law, Article)	Comments	Specific provisions going beyond minimum harmonisation requirements/use of exemptions	Included in national legislation		Comments
<b>Directive 93/13/EEC on unfair terms in consumer contracts</b>	Decree-Law no. 446/85 (October 25), amended by Decree-Laws no. 220/95, 249/99 and 323/2001.	UCT national legislation is prior to the Directive.	'Black list' of terms considered unfair in all circumstances	Yes	Articles 18 and 21, Decree-Law no. 446/85.	<i>Articles 18 and 19 apply to all contracts, while articles 21 and 22 are limited to B2C, C2B and C2C contracts.</i>
		Initially, it was only applied to general contract terms.	'Grey list' of terms which may be considered unfair	Yes	Articles 19 and 22, Decree-Law no. 446/85.	
		The Directive was implemented through two amendments to the national	Extension of the application of Directive to individually negotiated terms	No	Article 1, no. 2, Decree-Law no. 446/85.	<i>UCT national legislation is limited to pre-formulated standard contracts and to general contract terms.</i>
			Extensions of the application of Directive terms on the adequacy of the price and the main subject-matter	Yes	Article 1, Decree-Law no. 446/85	<i>UCT national legislation was not amended to exclude these aspects.</i>

		legislation.				
<b>Directive 93/13/EEC on unfair terms in consumer contracts</b>			Application to B2B contracts	Yes	Article 1, Decree-Law no. 446/85.	<p><i>The scope of application of the UCT national legislation does not draw a distinction between B2C and B2B contracts.</i></p> <p><i>The lists of unfair terms in articles 21 and 22 do not apply to B2B contracts.</i></p>
			Exclusion of contract terms based on mandatory provisions or on provisions or principles of international conventions	Yes	Article 3, pars. a) and b), Decree-Law no. 446/85.	<p><i>Some authors defend that the exclusion does not apply to some mandatory rules on the inclusion of standard terms into a contract<sup>45</sup>.</i></p>
			Exceptions for certain contract terms used by suppliers of financial services	Yes	Article 22, no <sup>s</sup> . 2 and 3, Decree-Law no. 446/85	<p><i>The lists implements annex II to the UCTD with one exception [par. a)].</i></p> <p><i>These exceptions do not apply to B2B contracts.</i></p>
			Application of the transparency principle to all contracts	Yes	Article 5, Decree-Law no. 446/85	<p><i>Contract terms shall be communicated in an appropriate and timely manner, considering the relevance of contract and the complexity of the terms.</i></p>

<sup>45</sup> Jorge Morais Carvalho, *Manual de Direito do Consumo*, 2016, pp. 71-72.



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			Contractual consequences associated to the use of intransparent terms.	Yes	Article 8, par. a), Decree-Law no. 446/85	<i>Intransparent terms are not included in the contract.</i>
			<i>Erga omnes</i> effect of the decision establishing the unfairness of a contract term	Limited	Article 32, no. 2, Decree-Law no. 446/85	<i>The effect of the decision is limited to contracts concluded with the trader concerned.</i>  <i>Other traders that use similar contract terms are not bound by the decision.</i>
<b>Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market</b>	Decree-Law no. 57/2008 (March 26), amended by Decree-Law no. 205/2015.	Prior to the Directive, there were no specific rules for unfair commercial practices.	Provisions on financial services going beyond minimum harmonisation requirements	Yes	Specific legislation of the financial sector	<i>Commercial practices that are not set out in the UCPD.</i>  <i>Misleading actions and omissions.</i>  <i>Aggressive practices</i>
			Provisions on immovable property going beyond minimum harmonisation requirements	Yes/No		<i>No data available.</i>
		UCP national legislation was amended in 2015 so as to include some protection for B2B relations.	Contractual consequences of unfair commercial practices	Yes	Article 14, no. 1, Decree-Law no. 57/2008	<i>The contract is voidable on the initiative of the affected party.</i>
			Application of UCP national legislation to B2B transactions	Yes	Article 7, no. 3, Decree-Law no. 57/2008	<i>Some misleading practices (e.g. concerning the trader's identity, the price or the object of the contract) are extended to B2B contracts.</i>

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<b>Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers</b>	Decree-Law no. 138/90 (April 26), amended by Decree-Law no. 162/99.	PI national legislation is prior to the Directive.	Extension of the application to other sectors (e.g. for immovable property)	No				
			Application to services contracts	Yes	Article 10, Decree-Law no. 138/90	<i>PI national legislation sets out a few specific rules for the indication of prices in services contracts.</i>		
			Application to products supplied in the course of a provision of a service	No	Article 4, no. 1, par. b), Decree-Law no. 138/90			
				The Directive was implemented through an amendment to national legislation.	Application to sales by auction or to sales of works of art and antiques	No	Article 4, no. 1, par. e), Decree-Law no. 138/90	
					Exclusion of the obligation to indicate the unit price where it is not useful or may lead to confusion	Yes	Article 4, no. 2, Decree-Law no. 138/90	<i>PI national legislation includes a list of products that do not have to indicate the unit price (e.g. products sold in quantities below certain limits or by the piece and different products sold in the same package).</i>
					Exclusion of the obligation to indicate the unit price where it represents an excessive burden to small retail	No		
					Narrow definition of consumer	No	Article 2-1, Law no. 24/96 (July 31)	<i>Both legal and natural persons may be qualified as consumers as long as the goods or services are not used for business purposes.</i>

<b>Directive 2006/114/EC concerning misleading and comparative advertising</b>	Decree-Law no. 330/90, (October 23), amended by Decree-Laws no. 275/98 and no. 57/2008.	Decree-Law no. 330/90 set out a definition of misleading advertising.	Definition of misleading advertising going beyond minimum harmonisation	Yes	Article 11, no. 1, of Decree-Law no. 330/90	<i>MA national legislation relies on the UCPD's definition of misleading actions, which is broader.</i>
	Decree-Law no. 57/2008 (March 26), amended by Decree-Law no. 205/2015.	That definition was amended with the implementation of both the MCAD and the UCPD.			Article 7, Decree-Law no. 57/2008.	<i>This definition applies to both B2C (directly) and B2B contracts (by virtue of article 11, no. 1, of Decree-Law no. 330/90).</i>
	Decree-Law no. 330/90 (October 23), amended by Decree-Laws no. 275/98 and no. 57/2008.		Definition of comparative advertising in accordance with the Directive	Yes	Articles 16 and 43, Decree-Law no. 330/90	
	Decree-Law no. 57/2008 (March 26), amended by Decree-Law no. 205/2015.		Application of the regime on comparative advertising to consumers	Limited	Article 7, no. 2, par. a), Decree-Law no. 57/2008.	<i>In B2C transactions, comparative advertising is only prohibited when it causes confusion with any goods or services, trade marks, trade names and other distinguishing marks of a competitor.</i>
			Other rules protecting B2B transactions	Yes	Article 1, Decree-Law no. 446/85  Article 7, no. 3, Decree-Law no. 57/2008	<i>The UCT national legislation includes B2B contracts.</i>  <i>The UCP national legislation applies to some misleading practices in B2B contracts.</i>

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<b>Directive 2009/22/EC on injunctions for the protection of consumers' interests</b>	Law no. 25/2004					
	Law no. 24/96 (Consumer Protection Act – CPA)					
	Decree-Law no. 446/85					

**Table 2: Fact sheet on Injunctions Directive –Portugal**

Issue	Answer	Comments
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)?	Yes, separate procedures in separate legal acts	<p><i>Law no. 25/2004 (July 8) implemented into national law the ID.</i></p> <p><i>The injunction procedure is set out in separate legislation:</i></p> <p><i>a) Law no. 24/96 (Consumer Protection Act – CPA) applies to all cases not covered by specific legislation.</i></p> <p><i>b) Decree-Law no. 446/85 covers unfair commercial terms.</i></p> <p><i>Decree-Law no. 446/85 only applies when there is no specific provision on the CPA.</i></p>
Who is entitled to bring an action seeking an injunction?	<p>National injunctions</p> <ul style="list-style-type: none"> <li>- Designated public bodies (Prosecutor's Office and Directorate-General for Consumers);</li> <li>- Consumer associations;</li> <li>- Trade associations;</li> <li>- Individual consumers.</li> </ul> <p>Cross-border injunctions</p> <ul style="list-style-type: none"> <li>- Designated public bodies (Prosecutor's Office and Directorate-General for Consumers);</li> <li>- Consumer associations included in a list notified to the European Commission.</li> </ul>	<p><i>National injunctions</i></p> <p><i>Article 13, CPA and article 26, no. 1, Decree-Law no. 446/85.</i></p> <p><i>Cross-border injunctions</i></p> <p><i>Articles 3 to 5, Law no. 25/2004.</i></p>
<p>Is the injunction procedure a court or an administrative procedure?</p> <p>If your country legislation foresees both forms of the procedure, please explain in the comments column for which infringements the court or administrative procedure is foreseen</p>	Court procedure.	<p><i>Article 11, CPA.</i></p> <p><i>In some sectors, a draft of the contracts must be deposited with the regulatory authority. The powers of the regulatory authorities in this regard are unclear.</i></p>

<p>Who bears the costs of an injunction procedure? If qualified entities (or some of their categories e.g. consumer organisations are entitled to an exemption of some/all cost related to the procedure please explain the characteristic of such exemption in the comments column.</p>	<p>Consumer associations and consumers - The costs are as a rule borne by the losing party.</p> <p>Designated public bodies - Exemption from court costs.</p>	<p><i>Article 25, no. 1, Decree-Law no. 34/2008 (February 26) repealed all previous exemptions.</i></p> <p><i>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).</i></p>
<p>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?</p>	<p>Yes, scope of application extended to cover consumer law in general</p>	<p><i>Article 2, no. 2 of Law 25/2004.</i></p> <p><i>The injunction procedure applies to any practice that violates consumers' rights.</i></p>
<p>Is protection of business' interests covered by the injunctions procedure? If scope of application extended to the protection of business' interests, please provide details in the comments column regarding type of business' interests covered by the injunctions procedure</p>	<p>Yes, but only in the UCT national legislation.</p>	<p><i>The injunction procedure set out in the UCT national legislation may be used in B2B relations.</i></p> <p><i>In this case, the trader is not entitled to start proceedings.</i></p>
<p>Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations</p>	<p>Yes</p>	<p><i>Article 27, no. 2, Decree-Law no. 446/85 (for UCT) and articles 36 and 37, Civil Procedure Code (CPC), for all other cases.</i></p>
<p>Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID)</p>	<p>No</p>	
<p>Has your Member State taken specific measures regarding the prior consultation (Article 5 of the Injunctions Directive)?</p>	<p>No such requirement</p>	
<p>Does the national legislation provide for measures ensuring summary procedure? Please specify main characteristics of the procedure (subject matter/time limits) in the comments column.</p>	<p>The law does not set out any summary procedure for injunctions.</p>	<p><i>Article 548, CPC, repealed all existing rules referring to summary proceedings.</i></p> <p><i>The judge may use case management powers to adapt the pace or structure of proceedings to the case at hand (article 547, CPC).</i></p>
<p>Are there sanctions for non-compliance with the injunction order (Article 2(1) of the Injunctions Directive)? If sanctions in form of penalty or fine foreseen please specify in the comments column to who exactly should they be paid</p>	<p>Yes, penalty of a fine for each day of non-compliance (periodic penalty payment).</p>	<p><i>Article 10, no. 2, CPA.</i></p> <p><i>The fine is divided in equal parts between the State and the applicant.</i></p>
<p>Has your Member State taken specific measures regarding the publication of the decision and/or the publication of a corrective statement?</p>	<p>Yes</p>	<p><i>The decision is published automatically (article 11, no. 3, CPA).</i></p>

<p>Is it possible to claim within the injunction procedure for sanctions for the infringement?</p> <p>Can an action for damages or redress to be paid to the consumers concerned be brought within the injunction procedure?</p>	<p>Yes (civil liability)</p>	<p><i>Article 22, pars. 1 to 3, Law no. 23/95 (class actions).</i></p> <p><i>Article 483 and following, Civil Code (non-contractual liability).</i></p> <p><i>Articles 798 and following, Civil Code (contractual liability).</i></p>
<p>Can an action for the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to other beneficiary be brought within the injunction procedure?</p>	<p>No</p>	
<p>Can an action for damages to be paid to the qualified entity or the public purse be brought within the injunction procedure?</p>	<p>No</p>	
<p>Can individual consumers base their individual claims for damages/remedies on the injunctions order?</p>	<p>Yes, but only when unfair contract terms are concerned.</p>	<p><i>The counterpart may raise the decision on the unfairness of the contract term as an incidental question in future proceedings against the trader concerned (article 32, no. 2, Decree-Law no 446/85).</i></p>
<p>Can the qualified entity claim other measures beyond the injunction, e.g. evidence of compliance with the judgment?</p>	<p>No</p>	<p><i>Qualified entities may apply for a provisional prohibition to use certain contract terms (article 31, Decree-Law no. 446/85).</i></p> <p><i>However, this procedure is independent from the injunction procedure.</i></p>
<p>Are the effects of individual injunctions orders extended to the future infringements and/or same or similar illegal practices (of other traders)?</p>	<p>Yes (trader concerned)</p> <p>No (other traders)</p>	<p><i>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).</i></p>



## B. Data tables

*Number of B2C disputes*

Please indicate how many B2C disputes have been decided in your country on the basis of consumer law directives covered by this study (UCPD, UCTD, PID) as a proportion of the total number of B2C disputes decided on the basis of other national consumer legislation (based on statistics, or based on estimates by enforcement authorities and other stakeholders, where this is not the available).

**Table 3: B2C disputes decided on the basis of consumer law directives covered by this study in comparison with total B2C disputes decided on the basis of other legislation (most recent year for which data is available)**

Year	Type of data	Total number of B2C disputes (number of cases)	Share of B2C disputes decided on basis of ...					Comments
			UCPD	UCTD	PID	other EU consumer protection legislation (e.g. CRD, Sales Directive, sectoral legislation)	national consumer legislation not based on EU directives	
2015	Estimation (court procedures)	1 000	1%	40%	0%	39% (mainly Sales Directive and Consumer Credit Directive)	20% (mainly services of general interest)	Most consumer cases in Portuguese courts are related with unfair contract terms, sale of consumer goods and consumer credit.
2015	Estimation (ADR, incl. Peace Courts)	15 000	5%	15%	0%	20% (mainly Sales Directive)	60% (mainly services of general interest)	The high number of cases related to services of general interest (v.g., water, electricity or electronic communications, among others) may be explained by the rule that imposes arbitration on the trader for these disputes (Article 15, Law no. 23/96).

*Costs of obtaining redress for a hypothetical case of invoking unfairness of a standard contract term*

- Please estimate the costs, including time, for consumers in obtaining redress when invoking the unfairness, and thereby the non-binding character of standard contract terms in a contract they concluded. Please provide the estimate for the hypothetical example below, focusing on costs (and needed time) of a lower court procedure and the use of ADR or other relevant procedure (if applicable).<sup>46</sup>

**Table 4: Estimate of costs for consumers in obtaining redress when invoking the unfairness of standard contract terms in a contract they concluded (for the hypothetical example provided in the box below)**

Redress mechanism	Estimated court fees (national currency)	Estimated lawyer's fees (national currency)	Other costs, if any (national currency)	Estimated time involved for consumer (hours)	Comments
<b>Court procedure</b>	EUR 204 (each party). The court fees may be returned (totally or partially) to the winning party.	As a rule, no lawyer would be needed unless the case is worth EUR 5000 or more, but it is preferable to have one  Officially-appointed lawyers: EUR 204  All other cases, no less than EUR 500	Additional payments may be needed for some procedural issues and appeals.	+50 hours	+1 year to a decision
<b>Peace Courts</b>	EUR 35 (each party). The court fees may be returned (totally or partially) to the winning party.	As a rule, no lawyer is needed	-	10 to 20 hours	2/3 months to a decision
<b>Consumer ADR</b>	Mediation: from EUR 0 to EUR 10 (each party) Arbitration: from EUR 0 to EUR 40 (each party) The fees depend on the Centre; most centres are free of charges.	No lawyer is needed	-	5 to 10 hours	1/2 months to a decision

<sup>46</sup> For the hypothetical example it is assumed that both the provider and the consumer are located in your country.

**Hypothetical example: Terms which inappropriately exclude/limit consumers' rights to compensation**

*A consumer went on a package holiday with a friend to Kenya for which they paid € 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 €5,000 (€4,000 for the cost of the package and €1,000 for lost time and enjoyment). The tour operator agreed to compensate them €1,000 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/unfair-contract-terms/index\\_en.htm](http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-contract-terms/index_en.htm)]*

- Please estimate how often court and ADR procedures are used in your country for invoking the unfairness, and thereby the non-binding character of standard contract terms (i.e. the number of cases per year)?

The unfairness of standard contract terms is often invoked before Portuguese courts. Our estimation points to 80 cases per year. In analysing this data, it is important to consider that the rules on unfair contractual terms (Decree-Law no. 446/85) apply to all contracts and not only consumer contracts.

It is less common for the unfairness of standard contract terms to be invoked in consumer ADR procedures. This is probably due to the fact that consumers are not represented by lawyers in these procedures. In the interviews, a consumer arbitration centre confirmed receiving a substantial number of complaints on Decree-Law no. 446/85, but added that the majority was related to contractual transparency. We would estimate 60 cases per year related to unfair contractual terms.

## C. Interviews conducted and literature reviewed

**Table 5: Interviews conducted for this study**

Organisation	Stakeholder type	Date
<b>Directorate General for Consumers (DGC)</b>	National consumer enforcement authority	June 30, 2016
<b>Energy Services Regulatory Authority (ERSE)</b>	National regulatory authority (energy)	June 28, 2016
<b>National Communications Authority (ANACOM)</b>	National regulatory authority (electronic communications)	July 1, 2016
<b>Directorate General for Consumers (DGC)</b>	National enforcement authority (advertising)	July 12, 2016
<b>Authority for Economic and Food Safety (ASAE)</b>	National enforcement authority	June 22, 2016
<b>European Consumer Centre – Portugal</b>	European Consumer Centre	June 20, 2016
<b>Portuguese Association for Consumer Protection (DECO)</b>	Consumer organisation	June 21, 2016
<b>Portuguese Commerce and Services Confederation</b>	Business Association	July 7, 2016
<b>Portuguese Association of Distribution Companies</b>	Business Association	July 8, 2016
<b>Arbitration Centre for Consumer Disputes of Lisbon</b>	Consumer Arbitration Centre	July 12, 2016

**Table 6: Literature reviewed for country report**

Author/Source	Year	Title of publication
Almeno de Sá	2001	<i>Cláusulas Contratuais Gerais e Directiva sobre Cláusulas Abusivas</i> (Almedina, Coimbra)
Ana Maria Guerra Martins	2002	“O Direito Comunitário do Consumo” (Estudos do Instituto de Direito do Consumo, vol. I)
Ana Prata	2010	<i>Contratos de Adesão e Cláusulas Contratuais Gerais</i> (Almedina, Coimbra)
António Pinto Monteiro	1986	“Contratos de Adesão” (Revista da Ordem dos Advogados, ano 46)
António Menezes Cordeiro	2005	Tratado de Direito Civil Português, Vol. I, Tomo I (Almedina, Coimbra)
Cláudio Petrini Belmonte	2003	A Redução do Negócio Jurídico e a Protecção dos Consumidores (Coimbra Editora, Coimbra)
Civic Consulting	2011	<i>Study on the Application of Directive 2005/29/EC on Unfair Commercial Practices in the EU</i>
Filipe Vaz Pinto	2007	“Os Limites à Liberdade de Estipulação em Matéria de Denúncia” (Sub Judice, n.º 39)
Hugo Ramos Alves	2012	“Nótula sobre a Venda à Distância” (Liber Amicorum Mário Frota, Almedina, Coimbra)
Joaquim de Sousa Ribeiro	2005	“O Controlo do Conteúdo dos Contratos” (Revista da Faculdade de Direito da Universidade Federal do Paraná, n.º 42)
Joaquim de Sousa Ribeiro	2003	<i>O Problema do Contrato</i> (Almedina, Coimbra)
José de Oliveira Ascensão	2000	“Cláusulas Contratuais Gerais, Cláusulas Abusivas e Boa Fé” (Revista da Ordem dos Advogados, ano 60)
José Manuel de Araújo Barros	2010	<i>Cláusulas Contratuais Gerais</i> (Coimbra Editora, Coimbra)
Jorge Morais Carvalho	2016	<i>Manual de Direito do Consumo</i> (3 <sup>rd</sup> ed., Almedina, Coimbra)
Jorge Pegado Liz	2005	“A «Lealdade» no Comércio ou as Desventuras de uma Iniciativa Comunitária” (Revista Portuguesa de Direito do Consumo, n.º 44)
Jorge Pegado Liz	2014	“Práticas Comerciais Proibidas” (Estudos do Instituto de Direito do Consumo, vol. IV)
Luís Silveira Rodrigues	2003	“Tendências Recentes sobre a Protecção do Consumidor na União Europeia” (Estudos de Direito do Consumidor, n.º 5)
Mário Júlio de Almeida Costa	1999	<i>Síntese do Regime Jurídico Vigente das Cláusulas Contratuais Gerais</i> (Universidade Católica Editora, Lisboa)
Pedro Caetano Nunes	2011	“Comunicação de Cláusulas Contratuais Gerais” (Estudos em Homenagem ao Professor Doutor Carlos Ferreira de Almeida, Vol. II, Almedina, Coimbra)
Sara Fernandes Garcia	2014	<i>As Práticas Comerciais Desleais</i> (photocopied text)
TNS Political & Social	2015	<i>Flash Eurobarometer 397 on Consumers’ Attitudes Towards Cross-Border Trade and Consumer Protection</i>
TNS Political & Social	2015	<i>Flash Eurobarometer 396 on Retailers’ Attitudes Towards Cross-Border Trade and Consumer Protection</i>
Yara Miranda	2007	“As Cláusulas Contratuais Abusivas em Matéria de Relações de Consumo” ( <i>Direito Privado e Direito Comunitário – Alguns Ensaios</i> , Âncora, Lisboa)

## 1. Study to support the Fitness Check of EU Consumer law – Country report ROMANIA

### 1.1. Unfair commercial practices and marketing

#### 1.1.1. Effectiveness of the UCPD in establishing a high level of consumer protection

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

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

Implementation of the UCPD by Law 363/2007 is rather more formal than functional in Romania. Interpretation of the principle-based provisions of the UCPD is left to the implementing authority (National Consumer Protection Authority-NACP) and the courts. Although, no detailed legal provisions were enacted to assist the enforcement of the principle-based UCPD, the authorities did not signal significant interpretation problems in connection to the UCPD because of its principle-based approach.

Nevertheless, consumer associations have a different opinion, although they could not report significant practical experience on the UCPD. Consumers perceive it to be difficult under the principle-based approach to identify the unfair practice. It was emphasized that consumers prefer to opt for administrative enforcement rather than going to court when they feel harmed by a commercial practice. They proceed in this way because they consider the practice unfair in a general sense, not because they can identify the technical legal infringement and know their rights under the UCPD. This was also confirmed by the NACP, which usually receives complaints that do not indicate the legal basis of the claim, but only describe the potential 'offence' committed by the business entity against the consumer. It was further mentioned that the consumers are more interested in the contractual consequences of the unfair commercial practice and not in the factors leading to unfairness, despite the strong interplay of the two. It is rare that, subsequent to an administrative investigation, individual consumers go to court against infringing companies to ask for damages, upon identifying themselves as victims of the unfair commercial practice.

The administrative decisions of the NACP against the infringing companies are not made public on the website of the authority, only press releases and other studies on the investigations conducted under the UCPD are available to consumers. However, Law 363/2007 provides in Article 12(3) (among the sanctions) for the publication in a largely distributed newspaper of what the infringement has cost the infringing company. In most cases the consumers remain passive to such news – they do not identify themselves as affected by the unfair practices.

Conflicting case law was also mentioned as discouraging consumers from enforcing their rights. However, the interviewed consumer associations could not recall any collective action initiated in the past on the basis of the UCPD, as the focus of their efforts in assisting consumers is mostly on unfair contract terms law. It seems that from a consumer point of view, it is rather a task for the authorities to intervene in the field of unfair commercial practices. Consumers do not have an active role in enforcement through private law suits.

On the contrary, the business sector is satisfied with the general approach of the UCPD. It was mentioned that marketing practices change so quickly that it is better to have principle-based rules. The business sector does not see need for more regulation at European level or more detailed national implementing rules on the UCPD. However, no cases can be reported when business associations made use of administrative enforcement against their competitors at the central enforcement authority. On the basis of the extremely low number of administrative complaints or court cases initiated by consumers, competitors or by consumer associations it can be assumed that the market seems not to be reacting often enough to unfair practices.

Unfair commercial practices are an issue concerning consumers primarily and the institutional framework on the enforcement of the UCPD supports this.

The NACP is the central enforcement authority where complaints may be submitted not only by consumers and empowered entities to act in the interest of the consumers (Article 10, para. 1), but also by business entities (Article 10, para.2). However, the NACP has no special procedure on complaints submitted by business entities, these being considered rather simple notifications of the NACP upon which it may start the investigation of the case in the interest of the consumers. The NACP made mention of such complaints, but it keeps no separate record of the number of the inquiries coming from business entities. It also mentioned that, if it is in the interest of consumers, it could extend its competence also to B2B relations in which small and medium size enterprises are involved. However, the Ministry of Economy remains in charge of these relations, small and medium size enterprises being not considered as the weaker party vis a vis other larger business entities. In line with its concern for entities other than individual consumers, the NACP extended its competence to housing cooperatives.

The NACP considers the principle based approach as suited to the purpose of the policy aim it pursues. However, the NACP mentioned during the interview that in the view of its staff, the previous directives based on a vertical approach and more detailed rules were easier to apply in practice, whereas especially during the first years of implementation they had difficulties to 'circumstantiate' the principle based rules of the UCPD to the concrete case. Today the NACP has more expertise and more practical experience to handle the principle based approach.

Since in the field of unfair commercial practices private enforcement is weak in framing legal compliance, the NACP remains the main and only actor with an impact on companies' behaviour in the field of unfair commercial practices. Thus effectiveness of enforcement may be assessed mainly on the basis of the activity of the NACP which has extensive competencies to impose sanctions. It can stop the incorrect practice under the sanction of enforcement penalties, may impose fines, and as a complementary sanction it may also order the suspension of the activity of the infringing company until it stops the incorrect practice (Article 15). It can also initiate court action against the company if the public interest justifies such a measure (Article 10, para. 1). In addition Law 51/2016 reinforced the contractual consequences for unfair commercial practices. According to Article 12 of this law, the business entity concerned must pay back to the consumer the price of the goods and services contracted as a result of the unfair commercial practice. However, consumer organisations have complained, fines and enforcement penalties were low in Romania and due to this, the impact of the UCPD on the market behaviour of business entities is low. In 2015 the legislature reacted to this problem and Law 33/ 2015 raised the level of fines and enforcement penalties. Whereas in the past for misleading commercial practices, the NACP could impose fines from RON 3 000 [approx. EUR 665] up to RON 30 000 [approx. EUR 6 647],<sup>1</sup> these were increased to RON 5 000 – 100 000 [approx. EUR 1108 – 22 155], the upper level being more than three times more than before. Non-compliance with the measures imposed by the NACP, can lead to fines ranging from RON 6 000 – 600 000 [approx. EUR 1329 – 132 930]. For aggressive practices separate higher fines were introduced in 2015. These ranged from RON 2 000 to 100 000 [approx. EUR 443 to 22 155]. In 2016 this system was amended by Law 51/2016, which in Article 17 refined the level of fines function of the annual turnover of the business entity and the number of employees. Thus for misleading practices and non-compliance with the sanctions imposed by the NACP the fines range now from RON 2 000 to 10 000 [approx. EUR 443 to 2 215] for companies with less than 9 employees and net annual turnover less than EUR 2 000 000; RON 3 000 to 50 000 [approx. EUR 665 to 11 077] for companies with 10-49 employees and net annual turnover less than EUR 50 000 000; and RON 5 000 to 100 000 [approx. EUR 1108 to 22 155] for larger companies. The

<sup>1</sup> The official exchange rate of the National Bank of Romania on September 20, 2016 for 1 EUR was 4.45 RON.



enforcement penalties for non-compliance with the measures of the NACP as well are established on the basis of number of employees and the annual net turnover of the infringer company.

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

All interviewed entities (NACP, specialised regulatory authorities in the field of communications and energy services, business organisations and consumer associations) share the view that the black list of the UCPD helps enforcement. For the NACP it would be useful if such lists would be more often updated at European level, based on an institutionalised exchange of data and networking among the national central implementing authorities in order to let them to react quickly onto the fast changing marketing techniques that spread cross-border within the EU.

Business associations consider that such updated lists would assure more predictability and would enhance legal certainty under the principle-based approach. Consumers also align to this approach, stressing that consumer awareness is not as low as in general, when it comes to the examples of the black list of the national implementing law. However, they need to be informed about that list, and that list should be often updated by the authority, to keep track with the developments in commercial practices. However, one consumer association remarked that the average consumer cannot distinguish between a correct and incorrect commercial practice even if informed; consumers suffer from information asymmetry mainly due to the technicality of information not because of a lack of information. They go to the authority or to a consumer association when they perceive that practice to be incorrect, not because they are aware of their rights under the UCPD or they recognize a practice as unfair on the basis of the black list. The NACP also confirmed that consumers do not identify on the basis of the black list the infringing behaviour of the company they complain at the authority; they simply describe the act of the company. Publicity may help consumer awareness, as well as the publication of the administrative decision in a national newspaper that is the main channel of information for consumers, but consumer associations have no financial resources to conduct large campaigns even upon major cases on unfair commercial practices. Here as well the consumer association mentioned the information asymmetry problem of the consumer even when it has the information, since it will be not able to identify the information due to a lack of market skills. Thus the black list helps primarily the administrative enforcement authority.

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

Implementation of the UCPD is formalistic in Romania. Romania did not make use of the possibility to introduce higher level of protection where the Directive would have allowed, thus has not yet exploited the minimalistic approach of the Directive to the benefit of its consumers.

- 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 what 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?*]

This type of marketing practice concerns primarily the cleaning service sector in Romania. An assessment conducted in 2011 by the NACP on the compliance of cleaning services with Article 6 (1) a) and b) of the UCPD revealed that consumer claims are insignificant, although the number of infringements is high. The market surveillance concerned 565 cleaning services companies out of which 403 infringed consumer legislation and 28 infringed the provisions of the UCPD on environmental

claims. In all these cases the NACP imposed fines and ordered the companies to stop the illegal marketing practice. The number of environmental claims could not be provided by the NACP.<sup>2</sup>

- 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 your country rigidly?*]

Although the implementing law of the UCPD uses the general term of consumer, the concept of 'average consumer' as elaborated by the CJEU is taken literally by the Romanian enforcement authorities. Administrative decision and court decisions do not adapt the concept in a sector-specific way and do not debate it within the context of domestic economic, social, cultural conditions. However, the NACP mentioned the need for a more flexible interpretation of the concept underlining that the average consumer is different at Member States level depending on culture, level of economic development, and may vary even within the same Member State, with the average consumer being different in the urban and rural areas.

- 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 in your country recognised new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted)?*]

Vulnerability of certain categories of consumers is not considered for the purposes of unfair commercial practices law. There is no debate in the legal literature yet in Romania on the specific regulatory needs of certain categories more exposed or exposed differently to unfair commercial practices than average consumers due to their economic condition, education or health. Neither the legal profession nor the consumers raise this issue in court cases. However, the designated consumer protection association considers that in certain fields, such as consumer loans, the consumers are indeed vulnerable. In its view, vulnerability should be a question of law and not left to the discretion of the judiciary, i.e. vulnerability should be defined by legal criteria.

However, the legislative policy on unfair commercial practices and unfair contract terms indicates that no such measures are expected in the near future. The Romanian legislative did not remedy so far consumer over-indebtedness by specific legislative measures aimed at acknowledging the vulnerability of certain categories of consumers against unfair commercial practices. The consumers of financial services are treated as any other consumer categories, although over-indebtedness had high social and economic impact in Romania.<sup>3</sup> Even in those sectors such as the financial market and the market of telecommunications where in many cases unfair terms are the consequence of unfair commercial practices, this interplay is not sufficiently debated in the enforcement practice. The policy discourse in these sectors as well focuses exclusively on unfair contract terms law and within this context unfair commercial practices have an ancillary role only. In addition, Romania is under an infringement

<sup>2</sup> Statistical data could not be obtained from the NACP for the purposes of this project on the reason that statistics on administrative enforcement is not conducted separately on fields of consumers law or the legal basis of the administrative measures. The recording system of the NACP functions under different criteria; statistics is built on economic sectors, from which cannot be deduced the number of investigations on the specific directives. The yearly reports of the NACP are built on the same system, contain only general data on the total number of consumer complaints, without being specified the legal basis or the consumer law field of such complaints. In addition the individual decisions of the NACP are not made public on its website, therefore estimates cannot be made for the number of investigations and sanctions imposed on companies.

<sup>3</sup> On the dimension and causes of consumer over-indebtedness see: B. Andresan Grigoriu, M. Moraru, Country Report Romania, in H. W. Micklitz, I. Domurath (eds.) *Consumer Debt and Social Exclusion*, Hart, 2015, pp. 114-133.

procedure for not implementing the consumer credit directive in time, which would have at least increased the level of protection of the consumers of financial services for the future. Instead, Romania opted for a different policy that of promoting more consumer self-responsibility by enacting Law 151/2015 on personal insolvency that will enter into force by December 31, 2016. Even Law 77/2016 on debt discharge was not designed with consideration for the vulnerability of certain categories of consumers and their need of special protection. It contains no criteria on how to identify over-indebted consumers, because it applies to anyone. Thus it is characteristic of recent legislative solutions that in response to special protection needs of certain categories of persons, a measure is adopted which is not detailed or concrete enough to be applied to that category which most needs such protection. This measure caused opposition from the business sector.

- 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 interviewed sector specific regulatory authorities were not aware of the existence of such self-regulation initiatives or codes of conduct. One of the sector specific business organisations shared its view that such self-regulation would have reduced the risks and costs of liability, but the market is not yet aware enough of the function and benefits of such self-regulation in order to reach agreement on the need for it. The NACP could either report on codes of conduct from other fields or on ongoing cooperation with business associations aimed to promote the enactment of such codes in the near future, although the legal framework also provides for business entities themselves to elaborate and enforce such codes. The implementing law of the UCPD, Law 363/2007 allows in Article 14, para. 1 the control of the market by entities responsible to enforce codes of conducts and provides for their possibility to apply sanctions to their members in case of non-compliance with such codes of conducts, without banning the possibility of parallel administrative enforcement of consumer rights by the NACP or the judicial enforcement. The same provision also provides for the right of the organisations in charge of implementing the codes of conduct to ask for administrative control and sanctions from the NACP in case of infringements of such codes by their members.

Neither the NACP nor the specialized regulatory authorities practice co-regulation. Regulation and enforcement continue to be perceived as a state attribute and it seems that on this issue both the state and market players agree.

- 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?

The NACP was insisting on the need to update the list and on the need for an information exchange mechanism at EU level. It was also emphasized that the black list should be designed in such way that national authorities could adapt it to the national realities.

- Are there other measures that could improve the effectiveness of the UCPD in establishing a high level of consumer protection in your country? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

Since there is no reach administrative case law on unfair commercial practices in Romania, no large range of best practice can be reported for the purposes of this assessment. However, the introduction of contractual consequences for unfair commercial practices within the administrative procedure is an approach that may

drive a higher level of protection of consumers in those countries such as Romania, where, due to an extremely weak litigation culture of the consumers, private enforcement is not effective. The establishment of a European information exchange system as suggested by the Romanian authorities that would allow close networking among the national enforcement authorities may be also considered as a tool enhancing enforcement of the UCPD not only in cross-border cases, but also at domestic level, since marketing practices are increasingly global.

The general finding based on case law assessment and interviews with stakeholders is that in Romania the weak chain in enforcement is private enforcement both by consumers and competitors which creates the need for stricter administrative enforcement. This is also contributed to by the focus of private enforcement on unfair contract terms law-making the function of unfair commercial practices law ancillary to contract unfairness. Since the enforcement authorities did not mention significant interpretation difficulties related to the approach of the UCPD, it seems that the national toolbox of enforcement, namely the balance of private and public tools, need to be reconsidered to strengthen enforcement under the national conditions.

During 2015 the NACP reported 195 administrative cases on Law 363/2007, whereas in the case law database of the Ministry of Justice only 7 ongoing cases could be identified on Law 363/2007.<sup>4</sup> These are appeals of business entities against the administrative decision of the NACP and not civil law suits on damages initiated by consumers. In the database of the Înalta Curte de Casație și Justiție-ÎCCJ (the highest court of Romania) the number of cases on Law 363/2007 is very low. For the period of January 2008 – June 2016, only 13 cases were identified. These cases concern unfair contract terms in the field of consumer finances, mostly loan agreements denominated in foreign currency. However, the ÎCCJ never entered into an analysis of the issue raised under Law 363/2007 by the plaintiff at first instance, the focus of the analysis being always on unfairness of the terms, and usually the factors leading to the unfair contract term or unfair contracting practices are not analysed. Law 363/2007 is only mentioned as part of the basket of legal basis on which the applicant built the case, but no further analysis can be found on the issue whether the unfair commercial practices being challenged had led to the unfair contract term. Some of the decisions also revealed that the consumers and their legal representatives were not fully aware about the temporal application of Law 363/2007 and they attempted to invoke Law 367/2007 even for contracts concluded before 2007. Thus no highest court guidance is available to the consumers, business or legal profession on the UCPD. However, Romanian courts have not yet referred questions to the CJEU on the interpretation of the UCPD. In comparison to this very poor case law on unfair commercial practices, during the period of 2008-2016 the ÎCCJ issued 169 decisions in the field of unfair contract terms, whereas only in 13 of these cases it was raised by the applicant (the consumer) in first instance that it could be the case of unfair commercial practice behind the unfair term.

As long as court enforcement is weak and poor, the administrative sanctions remain the only and main tool to reduce the number of infringements. However, consumer association complained about the low impact of the fines on subsequent behaviour of the companies and mentioned that it would have a higher preventive function if certain unfair commercial practices were classified by law as criminal acts and it would also imply the civil law liability of the persons initiating the unfair commercial practice.

<sup>4</sup> Tribunalul Suceava, Dosar 6145/285/2013, Tribunalul Caras-Severin, Dosar 4165/290/2011; Judecătoria Slobozia Dosar 8656/279/2010; Judecătoria Piatra Neamț 4037/312/2008; Judecătoria Piatra Neamț, Dosar 4062/279/2015; Tribunal of Neamț, Dosar 1493/279/2014; Tribunal Neamț Dosar 6473/279/2014

### 1.1.2. Effectiveness of the PID in establishing 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;

The PID was implemented into the Romanian law by Government Decision 947/2000 which appointed the NACP as central enforcement authority (Article 13). Infringement of the obligations to indicate the price constitutes administrative infringement and can be sanctioned with fines ranging from RON 500 to 2 500 [approx. EUR 110 to 554]. These fines are considered by the NACP as sufficiently corrective for companies under the Romanian circumstances. In its view the large companies usually comply with the requirements of the PID, where awareness of these legal requirements at level of small companies is lower. Consumer associations signalled the opposite, complained about the lack of compliance at large shopping centres, although in their view the Romanian consumers are not interested in and not guided in their market decisions by unit selling prices. There are frequent cases when there is one price on the shelves and another when the consumer pays, the updating of prices being a problem in large shopping centres. The impact of the requirement on unit price indication does manifest differently in specific fields. For example, there are problems in those areas where prices are mentioned in EUR but the price will be paid in RON at the exchange rate of the seller's bank (practiced by car dealers and immovable agencies). In such cases the consumers may be confused by the fact that the exchange rate is not that of the National Bank of Romania. The lack of compliance is more visible in the sector of mobile telephones. Here as well the real difficulty for the consumer is not the lack of unit prices, but the accessibility of the information for the consumer on the price and performance, thus here again information does not reach the consumer in a way that actually influence their market decision, but risks to distort it. In this context the consumer association mentioned also the risk that by unit price indication the sellers often promote the purchase of larger quantities and promote this way unplanned consumptions rather than the economic interest of consumers. This phenomenon may have even negative impact on consumer health if for financial reasons the consumers over-consume certain products such as nutrition supplements besides that in such cases the financial interest of the consumers also suffers by buying large quantities of goods. However, the NACP signalled no specific enforcement problems in this field and mentioned that the number of complaints on the implementing law of the PID is insignificant compared to infringement concerning other fields of consumer protection law.

- 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?

The interviewed business associations did not express their view on this issue. However, in the opinion of the NACP primarily the international units should be mentioned and additionally the performance per unit.

- The effects of the regulatory choices/derogations allowed by the Directive and applied by Member States. [*Key aspects to consider are: Is the derogation relevant? Do companies make use of it? Are there consumer complaints because of this? If so, approximately how many per year?*]

Not applicable in case of Romania.

### 1.1.3. Effectiveness of the MCAD in providing protection for businesses

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

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

The Ministry of Public Finances, which is the central implementing authority on the MCAD for business entities, is of the opinion that the notion of 'advertising' as defined in the MCAD captures well even the modern forms of advertising practiced on the Romanian market. No court case law can be reported on the interpretation of the concept of 'advertising'. The NACP in charge of consumer complaints shared the view of the Ministry of Public Finance.

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

No opinion on this matter can be reported from the interviewed enforcement authorities or from the business sector. Consumer associations consider that vulnerable consumers are the most affected by comparative and aggressive marketing. In their view rules on less information and more comprehensive information would better serve the interest of the consumers.

- The effects of the minimum harmonisation provisions on misleading advertising; [*Key aspects to consider are: 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 Romanian implementing norms of the MCAD introduced by Law 158/2008 did not go beyond minimum harmonization. The MCAD was not extended to B2B transactions in Romania. No such regulatory demand can be reported from the business sector. Initially the Ministry of Economy and Finance was appointed as implementing authority in charge of Law 158/2008, respectively the National Council of Audiovisual (Article 7) where natural persons, legal persons, associations and organizations could submit complaints about infringements. Thus the same authorities were solving B2C and B2B disputes, consumers being protected by a ministry in charge of economic policy. This institutional framework was amended by Law 202/2013 of June 27, 2013 under which enforcement of Law 158/2008 is split between the NACP and the Ministry of Public Finances. In charge of consumer complaints is the NACP whereas business entities may ask for intervention from the Ministry of Public Finances where a specialized department on state aids and unfair commercial practices solves claims coming from business entities concerning also the infringements of the implementing law of the MCAD by competitors.

Competitors may inform the Ministry of Public Finances also about infringements of law by organizations in charge of code of conducts in case such codes of conduct encourage infringement of the legal provisions on misleading and comparative advertising (Article 8). Thus the implementing rules of the MCAD also raise awareness of businesses on the market function of codes of conduct. Both the NACP and the Ministry of Public Finances may act against business entities and associations in charge of codes of conduct applying market practices forbidden by Law 158/2013. Both authorities may issue an order to stop the illegal commercial practice and may impose fines.

However, the NACP may not impose enforcement penalties in case the companies refuse to comply with the decisions of the authorities. The administrative procedure may last for 3 months at the NACP and appeals may be made in 15 days against its decisions. Fines continue to remain low in Romania ranging from RON 3 000 to 30 000 [approx. EUR 665 to 6 646], regardless of the yearly turnover of the company. Law 158/2013 did not change the level of sanctions.



The administrative procedure at the Ministry of Public Finance may last up to 6 months and the administrative decision may be appealed in court in 15 days. During 2015 the Ministry of Public Finance acted on its own motion in 90 cases whereas the number of complaints submitted by business entities was much lower at 35. Out of its decisions, 13 were appealed in court. In the period of 1 January 2016 - 31 June 2016 the number of complaints were higher (14) than in 2015 and during the first 6 months the authority acted on its own motion 51 times. However, the Ministry of Public Finance could not report any cross-border complaints concerning infringement of the MCAD.

There is no data available on the number of complaints submitted by the consumer to the NACP concerning the MCAD.

Due to the lack of central statistical data, no estimates can be made on the yearly number of court cases on the MCAD. No highest court decisions were identified on the implementing law of the MCAD; no preliminary references were submitted to the CJEU by Romanian courts.

The stakeholders' attitude towards the effect of full harmonization on comparative advertising is positive. Legal literature does not debate the European regulatory approach.

- 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;

No information was provided on this issue during the interviews. Legal literature does not discuss this issue.

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

No opinions were expressed by the interviewed entities on cross border issues. Romanian business associations made mention of weak cross-border presence of Romanian companies, thus they lack experience with the legislation and enforcement mechanisms of other Member States.

- Are there measures that could improve the effectiveness of the MCAD in providing protection for businesses (see also 1.1.6 below)? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

According to the enforcement body in charge of solving complaints of business entities on infringements committed by competitors, it would enhance the enforcement of the MCAD directive to establish a European enforcement agency in the field of misleading and comparative advertising that would also provide uniform guidelines to the national enforcement authorities on the interpretation of the MCAD. The establishment of a black list that should be periodically updated was also mentioned by the authority as measure that could enhance effectiveness of the MCAD.

#### 1.1.4. Effectiveness of current rules 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;

The interviewed entities could not report on practical experience on this issue since they do not have significant cross-border activities.



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

The interviewed entities could not report on practical experience on this issue.

- Whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade. [*Do the national differences play a role in a business perspective? Have they caused problems?*]

The interviewed entities could not report on practical experience on this issue.

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;

The interviewed entities could not report on practical experience on this issue.

- Whether the minimum harmonisation character of provisions on misleading advertising represents a barrier to cross-border trade;

The interviewed entities could not report on practical experience on this issue.

- 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;

The interviewed entities could not report on practical experience on this issue.

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

The interviewed entities could not report on practical experience on this issue.

#### 1.1.5. Interplay amongst UCPD information requirements according to Article 7(4) with the information requirements in the horizontal consumer law instruments

Regarding the information requirements according to Article 7(4) UCPD ("invitation to purchase") in the advertising stage, please analyse:

- The level of awareness of traders as regards information requirements at the advertising stage, as in particular demonstrated by their practical application; [*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?*]

According to the administrative authority in charge of complaints from the business sector, companies are aware of the information requirements at the advertising stage. Neither this authority nor the NACP raised difficulties regarding the interplay of the UCPD and the CRD.

- 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 authorities did not specify extra enforcement costs arising out of the multiplicity of information requirements.

#### 1.1.6. Relevance for business-to-business transactions

Regarding the area of unfair commercial practices/marketing, please analyse:

- 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 cross-border trade;

Extension of the UCPD to B2B transactions has not been subject to academic debate in Romania. The business sector is of the opinion that neither the UCPD nor the MCAD should be extended to B2B transactions for the reason that they do not need to be protected by such tools.

- 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;

Business association consider that there should remain in place two separate regimes.

- 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 also cover unfair commercial practices during and after the transaction;

No opinion from business entities can be reported on this issue.

- Whether there is a need to have a black-list of practices in the business-to-business marketing area;

No opinion from business entities can be reported on this issue.

- What should be the enforcement cooperation mechanism in the business-to-business marketing area;

No opinion from business entities can be reported on this issue.

- Whether there is a need to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive;

Business associations would be against such rules. This should remain in their opinion a matter for private law.

- Whether there is a need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive.

No opinion from business entities can be reported on this issue.

### 1.1.7. Relevance of contractual consequences of unfair commercial practices

Please analyse whether there are in your country:

- 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;

Law 51/2016 issued on March 30, 2016, amending Law 363/2007 on unfair commercial practices, contains rules on contractual consequences for use of unfair commercial practices, and as explained by the NACP such possibility was available even before, but it was difficult to apply in practice. By Law 51/2016 a new article was introduced in Law 363/2007, Article 15<sup>1</sup>, according to which the inspectors of the NACP may order the business entity that employed unfair commercial practices to return the price of the product or the services provided to the consumer. This is a complementary sanction that applies together with administrative fines. The law also provides for significant enforcement penalties (RON 5 000 to 50 000 [approx. EUR 1 107 to 11 077]) in case the business entity does not comply with the decision of the inspector. Under this possibility the consumers should not have to go to court and bear the risks and costs of a civil law suit. However, the NACP mentioned that on contractual consequences of the UCPD usually they apply the UCTD and not Law 51/2016 if there is the case of unfair contractual clauses. For this reason no administrative decisions can be reported by the NACP on Law 51/2006. Usually not the consumers but the authority establishes the legal basis of the claim (as mentioned by the authority), depending on what the consumer wants to achieve with their complaint, and as a rule the consumer is interested in having the contract or its clauses declared void, thus the UCTD applies in most of these cases.

Therefore, if the authority does not opt for the administrative rendering of the contractual consequences of the incorrect commercial practice, consumers remain unaware of this possibility, although they would be better off because the court decisions on finding the terms unfair are declaratory and do not rule on damages. In fact the unfair commercial practice dimension of the case is vanishing this way, by being turned into an unfair contract terms case, although the risks and costs of such litigations are far higher compared to the administrative procedure. In order to become "law in action", Article 15<sup>1</sup> of Law 51/2016 needs to be better publicised among the consumers. The legal literature has not yet discussed the provision and its potential in enhancing effectiveness in enforcement.

The consumer associations interviewed emphasized the high risks and costs of civil law litigation on damages, as well as the lack of information for consumers on administrative investigations on the basis of which they could go to court. However, they did not mention having initiated any collective action to ask for restitution for the price of the goods and services for the affected consumers under the administrative procedure.

The courts focus on unfair contract terms law, although usually the consumer or their legal representative builds the case on a selection of legal bases, among which however rarely can be found Law 363/2007 on unfair commercial practices. No cases on damages can be reported in which the consumers would have tried to obtain compensation under the general provisions or special provisions of contract law, such as usury or other immoral behaviour.

- Any case law (enforcement decisions, court rulings) providing for such consequences;
- Whether there is, based on past experience in your country, a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

Article 12 of Law 51/2016 does not render the issuing of damages caused to consumers by unfair commercial practices. Damages may be asked within a separate civil law suit. Case assessment reveals that Law 363/2007 usually appears as part of the legal basis in cases on unfair contract terms. Unfair commercial practices law has

a rather marginal and ancillary role in unfair contract terms cases even in civil law litigation. The courts do not really elaborate on the infringement of these rules, with the focus in legal reasoning being on finding unfairness in the terms challenged by the consumer.

## 1.2. Contract conclusion and performance

### 1.2.1. Effectiveness of the current rules in establishing 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 implementing Law 193/2000 does not detail the principle based approach, nor does it contain rules that would grant to the consumers more protection than the Directive does under its minimalistic approach.

Consumer organisations and business associations share the view that the principle based approach negatively affects the enforcement of the UCTD in Romania. In their opinion it would have been better to have 'rule based control' on unfair terms, because the principle based approach leads to conflicting decisions at both the administrative and judicial level. However, while the NACP did not signal significant interpretation problems related to the UCTD, it considers that guidance provided by the CJEU does not suffice. It has emphasized that it is clear that the CJEU rules directly apply in the Member States, but to facilitate an easier access by all the interested stakeholders, especially for consumers, these interpretation rules should be transposed into legislation.

However, in light of highest court decisions and appeal court decisions on unfair contract terms, one can establish that the judiciary did cope successfully with the interpretation problems arising from the interplay of the traditional principles of contract law and civil procedural law on one hand and the national implementing law of the UCTD on the other hand. Nevertheless, isolated cases of conflicting decisions on the very same state of facts and legal questions at different levels of jurisdiction can be reported. In these cases as well the ÎCCJ provided ultimate justice to the consumers finding the challenged clauses unfair.<sup>5</sup>

The rulings of the CJEU have a high impact on the enforcement of the unfair contract terms law in Romania. This is why not as many preliminary references reach the CJEU from Romania as from Spain or Hungary: only 11 were sent from Romania, out of which 4 were withdrawn.<sup>6</sup> In May 2013, the ÎCCJ established that obligation of the courts to interpret the implementing law in light of the UCTD also implies the use of the methodology of the CJEU.<sup>7</sup> In July 2016, 11 800 cases could be identified as registered under the legal basis of Law 193/2000 in the database of the judiciary. A large proportion of these cases concern consumer loans, predominantly mortgage loan cases.

The NACP also mentioned an increase in the number of consumer complaints regarding unfair contract terms during recent years due to problems in credit contracts, and to pro-consumer rulings of the CJEU. In 2014, the NACP registered

<sup>5</sup> For example: ÎCCJ Decizia 310 din 14 februarie 2016; ÎCCJ Decizia nr. 3864 din 4 decembrie 2014; ÎCCJ Decizia 3234 din 23 octombrie 2014; ÎCCJ Decizia nr.1453 din 10 aprilie 2014.

<sup>6</sup> Rulings delivered: C-348/14 Maria Bucura v SC Bancpost SA; C-110/14 Horațiu Costea v SC Volksbank Romania; C-143/13 Bogdan Matei, Ofelia Ioana Matei v SC Volksbank Romania SA; C-74/15 Dumitru Tarcău și Ileana Tarcău. Pending reference: C-534/15 Pavel Dumitras, Miorara Dumitras v BRD Grupe Societe Sucursala Judeteana Satu Mare. Rejected reference: C-92/14 Liliana Tudoran et al, v SC Suport Colect SRL; Withdrawn reference: C-236/12; C-123/12; C-108/12; C-571/11; C-47/11;

<sup>7</sup> ÎCCJ Decizia 193/2013

1993 consumer complaints on unfair contract terms, concluded 69 fact finding statements, and deferred 23 possible unfair clauses to the court. In 2015 the NACP issued 27 fact finding statements regarding possible infringements of the UCTD and brought the business entities to court. During the period of January 2016 to June 2016 the NACP asked the court to rule on the unfairness of the clauses in 21 cases and to impose administrative fines on the infringing companies.

The NACP is a specialized enforcement authority for financial services and from its yearly reports, it seems that it has assumed an active role in the service of the consumers. Unfortunately, these decisions are not made public on the website of the authority and thus no information can be provided on the interpretation problems which they raise. The database of the judiciary revealed that the NACP initiated procedures against almost all large financial institutions which practiced unfair contract terms on a large scale in Romania, thus there are several pending cases against financial institutions.<sup>8</sup> Important to mention in this context are also the first class actions won by the NACP in the last instance<sup>9</sup> and another two in the first instance.<sup>10</sup>

- 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 your MS? Does this work in practice or are there problems?*]

The NACP emphasized that in order to achieve uniform interpretation and uniform enforcement at EU level, the indicative list of the UCTD should be updated on the basis of Member States' experience, since at the Member State level other types of practices may harm the economic interest of the consumers than those currently listed in the UCTD. Such a periodic updating of the indicative list would impede the cross-border export of unfair contract terms. In addition to the need to periodically update the indicative list in order to keep track with developments in contracting practices applied cross-border, consumer associations mentioned that such a list should be unfair *per se*. The view that the indicative list needs to be updated was also shared by business organisations. Nevertheless, the case law assessment has shown that the unfair clauses practiced in the Romanian market usually are not those on the indicative list of the UCTD.

- 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; [*Note: If a black/grey list exists in your country, key aspects to consider are: How does the list work in practice? Does it make a difference to have such a list?*]

Romania opted for a grey list, which strictly followed the indicative list of the UCTD, but administrative practice shows that the majority of unfair clauses in practice are not those mentioned on the grey list. The NACP considers the grey list useful and it emphasized here again the need for an institutionalized exchange of information at the European level about unfair contract clauses, which spread cross-border because administrative and judicial control is often one step behind the developments in unfair contracting practices. A European database would therefore promote a prompt reaction of the authorities to unfair contracting practices.

There is no black list of unfair terms in Romania publicly available to consumers and business entities that would raise more awareness as to the consequences of using

<sup>8</sup> Dosar 1409/2/2015; Dosar 1513/2/2015; Dosar 1192/2/2015; Dosar 1106/2/2015; Dosar 286/2/2015; Dosar 857/2/2015; Dosar 7069/2/2014; Dosar 434/2/2015; Dosar 1408/2/2015; Dosar 956/2/2015; Dosar 14484/3/2015; Dosar 4051/2/2015; Dosar 13864/3/2015; Dosar 13863/3/2015.

<sup>9</sup> Curtea de Apel București, Decizia nr. 17 din 10 Februarie 2016.

<sup>10</sup> Tribunalul Sibiu, Dosar 3295/306/2011; Tribunalul Tg. Mures, Dosar 2377/325/2013, Decizia 390/2015 din 9 martie, 2015.

unfair terms and also prevent companies from using such terms. Nevertheless, in the opinion of the financial sector, such black lists would be useful for the market.

- 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: In your country, have the effects of court decisions establishing the unfairness of an unfair term been extended to all contracts of the trader concerned or to the contracts of any other trader containing such a term? If so, how does this work in practice? What are the impacts on businesses? If there are no such effects of court decisions on unfair terms: what are the effects of this situation?*]

Declaratory judgements on unfairness of contract terms have an *erga omnes* effect in Romania since November 1, 2013. Law 193/2000 on unfair terms, as amended by Law 76/2012, provides that the NACP and consumer NGOs which meet certain legal requirements can ask the courts for the removal of the unfair terms from all the contracts concluded with the trader. If the court decides that a term is unfair, the trader is obliged to amend all the ongoing standard contracts and not to use the term in future contracts. Law 193/2000 does not contain sanctions for non-compliance with the court decision to amend existing contracts and the NACP cannot order the business entity by administrative decision to amend the contract containing unfair terms.

However, it does not apply to other business entities which apply the same term with their clients. The court in addition will also impose an administrative sanction since Article 1 (b) of Law 193/2000 provides the obligation for the business entities not to apply unfair contract terms in consumer contracts. However, these fines are low, ranging from RON 200 to 1 000 [approx. EUR 40 to EUR 220]. The procedure starts at the NACP, which either on its own motion or upon private complaints or complaints of entitled entities, examines the contract and if it finds the term unfair then it brings the business entity to court, either at the domicile of the consumer or at the place of business of the business entity, asking the court to compel the business entity to amend all contracts in force or those intended to be used by eliminating the unfair terms from the contract and to impose fines. Previously, the business entity was sued at its place of business and at first instance court. Law 82/2012 conferred such cases to the competence of tribunals, where there is much more specific expertise than at the level of a lower court. Another important development introduced by Law 82/2012 is that it conferred competence to courts to order the business entity to amend not only its contracts in force, but also all its standard contracts elaborated to be used in the future. However, the main shortcoming of these pro-consumer revisions of the implementing law is that these provisions only apply for the future, for litigations started in the period of 15 February 2013 to 30 September 2013. Such limitation in time of the temporal effect of the rules on the *erga omnes* effects finding unfairness was introduced by a subsequent Emergency Ordinance of the Government no. 4/2013. Another shortcoming of this procedure is that courts do not rule on damages. Thus, the consumers must bear the risks and costs of another time consuming civil law suit.

This is the main reason why consumer confidence is so low in justice provision on unfair contract terms. The consumers do not see the contractual consequences of finding unfairness in their contracts in terms of compensation for the loss they suffered. In fact the compensatory consequence of a finding of unfairness is of very limited effectiveness.

The same applies to the preventive/corrective function of the unfair terms law as implemented in Romania. Although the court may declare the terms void and order the business entity to amend its contracts, i.e. to remove the unfair terms, the infringing entity may escape with a symbolic administrative fine that is below the average minimum net salary in Romania. This happened in the first class action won by the NACP against a financial institution when the Appeal Court of Bucharest



confirmed the finding on unfairness and the fines established by the NACP in value of RON 700 [approx. EUR 157]. The financial institution applied the terms that were found unfair with 8000 clients. Due to the lack of specific provisions on collective actions in civil law suits, the effect of such administrative sanctions compared to the economic harm caused to its clients and the costs of civil law litigations for the consumers is more than disproportionate and thus ineffective on the market of consumer loans where the unfair terms were employed with thousands of clients.

Although in this case the Appeal Court of Bucharest refused the inquiry of the financial institution to suspend the litigation for reason of constitutional control of Article 13 of Law 193/2000, which was requested by the financial institution, it could not stop the financial institution exercising this right. This has become a custom by the financial institutions, done in order to suspend the administrative litigation or even stop the enforcement of final court decisions. At the end of June 2016, there were 39 decisions on unfair contract terms cases on the webpage of the Constitutional Court and another 19 pending cases can be reported. These inquiries challenge Article 12<sup>11</sup> and Article 13<sup>12</sup> of Law 193/2000 together or separately Article 13 only. Although the challenged provisions of Law 193/2000 were not found unconstitutional in any of these cases, the constitutional control severely delays the provision of justice to the consumer. Even more, some of the financial institutions refer the same questions for which an opinion has already been delivered by Constitutional Court, since there is no *acte clair* doctrine in place at the Constitutional Court on the basis of which it could refuse repeated inquiries on the same legal issue.

Business entities invoke the infringement of the following constitutional principles and rights by the judicial intervention into contracts and the *erga omnes* effects of finding unfairness: non-retroactivity of the law (for challenging that Law 82/2012 was not in force when the contracts were concluded), the right of conduct economic activity and the right to commerce (for defending that contracts are freely negotiated and the courts should not intervene in private law contracts), the right to property (for challenging the order of the court to pay back to the consumer the amounts charged under the unfair term) the separation of powers in state (for challenging the competence and obligation of the court to rule on the nullity of the unfair clause and to order the modification of the contracts based on the suit of the administrative enforcement authority).<sup>13</sup> This practice not only delays consumer justice provision, but also turns the Constitutional Court into a private law court, contributing to the proceduralisation of the unfair contract terms law, whereas in the meantime the Romanian courts did comply with the guidance of the CJEU on the interpretation of the provisions of the UCTD on own motion and *erga omnes* effect of nullity.

The practice of the business entities to challenge Article 13 of Law 193/2000 at the Constitutional Court is not new, and was not only generated by the legislative provisions of the *erga omnes* effects of finding the term unfair. First, the companies have challenged the possibility of the judiciary to intervene into business contracts and

<sup>11</sup> Article 12 of Law 193/2000:

In case they discover the use of unfair terms the enforcement entities mentioned in Article 8 will sue the professional at the tribunal at his domicile or at his place of business, asking the court to oblige the professional to amend its contract in course of implementation;

(...)

Associations of consumer protection which fulfill the conditions of Article 30 and 32 of the Emergency Government Ordinance no. 21/1992 on consumer protection (are designated entities) (...) may sue the professional who applies unfair contract terms at the court mentioned at (1) in order for this to impose to the professional to stop using the unfair terms and to amend the contracts in course of implementation containing such terms, by eliminating the unfair terms.

<sup>12</sup> Article 13 of Law 193/2000:

In case the court finds the contract terms unfair it will order the professional to amend all its standard contracts in course of implementation and to eliminate the unfair terms from its contract intended for future use.

In cases when para (1) applies the court will also apply the administrative sanctiones mentioned in Article 16.

<sup>13</sup> Curtea Constituțională Decizia nr. 245 din 19 aprilie 2016.



order the nullity of the clause on the basis that such a possibility harms their right to fair procedure, by challenging the competence of the NACP to bring the companies to court.<sup>14</sup> The opposition of the business sector to the *erga omnes* effect is thus significant in Romania.

Consumer associations are of the opinion that court decisions should have an *erga omnes* effect against other companies which apply the same term. The consumer associations also raised the issue of mandatory ex-ante submission of the contracts at the authority for an unfairness check, even if with a consultative function, which later could be used by the judge. This would be very important in the opinion of consumer associations especially for unwritten clauses that are an integral part of the contract, such as general terms and conditions.

The NACP also is on the opinion that such declaratory judgement should have *erga omnes* effect in the whole banking sector to assure effective consumer protection. However, the business associations of the banking sector put forwards the argument against the extension of such effects to other business entities that the unfairness test should remain as it is, based on all circumstances of the contract and such an extension of the effect therefore would not be fair from a market point of view.

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

The function and role of contractual transparency within the test of fairness is increasing. There is case law on the meaning of this requirement and preliminary questions were also referred to the CJEU by Romanian judges, although several legal acts detail the requirements on contract transparency at least in the field of consumer credit. However, since such legal provisions were not in place at the moment of contract conclusion, the main guidance for the Romanian courts remains the preliminary rulings of the CJEU on this issue. Court case law on this issue is rather uniform, since judges share the view that average, well informed consumers can take the right market decision. Investigations undertaken by the NACP and court cases initiated by the NACP are few in number compared to the high number of civil law cases, which usually were initiated by the business entities (financial institutions and providers of services such as mobile telephony service providers) for late performance or non-performance of payment obligations by the consumers under the clauses that were subsequently challenged as unfair.

The NACP is of the view that the rulings of the CJEU should be transposed into the implementing law of the UCTD in order to achieve more legal certainty and to ensure easy access to the information off all parties, especially consumers. The need for a guide on contractual transparency has been suggested, covering what kind of information should be included in the contracts in order to comply with the requirement of transparency.

Case law assessment confirms that not the obligation of own motion but rather the NACP and the consumer associations are the main engine of the unfairness control in civil law actions. However, the consumers have no administrative remedies where the judge does not comply with the obligation to act *ex officio*.

- 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. [Note: Question only relevant for MS that have put in place extensions of application of UCTD]

<sup>14</sup> Curtea Constituțională Decizia nr. 464/2011 din 12 aprilie 2011; Curtea Constituțională Decizia nr. 1376 din 26 octombrie 2010; Curtea Constituțională Decizia nr. 1535/2009 din 17 noiembrie 2009.

Romania did not extend the unfairness control to the main subject matter of the contract or the adequacy of the price, although the 2014 amendments<sup>15</sup> to Law 193/2000 introduced a new provision on the obligation of the NACP to inform the European Commission on stricter rules than those in Directive 93/13, especially when the provisions extend the unfairness control to individually negotiated clauses, on the adequacy of the price or on lists of terms considered unfair. However, no stricter rules were introduced on these aspects so far, although attempts by the Romanian courts can be reported where the judges referred such question to the CJEU in the hope to receive reinforcement on the judicial extension of the material field of application of the UCTD.<sup>16</sup> Although in reply of similar references also from other Member States, the CJEU opened the possibility only to the legislature of the Member States to enact legislation that allows for such an extension, but not to the judiciary by way of interpretation, the Romanian legislature did not opt for raising the level of protection of the consumers this way.

The lack of response from the legislature to issues raised in practice is in line with its general approach in the field of unfair contract terms law, that of not intervening, not going beyond the minimalistic approach of the UCTD. In general, Romania did not enact special laws and did not amend general contract law and civil procedural law when existing provisions of general contract law or that of the national civil procedural law were raised in consumer contract litigations in a manner conflicting with the aim and scope of the Directive or the case law of the CJEU. The solution of such conflicts was left to the judiciary which succeeded well in integrating the policy based reasoning beyond the rulings of the CJEU into the national judicial reasoning and built the bridge between the policy of the UCTD and traditional principles of contract law, smoothing the conflict.

Nevertheless, despite this reality, the public opinion in general and the opinion of affected consumers especially is that the case law on unfair contract terms is not pro-consumer. However, the reason behind this perception is as explained above that the judgements adopted under the implementing law of the UCTD, Law 193/2000, are mostly declaratory judgements, which only establish unfairness, and do not render the contractual relationship between the parties in light of the unfairness in terms of what will happen with contract enforcement without the unfair terms, or how the situation before contract conclusion will be remedied in cases where the whole contract fails because of the unfair clause, or the issue of damages to be paid to the consumers injured as consequence of the unfair clause. For these questions the courts did not have specific legislation at hand other than the provisions of general contract law that would have provided solutions suited to render the consequences of unfairness of long term social contracts, such as mortgage loans, or contracts that affect hundreds of consumers, such as in the case of communications services.

- 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?*]

Romanian courts understood relatively early under the guidance of the ÎCCJ, based on the policy reasoning of the CJEU, the function of the sanction of nullity of the unfair terms and of acting on their own motion. The ÎCCJ based its reasoning on the obligation to interpret the implementing law in line with the Directive and the case law of the CJEU<sup>17</sup> as a consequence of Romania's EU membership,<sup>18</sup> and on the policy

<sup>15</sup> Emergency Government Ordinance 34/2014 of June 13, 2014.

<sup>16</sup> C-236/12 Volksbank România v Comisariatul Judeţean pentru Protecţia Consumatorilor Argeş, C-108/12 Volksbank România v Ionuţ Florin Zglimbea, Liana Zglimbea; C-571/12 Volksbank România SA v Andrea Câmpan şi Ioan Câmpan.

<sup>17</sup> ÎCCJ Decizia 686/2013, ÎCCJ Decizia 1719/2014.

consideration that the UCTD does not only protect individual interests, but is targeted at the consumers as a collective, thus it protects public order under a special protection regime.<sup>19</sup> From this follows in the approach of the highest court, the obligation of the national judge to act on own motion and sanction of absolute nullity of the contract as a consequence of unfairness.<sup>20</sup> In highest court case law, the public interest argument was much emphasised beyond the obligation to act on own motion by referring to cases C-240/98 *Oceano*,<sup>21</sup> C-840/98 *Claro*<sup>22</sup>, C-241/98 *Salvat Editores*<sup>23</sup> and C-76/10 *Pohotovost*.<sup>24</sup> For this reason, in Romania the interplay of the public law provisions of the domestic consumer credit law with those of the UCTD or between the UCTD and civil procedural law did not cause major interpretation problems. In cases where the defence invoked the principles of general contract law against the consumer policy arguments of the courts, the ÎCCJ did not hesitate to establish that the Directive attenuates the principle of *pacta sunt servanda*, conferring to the court the right to declare void the unfair clauses, by emphasizing that contractual freedom does not mean an absolute and discretionary freedom of contracting.<sup>25</sup> Since contracts must respect the law and Article 1(3) of Law 193/2000 states the obligation of the business entities to not apply unfair clauses in consumer contracts, it was not a question for the courts to consider the UCTD as prevailing over the general principle of freedom of contracts. Both the ÎCCJ and appeal courts use without difficulty the policy-based reasoning of the CJEU for the elucidation of interpretation problems, binding and tying the implementing law with the living EU law, as framed by the CJEU. Case law assessments confirm that the Romanian judiciary succeeded in well-integrating the methodology of the CJEU into judicial reasoning. This is an extraordinary achievement in a strongly positivistic judicial culture, such as the one in Romania. The central merit of the ÎCCJ consists in the legal theoretical clarification of the function and the place of the new private law institution – “the unfairness test” – within the system of domestic contract law, including the interplay of policy on unfair contract terms law with the general principles of contract law.

However, in contrast with this successful, public policy focused approach of the judiciary on the question of absolute nullity and the obligation of own motion, the consumers have no administrative tools in case it happens that the courts do not act on own motion. Only the appeal can remedy such situation. This is of major importance from consumer perspective, because the number of civil law suits when the business entity brought the consumer in court for non-payment is far more significant than the number of cases initiated by the NACP, especially in the field of financial services, but also in the sector of telecommunications. Also significant in number are the court cases based on an enforcement order or evictions in the field of mortgage loans when the consumers raise the objection of unfairness among other grounds of contract invalidity.

Case law assessment confirms that the obligation of own motion in civil law actions is not the main engine of the unfairness control, but rather the NACP and the consumer associations is the main engine. However, the consumers have no administrative remedies in case the judge would not comply with the obligation to act *ex officio*. The NACP considers that the guidance of the CJEU does not suffice on this matter, the case law of the CJEU should be transposed into the national legislation.

<sup>18</sup> ÎCCJ 686/2013.

<sup>19</sup> ÎCCJ Decizia 3234 din 23 octombrie 2014; ÎCCJ Decizia 3864 din 4 decembrie 2014.

<sup>20</sup> ÎCCJ Decizia 3885/2013 din 12 noiembrie 2013, ÎCCJ Decizia 586/2013, ÎCCJ Decizia 950/2013, ÎCCJ Decizia 288/2012.

<sup>21</sup> Trib. Brasov Decizia 53/2012.

<sup>22</sup> ÎCCJ Decizia 3885/2013, ÎCCJ Decizia 950/2013, ÎCCJ Decizia 288/2012.

<sup>23</sup> ÎCCJ Decizia 3885/2013, ÎCCJ Decizia 586/2013, ÎCCJ Decizia 950/2013.

<sup>24</sup> ÎCCJ Decizia 3885/2013, ÎCCJ Decizia 2875/2013, ÎCCJ Decizia 686/2013, ÎCCJ Decizia 950/2013.

<sup>25</sup> ÎCCJ Decizia 2875 din 26 septembrie 2013.

- In a forward looking perspective: Are there other measures that could improve the effectiveness of the UCTD in establishing a high level of consumer protection in your country? Would a graphical presentation model improve the readability and comprehension by consumers of the T&Cs? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

The UCTD was turned into the main instrument of consumer protection after the 2008 global financial crisis impacted consumer contracts, especially in the field of mortgage loans. Consumer contract justice is thus currently framed mainly by judicial developments in the field of consumer loans, according to the judicial needs of this sector that makes a mark on the standard of substantive justice in consumer contracts, in general.

Due to lacking specific legal provisions to render contractual consequences for unfair contract terms between the parties and to lacking innovative judicial solutions suited to respond to the specific needs of long term social contracts, such as housing loans, the general consumer perception is that enforcement of the UCTD is weak in Romania. However, the reality is that the Romanian judiciary including lower courts and the highest court succeeded to functionally integrate the policy of the UCTD and the rulings of the CJEU in the domestic private law reasoning. This has led to a pro-consumer interpretation of the implementing law of the UCTD in Romania in issues that fall under the UCTD. The methodology of Romanian courts may be considered as best practice in Central- Eastern Europe.<sup>26</sup> In Romania the interpretation problems of the UCTD in the context of the domestic private law and domestic procedural law were solved by judicial rules and the legislature had not to intervene retroactively into contracts, thus the system and policy of traditional contract law both under the old and New Civil Code (entered into force on October 1, 2011) was interpreted in line with the UCTD being adapted to the specific needs of the consumers. This is the sole merit of the Romanian highest court and of the judicial system that coped with the interpretation problems without being backed up by doctrinal solutions.<sup>27</sup> Today the ÎCCJ has settled case law on the UCTD, based on a significant number of decisions adopted since 2008 (169 are published on the website of the ICCJ): 25 in 2015, 38 in 2014, 49 in 2013, 20 in 2012, 43 in 2011, 4 in 2010, 4 in 2009, 9 in 2008. The large majority of the cases concern consumer finances, especially mortgage loans. At the time of drafting this report the database of the Ministry of Justice showed 614 pending cases on Law 193/2000 in the lower courts. Thus, the effectiveness of enforcement of the UCTD is not low in Romania compared to other EU countries.

However, effectiveness suffers a serious deficit when it comes to the consequences of unfairness on the contractual relationship between the parties, especially in those sectors, such as in case of long contracts, including mortgage loans for housing purposes, where restoration to the situation before contract conclusion under the traditional principles of general contract law may not serve the interest of the consumers. Given the lack of special rules, there is the risk that if the terms of the contract were found unfair the consumer would be put in the situation to repay at once the value of loan contracted for several decades, if no agreement is reached with the financial institution to continue the contract without the unfair term. There are cases when, given the lack of agreement between the parties on another contract term on the interest rate that was found unfair, the court ruled for the termination of the contract and restoration of the situation before contract conclusion, without awarding damages for the consumer.<sup>28</sup> Since there are mass litigations in the field of consumer finances where thousands of consumers will need to be reimbursed for the

<sup>26</sup> On judicial methodology of the Romanian courts see: M.Józson, *The Methodology of Judicial Cooperation in Unfair Contract Terms Law*, in F. Cafaggi, S. Law (eds.) *Judicial Cooperation in European Private Law*, Edwards Elgar, 2017 (forthcoming).

<sup>27</sup> Doctrine on unfair contract terms law, as on consumer private law and consumer public law in general, is poor, rather descriptive than reactive or innovative. This is why the very few journal articles and books on consumer law published in Romania assessed for the purposes of this project are not quoted in this Report.

<sup>28</sup> For example: Judecătoria Ploiești, secția civilă I, decizia nr. 154270/2014 (Court of First Instance of Ploiești)

value of payments charged under the unfair terms for long periods of time, innovative solutions may not come from courts soon, as they remain reluctant to assume the role of policy framers by using innovative solutions for damages. Thus legal uncertainty is still high in this respect in Romania and this implies costs for both the consumers and the banks. Consumers urge new rules to complete the process of justice provision, since finding unfairness with the help of the UCTD is only the starting point. Given the lack of specific rules the consumers and banks often opt for mediation.

In 2015, a specialized institution was established for alternative dispute resolution between consumers and financial institutions – the Centre for Alternative Dispute Resolution in the Banking Sector (Centrul de Soluționare Alternativă a Litigiilor din Domeniul Bancar-CSALB)<sup>29</sup> which started its activity on March 1, 2016. The procedure at CSALB is free of charge. In its activity report published on June 30, 2016 for the first 4 months of activity, the CSALB reported 117 written complaints and 450 telephone inquiries. In total, 79 requests for alternative dispute resolutions arrived at the CSALB in that period out of which 42 were rejected for various reasons, such the lack of acceptance of the alternative dispute resolution by the credit institution because of ongoing court litigation, because they proceeded in reaching an agreement with the consumers, or because they started eviction proceedings against the consumers. Thus 37 requests are in resolution, out of which in 5 cases saw decisions adopted in favour of the consumers. However, the finding of the CSALB is that the consumers are not yet aware that the alternative dispute procedure is not mandatory procedure for the financial institutions, and that there is a lack of consumer confidence in the alternative procedure that is quicker than the court procedure and is free of charge.<sup>30</sup> The same report also mentioned the reluctant attitude of the financial institutions to comply with the solutions of the CSALB in case they agree with the consumers on alternative dispute settlement by CSALB.

The consumer associations consider that mandatory rules are needed and not default rules on issues where Member States have autonomy in establishing the details necessary for making the UCPD workable within the context of their domestic private law, and that full harmonization would have served better their interest, given the lack of specific rules in issues left to Member State law. They also urge rules on legal consequences when administrative authorities or the courts would not comply with the requirements arising from the UCTD, including state liability. Even when the consumers have in hand a final decision with an *erga omnes* effect in a case won by the NACP, they need to go to court to obtain an execution of the court decision since the NACP does not have the legal means to impose administrative sanctions on the business entity if it refuses to comply with the court decision. The NACP can employ only the existing judicial mechanisms to achieve compliance with the court decision.

It was also suggested by consumer associations that more administrative procedures should be available; only in extreme cases should the consumers go to court, and the law should give less room to courts and less room for adjudication on contract fairness. The main consumer organisation, which is a qualified entity to proceed in the interest of the consumers, could only report on 1 court case they initiated concerning the directives which are the subject matter of this assessment. Nevertheless, this consumer association submitted more than 100 complaints to the NACP. However, today the enforcement mechanism of the UCTD is based largely on courts and not on the administrative enforcement authority. The role of the NACP only consists in the identification of the unfair clauses within its regular market assessment or on the basis of consumer complaints, whereas unfairness must be reinforced by a court decisions, and fines may be imposed only by the courts. The fines that may be established for infringement of the UCTD are no more than symbolic for a company (EUR 200 to 1 000).<sup>31</sup> This does not diminish the role of the administrative procedure which is free

<sup>29</sup> The CSALB functions as a non-governmental, non-profit, public interest entity, which transposes at national level the requirements of Directive 2013/11/EU and of Directive 2009/22/EC.

<sup>30</sup> The report is available at: [www.csalb.ro/images/PAPORT.PDF](http://www.csalb.ro/images/PAPORT.PDF)

<sup>31</sup> On August 1, 2016 RON 1000 amounted to EUR 225 at the official exchange rate of the National Bank of Romania.

of charge for the consumers and the litigation costs are supported by the NACP may not win in court.

As long as legal sanctions are missing where business entities do not comply with court decisions on fairness, the provision of justice is perceived by the consumers as incomplete. This also weakens the effectiveness of the administrative enforcement and the success of the judiciary in enforcing the European unfair contract terms law in issues that fall under the UCTD. These are the risks of minimalistic and partial harmonisation for the consumers of those Member States where the market values and consumer values are strongly competing in the policy approach on contract fairness, where business entities continue to question in Constitutional Court the legitimacy and legality of the approach of the European unfair contract terms law, that protection of the consumer is public interest. Consumer associations urge the adoption of procedural rules that would ban the suspension of the execution of final court decisions by reason of constitutional control, which so often requested by business entities who have infringed the unfair contract terms law.

Both consumer associations and business associations interviewed were of the opinion that a graphical representation of general terms and conditions would have a positive impact on consumer comprehension of contracts. In the same line, the NACP added that it should better assist the consumers and businesses if the UCTD would contain a list of pre-contractual information to be provided to the consumers similar to the approach of the Consumer Credit Directive. However, the NACP did not mention what such a list should contain. This proposal neglects however that general information is not sufficient to alleviate the information asymmetry of the consumers, which in specific fields need specific information. Additionally, more information does not necessarily reduce the risk of unfair terms. Considering the consumers attitude towards unfair commercial practices, it would be more efficient to institute an ex ante control of the general terms and conditions by a sectoral authority instead of providing more pre-contractual information (horizontal information) to the consumers.

Last but not least, another weak chain of the enforcement of the UCTD must be also mentioned: the lack of reaction in the affected markets to the large scale use of unfair terms, lack of acknowledgement by the business that unfair contract terms law is market regulation that protects not only the consumers but the competitors as well, and that unfair terms distort the market. The NACP could not recall instances of notifications coming from business entities about cases of infringement of Law 139/2000 by competitors. Although business entities may inform the NACP about an infringement of Law 193/2000, this possibility remains so far unexplored by business entities.

### 1.2.2. Effectiveness of the current rules 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 disparities have an impact on cross-border trade; [*Key aspects to consider are: Do national differences in the application/implementation of the Directive play a role for businesses? Have these differences led to changes in their business strategy? Have these differences caused problems?*]

No information from business associations on this issue can be reported.

- 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;

No information from business associations on this issue can be reported.



- 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.

No information from business associations on this issue can be reported.

### 1.2.3. Relevance for business-to-business transactions

Regarding the area of contractual fairness and in relation to the Unfair Contract Terms Directive, please analyse:

- Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;

The need to protect small business is not raised in the legal literature on unfair contract terms law. However, court judgements can be reported where small companies tried to invoke the implementing norms of the UCTD in order to challenge the fairness of contracts concluded with financial institutions or large industrial companies. However, lower courts and also the ÎCCJ stay bound to the definition of the UCTD and the case law of the CJEU on the concept of consumer.<sup>32</sup> Companies repeatedly brought the issue also to the Constitutional Court, which refused to consider Article 2 of Law 193/2000 unconstitutional regarding the definition of the consumer on the basis that the limitation of the definition of the concept of consumer to natural persons is an 'omission of the legislative', and thus is a question of policy which cannot be substituted via judicial interpretation.<sup>33</sup> In these requests for constitutional control, the companies advanced the argument that framework contracts practiced by large companies impose clauses onto small companies that cannot be negotiated due to their market position, thus these contracts fall under the unfair contract terms law.

The concept of the consumer is interpreted strictly by the Romanian courts due to the lack of domestic legislation that would empower them to give an extensive interpretation of the concept. Considering that so far Romania did not make use of the possibility granted to the Member States by Directive 2011/83/EU on consumer rights (the Consumer Rights Directive) to extend the test of the UCTD also to B2B contracts, the current jurisprudence will hardly change in the near future. However, Romanian courts started testing the boundaries of the consumer concept in those cases when the contract seems to have a mixed nature. The preliminary question referred to the CJEU by Romanian courts in the cases C-143/13 (Matei); C-110/14 (Costea); C-534/15 (Dumitraş); C-74/15 (Tarcău) aimed at clarifying where the borders are between the consumer interest and the business interest.

- 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;

The business association interviewed is against such an extension for the reason that business entities do not suffer from information asymmetry and are not weaker parties in negotiations (so do not need similar protection to consumers).

<sup>32</sup> ÎCCJ, Decizia nr. 763/2015 din 10 martie 2015

<sup>33</sup> Curtea Constituțională, Decizia nr. 464/2011 din 12 aprilie 2011, Curtea Constituțională, Decizia nr. 621/2012 din 12 iunie, 2012, Curtea Constituțională, Decizia nr. 360/2013 din 24 septembrie, 2013, Curtea Constituțională, Decizia 2013/2014 din 15 aprilie 2014.



- 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;

No such details were provided by business associations since they are against the extension of the UCTD to B2B.

- 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;

No such details were provided by business associations since they are against the extension of the UCTD to B2B.

- Whether there is a need for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive;

No such details were provided by business associations since they are against the extension of the UCTD to B2B.

- Whether an extension of the Unfair Contract Terms Directive to B2B transactions can bring benefits for cross-border trade;

No such details were provided by business associations since they are against the extension of the UCTD to B2B.

- Whether the consequences of such an extension would have an effect on innovation by or market opportunities for SME providers/suppliers;

No such details were provided by business associations since they are against the extension of the UCTD to B2B.

- Whether the benefits of extending the scope to business-to-business transactions would exceed the negative consequences of such an extension.

No such details were provided by business associations since they are against the extension of the UCTD to B2B.

### 1.3. Injunctions

#### 1.3.1. Effectiveness of the current rules in establishing a high level of consumer protection

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

- To what extent is the use of the injunction procedure in your country contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment?<sup>34</sup>

The ID was implemented in Romania by Government Decision 1153/2004. Romania opted for the administrative injunction. Two of the directives that constitute subject matter of this assessment fall under the procedure of injunction: UCPD and UCTD. Such injunctions may be submitted by qualified entities (consumer associations empowered by law to represent the collective interest of the consumers) to the enforcement authority (the NACP), which under an emergency procedure (within 20

<sup>34</sup> 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.

day upon the receipt of the consumer complaint) in well justified cases will take the measures and impose the administrative sanctions provided by the implementing laws of the these directives in order to stop, limit or remedy the effects of the unfair practices. Government Decision 1553/2004 does not institute special procedures and does not confer additional competencies on the enforcement authorities in relation to the injunction procedure.

The injunction procedure has very low practical relevance in Romania, and is not used so far by the consumers. Only one single injunction case could be reported by the NACP (registered in 2015). This case was advanced by a designated consumer protection association upon it received more than 100 inquiries from consumers concerning the infringement of Law 193/2000 on unfair commercial terms and Law 363/2007 on unfair commercial practices. The NACP did not grant the injunction in this case for the reason that some of the consumers had pending cases in court against the same financial institution for the infringement of the same provisions.

The NACP considers that the consumers are not interested in the injunction procedure because they are satisfied with the procedure at the NACP which is free of charge and quick, even if a little longer (the injunction being 20 days). Since the NACP can issue orders to stop the infringement and impose sanctions onto the infringing companies 'a procedure such as the injunction is not inevitably necessary'. The NACP could not report any injunction submitted from other Member States.

The reasons behind the low relevance of the injunction procedure are complex. First of all, there is the approach on implementation, namely the option for the administrative injunction instead or beside the court injunction. The Romanian consumers need assistance in courts, private enforcement being the weakest chain of the enforcement mechanism in the case of both the UCPD and the UCTD. Another obstacle for its large scale use is that it does not bring more assistance for the consumers in procedural terms (did not introduce new procedures), whereas it is more risky and costly if the consumer goes first to a consumer association and that association will proceed in the interest of the consumers. In case the complaint fails, the consumer must pay the litigation fee, whereas in case where the NACP brings the business entity to court under the UCTD, then the NACP pays the litigation cost, and the same applies if the business entity challenges the administrative decision of the NACP in court.

- What measures in your national legislation on injunction procedure are considered to be particularly effective, if any: measures regarding the cost of the procedure, the 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?

Compared to the 'direct' enforcement procedure at the NACP, the length of the procedure was mentioned as being the only advantage for the consumers in case of injunction. Whereas the administrative procedure may take up to 30 days and may be prolonged one time for 15 days, the injunction would take up to 20 days.

Concerning the costs of injunction, the administrative procedure is free of charge, the consumer must not pay any fee and the cost of the litigation falls on the NACP, whereas in a case where the consumers ask a consumer association to represent their interests, the procedure will be free of charge, but if the court rules for litigation costs, than such costs will be paid by the consumers.

- Has your country extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunction Directive? If yes, what are the additional consumer rights covered?

The scope of injunction was not extended.

- Analysis of the obstacles to the effective use of the injunction procedure, in particular by analysing which progress in removing obstacles has been made and/or new difficulties that have emerged in your country since 2012.

No progress can be reported since 2012.

- In a forward looking perspective: Should the coverage of the Injunctions Directive be extended (by including additional legislation into Annex I to the Directive)? If so, which EU legislation should be included? Are there other measures that could improve the effectiveness of the ID in establishing a high level of consumer protection? Should the scope of the Injunctions Directive be extended to the protection of collective business' interests? Are there best practices in your country that could be relevant for other countries and considered as model for the injunction procedure at EU level?

There is no best practice to report, as no successful injunction cases can be mentioned.

Nevertheless, the qualified entity which is empowered to act in the interest of consumers in Romania considers that injunctions could have a major role in curing the current deficit in legislative and judicial solutions on the award of damages to the consumers affected by unfair terms, if the European legislation would impose onto the Member States the obligation to adopt rules on collective procedures for cases that fall under the ID.

### 1.3.2. 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:

- How effective is the injunction procedure in addressing infringements originating in another EU country?

No such case was reported by authorities.

- How effective is it to address infringements originating in another EU country that qualified entities in your country are enabled to seek injunctions in the other Member State (Article 4 of the Injunctions Directive)?

No such case was reported by authorities.

- In a forward looking perspective: Are there non-legislative or/and legislative measures that could improve the effectiveness of the injunction procedure in addressing infringements originating in another EU country? Are there best practices in your country that could be relevant for other EU countries and could be considered as a model for the injunction procedure at EU level?

In the opinion of the NACP, the injunction procedure should be extended to include collective redress.

### 1.3.3. Interplay between the Injunctions Directive and other enforcement instruments of consumer law

Please analyse:

- Is the injunction procedure as designed by the Injunctions Directive regulated separately in your country (in a separate legal act or as a separate procedure regulated within the same legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (UCPD, UCTD and by the Consumer Rights Directive)?

Injunction is governed by a separate law, which however does not contain a distinct procedure. Thus in case of injunctions the procedure will be determined by the law under which the injunction takes place, from those listed in the Annex of the ID.

- If these procedures are regulated separately: What are the main differences between them? How is the coherence between these procedures ensured? If these procedures are regulated in a single legal act (possibly as a single procedure): In what way do these procedures (or this procedure) go beyond measures foreseen by the Injunctions Directive?

Not the case for Romania.

## 1.4. Cross-cutting issues

### 1.4.1. Cost and benefits of the directives covered by the study

- To what extent is there evidence for benefits for consumers stemming from the protection provided by both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of benefits for consumers from the protection against unfair commercial practices and unfair standard terms in contracts; [*Note: a relevant aspect in this context is whether the costs for consumers in exercising their rights under these directives are limiting these benefits or not.*]

The administrative enforcement mechanism of the implementing laws of the UCTD and the UCPD are of high benefit for consumers in Romania. The risks and costs of court actions far exceed those of administrative enforcement. When NACP refers a case to the court, consumers do not bear any cost. However, the administrative enforcement does not have contractual consequences between the parties. The court will render the contract clause of the contract void if the case may be.

In the case of the UCPD, consumers save costs, taking into account that redress in case of damages is ensured by the administrative procedure. In the case of the UCTD, consumers save the costs of establishing the unfairness of a term, but they would have to address themselves to the court to receive redress.

A consumer organisation could represent consumers in front of the court, and in this case, neither consumers, nor the organisation pay the taxes imposed by the court.

In case the consumers complain at the NACP about a potentially unfair term, the NACP proceeds to assess the contract under the UCTD and if considers that the interest of consumers justifies it, it will initiate a court case against the company. This procedure is free of charge for consumers, and the consumers prefer to complain under this administrative procedure instead of going to court directly to challenge the fairness of the terms and of the contracting practice of the business entity. This procedure is not only costless but also last less time than a civil law suit. The NACP solves the complaints within 30 days. The risks and costs of litigation are fully on the NACP. This is why so far the Romanian consumers did not make use of injunctions. Despite the net benefits of this procedure for the consumers, they have not made use of it at a large scale in order to prevent the business entity from bringing the consumer to court under the unfair terms. The number of civil law suits initiated by business entities

against consumers for late performance or non-performance of their payment obligations under contract clauses that turned out later to be unfair is much higher than the number of complaints submitted by consumers to the NACP before they were brought to court for non-performance. This reality indicates that there is still low awareness among consumers on the benefits of the administrative procedure on the unfair contract terms carried out by the NACP. However, in this context it must be also mentioned that since there are no specific laws on the consequences of finding unfairness and declaring the terms void in terms of how the courts should restore the situation before and how the damages should be calculated, the UCTD only opens the way for contract justice, which is then completed under the domestic approach for damages.

The NACP does not have competence to go to court in the field of the UCPD. Its role stops by finding the commercial practice incorrect and imposing sanctions against the infringing business entity. This administrative procedure is also free of charge. However, since in such cases the NACP does not bring the business entities to court, the procedure is shorter. Usually the business entity challenges the finding of the NACP in court. It is indeed a very significant step in Romania to have contractual consequences for finding the commercial practice incorrect, although this procedure is not applied by the NACP, which builds cases on the UCTD when the complaints of the consumers focus on the contractual consequences of the unfair commercial practice. A similar legislative solution would be more than welcome also for unfair contract terms.

Last but not least, the NACP considers that if commercial fairness would improve by enhancing enforcement of the UCPD and the MCAD, then this would have positive impact also on unfair contract terms law. This acknowledgment of the NACP fully depicts the Romanian realities.

- To what extent is there evidence for benefits for traders stemming from both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of creating a level playing field for honest traders by providing a legal basis to eliminate or at least constrain dishonest market practices, such as the use of unfair standard terms in contracts or unfair commercial practices, including through the application of the Injunctions Directive;

No opinion can be reported from business associations on this issue. However, considering the low reaction coming from the market, in terms of complaints at the NACP (on unfair commercial practices and comparative and misleading advertising), it seems that business entities are not fully aware of the market regulatory function and the effect of these directives on competition. The NACP could not recall any single complaint or notification on the use of unfair terms by competitors, and only isolated cases of complaints on unfair commercial practices were mentioned. No court decisions can be reported from Romania that would provide information on cases when business entities went to civil law courts to sue their competitors who infringed the UCPD or the UCTD.

Unfair commercial practices and unfair commercial terms continue to be employed at a large scale in Romania. It seems that instead of complying with the laws implementing these directives, the companies prefer to assume the risks and costs of liability. This supports the assumption that in Romania the preventive effect of post-ante control on unfair commercial practice and unfair commercial terms is still low, considering the weak reaction of the market (no complaints from competitors), the low value of fines that can be imposed by the NACP, the length and costs of litigations, and the lack of clear contractual consequences (exception being the administrative sanction of repayment of the price of marketed goods or services in case of unfair commercial practices).

However, the NACP considers that due to the active role of the NACP less unfair terms are applied by the business entities, although the number of investigations and court cases are still high.

- What are costs for traders due to the need to respect the requirements under the directives covered by the study? [*Note: Such as costs of research, legal advice and compliance as well as the amount of time necessary to comply with the directives*]

The NACP considers that companies invest in high quality expertise to defend their case, but invest far less in legal compliance. They hire the best law firms in case of administrative investigations.

- What are the costs involved in the public enforcement of these rules?

Administrative enforcement is free of charge for consumers. Where the NACP decides to bring the business entity to court and the court establishes litigation costs, such costs will be supported by the NACP.

- Are there indications that the directives covered by the study are not implemented in your country in a cost-effective manner?

Not the case for Romania. Both the NACP and the national associations of consumers carry on their activities under a low budget.

- Could the costs for implementing and enforcing the rules of the directives covered by the study be reduced without lowering the level of protection for consumers? If so, how?

In the opinion of the NACP and consumer associations any reduction of their financing would be at the expense of the consumers. The NACP emphasized the need for continuous training in order to grant to its staff updated information on case law.

#### 1.4.2. Interplay with EU sector-specific consumer protection legislation

Regarding the interplay of the horizontal EU consumer legislation [mainly UCPD and UCTD] with EU sector-specific consumer protection legislation in the areas of electronic communications, passenger transport, energy and consumer financial services, please:

- Analyse the levels of awareness of the requirements of the horizontal EU consumer legislation (mainly UCPD and UCTD) of businesses and consumers and the specific public enforcement bodies in the relevant sectors, as in particular demonstrated by their practical application; [*Key question here is: Are UCPD and UCTD applied in practice by national authorities and courts as a legal basis to combat unfair commercial practices and unfair standard terms in contracts in the regulated sectors?*]

In Romania enforcement of the UCPD and UCTD falls into the competence of the NACP and not of the sectoral authorities. Concerning the institutional framework on enforcement of the horizontal consumer directives, the NACP considers it important for effective consumer protection that consumer policy is framed by an entity that is independent of and not under the subordination of an economic ministry (although the NACP is in the coordination of and financed from the budget of the Ministry of Economics). In the view of the NACP the current institutional set up is appropriate in the sense that other ministries or regulatory authorities which are in charge of issuing authorisations for companies and supervise the market along market policies do not have sector specific enforcement competencies in relation to the consumer protection directives. In the opinion of the NACP, conflicts of interest may be avoided this way. It has also emphasized that consumer issues should be presented and defended at EU level as well by the national consumer protection authorities and not by ministries of economies as usually happens. Thus the NACP considers that the current institutional framework should not change, enforcement of these directives should remain under the umbrella of the central enforcement authority, free from economic policy

considerations in order to assure effective consumer protection by way of uniform administrative practice.

For this reason the national authorities in the regulated sectors contacted for the purposes of this assessment (National Authority for Regulation in the Field of Communications and the National Regulatory Authority for Energy Services) have no legal competence to take measures (stop the practice and impose fines) in case they notice incorrect commercial practices or unfair contract terms within their sector. They can only report such cases to the NACP, which will take the necessary measures for the protection of consumers. Thus, in the regulated sectors as well, the consumers can complain only to the NACP about cases of unfair commercial practices and unfair commercial terms. The NACP will consider sector specific legislation to the extent that this is related to the consumer rights mentioned in the horizontal legislation (UCPD and UCTD), especially the information obligations of the business entities towards the consumers. However, there is no mandatory legal obligation for the regulatory authorities to involve the NACP in their sector or vice versa. Although there are in place bilateral protocols on collaboration between the NACP and the regulatory authorities, notifications towards the NACP and vice versa work rather on a voluntary basis and only very few instances of such cooperation were mentioned by the NACP. One can conclude from the interviews that such cooperation is not regular and there is not a tight procedural framework. However, the NACP would see a need for more involvement for example in the unfairness check of the standard contracts in the field of public utility services in the energy sector.

The energy sector is specific from the point of view of the interplay of horizontal and sector specific legislation concerning the provision of public utility services to consumers. Here the companies must submit for approval to the sector specific authority the standard contracts they apply with consumers. Due to this ex ante control of the standard contracts in this sector the chances of service providers to apply unfair terms is very low. If the service providers do not comply with the standard terms approved by the sectoral authority, then the consumers may complain to the NACP, which will take measures against the company. However, if the consumer leaves the regulated market of public service and procures the energy from the free market, then they lose this protection. The sectoral regulatory authorities have no competence in their fields to implement the UCTD except in this sector.

Concerning unfair commercial practices, the special regulatory authorities can only act when the unfair commercial practice also infringes the conditions of authorisation. Then the regulatory authorities may suspend the authorisation. At this point, although not mentioned by the NACP or the interviewed regulatory authorities, there may be a case of overlap, since the NACP as well may suspend the activity of the business entity in case it refuses to comply with the measures that the NACP adopts upon finding that questioned commercial practice is unfair.

The sector of financial services has a special institutional framework; here the NACP has a special competence and has a separate department in charge of handling consumer claims. The NACP takes the sector specific legislation into consideration in its investigations and assessments on commercial practices and unfair terms, especially on the information obligations towards consumers.

Sector specific case law on unfair contract terms reveals that the consumers are aware of their rights in the field of financial services and telecommunications (especially mobile telephone services). Court cases on unfair terms in consumer loan contracts far exceed the number of unfair contract terms cases in other fields.



- Specify whether in your country the same authority is responsible for the enforcement of the horizontal EU consumer law 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 UCPD/UCTD in the regulated sectors, as specified in the previous bullet?*]

Sectoral policies are mainly enforced by the sectoral authorities. These have no competencies related to the UCTD for which the NACP is in charge, whereas for the UCPD the competence is shared between the NACP and the Ministry of Public Finances. Their main competence is the authorisation of business entities to conduct sectoral activities and supervision of the markets. However, their competence to approve the framework contracts of the service providers has indeed a positive impact on legal compliance by the companies with the requirements under the UCTD, although the sectoral authorities do not have post ante control competence on the implementation of the consumer contracts. This falls in the competence of NACP and the courts. Nevertheless, it must be mentioned that the two directives (UCTD and UCPD) are not applied complementarily by the NACP. It applies either the UCTD or the UCPD and when the consumers are more interested in contractual consequences of the business unfairness the NACP uses the UCTD as legal basis and not the UCPD.

There are bilateral protocols in place between the NACP and sectoral authorities in the field of energy and telecommunications. These bilateral protocols contain detailed provisions on cooperation and information between the authorities. In the field of unfair contract terms, the sectoral authorities have the competence to approve framework agreements of the service providers and in case they discover unfair terms such contracts will be forwarded to the NACP which will take the necessary measures. Sectoral authorities do not have competence to impose sanctions where they discover unfair terms and unfair commercial practices.

By Government Decision 162/2016, which entered in force on March 22, 2016, a specific legal framework on interinstitutional cooperation was established to fight against unfair competition. The Interinstitutional Council is built of the Ministry of Public Finance (enforcement authority of the MCAD) National Consumer Protection Authority (enforcement authority for UCTD and UCPD), National Council of Audiovisual (enforcement authority for MCAD), Competition Council, and State Office for Inventions and Trademarks. Among the competencies of the Council is the harmonisation of the competencies of the stakeholder authorities and cooperation in the process of elaborations of policies aimed at the prevention of unfair competition.

- Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning contractual fairness, 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.?*]

In general the horizontal and sector specific provisions provide a coherent legal framework on information obligations. Nevertheless, overlaps and gaps may be identified in the sector of electronic communications between the horizontal and sectoral legislation with an impact on information obligations of the service providers. Thus, for example overlaps between the transposition act of Directive 2011/83/UE (Emergency Government Ordinance 34/2014 (Article 4, para. (1) lit. a), c), d) and f) which has horizontal application (implemented by the NACP) and the specific information obligations governed by Article 11 of Decision no. 158/2015 lead to cases when the same company is fined by both authorities on different legal basis, although Decision 158/2015 adapts the requirements to be sector specific. However, in other cases, the overlap does not cause costs because although the sectoral legislation provides for sectoral competence the sectoral authority does not have competence to impose sanctions. As concerns compliance by the service providers with the terms of their standard contracts, according to Article 7 (c) intent 3 of Government Ordinance

21/1992 (GO 21/1992 has general provisions – *lex generalis*) NACP can impose sanctions, if there is no specific legislation (*lex specialis*).

A competence gap in enforcement was also signalled in the energy sector where the sectorial legislation provides for information obligations of the utility providers towards the consumers, although the sectoral authority has no competence to enforce these provisions and impose sanctions.

Sectoral authorities mentioned the lack of competence to enforce sectoral legislation on information obligations as a deficit of the sector specific legislation. In the opinion of the sectoral authority for telecommunication services, more sectoral competence would bring more sectoral expertise that would enhance enforcement of the horizontal directives, at least in the sector of communications. Such a need was not mentioned in the energy sector, where the authority is in charge of ex ante control of the general terms and conditions of the public utility service provider, although it does not have ex post control competencies on such contracts. However, the central enforcement authority is committed towards the current division of competencies, in order to avoid possible conflicts of interest with the regulatory authorities which are in charge of the authorisation of the service providers.

- What are the benefits of the complementary application of the UCPD and UCTD in the regulated sectors? What are the costs due to the complementary application with the sectoral EU consumer protection legislation?

No such costs were mentioned by the stakeholders. The horizontal and sectoral requirements are different, and there are no overlaps in their opinion. The UCPD and UCTD are implemented by the NACP, whereas the sectoral legislation implemented by the sector specific authorities is of a different nature.

- Assess any need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law.

See above.

#### 1.4.3. Relevance of consumer law directives for consumer-to-business transactions

- Please analyse the need and potential for the application of the consumer law directives (mainly UCPD and UCTD) to 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).

There is no legal provision or case law to report that applies the UCPD or the UCTD to C2B relations. However, the NACP signalled that lease contracts between C2B concerning lands or buildings may present fairness problems. The NACP is entitled to receive such complaints from the consumers concerned and then to assess the contract. According to the authorities and consumer associations there should be consumer protection in place also for C2B contracts since in these transactions as well the consumer remains the weaker party.

#### 1.4.4. Specific protection for vulnerable consumers

Please analyse:

- Whether the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined in the consumer law directives and relevant jurisprudence, and as applied by national authorities and courts in your country, continue to be valid and fit for purpose.

The concept of consumer in horizontal and sectoral legislation follows the policy approach of the directives. In Romania there are no special legal provisions in place aimed at providing special protection to vulnerable consumers concerning the directives under assessment. How formalistic or how flexible the concept of consumer is depends on the authority and the courts concerned and is interpreted on a case by case basis.

Courts strictly refer to the policy preamble of the directives and the policy reasoning of the CJEU on the concept of average consumer. Therefore, no court case can be reported where the courts would have discussed the vulnerability of the consumers. Consumer associations made mention of lower court cases in the field of unfair contract terms where the private person contracting with the business entity was not considered to be an average consumer, due to his or her profession, although the contract was concluded outside of business and professional purposes.

However, the NACP has considered the vulnerability of the consumers in its decisions in certain cases, especially in case of elderly persons, in the field of unfair terms. In its opinion the standard of 'average consumer' needs to be circumstantiated depending on the economic and social conditions of the consumers; it should be defined distinctly at least considering the field where it applies. The current concept is considered too vague and difficult to be adapted in practice especially for over-indebted consumers and elderly people, according to the NACP. There is a need for special provisions on vulnerable consumers in the UCPD and UCTD in the authorities' view. The NACP drew attention to over-indebted consumers who are vulnerable on the financial market because of their need for short term loans for daily subsistence. Such cases have not yet reached the NACP, but are considered critical from the point of view of the affected consumers.

In the context of the Romanian economic, social and judicial conditions of the directives under assessment, it would be more than justified to treat vulnerable consumers differently. Vulnerability is justified in certain transactions, such as life-long contracts for housing purposes. The age and mental conditions (elderly people) and business education of the consumers, especially their financial education and the characteristics of certain markets which are not able to correct market failures, also justify different treatment. Business entities have in the past abused consumer vulnerability that has led to consumer over-indebtedness with significant social and economic impacts in Romania. The weak impact of the UCPD in Romania and the weak corrective force of the market on unfair commercial practices also support the need for special protection of vulnerable consumers. Since special protection seems not to evolve via judicial law, only a special legal regime is therefore able to grant to the vulnerable consumers the protection they need. However, the legislative solutions come slowly. Illustrative in this respect is the legislative process on defining the concept of vulnerable consumer in the energy sector. Here the framework provisions were enacted in 2012 by Law 123/2012 but the implementing rules providing concrete criteria to establish who is vulnerable are still to come. The law was not yet put in practice for this reason. Only at end of 2015 had the Ministry of Labor made public a bill on what the level of minimum income would be for vulnerable consumers. Law 123/2012 defined the vulnerable consumer as: 'end consumers belonging to the category of residential consumers, who for reason of age, health or low income, are at risk of social marginalization and for the prevention of such risk benefit from social protection, including protection of a financial nature [i.e. financial aid].'

- To what extent the existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers and whether, based on the experiences in your country, specific provisions should be introduced in other directives concerned, in particular the Unfair Contract Terms Directive.

As argued above, a high level of over-indebtedness among Romanian consumers and weak market reaction on incorrect commercial practices require specific protection on the consumers of financial services. Consumers of energy services are also vulnerable.

#### 1.4.5. EU added value

- Overall, would you consider that protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in your country since the implementation of the UCPD and the UCTD in national legislation?

According to the NACP the level of protection has significantly improved due to the EU directives on unfair commercial practices and unfair contract terms. However, consumer associations consider that one can talk only of a moderate improvement in terms of effectiveness of enforcement.

- Overall, would you consider that the information of consumers regarding unit prices has improved since the implementation of the PID in national legislation?

Consumer associations consider that there is a significant improvement in this field.

- Overall, would you consider that the protection of businesses against unfair marketing in your country has improved since the implementation of the MCAD in national legislation?

No information from business associations on this question.

- Overall, would you consider that it has become easier for businesses in your country to directly trade cross-border to final consumers located in other EU countries in recent years? Has it become easier for consumers in your country to directly purchase cross-border from traders located in other EU countries?

No information from business associations and consumer associations on this question.

- To what extent are these improvements, if any, due to the mentioned directives?

Consumer associations and enforcement authorities consider that the role of the EU directives is crucial for improvements in consumer protection in Romania.

## Annex

## A. Transposition fact sheet

**Table 1: Fact sheet on transposition of directives in Member States' law – ROMANIA**

Directive	Transposition legislation (National law, Article)	Comments	Specific provisions going beyond minimum harmonisation requirements/use of exemptions	Included in national legislation		Comments
<b>Directive 93/13/EEC on unfair terms in consumer contracts</b>	Law 193/2000 on unfair contract terms		'Black list' of terms considered unfair in all circumstances	No		
	Law 76/2012 and Emergency Government Ordinance 34/2014		'Grey list' of terms which may be considered unfair	Yes	Annex of Law 193/2000	
	Law 157/2015 on the approval of Emergency Government Ordinance 34/2014		Extensions of the application of Directive to individually negotiated terms	No		
			Extensions of the application of Directive terms on the adequacy of the price and the main subject-matter	No		

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<b>Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market</b>	Law 363/2007		Provisions regarding financial services going beyond minimum harmonisation requirements	Not by Law 363/2007. However, specific legislation on financial services contains more restrictive provisions than UCTD.		
	Law 33/2015 amending Law 363/2007		Provisions regarding immovable going beyond minimum harmonisation requirements	See answer above.		
	Government Ordinance 37/2015 on the modifications of certain legal acts in the field of consumer protection		Application of UCPD to B2B transactions	No		
	Law 51/2016 on the approval of Government Ordinance 37/2015					

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<b>Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers</b>	Government Decision 947/2000 on the modalities of indicating the price of products offered to consumers		Extension of the application to other sectors (e.g. for immovable property)	No		
	Government Decision 796/2011 amending certain legal acts in the field of consumer protection		Use of specific regulatory choices/derogations	No		
<b>Directive 2006/114/EC concerning misleading and comparative advertising</b>	Law 158/2008 on comparative and misleading advertising					
	Law 202/2013 on modification and completion of Law 158/2008		Designated entities also may notify the enforcement authority	Yes	Article 7 of Law 158/2008	
			Legal facilities may be directed jointly against a number of traders?	Yes	Article 8 lit. a) of Law 158/2008	
			Legal facilities may be directed against code owners	Yes	Article 8 lit. b) of Law 158/2008	
			Voluntary control by self-regulatory bodies	Yes	Article 19 of Law 158/2008	
<b>Directive 2009/22/EC on injunctions for the protection of consumers' interests</b>	Government Decision 1553/2004 on certain measures to stop practices that may affect the collective interests of the consumers					



**Table 2: Fact sheet on Injunctions Directive – Romania**

Issue	Answer	Comments
<p>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)?</p>	<p>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.</p> <p>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.</p>	<p><i>The framework law does not go beyond the provisions of the ID.</i></p> <p><i>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.</i></p>
<p>Who is entitled to bring an action seeking an injunction?</p>	<p>Designated entities (consumer associations entitled by law to represent the collective interest of the consumers.</p>	
<p>Is the injunction procedure a court or an administrative procedure?</p> <p>If your country legislation foresees both forms of the procedure, please explain in the comments column for which infringements the court or administrative procedure is foreseen</p>	<p>An injunction is primarily administrative procedure within which the authorities may impose administrative sanctions that are provided in the laws that fall under injunction.</p> <p>However, injunction does not prevent individual consumers to defend their individual rights or the consumer associations to act according to their competence in the interest of consumers under other laws.</p>	
<p>Who bears the costs of an injunction procedure?</p> <p>If qualified entities (or some of their categories e.g. consumer organisations are entitled to an exemption of some/all cost related to the procedure please explain the characteristic of such exemption in the comments column.</p>	<p>This is established in the laws that fall under injunction. Most of these laws provide for free of charge administrative procedure.</p>	
<p>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?</p>	<p>No, scope of the Directive not extended</p>	

Is protection of business' interests covered by the injunctions procedure? If scope of application extended to the protection of business' interests, please provide details in the comments column regarding type of business' interests covered by the injunctions procedure	No	
Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations	No	
Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID)	No	
Has your Member State taken specific measures regarding the prior consultation (Article 5 of the Injunctions Directive)?	No	
Does the national legislation provide for measures ensuring summary procedure? Please specify main characteristics of the procedure (subject matter/time limits) in the comments column.	No	
Are there sanctions for non-compliance with the injunction order (Article 2(1) of the Injunctions Directive)? If sanctions in form of penalty or fine foreseen please specify in the comments column to who exactly should they be paid	The competent authorities apply the sanctions provided in the specific legislation that has been infringed.	
Has your Member State taken specific measures regarding the publication of the decision and/or the publication of a corrective statement?	No	
Is it possible to claim within the injunction procedure for sanctions for the infringement?	No	
Can an action for the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to other beneficiary be brought within the injunction procedure?	No	
Can an action for damages to be paid to the qualified entity or the public purse be brought within the injunction procedure?	No	

<p>Can an action for damages or redress to be paid to the consumers concerned be brought within the injunction procedure?</p>	<p>No The law does not govern the issue of damages, since this is an administrative procedure. However, it allows the consumers or consumer associations to go to civil law court and ask damages.</p>	
<p>Can individual consumers base their individual claims for damages/remedies on the injunctions order?</p>	<p>No information available on this. However, the injunction order is not compulsory for the court, it may confirm or may reject the finding of the administrative authority</p>	
<p>Can the qualified entity claim other measures beyond the injunction, e.g. evidence of compliance with the judgment?</p>	<p>No</p>	
<p>Are the effects of individual injunctions orders extended to the future infringements and/or same or similar illegal practices (of other traders)?</p>	<p>No</p>	

## B. Data tables

*Number of B2C disputes*

Please indicate how many B2C disputes have been decided in your country on the basis of consumer law directives covered by this study (UCPD, UCTD, PID) as a proportion of the total number of B2C disputes decided on the basis of other national consumer legislation (based on statistics, or based on estimates by enforcement authorities and other stakeholders, where this is not the available).

**Table 3: B2C disputes decided on the basis of consumer law directives covered by this study in comparison with total B2C disputes decided on the basis of other legislation (most recent year for which data is available)**

Year	Type of data	Total number of B2C disputes (number of cases)	Share of B2C disputes decided on basis of ...					Comments
			UCPD	UCTD	PID	other EU consumer protection legislation (e.g. CRD, Sales Directive, sectoral legislation)	national consumer legislation not based on EU directives	
<b>2015</b>	Court statistics	More than 1000 administrative cases in which the NACP is litigating party  The number of civil court cases is significant	1 case	5930 cases	2 cases	Such data is not available	Such data is not available	Due to lack of data the percentage cannot be established

*Costs of obtaining redress for a hypothetical case of invoking unfairness of a standard contract term*

- Please estimate the costs, including time, for consumers in obtaining redress when invoking the unfairness, and thereby the non-binding character of standard contract terms in a contract they concluded. Please provide the estimate for the hypothetical example below, focusing on costs (and needed time) of a lower court procedure and the use of ADR or other relevant procedure (if applicable).<sup>35</sup>

**Table 4: Estimate of costs for consumers in obtaining redress when invoking the unfairness of standard contract terms in a contract they concluded (for the hypothetical example provided in the box below)**

Redress mechanism	Estimated court fees (national currency)	Estimated lawyer's fees (national currency)	Other costs, if any (national currency)	Estimated time involved for consumer (hours)	Comments
<b>Lower court procedure</b>	No submission fees/stamp duty for consumer claims at courts since 29 June, 2013	RON 750 – 3 000 (4 000)  [approx. EUR 166 – 664 (885)]	-	According to one consumer association it takes for a consumer on average 5-6 hours to prepare a complaint	Consumers must provide evidence on previous direct negotiation with the credit institution.  Litigations may last from 2-7 years, the average length is of 4 years. Some cases have last for 6-7 years.
<b>ADR</b>	No submission fee/stamp duty	Likely to be similar as above since the costs follow the lawyer fees	-	Likely to be the same as above.	Consumers must provide evidence on previous direct negotiation with the credit institution.  It may last 3-4 months, including the decision of the judge.

<sup>35</sup> For the hypothetical example it is assumed that both the provider and the consumer are located in your country.

<b>CSALB (in the banking field) functions only from March 1, 2016</b>	Free of charge	Free of charge	-	Likely to be the same as above.	<p>Consumers must provide evidence on previous direct negotiation with the credit institution</p> <p>90 days which may be prolonged by 3 months.</p> <p>According to latest information the procedure at CSALB is extremely quick within the time frame provided by the law. The shortest so far was 17 days in August</p>
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Notes: (1) Emergency Government Ordinance no. 80/2013 abolished the submission fee/stamp duty for consumers in litigations initiated against business entities. (2) The 5-6 hours time is used by consumers to prepare a complaint to be submitted at the NACP, which will act in the interest of the consumers. This is used for gathering information on the internet or on consumer blogs and for exchange of information on unfair terms with other consumers as well as on how should be drafted the complaint and what evidence must be provided to the authority. No information is available on the time needed for the consumer to provide the necessary information to a law firm or an individual lawyer when the consumer opts for civil litigation. It will certainly take less time.

**Hypothetical example: Terms which inappropriately exclude/limit consumers' rights to compensation**

*A consumer went on a package holiday with a friend to Kenya for which they paid € 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 €5,000 (€4,000 for the cost of the package and €1,000 for lost time and enjoyment). The tour operator agreed to compensate them €1,000 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/unfair-contract-terms/index\\_en.htm](http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-contract-terms/index_en.htm)]*

- Please estimate how often court and ADR procedures are used in your country for invoking the unfairness, and thereby the non-binding character of standard contract terms (i.e. the number of cases per year)?

Number of court cases on unfair contract terms law based on data available on the website of the Ministry of Justice.<sup>36</sup>

2016 (January-June): 2091 cases

2015: 5930 cases

2014: 3522 cases

2013: 1055 cases

2012: 865 cases

2011: 843 cases

2010: 995 cases

One can notice an increase in the number of court cases from 2013 under the impact of the case law of the CJEU.

<sup>36</sup> See [www.portal.just.ro/](http://www.portal.just.ro/)



## C. Interviews conducted and literature reviewed

**Table 5: Interviews conducted for this study**

Organisation	Stakeholder type	Date
<b>Romanian Banking Association</b>	Business association	30 June 2016
<b>Romanian Chamber of Commerce and Industry</b>	Business association	28 June 2016
<b>National Consumer Protection Authority</b>	National consumer enforcement authority	29 June 2016
<b>National Authority for Management and Regulation in Communications</b>	National regulatory authority	28 June 2016
<b>Regulatory Authority for Energy</b>	National regulatory authority	30 June 2016
<b>Ministry of Finance</b>	Ministry	Written and phone interview
<b>European Consumer Centre</b>	European Consumer Centre	29 June 2016
<b>Association Pro Consumer</b>	Consumer organisation	29 June 2016
<b>Association of Romanian Users of Financial Services</b>	Consumer organisation	29 June 2016
<b>Competition Council</b>		Written interview

**Table 6: Literature reviewed for country report**

Author/Source	Year	Title of publication
Cristina Dana Enache	2012	Clauze abuzive în contractele încheiate între profesioniști și consumatori (Unfair terms in contracts concluded by professionals with consumers), Editura Hamangiu, 2012.
Sorna Popa	Dreptul 3/2015	Drepturile consumatorilor în statornicirea Ordonanței de Urgență a Guvernului nr. 34/2014 privind drepturile consumatorilor în cadrul contractelor încheiate cu profesioniști (The rights of consumers in Emergency Government Ordinance 34/2014 on consumer rights in contracts with professionals).
Carmen Adriana Gheorghe	Curierul Judiciar 1/2014	Clauzele abuzive în contractele cu consumatori (Unfair terms in consumer contracts)
Anca Nicoleta Gheorghe, Camelia Spasici	2012	Dreptul consumației (Consumer Law), Editura Hamangiu, 2012.
Ana Juanița Goicovici	2014	Credite pentru consumatori și investiții imobiliare Comentarii și Explicații (Loans for Consumers and Investments in Immovable) Editura Ch. Beck, 2014.
Lucian Bercea	Curierul Judiciar 6/2013	Configurarea contractelor standard. O aplicație la noile acțiuni de înlăturare a clauzelor abuzive în contractele de consum (Standard agreements configurations. Applications on new actions for the removal of unfair terms from consumer contracts)
Ioan Ilieș Neamț	Revista Română de Drept Privat 6/2013	Considerații generale cu privire la acțiunile reglementate în art. 12 și 13 din Legea 193/2000. Analiză de drept comparat. (General considerations on the actions governed by Article 12 and 13 of Law 193/2000. Comparative analysis.)
Beatrice Andreșan Grigoriu, Mădălina Moraru	2015	Country Report Romania, in Hans. W. Micklitz, Irina Domurath (eds.) Consumer Debt and Social Exclusion, Hart, 2015, pp. 114-133.
Mónika Józson	2016	The Methodology of Judicial Cooperation in Unfair Contract Terms Law, in Fabrizio Cafaggi, Stephanie Law (eds.) Judicial Cooperation in European Private Law, Edwards Elgar, 2016 (forthcoming).

## 1. Study to support the Fitness Check of EU Consumer law – Country report SLOVAKIA

### 1.1. Unfair commercial practices and marketing

#### 1.1.1. Effectiveness of the UCPD in establishing a high level of consumer protection

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

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

The principle-based approach proved to be the only effective way to prevent and remove the use of unfair commercial practices. Its effectiveness has been verified by: a) findings of the Commission on the Assessment of Terms in Consumer Contracts and of Unfair Commercial Practices established at the Ministry of Justice, (hereinafter referred as 'Commission on Assessment'), b) decisions of Slovak Trade Inspection (authorised administrative authority, hereinafter referred as 'STI') and c) the fact that court decisions clearly indicate, that the list of practices will never be exhaustive and complete to cover all misleading or aggressive practices. To sum up, the court decisions and the decisions and findings of administrative authorities tend to use the general clause or directly the black list proportionately. This overview of the relevant decisions shows that the courts tend to prefer the use of the general clauses enabling them to grasp the complexity of the cases where more sophisticated forms of abuse of the trader's position occurred. The reasons for such a finding may be that decisions in such cases were more complicated and could not be solved out of court (one may argue that when a practice is identified as the one of the black list practices, the solution of the case is clear without court proceedings therefore the sanction of administrative authority and other ways of dispute solution are easily available).

The following list contains the examples of cases where the principle-based approach was used:

- Decision of Supreme Court of 25 May 2015, no. Sžo/32/2014: misleading commercial practice in relation to the price of service and its calculation;
- Decision of Regional Court in Bratislava of 14 November 2013, no. S/154/2011-113: unfair commercial practice that consisted of unauthorised and misleading ticking the box 'for purposes relating to the profession' - in the relevant case the consumer was a pensioner;
- Decision of Regional Court in Trnava of 4 May 2016, no. 24 Co/448/2015: unfair, misleading practice of the trader inducing the consumer to acknowledge the debt without real knowledge and the understanding by the consumer of the effects of such conduct presented in the standard contract form;
- Decision of STI of 7 May 2010, no. P/0110/05/2010: misleading practice in relation to the price of the product;
- Findings of Commission on Assessment of 11 December 2012, no. 56208636/2011-110.292,315,12156/2012110.20,23,24,25,26,28,30,36,41,46,60,71,91,142,172,178: The trader (the electric energy provider represented by its commercial agents) concluded doorstep contracts where they falsely informed the consumer that a) they represent the former provider, b) the contract is limited only to the change of the former contract regarding its content;
- Findings of Commission on Assessment of 22 April 2016, no. 28052/2015-20.78,118,253,290,349a,379,429,33083/2016-20.120: misleading commercial practice in relation to the price of service and its calculation.

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

The everyday practice of STI, the body authorised to control the traders' practices, shows that the black list is an important tool for prompt progress in their work. If a commercial practice falls under the black list it is not necessary to determine whether such a practice satisfies the requirements of a general clause. It also strengthens the legal certainty and the uniform decisions of authorised bodies.

The black list proves to be useful as the easier way to decide on the concrete case and it may also serve as the educative tool both for traders and consumers. The list clearly indicates the border not to cross for traders and it may help to build up the argumentation in the relevant case for the reasonable and well informed consumer.

The following list contains the examples of cases where the black list of unfair commercial practices was applied:

- Decision of District Court Bratislava IV of 3 September 2014, no. 5C/64/2009, unfair commercial practices under Annex I, misleading: no. 7, 17, 20, aggressive: no. 24;
- Decision of STI 19 July 2013, č. P/0076/04/13, unfair commercial practices under Annex I, misleading: no.7, aggressive: no.31;
- Warning of STI for Slovak consumers about unfair commercial practices of Israeli traders where the STI has no inspection authority, unfair commercial practices under Annex I, misleading: no. 7, aggressive: no. 31;<sup>1</sup>
- Findings of Commission on Assessment of 13 August 2014, no. 02097/2013-110.120, 121, 122, 123, 125, 126, 127, 139, 140, 142, 146, 183, 186, 190, 191, 192, 193, 195, 197, 198, 203, 204, 205, 206, 207, 210, 211, 213, 214, 215, 221, 224, 226, 228, 263, 266, 269, 275, 293, 321, 331: aggressive commercial practices under Annex I, no. 31.

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

In Slovakia, the deficiency of the implementation of UCPD has finally been removed only by the amendment of CPA by the Act 102/2014 Coll. by which the scope of consumers' protection against UCPs has been broadened to the products including not only movable things (goods) but also services, immovable property, rights and obligations. The lack of previous regulation was evident and it restricted the entitlement of STI to control traders.<sup>2</sup>

- 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 what 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?*]

In relation to the Directive 2006/95/EC on the harmonisation of the laws of Member States relating to electrical equipment designed for use within certain voltage limits, STI realised the inspection of the electrical appliances where the investigations of STI indicated among the breaches also the non-conformity in the regard to information

<sup>1</sup> Available at: <http://www.soi.sk/files/documents/rspotreb/spotrebite%C4%B5sk%C3%BD%20prieskum%20nekal%C3%A9%20praktiky.pdf>

<sup>2</sup> Machútová, 2013.

provided to consumers about voltage limits and performance per watt. The problems consisted of faulty labelled voltage limit or misleading performance per watt.<sup>3</sup>

Experiences of consumer organisations indicate problems with misleading information about the performance of domestic home appliances. On the other hand, business associations complain about the conflict and gap between standards for performance (e.g. new performance standards for vacuum cleaners) and the expectations of consumers regarding the performance and long-standing use of the electronic equipment. At the same time the business associations acknowledged that the improved technology may allow for very good performance of the sustainable characteristics.

- 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 your country rigidly?*]

The courts frequently employ the term 'average consumers' without paying special regard to the assessment of their qualities. Also stakeholders indicate that there is a presumption that the consumer in the particular proceeding is an average one, therefore this category seems to be self-explanatory and it is questionable whether it is useful to have it in the text of directive's articles. It may be sufficient to include this term only in the recitals. On the other hand, in the academic literature the demand was raised of the need to stipulate the objective criteria for average consumer by the law.<sup>4</sup> This plea seems to be rare, as the court practice does not indicate such need. District Court Poprad in its decision 17C/113/2010 of 20 December 2011 held with the reference on decisions of CJEU (C-201/96, C-220/98) 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 on-line sales and on-line services without any special education. The court referred to the statistics of [www.telecom.gov.sk](http://www.telecom.gov.sk) as a proof of the extensive use of internet in Slovakia that suggests that the average consumer could not be differentiated from the common user of internet.

Attention should be paid to the fact that the average consumer in the Slovak republic is highly influenced by the price of the product as the Slovak average income (EUR 882 per month in 2015) is in comparison to the EU average a relatively low one.<sup>5</sup> Supreme Court in its decision of 26 April 2012, no. 8 Sžo/40/2011 argued at the same line of reasoning: 'The average consumer gets primary orientation on market by the prices of the products, and it should be stressed that every consumer does not regularly buy the goods in instalments and is not experienced in such a form of sale'.

The Regional Court in Prešov in its decision of 25 February 2013, no. 16 Co 24/2013 argued that the average consumer is not able to assess all circumstances decisive for the case alone and therefore the appeal by the consumer organisation as the intervener should be admissible also against the consumer's will. This decision has been thoroughly criticised on the grounds of the excessive over-protection of the consumer.<sup>6</sup>

In some decisions there is a link created between the notions 'average consumer' and 'vulnerable person' (e.g. decision of District Court in Nitra of 1 April 2014, no.

<sup>3</sup> Available at: <http://www.soi.sk/sk/Kontrolna-cinnost/Vysledky-kontrol-SOI/Vyhodnotenie-sektoroveho-programu-dohladu-SOI-nad-trhom-pre-elektricke-zariadenia-pouzivane-v-u.soi?ind=>

<sup>4</sup> Graban, 2012.

<sup>5</sup> Vozár, 2013.

<sup>6</sup> Available at: <http://www.najpravo.sk/clanky/nazor-ochrana-spotrebitela-napriek-jeho-nesuhlasu-alebo-ks-presov-urcuje-co-je-pre-priemerneho-spotrebitela-najlepsie.html?print=1>

15C/55/2013, decision of the Constitutional Court of 18 November 2015, no. PLz. ÚS 5/2015).

Business associations expressed the opinion that the protection of consumers is generally reasonable but also the concern that the notion of 'average consumer' is sometimes interpreted as meaning a person without a sound mind. Such an interpretation may endanger not only traders but consumers as well, as it results in higher prices for the products and services.

- 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 in your country recognised new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted)?*]

As already stated above sometimes there is a tendency to identify the vulnerable person with the consumer.

The explicit use of the provision on the protection of vulnerable consumers in the decisions of relevant authorities in connection to UCPD is not frequent, but on the other hand, the judges usually take into account all relevant circumstances of the case and the vulnerability of the concerned person may be one of them, i.e. the relevant authorities do not explicitly create new categories of consumers but they pay attention to their situation (poor, indebted) as the personal situation of the consumers is the important factor in their transaction decision.

District Court Bratislava IV in its decision of 3 September 2014, no 5C/64/2009 held that the defendant was vulnerable because of her age (pensioner) (regarding an unfair commercial practice: falsely claiming that a product is able to cure illnesses).

Sector specific directives (energy sector) have introduced the notions of 'energy poverty' and 'vulnerable customer'. The sectoral protection of the vulnerable customers seems to be an efficient measure (in relation with the generally applied UCPD). Some stakeholders argued that generally the notion of the vulnerable consumer is redundant; its importance may be manifested only in the sectoral regulation. Otherwise they found the general regulation targeted on the average consumers as a sufficient tool. On the other hand, the consumer organisations would prefer to introduce this category also into UCTD.

- 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?*]

As one of the examples of the quite successful self-regulation action may be considered the activity of the Council for the Advertisement.<sup>7</sup> The Council is the non-governmental body encompassing the various subjects from trade, advertisement and media. They declare as the main objective of their existence to provide and promote honest, decent, legal and truthful advertising in the Slovak Republic. Their Code of Ethics for Advertisement Practices serves as the basis for the decisions of their Arbitration Committee based exclusively on a written suggestion of the complainant. The complaint may be submitted by any legal or natural person, except the members of the Committee. The awards of the Arbitration Committee frequently tackle aspects of unfair commercial practices and misleading advertisements. The reference to the findings of the Arbitration Committee and their reasoning may be found in the decisions of the state authority (STI). The cooperation between Slovak Trade Inspection and the Council for the Advertisement works in both directions. Also the advertisement in accordance with the legal requirements may be contrary to some ethical requirements envisaged by the Code of Ethics. In such a case, STI may

<sup>7</sup> Rada pre reklamu, <http://www.rpr.sk/en>

reassign the complaint to the Council for proceeding and the Arbitration Committee may hold the advertisement as breaching the Code of Ethics despite the fact that this advertisement is in accordance with CPA or Act on Advertisement.<sup>8</sup>

The regulatory authorities emphasised problems in the area of enforcement of obligations stipulated under the code of conduct by code owners. The traders ranking among the group of traders bound by code frequently do not indicate in a commercial practice that they are bound by the code. It is also questionable whether the trader is obliged to communicate this information under Article 6 (1) UCPD. Monitoring compliance with the code by those who have undertaken to be bound by the code is not in practice frequently executed by the code owner. Also where the code owner has knowledge about non-compliance, an effective enforcement mechanism is not available.

- 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?

Stakeholders point out the lengthy procedure for the amendment of a directive. In this regard the principle based approach seems to be a sufficient tool in the long term. On the other hand if there was an admissible procedure for updating the black list without need to go through the legislative process, this would improve the functioning of the protection against unfair commercial practices.

According to stakeholders these practices should be added to the list:

- Television contests, games or fortune-telling, where practices of non-transparent fees, manipulation with connection to TV studio or the intentional disinformation occur, or there is intentional provision of false or incorrect information about how to proceed in the game or to solve the task (the idea being to prevent the consumer gaining the envisaged benefits);
- Subliminal advertising;
- Court practice suggests that attention should be paid to the frequent practice where the consumer is offered to conclude an instalments agreement, but its effect regarding the renewal of prescription period by acknowledgment of the debt is 'hidden'/'unsaid' and the consumer concludes this agreement without real knowledge about its effects on the prescription period (by acknowledgment of the debt the new 10 year period begins). Courts held that such conduct constitutes an unfair commercial practice and dismissed trader's claim (e.g. decisions of Regional Court in Bratislava of 21 April 2016, no. 9Co/659/2013; Regional Court in Trnava of 4 May 2016, no. 24Co/448/2015; District Court in Michalovce of 2 May 2016, no. 24C/3/2016 and others).

- Are there other measures that could improve the effectiveness of the UCPD in establishing a high level of consumer protection in your country? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

Very problematic areas for protection of consumers (apart from consumer credits) are firstly contracts negotiated away from business premises and secondly the enforcement of consumers' debts.

Concerning the contracts negotiated away from business premises, the traders organise various 'presentations and advertisement actions' at spaces accessible to the public, such as restaurants, hotels or during excursions. In reality these actions labelled e.g. as 'cookery show', 'wine tasting', etc. were very aggressively organised

<sup>8</sup> Kršková, Pániková, 2016.



sales events. The use of unfair commercial practices was so frequent that the Slovak republic had to introduce special administrative rules for these actions. Under article 11 of Act on Distance and Off-premises Sales and Services effective from 1 May 2014 the trader is obliged to notify a 'sale action' in advance (20 days before action takes place) to STI, particularly to provide the invitation to the action and the contract terms, list of products offered and prices required. STI will assess the information provided and if it is in accordance with law, it will publish the action on their website. The breach of obligations of the trader at the 'sale action' has important consequences, particularly the consumer contract concluded in such action is considered as not 'concluded'. The strict regulation of the rights and obligations of the providers at the 'sale actions' has led to a pronounced decrease in the use of unfair commercial practices at 'sale actions'. Consumer organisations approved of this measure.

Similarly troublesome for consumers proved to be contracts for supply of gas, electricity and water negotiated and concluded on the occasion of the unsolicited visit of trader or their representative at the consumer's home. These findings have been obtained mainly from decisions of STI and from findings of the Commission on the Assessment of Terms in Consumer Contracts and of Unfair Commercial Practices.

Future regulations or improvements of UCPD should also concentrate on preserving the dignity of the consumer and preventing the use of the illegal and immoral enforcement of the consumers' debts. Humiliation or defamation of consumer should not belong to the regular practices of traders. In this regard the Regional Court in Prešov in its decision of 27 November no2 Co/116/2011 held that trader is ordered to cease the commercial practice: sending the notices to the consumer to pay debts under the threat of publication, sending shaming notices in the envelopes labelled as 'how to get rid of debts' or addressed explicitly to 'the debtor' and to cease any advertising of consumer as a debtor. (The stage of enforcement is partly covered by Annex 1 no. 25, 26 of UCPD).

Regulatory authorities indicated that consumers have to face serious problems in cross-borders relations, partly due their lack of experience and understanding and the lack of differentiation between domestic and foreign providers of services. Consumers claimed protection at the domestic regulatory authority because they encountered serious problems in communication with foreign regulatory authorities, the information from foreign regulatory authorities was provided only in a state language of the foreign Member State and cooperation proved to be problematic and time-consuming.

#### 1.1.2. Effectiveness of the PID in establishing 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;

Stakeholders have not expressed problems in this area. PID and the obligations of the traders stemming from this regulation are relatively easily and therefore also frequently reviewed by the state authorities. The findings of the STI suggest that the breaches in this area are frequent, but many of them are also caused by negligence and the breaches are not always intentional.

- 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?

There is not unanimity among consumer organisations on how to solve this question: some of the stakeholders would prefer 'performance measurement' while some of them would prefer both ways of indicating the 'unit price'.

Business associations point out the risks involved in labelling such products only by performance, as the inspection would not be easy and the criteria of the measurement per 1 kg or 1 litre is more objective. Moreover the consumers have different performance expectations and such subjective criteria may cause more difficulties than any real gain that could be achieved.

As the proof of differentiated opinions may serve the answer provided by the government officials preferring the measurement by number of washloads and referring to this method as employed also by STI.

- The effects of the regulatory choices/derogations allowed by the Directive and applied by Member States. [*Key aspects to consider are: Is the derogation relevant? Do companies make use of it? Are there consumer complaints because of this? If so, approximately how many per year?*]

Not applicable.

### 1.1.3. Effectiveness of the MCAD in providing protection for businesses

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

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

Business associations expressed satisfaction with the current state of regulation. The prominent Slovak legal scholar discusses non-commercial advertising or social advertising and its possible effects on trade and the market (e.g. quitting smoking, preference of home-made products, etc.).<sup>9</sup> The scope of Directive in this sense depends on the interpretation of Article 2(a) of MCAD.

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

The principle-based approach seems to be the inevitable solution in the legal practice in Slovakia in regard to the misleading advertising (and other forms of unfair competition as well) as the court practice and academics require a double test,<sup>10</sup> i.e. the misleading advertising should not only fulfil the requirements of its legal definition in sec 45 of CommC, but its unfair nature must also be tested under the general clause of unfair competition under sec 44 of CommC (see e.g. Decision of the Supreme Court of 20.3.2008, no. 6Obo302/2002). On the other hand, while the self-standing nature of the particular clauses of unfair competition without any need to test them under general clause of unfair competition has been upheld by the Decision of the Supreme Court 5 Obo 138/2000, this approach seems to be sporadic and not generally accepted.<sup>11</sup>

- The effects of the minimum harmonisation provisions on misleading advertising; [*Key aspects to consider are: 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 regulation of misleading advertising is implemented in CommC within the frame of unfair competition regulation (sec 45 of CommC). The definition of misleading

<sup>9</sup> Vozár, 2013,

<sup>10</sup> Vozár, 2013.

<sup>11</sup> Závadová, 2015b.

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).<sup>12</sup> 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. On the other hand, such regulation clearly blurs the borders between decisions of courts on unfair competition and unfair commercial practices. The reasoning in unfair competition cases has been therefore heavily influenced by the implementation of UCPD.<sup>13</sup>

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

Comparative advertising is not often used among traders as the risk of its illegality prevails over the positive effects and there was also opinion expressed that the legal regulation of its admissibility is vague and too general.<sup>14</sup> Another scholar argues that the legal regulation of comparative advertising is at the satisfactory level and the reasons why this type of advertising has not been used frequently lies in the lack of information, inexperience and the concern about taking risks.<sup>15</sup> Arguments of both abovementioned scholars however relate to the already repealed directive 84/450/EC and its transpositions into the Slovak legal order, but the frequency of the use of comparative advertising has not changed in the last years.<sup>16</sup> Some of the stakeholders also expressed the opinion that 'abstract' regulation is applicable only with massive support of the relevant decisions of CJEU. Provided that everybody looks at this type of advertising as 'risky business' and considering the evident shift of its application to the area of internet and digital technologies, the full harmonization seems to be a reasonable choice. Moreover it does not hinder the use of article 8 para 3, 4 of MCAD nor the accommodation of its regulations to the particular restrictions applicable in the national state.<sup>17</sup>

- 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;

Government officials consider the legal framework in this regard as satisfactory. Some stakeholders point out the growth of the digital market and raise the issues of liability of information society service providers, where they feel a need for full clarification in relation to advertising.

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

Government officials do not consider enforcement in cross-border transactions to be efficient. They emphasised that the regulation on consumer protection cooperation (2006/2004/EC) solves the relevant matters in relation to consumers, but the enforcement in relation to B2B relations is not sufficiently supported and existing national enforcement arrangements are not adapted.

<sup>12</sup> Vozár, 2013.

<sup>13</sup> Vuongová, 2011.

<sup>14</sup> Jakab, 2005.

<sup>15</sup> Kubinec, 2005.

<sup>16</sup> One of the rare decisions in this area was decision of Supreme Court in case Tesco vs Kaufland of 28 January 2010, no. Obdo V 84/2007.

<sup>17</sup> Vozár, 2011.

- Are there measures that could improve the effectiveness of the MCAD in providing protection for businesses (see also 1.1.6 below)? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

The regulatory authorities recommended including in the law regulating advertising the clarification of CJEU in relation to a) the requirement of verifiability (C-356/04), b) identification of the other competitor (C-44/01) and c) criteria necessary to consider for establishing the existence of the competitive relationship between the advertiser and the undertaking identified in the advertisement (C-381/05).

#### 1.1.4. Effectiveness of current rules 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;

None of the stakeholders expressed concerns and problems in relation to this question.

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

The uniform black list provides the same rules for all EU countries and therefore it prevents traders from using certain unfair practices in the EU as a whole. Stakeholders appreciate that it brings about clarity and certainty both for traders and consumers, allowing them to determine which conduct is not allowed. In this regard a mechanism for the subsequent inclusion of new practices into the UCPD would be beneficial. Otherwise the general clause provides a reliable flexible rescue net.

Slovak consumers are not satisfied with the frequent trade practice where food, laundry detergents, or washing powder sold under the same label or trademark everywhere are of a different quality in Austria, Germany or in Slovakia. Such practice is allowed by relevant EU provisions where producers are entitled to accommodate local tastes or requirements but some argue that such a law allows Central and Eastern European Member States to be provided with products of lower quality.<sup>18</sup> Such conduct is regarded as an unfair commercial practice by Slovak consumers.

- Whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade. [*Do the national differences play a role in a business perspective? Have they caused problems?*]

Slovakia does not make use of this minimal harmonisation. There was no input from stakeholders.

<sup>18</sup> <http://www.hlavnespravy.sk/vieme-co-kupujeme-rozdielne-zlozenie-potravin-pod-rovnakou-znackou-problem-celej-post-komunistickej-eurovy/649441>  
<http://www.aktuality.sk/clanok/300757/europoslankyne-si-dupli-nechcu-iny-tovar-pre-zapadny-a-vychodny-trh/>  
<http://www.pluska.sk/spravy/z-domova/velke-porovnanie-potravin-nas-rakusku-rovnaky-tovar-ina-kvalita.html>

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;

No specific answer was provided on the experience of businesses when conducting cross-border trade with other Member States, as observed by their associations and authorities.

- Whether the minimum harmonisation character of provisions on misleading advertising represents a barrier to cross-border trade;

No specific experiences reported.

- 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 already stated above some notions in regard to comparative advertising in the MCAD were considered too abstract and vague and there is a question whether the interpretation of CJ EU provides a sufficient solution in the long run.

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

The judicial cooperation and cross-border enforcement of court decisions in civil and commercial matters have been supported by a reliable legislative framework: unfair competitions claims involving misleading advertising or comparative advertising could be enforced under these rules. Stakeholders have however pointed out that the administrative enforcement and language barriers hinder administrative enforcement.

#### 1.1.5. Interplay amongst UCPD information requirements according to Article 7(4) with the information requirements in the horizontal consumer law instruments

Regarding the information requirements according to Article 7(4) UCPD ("invitation to purchase") in the advertising stage, please analyse:

- The level of awareness of traders as regards information requirements at the advertising stage, as in particular demonstrated by their practical application; [*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?*]

It may be noted that big and medium enterprises are generally aware of information requirements as indicated by responses from representatives of traders and authorities. All stakeholders are unified in the point that there is an overflow of information and the consumers are thereby discouraged to read it. Experiences of the relevant authorities clearly indicate that consumers do not read information provided. Therefore the question whether the information should be more comprehensive does not target the real problem. Moreover the presumption that the majority of consumers make rational decisions is not verified by the practice of stakeholders. Rational decision making is undermined by factors such as low IQ, low financial literacy, no legal knowledge, the practices of some traders, needs of consumers, emotional factors, etc. Stakeholders also argue that the information provided to consumers exceeds the real possibility of human perception taking in regard complexity of life. As the example they provide European Standardised Information Sheet (ESIS) under

Directive 2014/17/EU, is ineffective due to the large number of pages, although it may still be better than the lengthy standard contract terms of some banks.

Business associations emphasised the costs (not explicitly in numbers) incurred in fulfilling all information obligations (legal advice, software, hardware, printing, wages of employees- where oral information is provided), all these costs must be reflected in the price of the product and business associations feel the lack of the serious statistics or research whether consumers are aware of the costs of protection they have to pay in the higher prices of the products.

The level of the information requirements at the advertising stage covers substantial characteristics of the product essential for the consumer's decision and nobody raised the need to broaden them in line with CRD. Moreover, the words 'if not already apparent from the context' in Article 7 (4) and the link created by the Article 7 (5) seems to provide protection, too. Business associations appreciated that uniform requirements for the invitation to purchase created equal opportunities for businesses on the single market.

- 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 in Article 22 of the Services Directive apply in addition to the information required for invitations to purchase under Article 7(4) of the UCPD.

There is no discussion of this point in the Slovak literature. Only one reaction in interviews came from the government officials stating that information requirements laid down in the different laws significantly worsen the position of traders as it is demanding to be very well aware about all duties, therefore they recommend to unify the requirements and to eliminate the overlaps.

#### 1.1.6. Relevance for business-to-business transactions

Regarding the area of unfair commercial practices/marketing, please analyse:

- 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 cross-border trade;

It should be noted that a frequent unfair commercial practice that has been found is the practice of some providers (e.g. in the area of consumer credits) to illegally force the consumer to become the trader and to arrange the trade licence for him or her in order to obtain credit. By this way the traders are trying to exclude the application of consumer protective legislation. Such a relationship should be materially assessed as a B2C contract but the burden of proof is not easily shifted and this may cause problems.

The experiences show that the application of the rules on unfair commercial practices in regard to SME should be probably extended. Otherwise there is a prevailing opinion that national law (sec 265 of CommC) where the exercise of a right that is contrary to the principles of honest business relations shall not enjoy legal protection and rules on unfair competition (including the Misleading and Comparative Advertising Directive) may be sufficient tool in B2B relations without any need to enact the special legislation in this field. The role of good manners and the application of doctrine of honest business relations in B2B relations have been supported also by the judgments of the Supreme Court of 18 June 2009, no. 3 Obdo 11/2008 or of 6 May 2008, no. 4 Obo



161/2007 or the Constitutional Court (I ÚS 457/2010 of 7 December 2010, I ÚS 26/2010 of 8 December 2010).<sup>19</sup>

The notions of unfair commercial practice and unfair contract term have already been introduced into the CommC in the regulation of B2B contracts by the implementation of the Late Payment Directive. Government officials assume that regulation of unfair commercial practices in B2B relations may deepen the protection already existing in the field of misleading and comparative advertisement. Generally they do not recommend application of the UCPD regime to B2B relations. On the other hand they recommend the creation of a black list of unfair commercial practices in B2B relations, as such a list would support uniform decisions of authorities and legal certainty for participants in legal relations.

- 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;

Some of the stakeholders are extremely careful to support the regulations in the area of B2B relations. It is questionable whether it is feasible to draft a directive with a common principle-based approach for both B2B and B2C regimes.

- 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 also cover unfair commercial practices during and after the transaction;

No specific experiences reported or literature to mention other than stated above.

- Whether there is a need to have a black-list of practices in the business-to-business marketing area;

Unfair commercial practices can significantly affect the EU single market in the cases when domestic retailers in some countries generally unofficially deny foodstuffs from other Member States (mainly new ones). As an example, it is possible to see other forms of such practices where a supermarket chain (owned by a foreign entity) prefers products from its home country over local products. With regard to higher production costs in the trader's home country as well as higher transport costs, these products are being sold for a price lower than production costs, and this loss is covered by the supermarket chain with a high price mark-up imposed on local products, which is then reflected in low saleability due to the high price.<sup>20</sup>

As stated above, government officials are slightly in favour of such list.

The businesses are very often endangered by so-called 'catalogue firms', offering registration in their evidence, misleadingly creating the impression that the registration is compulsory or approved and required by the state authorities and falsely informing about the fee required or creating the impression that the service is free of charge.<sup>21</sup> As a reaction to such practices, the amendment of CommC was adopted in 2013 in the part of unfair completion where the subsection 2 of sec 47 was added as follows: 'In addition to the cases under Subsection 1, conduct contributing to mistaken identity also refers to an entrepreneur's conduct in which their selection of a business name or use of the designation of an enterprise is objectively capable of leading the addressees of their business documents to

<sup>19</sup> See also Rostáš, 2014, Ovečková, 2011.

<sup>20</sup> [http://ec.europa.eu/internal\\_market/consultations/2013/unfair-trading-practices/docs/contributions/public-authorities/slovak-republic-ministry-agriculture-and-rural-developments\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2013/unfair-trading-practices/docs/contributions/public-authorities/slovak-republic-ministry-agriculture-and-rural-developments_en.pdf)

<sup>21</sup> Machútova, 2013, Biroščáková, 2007.



mistakenly identify the entrepreneur as a public register or another register maintained under the law.'

- What should be the enforcement cooperation mechanism in the business-to-business marketing area;

Government officials would like to support the revision and improvement of the mechanism of the cross-border enforcement in marketing and advertising in B2B relations. The civil law claims in unfair competition do not encounter problems.

Government officials do not consider the enforcement for cross-border transactions as being efficient. They emphasised that the regulation on consumer protection cooperation (2006/2004/EC) solves the relevant matters in relation to consumers, but the enforcement in relation to B2B relations is not sufficiently supported and existing national enforcement arrangements are not adopted.

- Whether there is a need to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive;

The regulation of misleading advertisements in the Slovak republic covers also cases where such conduct may injure the consumer. In that respect the regulation of misleading advertising and misleading commercial practices overlaps and gives rise to contractual consequences already provided for in regulation and judicial decisions developed under the UCPD (see 1.1.7). It is questionable whether there is a contractual relationship between the injured person and the person in breach. The reply is a negative one in the majority of cases. Therefore there is no need to create contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive, the existing tools (administrative authority or court) are sufficient. Furthermore, it could be presumed that in the rare cases where the contractual link does exist, the breach of MCAD may also constitute a breach of some of the auxiliary duties in the relationship and in such a case the existing remedy may be activated.

- Whether there is a need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive.

Government officials recommended to include into law regulating the advertising the achievements and clarification of CJEU in relation to a) the requirement of verifiability (C-356/04), b) identification of the other competitor (C-44/01) and c) criteria necessary to consider for establishing the existence of the competitive relationship between the advertiser and the undertaking identified in the advertisement (C-381/05).

#### 1.1.7. Relevance of contractual consequences of unfair commercial practices

Please analyse whether there are in your country:

- 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;

The general part of the Civil Code (CC) regulates the general prerequisites for the validity of legal acts and this part of CC also contains the general provisions on consumer contracts and the regulation of the unfair contract terms in B2C contracts. These provisions create a legal basis for contractual consequences in case of a breach of the UCPD. Slovak courts often review the category of unfair commercial practices

and the category of unfair contract terms together, depending on circumstances of the concrete case.<sup>22</sup>

Unfair commercial practices are regulated in the Consumer Protection Act, CPA; this act prohibits unfair commercial practices before, during and after executing the commercial transaction (sec 7 para 1).

Unfair commercial practices usually represent conduct (or omission) which is contrary to good morals (*bonos mores*). This is defined solely for the purposes of the Consumer Protection Act (sec 4 para 8) as a conduct that is contrary to the conventional traditions and includes elements of apparent discrimination or departs from the rules of morality recognized at the sale of product or provision of service or that may cause harm to the consumer for breach of good faith, honesty, usages and practices, making use of mistake, deceit, threat, significant inequality of parties and of breach of contractual freedom.

Validity of the contract has to be tested under the general clause for the invalidity of legal acts under section 39 of CC (A legal act is invalid if the content or the purpose thereof violates or evades the law or it is inconsistent with good morals). Taking into regard the above mentioned provisions (sec 7 para 1 of CPA, alternatively section 4 para 8 of CPA), consumer contracts concluded with usage of unfair commercial practices can be invalid (under section 39 of CC).

The misleading commercial practices may also give arise to a right of the consumer to invoke the invalidity of contract under section 49a of CC, where a legal act is invalid if a person acted in error arising from a circumstance decisive for its creation and the person to whom the legal act was addressed gave rise to the error or had to be aware of the error. A legal act is also invalid if the error was caused by the other person intentionally. The aggressive commercial practices may create a real threat for the consumer, in such a case, the contract will be invalid ex officio under sec 37 para 1 of CC where a legal act has to be made freely and seriously, clearly and concisely, otherwise it is invalid.

Use of an unfair commercial practice may be a reason for the application of sec 3 para 1 of CC, under which exercise of rights and duties following from civil legal relationships must not interfere with rights and legitimate interests of others without legal cause and must not be in conflict with good manners. In these cases the court does not provide legal protection to the subject which violates the provision.

Sec 53d of CC expressly states that a consumer contract containing a term already held unfair by a court (issued sooner than the contract was concluded), and which was entered into as a result of an unfair commercial practice or usury, is invalid. This new provision of Slovak CC is effective from 1st of June 2014 and it has been introduced under the influence of the Judgment of CJEU in case *Perenič, Pereničova* C-453/10.<sup>23</sup> In accordance with new civil procedure legislation (Civil Dispute Procedure Code effective from 1 of July 2016), if a court determines some contract term as invalid for its unfairness, then the court explicitly specifies wording of this unfair contract term in the dictum of the judgment (Section 298 para 2). The explicit regulation of usury was introduced in 2014 in section 39a of CC. This provision makes usury invalid provided it is done by a natural person who is not an entrepreneur and misuses the other party's distress, inexperience, mental condition, stress, trustfulness, improvidence, financial dependence or inability to fulfil the other party's obligations and accepts, either for himself or for another person, a promise or provision of performance, the proprietary value of which is grossly disproportionate to their mutual performance.

Under section 53c of CC 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

<sup>22</sup> Dobrovodský 2013, Budjač, 2013.

<sup>23</sup> Budjač, 2015.

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. The breach of this provision may also imply the breach of the requirements of the professional diligence under Art. 5 (2a) UCPD, but as the second prerequisite under Art.5 (2b) UCPD shall not be probably fulfilled and the breach of the formal requirements is the sole reason for the invalidity of the written contract, this reasoning is not of such a great importance.<sup>24</sup>

Apart from the invalidity of the contract, breach of UCPD may entitle the consumer to withdraw from the contract under section 49 CC, where a party that concluded a contract in distress under clearly disadvantageous conditions has the right of withdrawal from the contract.

Under the above mentioned regulation of 'sale action', non-compliance with the requirements of special act leads to the legal non-existence of the contracts concluded at the action.

- Any case law (enforcement decisions, court rulings) providing for such consequences;

The following list contains some of the relevant decisions:

- Decision of the District Court in Prešov of 12 July 2010 no 17C/56/2010: The assignment of the claim by the trader (transfer of the contractual position) to the another subject seated outside EU has been regarded as an unfair commercial practice aimed at worsening the consumer's position in relation to the trader as it creates obstacle for the consumer to claim the unjustified enrichment from the assignee, such transfer violates law and it is contrary *bonos mores*, the assignment is invalid under 39 CC;
- Decision of the Regional Court in Prešov of 28 October 2014, no. 20Co/229/2013: Unfair commercial practices are prohibited. In this regard it is important to take into account good morals under sec 4 para 8 of CPA. The legal act that is contrary to the provisions of law is invalid (sec 39 CC). Legal act which is contrary to sec 4 para 8 of CPA is invalid for the conflict with the law;
- Decision of the Regional Court in Trenčín of 26 March 2014, no. 5Co/269/2013: The fraudulent inducement of the consumer to acknowledge the statute – barred debt constitutes an unfair commercial practice in the form of misleading omission and such practice is contrary to the requirements of the professional diligence, therefore the acknowledgement of debt by consumer is an invalid legal act under sec 39 CC. (Similar problem solved by the Decision of the Regional Court in Prešov of 7 June 2012 no 11Co/37/2012);
- Decision of the Regional Court in Prešov of 14 July 2011, no. 6CO 1/2011: The assignment of the claim against the consumer to the assignee in the bankruptcy proceedings constitutes the unfair commercial practice, this assignment causes the material distortion in the commercial relations as the claimant in the bankruptcy is not obliged to pay the court fees. Moreover the consumer as the debtor will be unwilling to seek professional legal advice if he or she is sued by such assignee, because the reimbursement of the costs of the legal counsel for the consumer may prove as a problematic if that the other party is in bankruptcy and the consumer's claim for reimbursement will not have any priority. The court decided that the assignment (which took place in many similar cases) is invalid under sec 39 of CC;
- Decision of the District Court in Piešťany of 26 January 2012, no. 10C/5/2010: The package travel contract. The measure of damages awarded to the consumer

<sup>24</sup> Závadová, 2015a.

in this decision has been probably influenced also by the misleading commercial practices of the travel agent at the conclusion of the contract.

- Whether there is, based on past experience in your country, a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

As already stated above, such a link has already been created by the legislator in sec 53d of CC or by usage of the category of good morals (sec 4 para 8 of CPA).

## 1.2. Contract conclusion and performance

### 1.2.1. Effectiveness of the current rules in establishing 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 principle based approach under this directive proved to be effective in establishing a high level of consumer protection, but such state has been reached only in recent years. To sum up the reasons, it took some time to tune in the legal regulation to the needs of consumers and for the court practice to take over the active role in the protection of the consumer. The Slovak Republic has adopted the regulation where next to the definition of the unfair terms by the general clause there is a list of unfair terms. The general clause states that consumer contracts must not contain provisions that cause considerable imbalance between the rights and obligations of the parties to the detriment of the consumer. This shall not apply if such are contract terms that refer to the main subject matter of performance and reasonability of the price, if such contract terms are expressed distinctly, clearly and concisely, or if the unfair terms have been agreed individually. Provisions that the consumer had an opportunity to familiarise himself with before the signing of the contract but could not affect the content thereof, shall not be considered as individually agreed contract provisions. Unless the trader can prove the contrary, contract terms agreed between the trader and the consumer shall not be considered individually agreed. The unfairness of contract terms shall be assessed with regard to the nature of the goods or services for which the contract was concluded, and to all the circumstances of formation of the contract at the time of concluding the contract, and to all other contract terms or other contracts such are dependent on. The transposition of UCTD has begun in 2004 (Act no 150/2004 Coll.), and in coordination with European Commission that had invoked the deficiencies of transposition in the preceding years, the nowadays regulation (the last fundamental amendments of regulation of unfair terms were executed in 2014) covers the substantial needs of society and the courts have been able to work effectively with the legal regulation. The transposition of the unfair terms in 2004 also positively influenced the legal status of consumers in contracts concluded before 1 April 2004 as under sec. 879f para 3, 4 of CC consumer contracts concluded prior this date should be brought into accordance with the provisions of CC and those contract terms that are not brought into agreement with the provisions of Section 53, 54 and 57 of CC shall become invalid after the lapse of three months from the effective date of this Act.

- 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 your MS? Does this work in practice or are there problems?*]

The indicative list in the directive served as an inspiration for the Slovak legislator because in the course of the last twelve years it had been transformed with slight amendments to the CC in the form of the list of unfair terms.

Government officials appreciate the indicative list in the directive as the important basis for the Member States to create the legislation. For the future regulation they would recommend the black list adopted in the directive in the form of minimum harmonization, so same practices would be regarded as unfair in all Member States. This should not preclude the Member States to broaden and supplement this list according to the domestic requirements and needs.

- 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; [*Note: If a black/grey list exists in your country, key aspects to consider are: How does the list work in practice? Does it make a difference to have such a list?*]

Slovakia has adopted the list of contract terms in section 53 para 4 of CC. The terms shall be regarded as unfair in particular if:

- a) the consumer has to fulfil them, but did not have the opportunity to become familiarised with them prior to concluding the contract;
- b) they permit the trader to transfer the rights and obligations from the contract to another trader without the agreement of the consumer, if the transfer would adversely affect the enforceability or securing of the consumer's claim;
- c) they exclude or limit the trader's liability for action or omission resulting in the consumer's death or injury;
- d) they exclude or limit the consumer's rights to claim liability for defects or liability for damage;
- e) they permit the trader to retain sums paid by the consumer even where the consumer does not conclude a contract with the trader or withdraws from it;
- f) they permit the trader to withdraw from the contract without any contractual or legal justification, while not allowing the consumer to do so;
- g) they entitle the trader to terminate a contract of indeterminate duration without reasonable notice even in the absence of any reasons meriting special consideration;
- h) they require the consumer to fulfil all obligations even if the trader has not fulfilled the obligations which have arisen;
- i) they permit the trader to alter the contract terms unilaterally without a reason agreed upon in the contract;
- j) they state that the price of the goods or services is to be determined at the time when the goods or services are provided, or they entitle the trader to increase the price of the goods or services without making it possible for the consumer to withdraw from the contract if the price agreed when the contract was concluded has been significantly exceeded at the time when the goods or services are provided;
- k) they require any consumer who fails to fulfil his obligation to pay a disproportionately high sum as a penalty;
- l) they restrict access to evidence or impose on the consumer a burden of proof which, according to the applicable law, should lie with another party to the contract;

- m) in the case of the trader's partial or complete failure to fulfil his obligation they unduly restrict or rule out a possibility for the consumer to exercise his rights vis-à-vis the trader, including the right to offset the claim against the trader;
- n) they extend the validity of a fixed-term contract after the expiry of the fixed period, while granting the consumer only a disproportionately short period to consent to the extended validity of the contract;
- o) they entitle the trader to decide on whether his performance is in line with the contract, or they grant the right to interpret the contract solely to the trader;
- p) they limit the trader's liability where the contract was concluded by an intermediary, or they require that the contract concluded by an intermediary be concluded in a specific form;
- r) they enable to solve the dispute between parties in arbitration proceeding without observing the prerequisites set by the special act;
- s) they require the consumer to ensure the fulfilment of his obligation at an amount disproportionately higher than that deriving from his obligation under the consumer contract when the agreement providing for the consumer to fulfil the obligation was concluded;
- t) they require a consideration from the consumer for a service, the provision of which by the trader is to a large extent against the interests of the consumer;
- u) they require the consumer to be bound by the contract for an unreasonably long time, even when it was clear when the contract was concluded that the object of the contract may be achieved in a significantly shorter time;
- v) they require reimbursement from the consumer for performances of which the consumer was given no prior information before concluding the contract, reimbursement for which was not regulated in the contract or for which the consumer does not receive the consideration agreed upon.
- w) they require the consumer to provide or remit to a third party or for the benefit of a third party any performance arising from or connected with the consumer contract, which is not, for the most part, for the consumer's benefit, or to fulfil any obligations to a third party in connection with such performance.

There is almost general consensus among academics that this list constitutes a black list of contract terms,<sup>25</sup> but hesitations were also expressed, as the present wording of Sec 53 para 11 of CC, which requires assessment of the unfairness of terms with regard to the nature of the goods or services and to all the circumstances of formation of contract, may favour the idea of 'grey list'.<sup>26</sup> The preference of the 'black list' over the 'grey list' has been firmly established in the court practice of the last years where the occurrence of unfair terms from the black list of terms in the contract does not presuppose the further testing of the material imbalance of the interests involved and therefore has been favoured by the judges. This position might be strengthened by the overload of consumer cases in the Slovak courts, where the list of unfair terms proved to be very helpful. Nevertheless, the serious arguments raised recently by some authors<sup>27</sup> point out the legislatively unclear wording of Sec 53 para 4 of CC that allows also the interpretation that the list in the section 53 para 4 of CC is a grey list, and the particular term has to be tested by the general clause of unfairness. The indicative list of unfair terms expressly stated in CC has been a step in the right direction supporting the awareness of consumers.<sup>28</sup>

<sup>25</sup> Budjač, 2015, Csach, 2009.

<sup>26</sup> Lazíková, Števíček 2013.

<sup>27</sup> Závadová, 2015b.

<sup>28</sup> Círák, 2009.

- 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: In your country, have the effects of court decisions establishing the unfairness of an unfair term been extended to all contracts of the trader concerned or to the contracts of any other trader containing such a term? If so, how does this work in practice? What are the impacts on businesses? If there are no such effects of court decisions on unfair terms: what are the effects of this situation?*]

Under sec 53a para 1 of CC, if the court determined some contract term in the consumer contract concluded in multiple cases (i.e. as a part of standard contract terms), and it is usual that the consumer does not affect the content of the contract in a significant way, or in the standard business terms, to be invalid due to the unfairness of such term, or did not award the performance to the trader due to such a term, the trader shall refrain from using such term or any term with the same meaning in contracts with all consumers. The trader shall have the same obligation even if the court ordered the trader to render the consumer unjust enrichment, compensate for damages or pay adequate financial compensation on grounds of such term. The legal successor of the trader shall have the same obligation. This provision has been included in CC as effective from 1 of March 2010 in order to secure the full effect to the Article 7 para 1 of UCTD. The effect of a court decision establishing the unfairness of an unfair term is not limited to the individual relationship between the specific trader and the consumer, but it could be regarded as extended to all contracts concluded with a given trader.<sup>29</sup> Some authors argue that sec 53a of CC may be understood as an establishment of precedential character of the judicial decisions in consumer matters.<sup>30</sup> Violation of the injunction by trader is considered as a particularly serious breach of obligations (sec 4 para 10 CPA). Such breach may lead to the sanctions by the Trade Office and to the suspension of their trade licence (sec 58 of Trades Licencing Act). Under sec 3 para 5 CPA consumers' organizations can sue the trader in cases of collective interests of consumers with the purpose of refrain of violation and eliminate unlawful situation created by the trader.

At the beginning the effectiveness of sec 53a para 1 of CC had been contested by the traders objecting that the various district courts made different judgments concerning the same contract term. These objections have not been well reasoned because the full effect of the CC regulation and the protection of both parties at the court proceeding had been safeguarded by simultaneous amendment of the Civil Procedure Code (CPC) effective till 30 June 2016.<sup>31</sup> This introduced the admissibility of the appellate review (extra-ordinary legal remedy) under section 238 paragraph 3 CPC against a judgment of a court of appeals by which a judgment of a court of first instance has been confirmed, if confirming a judgment of a court of first instance by which the court of first instance has declared the invalidity of a contract term under Section 153 para 3 and 4 of CPC.<sup>32</sup>

<sup>29</sup> Straka, 2013.

<sup>30</sup> Fekete, 2014.

<sup>31</sup> Budjač, 2015.

<sup>32</sup> Sec 153 para 3 CPC In the judgment regarding disputes arising from or in connection with a consumer contract, the court may state, even without any proposal, that a certain term used in consumer contracts by the supplier is unfair; in such case, the court shall state in the statement of the judgment the wording of such contractual term as agreed in the consumer contract.

Sec 153 para 4 CPC If the court has determined any contractual term in a consumer contract <sup>16ab)</sup> or general commercial terms to be invalid due to the unacceptability of such term, has not awarded performance to the supplier because of such term, or the court has imposed an obligation upon the supplier to provide the consumer with unjust enrichment, compensate a damage, or pay reasonable financial compensation based on such term, the court shall explicitly state that term in the decision verdict, even without any proposal, in the statement of the judgment the wording of such contractual term as agreed in the consumer contract.



The Civil Dispute Procedure Code effective from 1 July 2016 has special provisions on consumer disputes. This new regulation has not only taken over the abovementioned instruments (determination of the unfair term in the judgment without proposal of participants or admissibility of the extraordinary appeal) but also introduced the long-awaited abstract control of unfair terms in consumer contracts. The final judgments in the proceedings on abstract control of consumer contract will be effective for everybody (sec 306 of The Civil Dispute Procedure Code). The proceedings on abstract review of consumer matters (review of unfair standard terms or unfair commercial practices) is a new type of procedure which is justified by the implementation of directive 2009/22/EC on injunctions for the protection of consumers' interests (explanatory report to section 301 of CDPC). The courts of second instance (concretely Regional Court in Bratislava, Regional Court in Banská Bystrica, Regional Court in Košice) will decide these cases in the first instance. So, under Slovak legislation effective from 1 of July 2016 it is possible for the court to extend the effects of a court decision to all contracts of the trader (in the case inter-partes – quasi-precedential character of the court decision), and it is possible to sue the traders in abstract review of unfair contract terms (without necessity of individual dispute). In abstract review, complaint against trader can be filed by the consumer organisation or the national enforcement authority (e.g. Slovak Trade Inspection) and violations of injunction in abstract review can be sanctioned by administrative mechanism.

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

Contractual transparency requirement proved to be one of the most effective measures under the UCTD in connection with the important guiding role of CJEU ( e.g. C-143/ 13 Matei, C-26/13 - Kásler a Káslerné Rábai.

The numerous court decisions and findings of the Commission on the Assessment of Terms in Consumer Contracts and of Unfair Commercial Practices have been based on breach of the transparency requirement. In order to strengthen the transparency one of the recent amendments of CC employed new measure in Section 53c of CC '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.' This legislation targeted the frequently applied unfair practices rules where traders used a very small font size in contracts, as well as in general contract terms and conditions. The contract was thus difficult to read, making it hard for consumers to adequately familiarize themselves with the contract.

- 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. [*Note: Question only relevant for MS that have put in place extensions of application of UCTD*]

The extensions of the application of UCTD to individually negotiated terms or to terms on the adequacy of the price and the main subject-matter do not apply in Slovakia. The possibility to review the individually negotiated terms had been opened for the consumer contracts concluded before 1 January 2008, as the revision of unfair terms restricted only to standard contract terms has been implemented in CC only by Act 568/2007 Coll. This has been stressed by the important decision of the Regional Court in Prešov of 31 May 2011, no 20 COE/24/2011.

- 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?*]

Invalidity of juridical acts in Slovak legal order may be absolute (juridical acts are void) or relative (juridical acts are voidable). The regulation of the unfair terms is based on the principle that invalid terms are absolutely invalid (void), such invalidity arises from the statute itself (*ex lege*) and its effects are universal (*erga omnes*), i.e. anyone may claim that a term is void (this rule is in the procedural law restricted by the admissibility to file a claim to the court by the entitled claimant). Absolute invalidity is taken into consideration by courts (or other public authorities) of their own motion (*ex officio*). Absolute invalidity may not be remedied by subsequent approval (ratification) or rendered valid by subsequent termination of invalidity. Performance provided under a void juridical act constitutes unjustified enrichment. Absolute invalidity is not subject to limitation or expiration.<sup>33</sup> On the basis of invalidity of the unfair term, it may be ordered to restore unjustified enrichment, to pay damages or an adequate pecuniary satisfaction (sec. 3 para 5 CPA) to the consumer by the court. If the court decides that only part of a contractual term is unfair, this duty applies only with respect to that part. Furthermore, this duty also applies to the supplier's legal successors.

As already mentioned above, CPC and the newly effective Civil Dispute Procedure Code enhance the determination of the unfair term in the judgment without proposal of participants.

The most discussed problem in the relation to the *ex officio* duty of court to examine the unfair terms used to be connected to the final arbitration awards, where the objections with respect to the existence or validity of the arbitration agreement, particularly in the form of an arbitration clause in the consumer contract has arisen, later, only at the stage of its enforcement. The problems were so frequent that the amendment of CC in 2007 (Act no. 568/2007 Coll.) has also included into the list of unfair terms in sec. 53 para 4 (r) the following term 'requires from the consumer in the frames of agreed arbitration clause to solve the disputes with the trader solely in the arbitration proceeding'.<sup>34</sup> This regulation proved to be insufficient to protect consumers' interests in the arbitration and many court decisions can be referred to solving the matters related to the arbitral awards based on the unfair arbitration clauses or if an arbitration clause itself has not proved to be unfair, where the protection of the consumer has been disregarded in the arbitration proceeding. Real choice and protection in arbitration proceedings has been substantially restricted for the consumer and the personally interconnected circle of suppliers, arbitrators and solicitors or even judicial executors has proven detrimental for the protection of consumers.<sup>35</sup> The following list contains the extracts from the relevant case-law:

- Decision of the Regional Court in Prešov of 31 May 2011, no. 14CoE/39/2010 - the arbitration clause as an unfair term;
- Decision of the Supreme Court of 21 March 2012, no. 6 Cdo 1/2012 - the interpretation of Sec 44 para 2 of the Enforcement Act, the enforcement order that violates law on the grounds of the unfair terms;
- Decision of the Regional Court in Trnava of 9 August 2011, no. 10CoE/326/2010 - the arbitration award as a substantially unenforceable order;
- Decision of the Regional Court in Košice of 15 April 2013 no 6Co/383/2013 - the admissible period for the abolishment of the arbitration award;

<sup>33</sup> Jančo, 2010.

<sup>34</sup> Csach, 2008, Magál, Kubina, 2008, Výboch, 2013

<sup>35</sup> Budjač, 2015.

- Decision of the Regional Court in Banská Bystrica of 26 October 2012 no 17CoE/175/2012- substantially unenforceable enforcement order Sec 57 para 1 a) of the Enforcement Order, non- existent jurisdiction of the arbitration court. The court also expressed the idea that the principle *vigilantibus iura scripta sunt* has been overpowered by the need to protect the weaker party in the B2C relations;
- Decision of the Regional Court in Prešov of 28 September 2012 no 6CoE/210/2012, the arbitration clause as an unfair term, sector specific regulation on bank arbitration does not prevent the obligation of the bank employee to inform the consumer and to enable him the possibility of the choice in regard to arbitration.

Perspectives in relation to the arbitral awards have improved only recently, after the enactment of the Act on Consumer Arbitration which provides a new and separate regulation covering alternative dispute resolution methods applicable to contracts involving consumers.<sup>36</sup> The changed situation has been also reflected in the list of unfair terms in sec 53 para 4 (r) of CC where present wording relates to the special requirements set out for the consumer arbitration 'they enable to solve the dispute between parties in arbitration proceeding without observing the prerequisites set by the special act'.

As far as the administrative remedy is concerned, the section 3 para 3 of CPA states that the consumer has a right to be protected against the use of unfair contract terms. The administrative authority (e.g. State Trade Inspection) executes the control of fulfilment of obligations by traders under CPA. Within the framework of this control it may review the standard contract terms, but the court is the sole authority at the level of private law relationship to decide whether the contract term is unfair or not; the protection of consumer by the administrative authority has therefore only preliminary character.<sup>37</sup> The Civil Dispute Procedure Code (sec 193) stipulates that court is bound by the decision of the administrative authority that the administrative offence punishable under special regulations has been committed and who has committed it. In this regard the decision of the administrative authority is definite in relation to respective trader and the relevant contract term in the particular case. Some academics argue that effects of the decisions of the administrative authorities extend beyond the particular case.<sup>38</sup>

Nevertheless, some consumers prefer to notify the administrative authorities of breaches of trader's obligations before taking recourse to a judicial proceeding. The risk of an administrative fine and other sanctions seems to be in some cases a more persuasive compliance mechanism than the risk of a judicial proceeding with its length and costs.<sup>39</sup> The administrative authority is also entitled to order the interim measure on the request of consumer organisation under section 21 CPA (see the part on effectiveness of ID).

Government official emphasised that the length of court proceedings is the greatest problem for consumers discouraging them to claim their rights at the court. They assume that the lack of the reliable administrative enforcement of consumers' rights against traders is the blind spot in Slovakia.

The consumers successful in protection of their rights (also by invoking unfairness of contract terms) are entitled to claim the financial compensation for non-pecuniary damage under sec 3 para 5 of CPA (e.g. Decision of District Court in Lučenec, no 13Cb 132/2009).

The important role in the assessment of the unfair terms (and unfair commercial practices) is played by the Commission on Assessment of Terms in Consumer Contracts and of Unfair Commercial Practices. This authority is part of the Ministry of

<sup>36</sup> Maslák, 2015.

<sup>37</sup> Budjač, 2015.

<sup>38</sup> Csach, 2014.

<sup>39</sup> Csach, 2016.

Justice, its creation was presupposed by sec. 26a of CPA and its role is to review the standard contract terms. If there is a breach, the Commission on Assessment shall pass their findings to the relevant state authorities or shall contact consumer organisation to give them incentive for a claim at the relevant state authority. Traders are obliged to cooperate with Commission.

Court judgments on unfair terms in consumer contracts are available on the internet and the most important decisions on consumer matters are also available separately at the internet pages of Ministry of Justice in connection to the work of the Commission on Assessment. These decisions are classified into groups and this classification proves to be extremely instructive as it significantly shows the most problematic areas in consumer disputes, these are: the enforcement against consumers, the arbitral awards and their enforcement, transfer of a right for securing the debt of consumer, consumer credit agreements, the local competence of the court in consumer matters, maximum permissible consideration and unreasonable contractual fines and fees, exercising of the lien, unfair terms, unfair commercial practices, court fees and finally also the decisions of the penal courts in matters dealing with credit and loan agreements.

- In a forward looking perspective: Are there other measures that could improve the effectiveness of the UCTD in establishing a high level of consumer protection in your country? Would a graphical presentation model improve the readability and comprehension by consumers of the T&Cs? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

A graphical presentation model would probably significantly improve the readability and comprehension by consumers of the T&Cs. One of the most relevant obstacles for consumers to understand and become acquainted with their rights and obligation is the huge amount of information. In this regard it could be only recommended that EU would not broaden the information requirements for traders: stakeholders do not regard this tool as effective, consumers do not have time and knowledge to read them and understand them, it is generally acknowledged that the lengthy T&Cs only serve as a place to hide a surprising term, and also fair and just terms are not easily found and understood in standard contract terms. To sum up, a graphical presentation model may bring about easier way for consumers to be informed about their rights and obligations.

In Slovakia, there were frequently used unfair practices leading to the incorporation of unfair terms in contract in relation to the representation of the consumer.<sup>40</sup> Traders nominated a person to be the representative for consumer in advance and this representative was authorised for the future: to create a security in the name of consumer, to represent the consumer at the stage of performance and the stage of enforcement, and to acknowledge the debt. Such a representative of the consumer was usually a close person to the trader and it could be assumed that there was a conflict of interests between representative and the principal (consumer). These practices were forbidden and the legal acts arisen out of such representation are invalid. The regulation in sec 5a of CPA however has its deficiencies because its interpretation may lead to results that the consumer may not use the representative at all. It is also questionable whether the problematic situation could not be solved by the general provisions on the conflict of interests in representation (sec 22 para 2 of CC). The explicit regulation in CPA however proved to be effective.

<sup>40</sup> Decision of the Supreme Court of 11.June 2013, no. 1Sžr/150/2012

### 1.2.2. Effectiveness of the current rules 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 disparities have an impact on cross-border trade; [*Key aspects to consider are: Do national differences in the application/implementation of the Directive play a role for businesses? Have these differences led to changes in their business strategy? Have these differences caused problems?*]

Stakeholders have not referred to any problems in this area.

- 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;
- 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.

The advantages of targeted national protection probably prevail over the creating of a hypothetical barrier. Moreover, none of the stakeholders indicated that differently construed lists or prerequisites for unfairness of terms in the different Member States would represent barriers to cross border trade. The differences regarding the guarantees or sale of consumer goods may have more significant impact, similarly with languages barriers and types of products or services clearly unsuitable to be offered in cross-border trade.

### 1.2.3. Relevance for business-to-business transactions

Regarding the area of contractual fairness and in relation to the Unfair Contract Terms Directive, please analyse:

- Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;

As already stated above, and the opinions of some stakeholders confirm this assessment, there is almost a negligible difference between small business (especially microenterprise) and consumers with regard to their knowledge, experience or negotiating power. Otherwise the views of stakeholders, particularly business associations, are not in favour of the regulation of contract terms between businesses.

The knowledge and understanding of contract terms proved to be the relevant criteria and in the assessment of this point the need to clarify the terms of 'professional' or 'expert' may be raised. In this respect the criteria of the appropriate skills and knowledge may sometimes be a more relevant factor than the status of an enterprise or consumer.

- 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;

In Slovakia the concept of good faith is not present in the legal regulation. Good manners could not be regarded as the fully equivalent term and in the area of commercial relations they are substituted by so called 'honest business relations principle'. The concept of 'good faith and fair dealing' as used in UNIDROIT principles or as suggested in CESL proposal where 'good faith and fair dealing means a standard of conduct characterised by honesty, openness and, in so far as may be appropriate, reasonable consideration for the interests of the other party to the transaction or relationship in question', would be the appropriate yardstick.

The notion of unfair contract terms has been already implemented in CommC in the process of implementation of the Late Payment Directive. The criteria for assessment of contract term as 'unfair' are as follows (sec 369d para 8 of CommC): a) compliance with the principle of honest business relations, b) the nature of the subject of fulfilment of the obligation, c) the existence of a justified reason for the debtor's deviation from the default interest rate under law, the period of payment of the debtor's monetary obligation under law and the amount of the compensation of costs connected with the enforcement of a receivable under law. A contractual agreement concerning the period of payment of a monetary obligation, the rate of default interest, or lump-sum compensation of costs connected with the enforcement of a receivable that is grossly disproportionate to the rights and obligations arising from the contractual relation for the creditor and without the existence of a justified reason for such agreement is invalid. The invalidity of an unfair contractual condition or prohibition of an unfair business practice may also be demanded by a legal entity founded or established for protecting the interests of entrepreneurs.

- 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;

Various theories offer the reasons for the control of standard contract terms: constitutional concepts, including fundamental rights and freedoms in the horizontal relations, contractual theories (e.g. *Richtigkeitsgewähr*), unequal bargaining power, procedural justice, transaction costs and information asymmetry, economy theories e.g. abuse of the participation in the market competition.<sup>41</sup> The arguments expressed the need for the control of standard contract terms. In the relations between traders it is not easy to recommend protection also in regard to the individually negotiated terms, the main subject-matter of the contract and the adequacy of the price. Stakeholders prefer the traditional tools of contract law in the area of individually negotiated terms. The above conclusion probably should not be applied to small enterprises where protection similar or almost same as for consumers would be the reasonable step forward.

- 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;

There is a special law in Slovakia regulating the relations between suppliers and purchasers of food enacted as the reaction to the frequent unfair practices in this branch of trade; the Act no. 362/2012 Coll. on unreasonable terms in trade relations objects of which are foodstuffs entered into force on January 1, 2013. The act has been covering only the sphere of trade relations with foodstuffs and determined (without having the general clause) 44 unreasonable terms for which any contractual party, benefiting from agreed unreasonable terms, may be sanctioned. The Ministry of Agriculture and Rural Development of the SR is the inspection body. Upon the act, as an unreasonable term is regarded the financial/nonfinancial performance without adequate counter performance.<sup>42</sup> The serious objections of effectiveness of this act were raised by prominent scholars in Slovakia<sup>43</sup> (e.g. the protection of suppliers against food supply chains targeted by this act would be effective only if enacted by EU law.<sup>44</sup> The question remains whether sectoral solution should be a preferable instrument in this area or whether there is a need for a principle-based approach.

<sup>41</sup> Csach, 2009.

<sup>42</sup> [http://ec.europa.eu/internal\\_market/consultations/2013/unfair-trading-practices/docs/contributions/public-authorities/slovak-republic-ministry-agriculture-and-rural-developments\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2013/unfair-trading-practices/docs/contributions/public-authorities/slovak-republic-ministry-agriculture-and-rural-developments_en.pdf)

<sup>43</sup> Csach, 2015b.

<sup>44</sup> Vozár, 2013.



- Whether there is a need for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive;

The need for contractual transparency belongs to the general requirements of modern contract law and there is not any reason why it should be excluded in B2B relations.

- 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;

No relevant data could be obtained to provide an answer to these questions.

- Whether the benefits of extending the scope to business-to-business transactions would exceed the negative consequences of such an extension.

Lando argued that the differential treatment of B2B and B2C contract terms is not justified in the area of standard contract terms.<sup>45</sup> The need to protect against surprising unfair terms should probably prevail over the negative consequences of regulation in this area but business associations are not much in favour of such regulation, some of them find the general rules of contract law and *contra proferentem* rule to be the suitable and satisfactory solution.

Government officials recommend a thorough analysis in order to decide whether extending the scope to business-to-business transactions would be beneficial for trade. They recommend protection only to relation to microenterprises and do not recommend such regulation in relation to small and medium sized traders.

### 1.3. Injunctions

#### 1.3.1. Effectiveness of the current rules in establishing a high level of consumer protection

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

- To what extent is the use of the injunction procedure in your country contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment?<sup>46</sup>
- What measures in your national legislation on injunction procedure are considered to be particularly effective, if any: measures regarding the cost of the procedure, the 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?

Under sec. 3 para 5 of CPA, consumer organization may apply to a court to claim that the breaching party shall refrain from unlawful conduct if it injures collective interests of consumers. Collective interests of consumers are interests of consumers which are not just the mere sum of the individual interests of consumers affected by a breach of consumer rights, but it is a conduct of the infringer applicable to all consumers.

In the relation to this provision there is a related regulation of unfair competition, under sec. 54 para 1 of CommC: 'The right to demand that an offender refrains from their illegal conduct and eliminates the improper state of affairs may also be

<sup>45</sup> Lando, 2014.

<sup>46</sup> 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.



exercised, except for cases referred to in sec. 48 through 51, by a legal entity entitled to protect the interests of competitors or consumers.' Consumer organizations are entitled to sue the infringer in cases of unfair competition generally and in cases of following specific merits of unfair competition: misleading advertising, misleading designation of goods and services, conduct contributing to mistaken identity, endangering the health of others and the environment. Consumer organizations have right to sue and they are party of proceeding, not only a representative of consumers.<sup>47</sup>

The question is what the concept 'to remove the unlawful state of affair' means in practice (mentioned in sec 3 para 5 CPA). Does it represent a right of the consumer organization to demand damages, unjust enrichment or financial compensation in favour of consumers? The answer is a negative one. The impossibility to demand monetary compensations by consumer organizations is confirmed also by the legislative change of sec 3 para 5 of CPA in the 2013. Wording of the relevant provision entitling the consumer associations to claim for removal of the unlawful state of affair was changed in that respect that their right expressed by words 'including unjust enrichment' was deleted.<sup>48</sup> Another reason is that a consumer organization is not a representative of consumers (under sec 3 para 5 CPA or sec 54 para 1 CommC), but a party of a legal proceeding. Under sec 456 CC the object of unjust enrichment shall be surrendered to the person at whose expense it was gained (and this person is not consumer organization but consumers). A consumer organization in proceedings defends the interests of consumers, but it is not the representative of consumers; the organization is acting in its own name in proceedings.

As a result, consumer organizations cannot make financial claims (unjust enrichment, damages, financial compensation) in favour of consumers who suffered damage in cases of protection of collective interests of consumers. If the possibility of requiring financial claims by consumer associations under general norm stated in sec 3 para 5 CPA was permitted, it would bring the substantial risk of abuse of this procedure and this is not desirable. Therefore, consumers whose rights have been violated and who have suffered financial loss must exercise their rights individually. The Ministry of Economy of the Slovak Republic in its policy document about Consumer Policy Strategy of the Slovak Republic for the years 2014-2020 notes that they are planning to introduce measures to enable financial claims by qualified entities in favour of consumers. However, nowadays the professional level of consumer organizations is not sufficiently developed for the proposed measure, the legal background in the Slovak Republic is not ready for application of that measure and there is a risk of it being abused.<sup>49</sup>

Impediments to the effective protection of collective consumers' interests are also created by insufficient material and personal sources of consumer organizations in the Slovak Republic.<sup>50</sup> Stakeholders (consumer organizations) unanimously indicated this fact. Consumer organizations are exempted from paying the court fees (sec 4 para 2 letter c) Court Fees Act), nevertheless court proceedings may be expensive with respect to the possible future compensation of legal counselling in the event of failure in the proceeding (sec 255 para 1 CDCP or sec 142 CPC).

<sup>47</sup> Patakyová, 2013.

<sup>48</sup> From 1 of November 2012 to 9 of June 2013 the wording of sec 3 para 5 CPA entitled consumer associations to claim monetary compensations in cases of violations of consumer rights. The legal grounds and measure of compensation however remained questionable; therefore this part of the relevant provision remained in practice inapplicable. District Court Bratislava I in its decision of 20 February 2013, no 15C/234/2012 points out that the provision sec 3 para 5 CPA does not contain a comprehensive substantive rules to establish the claim for unjust enrichment in favour of consumer associations. The court emphasised that the existence of unjust enrichment cannot be hypothetical, successful action is possible only if conditions are fulfilled for reimbursement of the unjust enrichment under CC.

<sup>49</sup> See discussion on Law blog [lexforum.sk](http://www.lexforum.sk), available at <http://www.lexforum.cz/417> or decision of District Court Bratislava I of 20 February 2013, no 15C/234/2012

<sup>50</sup> Straka, 2010.

Another problem is that until the success of the CDPC (1 of July 2016), procedural regulation of protection of collective interests of consumers explicitly had not existed. The former CPC did not expressly regulate the specific questions of abstract control of unfair contract terms and unfair commercial practices in consumer contracts. The above mentioned substantive provisions of the CPA (generally) or CommC (in relation to unfair competition) presupposed the protection of collective interests of consumers, but they were not reflected by procedural provisions. These rights could have been exercised only by the application of the general provisions of CPC, but this solution had not been ideal one.

As a result of the abovementioned state of affairs, protection of collective interests of consumers in private law was not ideal, but it does not mean that it completely did not function. Regional Court in Prešov (decision of 12 October 2011, no 6Co/177/2011) established the interim measure and ordered the defendant (trader) to refrain from any extrajudicial recovery of claims established by distance consumer contract concluded at given website except claims admitted by court decision. The Regional Court in Prešov in decision of 26 May 2011, no 6Co/84/2011, established interim measure and ordered the trader to refrain from conduct by which he or she persuades, induces or otherwise influences the consumer in order to achieve the feigned state that credit is for purpose of consumer's profession or business. District Court Prešov in its decision of 3 February 2012, no 12 C 1/2012 ordered interim measure and prohibited any assignment of claims from the defendant (trader) to another third person except claims held by court decision and ordered the defendant (trader) to refrain from any extrajudicial recovery of mentioned claims. According to the Regional Court in Banská Bystrica (decision of 28 October 2011, no 14Co 346/2011), if the consumer association can claim the protection of consumer rights in court (sec 3 para 5 CPA), then it can also apply for an interim measure in favour of consumers. The Regional Court in Banská Bystrica in the mentioned decision even expresses the opinion that local jurisdiction of court is defined by domicile of consumer association. Reasoning of this legal opinion is based on the provision of CPC that a court applicable for proceedings shall also include a court in the district in which the consumer is domiciled when a dispute arising from or in connection with a consumer contract is concerned. These cases prove that court may under sec 74 para 1 of CPC order the interim measure until the final decision.

The abovementioned problems are solved (although not completely) in the new CDPC which regulates the proceedings for abstract control in consumer affairs (sec 301 to 306 CDPC). It is a new type of proceeding where the court will review the unfairness of contract terms and the unfairness of commercial practices in consumer contracts and in other contractual documents related to the consumer contract, irrespective of the circumstances of the individual case. Introduction of the control is justified by the implementation of the Directive 2009/22/ES. The right to file an action belongs to the consumer organization or to the competent national authority (defined by particular legislation e.g. STI, National Bank of Slovakia). The court is not obliged to hold an oral hearing; it is possible to decide on the basis of the documentary evidence. The court may also introduce evidence other than that proposed by the participants, if the introduction thereof is necessary for establishing the decision. If the court holds that the action is successful, it will specify the unfairness and text of the unfair contract term and/or unfair commercial practice in the court decision. The plaintiff (consumer organization or other authority) is entitled to ensure the publication of that judgment in the appropriate form. The trader cannot use the unfair contract term (unfair commercial practice) defined in dictum or an unfair contract term (unfair commercial practice) with the same meaning in any consumer contracts or other related documents. The dictum of the judgment is binding for everyone (sec 306 CDPC).<sup>51</sup> It

<sup>51</sup> This provision is new in the Slovak legal order and there is not yet any application in practice, so the extent of this effect is so far unknown. This provision may be understood as binding for state authorities acting in administrative proceedings and imposing fines on the trader (party of proceeding) and as binding for the trader (party of proceeding) to not use these clauses in any of its consumer contracts. Proceeding strictly under the wording of this provision, it could be speculated that the judgment would be

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 Order).

It is important to distinguish between the abstract control of unfair contract terms (unfair commercial practice) independent of the concrete circumstances of the case and sec 53a CC which has procedural expression in sec 298 CDPC (sec 153 para 3 and 4 CPC) and is based on the relationship between individual consumer and individual trader.

With regard to the parties in the abstract control in consumer affairs, consumers are not a participants in this proceeding, the parties are the consumer organization (or other competent authority) and the trader.

Another possibility is the right of the consumer organization to bring a proposal to a competent national authority (Slovak Trade Inspection) to request an interim measure if the trader violates the collective interests of consumers (under sec 21 CPA). Consumer organizations are allowed to request interim measures only if, after sending the written notice to cease the unlawful conduct, the trader does not refrain from harming the collective interests of consumers within two weeks of the receipt of this notice. The competent national authority may order interim measures ex officio (sec 21 para 2 CPA). STI quite frequently use this measure (summary proceeding) in practice (there are dozens of cases in which STI ordered interim measures and subsequently started proceedings in which they imposed sanctions, mainly fines, e.g. decision of STI of 23 September 2013, no SK/0619/99/2013, in which a fine of EUR 6 000 was imposed and this decision was preceded by an interim measure). Recently STI ordered an interim measure to be applied to a relatively well-known travel agency CK Hechter Slovakia, spol. s r. o. (interim measure of STI of 22 July 2016, no 2069/04/2016). The STI ordered cessation of the use of unfair commercial practice consisting of concluding package travel contracts with consumers, because the travel agency does not have compulsory insurance against bankruptcy or any bank guarantee. This summary procedure is very effective in stopping immediately evident violations of collective interests of consumers. In these cases the national competent authority opens the administrative proceeding and imposes fine on the trader up to EUR 66 400, in cases of repeated violations within twelve months up to EUR 166 000 (sec 24 para 1 CPA). In cases of significant excess STI can prohibit the trader from selling products or providing services to consumers for up to three years, and if the trader harms the collective interests of consumers within 12 months after that, the trader is punished for violation of collective consumer interests (sec 20a para 2 CPA).

The Slovak legal order allows that an interim measure can be ordered by a court under sec 325 para 1 CDPC (sec 74 para 1 CPC) or a relevant competent authority under sec 21 CPA.<sup>52</sup> Under legislation effective from 1 January 2015 interim measures in cases of breach of collective interests of consumers in sector of financial services can be ordered by the National Bank of Slovakia (sec 35e para 3 Act No 747/2004 Coll.). The National Bank of Slovakia orders the trader to refrain from the violation of consumer rights and immediately initiates the proceedings against a supervised entity. In subsequent procedures the National Bank of Slovakia can impose fines on the trader or (in cases of non-compliance with interim measure by trader) the National Bank of Slovakia can cancel the license of the trader for provision of financial services (sec 35g para 1 Act No 747/2004 Coll.).

As mentioned above, it is possible to use the summary procedure in the court under sec 325 CDPC (in past under 74 CPC) or at the competent authority, which is a very useful option when consumer rights are immediately threatened. Consumer organization has a right to bring an action in these cases.

an enforcement order for all traders using the same clause, but it is a very problematic issue and it cannot be presumed how the application in practice will develop.

<sup>52</sup> Budjač, 2013.

Prior consultation with the trader is mandatory only before a request for an interim measure to the national authority is filed (administrative method, sec 21 CPA). In other cases prior consultation is not mandatory.

The real use of the injunction procedure in Slovakia is functioning mainly in administrative law (mainly by activity of STI, as the competence of National Bank of Slovakia relating to the order interim measure in sector of financial services is effective only from 1 January 2015). It is expected that new procedural norms effective from 1 July 2016 on abstract control (independently on individual case) limited to unfair contract terms and unfair commercial practices in consumer contracts will be effective in this way. Sec 3 para 5 CPA is general and abstract provision which can cover cases which are not governed by special norms. It is not possible to estimate to what extent the use of the injunction procedure has caused the reduction in the number of infringements of consumer protection rules and reduction in consumer detriment, but this number will be increased because of the effectiveness of new and clear procedural norms (sec 301-306 CDPC) in this context.

In cases of cross-border actions, sec 25 para 1 letter b) CPA refers to legal persons created or established for the purpose of consumer protection listed in the list of qualified entities maintained by the Commission<sup>53</sup> and their right to request interim measures under CPA or to propose initiation of civil proceeding. As stakeholders (consumer organizations, authority bodies) mentioned, they do not have experiences with cross-border actions for the protection of collective interests of consumers. Cross-border protection in this context is not very effective. Stakeholders (administrative bodies) accentuate cross-border cooperation between national authorities.

- Has your country extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunction Directive? If yes, what are the additional consumer rights covered?

The right of consumer organizations under sec 3 para 5 CPA in context of protection of collective consumer interests is expressed generally without further specification. It is not restricted to the specific area of consumer law or specific directives. CPA has a general character providing wide range of consumers' protection.

Competence of the National Bank of Slovakia in this regard is limited to the scope of financial services provided to consumer.

Proceedings for abstract control in consumer affairs under sec 31 to 306 CDPC is limited to review of unfair contract terms and unfair commercial practice in consumer contracts and other documents related to consumer contract.

- Analysis of the obstacles to the effective use of the injunction procedure, in particular by analysing which progress in removing obstacles has been made and/or new difficulties that have emerged in your country since 2012.

The new CDPC effective from 1 of July 2016 aspires to increase efficiency of protection. Sec 21 of CPA covering collective consumers' interest is effective from 1 November 2012 and this section seems to be effective in administrative protection. Under legislation effective from 1 January 2015 there is a division of competence with respect to the administrative way of ordering interim measures. In cases of breach of collective interests of consumers in the sector of financial services, the National Bank of Slovakia can order interim measure (sec 35e para 3 Act No 747/2004 Coll.). The Slovak legal order does not recognize the right of a consumer organization (or competent authority) to demand financial claims in favour of consumers in cases of violation of their collective interest.

<sup>53</sup> 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 to bring an action under Article 2 of this Directive - 2016/C 87/01.

- In a forward looking perspective: Should the coverage of the Injunctions Directive be extended (by including additional legislation into Annex I to the Directive)? If so, which EU legislation should be included? Are there other measures that could improve the effectiveness of the ID in establishing a high level of consumer protection? Should the scope of the Injunctions Directive be extended to the protection of collective business' interests? Are there best practices in your country that could be relevant for other countries and considered as model for the injunction procedure at EU level?

Coverage of the ID could be defined generally, so the collective interests of consumers would be protected in all sectors.

Government officials proposed to add into Annex I:

a) Directive 2014/92/EU of The European Parliament and of The Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features and

b) Directive 2014/17/EU of The European Parliament and of The Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010.

It can be stated with regards to current legal regulation and statements of stakeholders that it is not necessary to contemplate the extension of the coverage of the ID to collective business interests.

The Slovak legal order adequately regulates protection of collective consumer interests, balancing between protection in the private and public law. Taking into account the unsatisfactory state of the consumer organizations in Slovakia (insufficient funding and personal base), the effective option for protection of consumer interests is an interim measure ex officio under sec 21 CPA or under sec 35e para 3 Act No 747/2004 Coll. (only administrative proceeding); and abstract control proceedings (sec 301 to 306 CDPC, civil proceeding) initiated either by a consumer organization, or by the national competent authority. As the courts of the second instance decide about the actions in the first instance (specifically defined in CDPC - Regional Courts in Bratislava, Banská Bystrica and Košice) and the Supreme Court decides on appeals in this type of proceeding, the principle of legal certainty and requirement of accustomed uniform judicial making seems to be ensured.

The work and the legal status of Commission on Assessment could be inspirational. The Commission on Assessment itself does not have a decision-making competence but it is entitled to bring suggestions to the competent authority if the Commission on Assessment finds out the cases of violations of the consumer rights (including violations of collective interests of consumers). Reasoning in the statements issued by the Commission on Assessment are often mentioned in the justifications of the court decisions or the decisions of the state authorities in the consumer affairs thanks to their persuasive character (decision of Slovak Trade Inspection of 11 March 2014 no SK/0215/99/2014 or District Court Košice I of 4 June 2014 no 39C/448/2009).

### 1.3.2. 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:

- How effective is the injunction procedure in addressing infringements originating in another EU country?

Stakeholders stated they did not have any experience with the injunction procedure in cases of infringements originating in another EU country. In Slovakia there are many entities (all of them are consumer organizations) which have been recognised as the qualified entities to bring actions for an injunction under Article 2 of Directive

2009/22/EC.<sup>54</sup> However, they do not have any experience with this type of procedure, nor were they able to provide any information about injunction actions from the Slovak consumer associations for infringements originating in another EU country.

- How effective is it to address infringements originating in another EU country that qualified entities in your country are enabled to seek injunctions in the other Member State (Article 4 of the Injunctions Directive)?
- In a forward looking perspective: Are there non-legislative or/and legislative measures that could improve the effectiveness of the injunction procedure in addressing infringements originating in another EU country? Are there best practices in your country that could be relevant for other EU countries and could be considered as a model for the injunction procedure at EU level?

It is indisputable that the most serious obstacle for the injunction action filed by Slovak subject in another Member State is their low knowledge of foreign procedural law, although substantive law is determined by the domicile of the consumer. Logistic aspects of that action could be also expensive (court hearing in another member state, travel costs). There are also obstacles related to language skills. All these problems create obstacles for further developments and the real effectiveness of the injunction procedure in other Member States. In addition, a sufficient tradition of collective rights protection has not been established in the Slovak Republic yet. It can be assumed that qualified entities would prefer the option under which the injunction action against the trader from another Member State may be brought in Slovakia in the Slovak jurisdiction (as allowed under Regulation (EU) no 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

### 1.3.3. Interplay between the Injunctions Directive and other enforcement instruments of consumer law

Please analyse:

- Is the injunction procedure as designed by the Injunctions Directive regulated separately in your country (in a separate legal act or as a separate procedure regulated within the same legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (UCPD, UCTD and by the Consumer Rights Directive)?
- If these procedures are regulated separately: What are the main differences between them? How is the coherence between these procedures ensured? If these procedures are regulated in a single legal act (possibly as a single procedure): In what way do these procedures (or this procedure) go beyond measures foreseen by the Injunctions Directive?

There are different procedures in cases of breach of collective interests of consumers available: 1) the interim measure (summary proceeding) ordered by STI (under sec 21 CPA, in consumer law generally); 2) The interim measure ordered (summary proceeding) by The National Bank of Slovakia (under sec 35e para 3 Act No 747/2004 Coll., in sector of financial services); 3) The interim measure (summary proceeding) ordered by court (without specific provision); and 4) The judgment ordered by court in the review of unfairness of contract terms and unfairness of commercial practices (under sec 301-306 CDPC). The coherence between these procedures is ensured because some of them have preliminary character and some have character of final decision. Decisions of administrative bodies (STI, National Bank of Slovakia) in cases of collective interests of consumers do not affect court decisions so court jurisdiction is preserved.

<sup>54</sup> 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 to bring an action under Article 2 of this Directive - 2016/C 87/01.

## 1.4. Cross-cutting issues

### 1.4.1. Cost and benefits of the directives covered by the study

- To what extent is there evidence for benefits for consumers stemming from the protection provided by both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of benefits for consumers from the protection against unfair commercial practices and unfair standard terms in contracts; [*Note: a relevant aspect in this context is whether the costs for consumers in exercising their rights under these directives are limiting these benefits or not.*]

The protection against unfair commercial practices and particularly unfair standard terms in contracts is granted at the court proceeding *ex officio*, i.e. the court is obliged to review the contract terms in consumer contract and their validity without any need of consumer's activity. Unfair terms are not binding. Provided that the consumer files the suit as the plaintiff, the consumer is not obliged to pay court fees. The consumers have to be aware of the risk that if they are not successful at the court proceedings, they may be obliged to reimburse costs of the court proceedings to the court and to the successful participant. Legal advice may be generally costly, but the amount of solicitor fees is restricted for consumer cases. Moreover, cheaper ways of alternative dispute resolution are at the consumer's disposal. A complaint at the administrative authority may solve the problem of a consumer without any costs. The factor of time and stress should not be disregarded but generally there is no hesitance in the society that the benefits clearly prevail, and that the legal position of consumers would be worse without protection granted by the UCTD and also the UCPD.

- To what extent is there evidence for benefits for traders stemming from both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of creating a level playing field for honest traders by providing a legal basis to eliminate or at least constrain dishonest market practices, such as the use of unfair standard terms in contracts or unfair commercial practices, including through the application of the Injunctions Directive;

The harmonised legal regulation (particularly in the case of fully harmonised rules) reduces costs of traders in cross-border transaction (the need of the legal advice in this area is not so urgent).

- What are costs for traders due to the need to respect the requirements under the directives covered by the study? [*Note: Such as costs of research, legal advice and compliance as well as the amount of time necessary to comply with the directives*]

Precise data is not available, as the amount of the costs for traders differs in relation to various criteria: scale of business, sector of business, whether the trader uses standard contract terms, engagement in the e-commerce, and use of advertising. In the area of legal services it could be roughly estimated that preparation of basic standard contract terms for a middle enterprise may cost at least EUR 1000 and every update at least EUR 500.

Business associations point out the costs for preserving the goodwill of traders, their costs increase under pressure of the public, consumers, and consumer organisations to accommodate the requirements of consumers out of court, i.e. in case where the goods are defective, they have to cover all costs incurred. They assume that costly legal advice is inevitable in more complex relations between businesses.

To sum up, it looks like sector specific directives presuppose higher costs for businesses, as does the PID. UCPD, UCTD and MCAD are not extremely costly for SMEs provided that they have no tendency to cross over the border of fairness and decency in the business relations.



- What are the costs involved in the public enforcement of these rules?

The responsible government authorities provided the general answer that the costs involved in the public enforcement of these rules were considerable, but it seems to be indispensable to incur them in order to secure the consumers' protection.

- Are there indications that the directives covered by the study are not implemented in your country in a cost-effective manner?

The implementation of MCAD has been frequently criticised<sup>55</sup> as it is divided between a public law act, the Act on Advertisement (comparative advertising), and a private law code, CommC (misleading advertising as a part of unfair competition). Moreover, as already stated above, misleading advertising is close to unfair commercial practices incorporated in CPA, as under Slovak legal order the criteria of consumer is added to the general clause of the unfair competition.

- Could the costs for implementing and enforcing the rules of the directives covered by the study be reduced without lowering the level of protection for consumers? If so, how?

No relevant answer from the stakeholders, but note that the length of court proceedings in some regions of Slovakia creates a serious obstacle in the enforcement of consumer protection. The average length of civil proceedings in the Slovak republic in 2015 was 14.4 months.<sup>56</sup>

#### 1.4.2. Interplay with EU sector-specific consumer protection legislation

Regarding the interplay of the horizontal EU consumer legislation [mainly UCPD and UCTD] with EU sector-specific consumer protection legislation in the areas of electronic communications, passenger transport, energy and consumer financial services, please:

- Analyse the levels of awareness of the requirements of the horizontal EU consumer legislation (mainly UCPD and UCTD) of businesses and consumers and the specific public enforcement bodies in the relevant sectors, as in particular demonstrated by their practical application; [*Key question here is: Are UCPD and UCTD applied in practice by national authorities and courts as a legal basis to combat unfair commercial practices and unfair standard terms in contracts in the regulated sectors?*]

UCPD and UCTD are applied in the practice by national authorities and courts for contracts in the regulated sectors without any doubt regularly and frequently. Unfair practices and unfair terms are very often detected in the contracts with mobile phone operators or in the sector of financial services. Same applies to energy providers. Their application is also useful in the area of passenger transport, particularly in relation to package travel contracts and the conduct of travel agencies.<sup>57</sup>

- Specify whether in your country the same authority is responsible for the enforcement of the horizontal EU consumer law 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*

<sup>55</sup> Vozár, 2013.

<sup>56</sup> Available at: <https://www.justice.gov.sk/Stranky/Sudy/Statistika-priemerna-dlzka-konania.aspx>

<sup>57</sup> Jurčová, 2014.

*affect the use of UCPD/UCTD in the regulated sectors, as specified in the previous bullet?]*

The general administrative enforcement authority is the Slovak Trade Inspection (STI), i.e. if the special act does not nominate a special body, the authority in the area of consumer protection shall belong to STI (sec 20 para 1 CPA).

The authority of STI is regulated by the Act no. 128/2002 Coll. on State Control of Internal Market in Consumer's Matters. Under sec 10 para 2 of this Act STI cooperates with consumer organisations and it applies their complaints and notices during the course of inspections.

The sector specific protection and horizontal protection as represented by the scrutinized directives are unified in the area of the protection of the financial consumer. The authority responsible for enforcement is National Bank of Slovakia (NBS); this body is responsible for enforcement in the area of unfair commercial practices, unfair terms and in the case where collective interests of consumers are endangered it may order the interim measure, i.e., its competence at the area of the protection of financial consumer is equal to that of STI in other sectors. This competence belongs to NBS from January 2015, where under Act no. 747/2004 Coll. NBS became the competent authority for consumer protection in the Slovak financial market, and as such it oversees the protection of the rights of financial consumers so as to support the secure and sound functioning of the financial market.

To sum up, authority in the area of unfair commercial practices and unfair contract terms in administrative level generally belongs to STI except where NBS is authorized in the area of financial consumer protection.

The Commission on the Assessment of Terms in Consumer Contracts and of Unfair Commercial Practices established at the Ministry of Justice cannot issue decisions or orders, but by providing their findings, giving notices to STI or to consumer organisations to file a suit it proved to be an effective professional body.

The Regulatory Office for Network Industries does not have an authority in the area of unfair commercial practices or unfair contract terms, but it is authorised to approve of the contract terms of providers of the universal service in the area of gas and electricity supply.<sup>58</sup> STI is authorised to apply protection against unfair contract terms and unfair commercial practices in these sectors.<sup>59</sup>

Concerning the Regulatory Authority for Electronic Communications and Postal Services, this body is not explicitly authorised for enforcement of horizontal directives,<sup>60</sup> this competence probably belongs to STI. The relevant act regulates cooperation between this regulatory Authority and STI.<sup>61</sup> The division of the competence between STI and this authority is not however absolutely clear. This can be demonstrated by the notice of STI published in April 2015 on their web pages, where they issued the instruction that in the area of the fees for services of electronic communication (quality and price), the Regulatory Authority for Electronic Communications and Postal Services is the authorised body. The problem occurred in the case of traders Skylink and CS link.<sup>62</sup> Under sec 6 para 3 d) of the Act on Electronic Communication Act, the regulatory authority shall protect the interests of end-users in regard to the quality and price of services. It is however difficult to separate the unfair terms and the price and other fees.

<sup>58</sup> Sec. 9 para 1 b) 2. in connection to sec. 13 para 2 m) of Act no. 250/2012 Coll. on Regulation in Network Sectors.

<sup>59</sup> Sec. 1 para 1 a) of Act no. 128/2002 Coll. on State Control of Internal Market in Consumer's Matters. In the past there was a problem in regard to the competence, as the proof of these difficulties may serve also the decision of the Supreme Court of 16 February 2011, no. 2SžO 540/2009, where there the court had to decide on the conflict of competence between State Energy Inspection (this authority has been from September 2012 substituted by the Regulatory Office for Network Industries) and STI.

<sup>60</sup> Act no. 351/2011 Coll. on Electronic Communication, act no. 324/2011 Coll. on Post Services

<sup>61</sup> Sec. 8 para 1 g) of Act no. 351/2011 Coll. on Electronic Communication.

<sup>62</sup> <http://www.soi.sk/sk/Informacie-pre-verejnost/Servisny-poplatok-Skylink.soi?ind=3>

In the area of passenger transport, (Package Travel Directive and respective regulations in the area of passenger transport), the authorised body is STI.

Regarding the MCAD, the administrative enforcement is divided among approximately seven authorities according to the relevant sector (sec. 10 of Act on Advertisement). In relation to misleading advertising, private law enforcement seems to be most important.

The consumer organisations emphasised that STI does not have sufficient number of employees to cover satisfactorily its broad competence in the field of consumer protection.<sup>63</sup>

The governmental officials acknowledge that the cooperation between administrative enforcement authorities is not institutionally arranged and the division between general inspection (STI) and the sectoral state authorities does cause difficulties in the application of law.

- Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning contractual fairness, 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.?*]

Governmental officials expressed the opinion that horizontal consumer provisions and sector-specific rules do not provide for a clear and coherent legal framework and such incoherence may have detrimental effects on traders, leading sometimes to their confusion and loss of orientation. As mentioned in the previous bullet, the conflict of competence may be caused by complementary application of the horizontal directives to sectoral legislation.

- What are the benefits of the complementary application of the UCPD and UCTD in the regulated sectors? What are the costs due to the complementary application with the sectoral EU consumer protection legislation?

Governmental officials expressed the opinion that application of the horizontal directives is important in the regulated sectors and its benefits have been proved in the recent years. They do not recommend the separate regulation of these matters in the sectoral legislation. No quantitative information is available.

- Assess any need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law.

Clarification is definitely needed. As the example may serve the case law on the amendments of consumer contracts in the regulated sectors and its applicability on other fields of consumer law, this relation is not clear and the approach of the CJEU (e.g. C-92/11- RWE Vertrieb or partly also C-359/11, C-400/11) to mix the norms (UCTD and sector-specific rules) does not help either.<sup>64</sup>

#### 1.4.3. Relevance of consumer law directives for consumer-to-business transactions

- Please analyse the need and potential for the application of the consumer law directives (mainly UCPD and UCTD) to consumer-to-business (C2B) relations. This concerns situations where the consumer sells goods or provides services to a trader

<sup>63</sup> STI is the state authority working under supervision of the Ministry of Economy, number of its employees was 283 at the end of 2015. STI is divided to the Central Inspection Body in Bratislava and 8 Inspection Bodies in the regions.

<sup>64</sup> Csach, 2015a.

(e.g. where the consumer sells gold jewellery to a trader or supplies digital content to business against remuneration).

The general legal definition of consumer contract under Slovak law is so broad that the consumer-to-business contract is not automatically excluded under sec 52 para 1 of CC (1) Any contract regardless of the legal form that is concluded between the provider and the consumer constitutes a consumer contract. Therefore some tools of protection (unfair commercial practices, unfair contract terms) could be used also in C2B synallagmatic remunerative contracts.

The opinion of government officials seems to be open-ended and not very clear and decisive on this point.

#### 1.4.4. Specific protection for vulnerable consumers

Please analyse:

- Whether the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined in the consumer law directives and relevant jurisprudence, and as applied by national authorities and courts in your country, continue to be valid and fit for purpose.

As already stated above in 1.1.1, the national authorities and courts adopted the concepts of 'consumer', 'vulnerable consumer' and 'average consumer' and they actively refer to these concepts in dealing with the consumer cases. Government officials also support the use of these concepts particularly in relation to the unfair commercial practices where notion of the average consumer (and in the special cases also the higher protection of vulnerable consumer) is inevitable.

The sectoral legislation providing special protection for vulnerable customers in connection to provision of universal service is an idea that should be promoted and intertwined in the UCPD and UCTD.

- To what extent the existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers and whether, based on the experiences in your country, specific provisions should be introduced in other directives concerned, in particular the Unfair Contract Terms Directive.

Stakeholders generally assume that current legislation is satisfactory in this regard. Government officials do not recommend introducing this notion in other directives. Consumer organisations expressed the opinion that they would recommend the inclusion of specific provisions into the Unfair Contract Terms Directive.

#### 1.4.5. EU added value

- Overall, would you consider that protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in your country since the implementation of the UCPD and the UCTD in national legislation?

The implementation both of the UCTD and UCPD has been a positive step forward. The Slovak economy in the last 25 years has been a typical economy in transition. Consumers, particularly those raised in the socialist era, have not been educated on how to behave in the market economy, and the traders tended to interpret the notion 'party autonomy' in the most liberal way. Standard contract terms in contracts represented an unknown danger for consumers (and SMEs as well). Same applied for the courts. The abuse of the stronger contractual position has been almost tolerated by the courts and the protection of the weaker party at the beginning of the 21st century was disregarded. Such a situation had created an ideal place for all possible forms of abuse of the traders' position. Therefore the implementation of the UCTD may be considered as one of the first positive measures to protect consumers

effectively. The protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved significantly after approximately 10 years of their application and it has been improved also by subsequent improvements in the level of implementation.

- Overall, would you consider that the information of consumers regarding unit prices has improved since the implementation of the PID in national legislation?

The improvement is evident; consumers are encouraged to make reasonable decisions thanks to information about unit prices displayed on the products.

- Overall, would you consider that the protection of businesses against unfair marketing in your country has improved since the implementation of the MCAD in national legislation?

Evident progress has not been found. The regulation of unfair competition itself provides the legal basis where majority of relevant cases may be solved satisfactorily. The input of MCAD lies mainly in the clarification of admissibility of comparative advertising; however, this marketing tool is not frequently used in Slovakia.

- Overall, would you consider that it has become easier for businesses in your country to directly trade cross-border to final consumers located in other EU countries in recent years? Has it become easier for consumers in your country to directly purchase cross-border from traders located in other EU countries?

- To what extent are these improvements, if any, due to the mentioned directives?

As generally stated above, the directives under consideration significantly contributed to consumer protection. Efficient tools for clarification of legal issues for easier cross-border purchases were provided also by the Consumer Rights Directive (CRD). In this regard the expectations are bound also to On-line Sales Directive (COM (2015) 635). On the other hand it is evident that the directives under consideration have served as an important educative basis for creation of more uniform commercial practices in the EU generally and thus enabled the development of cross-border trade also for consumers' shopping.

## Annex

## A. Transposition fact sheet

**Table 1: Fact sheet on transposition of directives in Member States' law – Slovakia**

Directive	Transposition legislation (National law, Article)	Comments	Specific provisions going beyond minimum harmonisation requirements/use of exemptions	Included in national legislation		Comments
<b>Directive 93/13/EEC on unfair terms in consumer contracts</b>	Act no. 40/1964 Coll. as amended (Civil Code)		'Black list' of terms considered unfair in all circumstances	Yes	Article 53 para 4	<i>As stated in 1.2.1 there is not a clear consensus as to whether the list is 'black' or 'grey' one.</i>
			'Grey list' of terms which may be considered unfair	No	Article 53 para 4	
			Extensions of the application of Directive to individually negotiated terms	No	Article 53 para 1	
			Extensions of the application of Directive terms on the adequacy of the price and the main subject-matter	No	Article 53 para 1	
<b>Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market</b>	Act no. 250/2007 Coll. on Consumer Protection as amended		Provisions regarding financial services going beyond minimum harmonisation requirements	No		
			Provisions regarding immovable going beyond minimum harmonisation requirements	No		
			Application of UCPD to B2B transactions	No		

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<b>Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers</b>	Act no. 250/2007 Coll. on Consumer Protection as amended		Extension of the application to other sectors (e.g. for immovable property)	No		
			Use of specific regulatory choices/derogations	No		
<b>Directive 2006/114/EC concerning misleading and comparative advertising</b>	Act no. 147/2001 Coll. on Advertisement as amended		Comparative advertising		Article 4	
	Act no. 513/1991 Coll. Commercial Code as amended		Misleading advertising		Articles 44, 45	
<b>Directive 2009/22/EC on injunctions for the protection of consumers' interests</b>	sec 3 para 5 CPA sec 20a para 2 CPA sec 21 CPA					
	sec 301 – 306 CDPC					
	sec 35e para 3 Act No 747/2004 Coll.					



**Table 2: Fact sheet on Injunctions Directive –SLOVAKIA**

Issue	Answer	Comments
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)?	- Yes, separate procedures in separate legal acts	<p><i>There are 4 procedures in cases of breach of collective interests of consumers:</i></p> <ol style="list-style-type: none"> <li><i>1) Interim measure (summary proceeding) ordered by STI (under sec 21 CPA)</i></li> <li><i>2) Interim measure ordered (summary proceeding) by The National Bank of Slovakia (in sector of financial services)</i></li> <li><i>3) Interim measure (summary proceeding) ordered by court (without specific provision)</i></li> <li><i>4) Judgment ordered by court in review of unfairness of contract terms and unfairness of commercial practices (under sec 301-306 CDPC)</i></li> </ol>
Who is entitled to bring an action seeking an injunction?	- Designated public bodies - Specified consumer associations	<p><i>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.</i></p> <p><i>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.</i></p> <p><i>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</i></p>
Is the injunction procedure a court or an administrative procedure? If your country legislation foresees both forms of the procedure, please explain in the comments column for which infringements the court or administrative procedure is foreseen	- Both forms of procedure	<p><i>Court procedure –</i></p> <ol style="list-style-type: none"> <li><i>1. Abstract control of unfair contract terms and unfair commercial practice in consumer contracts</i></li> <li><i>2. Interim measure (under general provision, special provisions does not exist)</i></li> </ol> <p><i>Administrative procedure –</i></p> <ol style="list-style-type: none"> <li><i>1. STI - injunction procedure (interim measure) in consumer law in general</i></li> <li><i>2. National Bank of Slovakia - injunction procedure (interim measure) in sector of financial services</i></li> </ol>
Who bears the costs of an injunction procedure? If qualified entities (or some of their categories e.g. consumer organisations are entitled to an exemption of some/all cost related to the procedure please explain the characteristic of such exemption in the comments column.	- The costs are as a rule borne by the losing party	

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<p>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?</p>	<p>- Yes, scope of application extended to cover consumer law in general</p>	<p><i>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</i></p>
<p>Is protection of business' interests covered by the injunctions procedure? If scope of application extended to the protection of business' interests, please provide details in the comments column regarding type of business' interests covered by the injunctions procedure</p>	<p>- No</p>	
<p>Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations</p>	<p>- No</p>	
<p>Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID)</p>	<p>- No</p>	
<p>Has your Member State taken specific measures regarding the prior consultation (Article 5 of the Injunctions Directive)?</p>	<p>- Yes, requirement for party seeking injunction to consult with the defendant</p>	<p><i>This requirement applies only for interim measures in cases of breaches of collective interests of consumers ordered by STI on the proposal of a consumer association under sec 21 CPA</i></p>
<p>Does the national legislation provide for measures ensuring summary procedure? Please specify main characteristics of the procedure (subject matter/time limits) in the comments column.</p>	<p>- Yes</p>	<p><i>It is possible to order interim measures by STI (generally) or by National Bank of The Slovakia (sector of financial services) – without time limits. Courts permit the application of interim measures in CDPC to breaches of collective interests of consumers (time limits to decide on proposal - 30 days)</i></p>

<p>Are there sanctions for non-compliance with the injunction order (Article 2(1) of the Injunctions Directive)?</p> <p>If sanctions in form of penalty or fine foreseen please specify in the comments column to who exactly should they be paid</p>	<p>- Yes, penalty of a fine for each day of non-compliance</p> <p>- Yes, other sanction</p>	<p><i>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</i></p> <p><i>In an administrative procedure –</i></p> <p><i>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).</i></p> <p><i>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.</i></p>
<p>Has your Member State taken specific measures regarding the publication of the decision and/or the publication of a corrective statement?</p>	<p>- Yes</p>	<p><i>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.</i></p>
<p>Is it possible to claim within the injunction procedure for sanctions for the infringement?</p>	<p>- No</p>	
<p>Can an action for the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to other beneficiary be brought within the injunction procedure?</p>	<p>- No</p>	
<p>Can an action for damages to be paid to the qualified entity or the public purse be brought within the injunction procedure?</p>	<p>- No</p>	
<p>Can an action for damages or redress to be paid to the consumers concerned be brought within the injunction procedure?</p>	<p>- No</p>	

<p>Can individual consumers base their individual claims for damages/remedies on the injunctions order?</p>	<p>- Yes</p>	<p><i>However not explicitly. If the court in abstract control of consumer contracts in the dictum of judgment determines unfairness of contractual terms or determines unfairness of a commercial practice, under sec 306 CDPC dictum of that judgment is binding for everyone. So when the court decides on the individual proposal of consumer for remedies based on an unfair contract term (unfair commercial practice) specified in the dictum of judgment in abstract control of consumer contracts it is obliged take this fact into account.</i></p>
<p>Can the qualified entity claim other measures beyond the injunction, e.g. evidence of compliance with the judgment?</p>	<p>- No</p>	<p><i>But the enforcement authority is entitled to impose a fine up to EUR 30 000 on the trader for the violation of the judgment in abstract control of consumer contracts (sec 192 para 1 Enforcement Act). The National Bank of Slovakia can cancel a license (permission) if an entity of sector of financial services violates the court decision. So the enforcement entities can claim evidence of compliance with the judgment for purpose if the judgment is respected.</i></p>
<p>Are the effects of individual injunctions orders extended to the future infringements and/or same or similar illegal practices (of other traders)?</p>	<p>- Yes</p>	<p><i>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.</i></p> <p><i>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.</i></p>

## B. Data tables

### *Number of B2C disputes*

Please indicate how many B2C disputes have been decided in your country on the basis of consumer law directives covered by this study (UCPD, UCTD, PID) as a proportion of the total number of B2C disputes decided on the basis of other national consumer legislation (based on statistics, or based on estimates by enforcement authorities and other stakeholders, where this is not the available).

**Table 3: B2C disputes decided on the basis of consumer law directives covered by this study in comparison with total B2C disputes decided on the basis of other legislation (most recent year for which data is available)**

Year	Type of data	Total number of B2C disputes (number of cases)	Share of B2C disputes decided on basis of ...					Comments
			UCPD	UCTD	PID	other EU consumer protection legislation (e.g. CRD, Sales Directive, sectoral legislation)	national consumer legislation not based on EU directives	
n.a.								

There is no evidence recording how many disputes have been decided in B2C relations. Therefore it is not possible to provide the number of disputes decided on the basis of directives covered by this study or decided on any other consumer directives. From 1 July 2016 new procedural codes are effective and under its implementing legislation (Statute of Ministry of Justice no. 206/2016 Coll. amending the Statute of Ministry of Justice no. 543/2005 Coll.) new evidences of consumer disputes are going to be created: a) register of consumer disputes; b) register of disputes on abstract control on consumer matters.

All that can be provided is a number of civil law disputes filed in courts in 2015: 871 155; number of disputes decided in 2015: 889 217. It should be noted that these numbers include also C2C (P2P) cases, therefore it is not possible to separate out B2C disputes.<sup>65</sup>

From 1 January 2015 the act no. 335/2014 Coll. on Consumer Arbitration is effective (as a part of the implementing legislation for the Directive on consumer ADR). The need to have this act was enhanced by the crisis situation under which the inadequacy of the commercial arbitration merged together with the consumer arbitration proved to be highly detrimental for the consumer. The new legislation on consumer arbitration has supported the creation of specialized consumer arbitration courts under strict legal requirements, upon evidence provided by 7 out of total number of 8 existing consumer arbitration courts we are able to provide number of 18 333 disputes filed on these courts in 2015. The consumer arbitration courts are not obliged to differentiate numbers of consumer cases according to the any criteria.

<sup>65</sup> Available at: <https://www.justice.gov.sk/Stranky/Sudy/Statistika-priemerna-dlzka-konania.aspx>

According to annual reports of STI, occurrence of unfair commercial practices in the regulated subjects was as follows:<sup>66</sup>

Year	Number of cases
2015	233
2014	253
2013	328
2012	276
2011	254
2010	298
2009	182
2008	326

*Costs of obtaining redress for a hypothetical case of invoking unfairness of a standard contract term*

- Please estimate the costs, including time, for consumers in obtaining redress when invoking the unfairness, and thereby the non-binding character of standard contract terms in a contract they concluded. Please provide the estimate for the hypothetical example below, focusing on costs (and needed time) of a lower court procedure and the use of ADR or other relevant procedure (if applicable).<sup>67</sup>

<sup>66</sup> The number of cases until 2013 includes also misleading actions under the CPA. This separate provision was repealed in 2014, as the issue was fully covered by the unfair commercial practices concept from the UCPD, and from 2014 it is this latter concept that is being referred to below.

<sup>67</sup> For the hypothetical example it is assumed that both the provider and the consumer are located in your country.

**Table 4: Estimate of costs for consumers in obtaining redress when invoking the unfairness of standard contract terms in a contract they concluded (for the hypothetical example provided in the box below)**

Redress mechanism	Estimated court fees (national currency)	Estimated lawyer's fees (national currency)	Other costs, if any (national currency)	Estimated time involved for consumer (hours)	Comments
<b>Lower court procedure</b>	0	EUR 450	EUR 100	48	
<b>ADR or other relevant procedure</b>	0	EUR 450	EUR 100	24	Consumer arbitration proceedings
<b>ADR or other relevant procedure</b>	0	Not applied	Maximum EUR 5	12	Act no. 391/2015 on alternative resolution of consumer disputes

Notes: **Lower court procedure:**

**Court fees:** Under sec 4 para 2 u) of Act on Court Fees the consumer does not pay the court fee in the consumer dispute, regardless whether they are a claimant or a defendant.

**Lawyer's fees:** Under sec 11 para 1 b) of the Statute of Ministry of Justice no. 655/2004 Coll. on prices and reimbursements to solicitors, the basic fee for a solicitor in the consumer case provided that a client is a consumer is 1/13 of the accounting basis. The accounting basis comes out of the average wage (EUR 858), so the basic fee represents the sum of EUR 66, plus reimbursement of other costs up to EUR 8.58. Provided that the solicitor is subject to VAT, a tax of 20% is added to the basic fee. If the client chooses the solicitor from a town other than their domicile, the solicitor may ask other payments (travel costs, loss of time). To sum up, one act of a legal service costs EUR 74.58 (or EUR 89.48 with VAT). It is evident that the fee in consumer cases does not depend on the sum of claim. It is assumed that minimally three acts of legal service have to be provided (consultation with client, preparation of the petition, the court proceeding), but the number of lawyer's acts will be probably higher one (more acts on the court), so the approximate costs are estimated at EUR 447.45 (EUR 536.94 with VAT). Consumers may be also represented by a consumer organisation, but these organisations lack professional and material sources for legal aid as well. Another possibility for the consumer is to agree with the solicitor on different terms, but such agreement will not be probably advantageous for consumer. If the consumer is in a material need (e.g. their income is lower than EUR 316.94 and they are without other property), they will be entitled to the free legal aid provided by the Centre of Legal Aid.

It should be noted that if the consumer fails to be successful in their claim, he or she may be obliged to provide the reimbursement of costs to the successful participant. The consumer's position is however protected as the amount the other participant paid to their solicitor is not fully reimbursed, only up to the sum of legal aid as regulated by the same scheme for solicitor fees as mentioned above. If the other party does not have a representative, the other party may claim only incurred costs. Exceptionally, if there are substantial reasons, the consumer will not be obliged to reimburse the costs to other participant, depending on the court's discretion. If the consumer is successful, he or she is entitled to ask for reimbursement of their costs.

**Estimation of time involved** for the consumer depends on many factors. The consumer's domicile is decisive for the competent court, it saves time, but other elements may enter into the calculations (the eligible solicitor, participation in the court hearings, consultations, the level of knowledge and activity of consumer).

**Consumer arbitration:** If there is a valid arbitration agreement between the consumer and the trader, the arbitration court may decide the case. The consumer does not pay any fees, the costs of legal advice are same as at the court proceedings and this type of dispute resolution may be faster. According to the annual reports of the consumer arbitration courts, the average length of arbitration is about 4 and half months. It should be emphasized that the length of the court proceeding varies according the locally competent court. The courts in the capital and in the bigger towns tend to have longer proceedings due to the overload of the cases filed there, so it may happen that in rare cases the court proceeding would also provide a timely solution.

One last remark should be given in regard to the **enforcement of claims**. The successful consumer should sometimes enforce the decision if the trader is not willing to fulfil their duty. The costs of enforcement should be paid by the obliged person (debtor) but if there is not any property of the debtor, the creditor will be obliged to pay some basic sums at the enforcement. However, the sum is low: its lowest threshold is EUR 33.19.

Complaints and other notices to the Slovak Trade Inspection or any other administrative authorities are not subject to any fees.



Act no. 391/2015 on **alternative resolution of consumer disputes** is effective from 1 February 2016. Slovak Trade Inspection, the Regulatory Office for Network Industries and the Regulatory Authority for Electronic Communications and Postal Services as well as other subjects are authorised to function as the alternative resolution bodies. State authorities do not charge any fees, other subjects maximally EUR 5.

**Mediation** is a possible way to proceed. The consumer pays a maximum of the sum of 10% of the price of the mediation; the rest of the sum should be paid by the other party (sec 4 para 3 Act.no 420/2004 on mediation). In the course of mediation, the parties may conclude an agreement. If this agreement should constitute an enforcement order, it has to be concluded in the form of the notary record. Price of the notary record in this case is about EUR 50. This type of solution seems not very effective in Slovakia for this type of case

**Hypothetical example: Terms which inappropriately exclude/limit consumers' rights to compensation**

*A consumer went on a package holiday with a friend to Kenya for which they paid € 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 €5,000 (€4,000 for the cost of the package and €1,000 for lost time and enjoyment). The tour operator agreed to compensate them €1,000 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/unfair-contract-terms/index\\_en.htm](http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-contract-terms/index_en.htm)]*

- Please estimate how often court and ADR procedures are used in your country for invoking the unfairness, and thereby the non-binding character of standard contract terms (i.e. the number of cases per year)?

There are no statistics available.

## C. Interviews conducted and literature reviewed

**Table 5: Interviews conducted for this study**

Organisation	Stakeholder type	Date
<b>Union of Transport, Posts and Telecommunications</b>	Business association	22.06.2016
<b>Association of Trade and Tourism of Slovak Republic</b>	Business association	06.07.2016
<b>Slovak Banking Association</b>	Business association	12.07.2016
<b>National Bank of Slovakia</b>	National consumer enforcement authority	29.06.2016
<b>The Regulatory Office for Network Industries</b>	National regulatory authority	23.06.2016
<b>Ministry of Economy of the Slovak Republic</b>	Ministry	15.07.2016
<b>Ministry of Justice</b>	Ministry	30.06.2016
<b>European Consumer Centre</b>	European Consumer Centre	01.07.2016
<b>OMBUDSPOT, Association for Protection of Consumer Rights</b>	Consumer organisation	20.06.2016
<b>Association of Slovak Consumer Entities</b>	Consumer organisation	03.07.2016

**Table 6: Literature reviewed for country report**

Author/Sour ce	Year	Title of publication
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Biroščáková, J.	2007	‘Katalógové firmy, ich zmluvy, obchodné praktiky z pohľadu práva.’ <i>Bulletin Slovenskej advokácie</i> , Vol.13, no. 7-8, 2007, pp. 25-31.
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Csach, K.	2015	‘Ochrana dodávateľa obchodných reťazcov prostriedkami súkromného práva’, XXXII. Karlovarské právnické dny, spolek Karlovarské právnické dny, Praha, 2015, pp. 425- 443.
Csach, K.	2016	‘ A Pair of Wings: Air Passenger Rights in the Czech Republic and Slovakia’ <i>Air Passenger Rights. Ten Years On</i> , Hart Publishing, Oxford ,2016, pp. 131-144
Dobrovodský, R.	2013	‘Test nekalosti správania sa podnikateľov k spotrebiteľom v slovenskom práve’, <i>Ingerencia súdov do súkromných zmlúv: Zásahy súdov do kontraktáčného procesu</i> , Justičná akadémia Slovenskej republiky, Pezinok, 2013, pp.125-151.
Fekete, I.	2014	<i>Občiansky zákonník. 1. Zväzok. (Všeobecná časť). Veľký komentár</i> , 2.ed. Eurokódex, Bratislava, 2014, p. 622.
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Lazíková, J., Števček, M.	2013	‘Ochrana spotrebiteľa v civilnom procese’, <i>Bulletin Slovenskej advokácie</i> , Vol. XIX., No. 6, 2013, pp. 20-30.

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Magál, M., Kubina, P.	2008	‘Rozhodcovské doložky v spotrebiteľských zmluvách’, <i>Justičná revue</i> , Vol. 60, No. 4, 2008, pp. 616-627.
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# 1. Study to support the Fitness Check of EU Consumer law – Country report SLOVENIA

## 1.1. Unfair commercial practices and marketing

### 1.1.1. Effectiveness of the UCPD in establishing a high level of consumer protection

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

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

A legal regulation always aims to strike the appropriate balance between the abstract, all-encompassing principles and case related answers to concrete legal questions. The general-clause-based approach of the UCPD is considered by all interviewed stakeholders and legal writers as the right approach to the problem of unfair commercial practices. The UCPD combines two levels of general clauses – the general prohibition from Art 5 (1) UCPD with explanations as to the unfairness from Art. 5 (2) UCPD, and the prohibitions of misleading practices from Art. 6 UCPD and aggressive practices from Art. 8 UCPD. The advantage of the principle based approach is that it enables sanctioning of a very broad circle of unfair practices including those who haven't yet been introduced by the businesses. This principle is combined with the black list of unfair commercial practices.

The enforcement of Consumer Protection against Unfair Commercial Practices Act (implementation of the UCPD) is in the hands of the Market Inspectorate. If the latter, after carrying out an inspection finds an unfair commercial practice, it may issue a decision prohibiting such practice (Art. 12 Consumer Protection against Unfair Commercial Practices Act). Against this decision, a complaint (a claim) may be filed and the matter is decided by Administrative Court. This is the biggest source of case law with regard to unfair commercial practices. Against its judgment a revision may be filed. If the revision concerns an important legal question, the Supreme Court of Slovenia will accept it and adopt a judgement. An unfair commercial practice is also punishable with a fine for a minor offence, ranging from EUR 3 000 to 40 000 (EUR 1 200 – 15 000 for sole traders), see Art. 15 Consumer Protection against Unfair Commercial Practices Act. The responsible person of the company may also be punished with a fine (EUR 300 – 2 000).

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

The understanding of the black list does not require legal skills, as does the application of the general clause. It seems that the practice relies quite heavily on the black list. If a case cannot be subsumed to one of the examples from the black list, difficulties have been reported to arise. One of the possible explanations might be, that not all of the so called 'market-inspectors' - the representatives of the state body responsible among other things for the supervision of the Act, implementing the UCPD – have legal education. Furthermore, sometimes also the courts seem to have difficulties with the use of general clauses. In this sense, the black list seems to be the preferred regulatory technique.

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

Slovenia did not make use of the possibility from Art.3 (9) UCPD. The general rules on unfair commercial practises and advertising apply. Furthermore, Art. 48-48a Consumer Protection Act prescribes the pre-contractual information duties with regard to distance marketing of consumer financial services, as demanded by the Directive 2002/65 on distance marketing of consumer financial services.

- 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 what 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?*]

According to the stakeholders, the Act implementing the UCPD (Consumer Protection against Unfair Commercial Practices Act, OJ 53/07) hasn't yet been applied in the field of the energy market or in the context of environmental claims. This does not mean, however, that there is no need for action. There is a lot of advertising in the media referring to 'green energy' and similar expressions.

Art. 328 Energy Act contains some rules with regard to advertising of energy products and services. Firstly, any advertising of a product should contain the information on the energy efficiency class or the information on energy use (Par. 7). Furthermore, showing of other signs, symbols or stickers which are not conforming to this Act, is prohibited if it is misleading for the final consumers with regard to the use of energy or other essential sources (Par. 8). Misleading advertising of energy characteristics or savings is prohibited. Advertising is misleading if it contains incorrect or incomplete information on energy or cost efficiency of a product regarding its admissible use. Moreover, when advertising with statements on costs or savings, environmental or other characteristics of a product any information which is essential with regard to the manner or purpose of use of a product must not be left out or presented in a less visible way (Par. 9).

While the Energy Agency of the Republic of Slovenia has general jurisdiction over the supervision of Energy Act, the Market Inspectorate should supervise the advertising of energy products (Art. 451 Energy Act). It would appear that the Energy Agency has much more expert knowledge needed to address these issues than the Market Inspectorate. Furthermore the latter has limited resources. There have been some questions as to the jurisdiction in individual cases. This issue is settled now: the general inspection jurisdiction of the Market Inspectorate also covers advertising of energy. No case law is recorded. Also, in the recent "VW-Dieseldgate" affair (2015), neither Market Inspectorate nor other state bodies have initiated any procedures against VW or their representatives in Slovenia.

- 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 your country rigidly?*]

The directive uses the reference point of an 'average consumer'. According to the case law of the CJEU (e.g. C-210/96), an average consumer is 'reasonably well-informed and reasonably observant and circumspect'.

The question whether an average consumer may be misled by a certain commercial practice is very often at the heart of the dispute. The Market Inspectorate and the Administrative Court seem to follow the concept of an average consumer of the CJEU, although without any concrete reference to the EU legislation and case law of the CJEU (e.g. Administrative Court I U 372/2014 from 2.9.2014).



For example, the Court held (Administrative Court, I U 651/2012 from 2.10.2013) that an average consumer is reasonably well informed, observant and circumspect that he or she cannot be misled solely due to the fact that the numbers indicating greater discount are bigger than the numbers indicating smaller discount. However, if the numbers or the letters are so small that they can hardly be read, this can represent a misleading omission. E.g. in the case before the Administrative Court (I U 1360/2012 from 20.8.2014), the claimant (filing a claim against the decision prohibiting the use of unfair practice by the Market Inspectorate) was advertising mobile phones 'for 1 EUR' in the media and on big billboards, with a very little sign (\*) referring to a hardly readable explanation of essential terms which were quite different. The Court found that the information provided in such an unclear way is misleading to an average consumer. In another case, the Administrative Court has even explicitly refused to accept the standard of reasonably well informed, observant and circumspect consumer, as the notion of "average consumer" is not defined in national legislation; however, the Court upheld the prohibition of misleading practice by the Market Inspector (Administrative Court, I U 526/2015 from 3.5.2015).

Stakeholders have different views on the question whether the standard of an average consumer should be set higher or lower. The Consumer protection organisation pleads for lowering the standards. However, all stakeholders seem to agree that the introduction of the EU standard of an average consumer by the Consumer Protection against Unfair Commercial Practices Act raised the standard applied before that. They are also unanimous in their view that an average Slovenian consumer is significantly less informed and circumvent than the standard of the CJEU.

- 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 in your country recognised new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted)?*]

In addition to the categories of vulnerable consumers from Art. 5 (3) UCPD, i.e. due to mental or physical infirmity, age or credulity, no further categories were developed on the basis of the Consumer Protection against Unfair Commercial Practices Act. However, with regard to the Consumer Credit Act, the Market Inspectorate developed some criteria for the protection of the borrowers with very poor credit ranking who are granted loans by the non-banking creditors.

- 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 Slovenian Advertising Code is a self-regulation tool for the advertisers, who are members of the Advertising Chamber. It contains principles and rules, aiming to ensure that the advertising is decent, fair, truthful and in accordance with the law.<sup>1</sup> An Advertising tribunal assesses the conformity of advertising with the Code. Its decisions are published.<sup>2</sup> There have been 278 decisions since 1994, an average of 12.6 per year. However, the stakeholders seem to agree that the effect of self-regulation in fighting unfair commercial practices is rather limited. The decisions of the tribunal are only effective against the members of the Chamber. The membership is not mandatory and not all advertisers are members.

<sup>1</sup> Available at: [http://www.soz.si/oglasevalsko\\_razsodisce/slovenski\\_oglasevalski\\_kodeks](http://www.soz.si/oglasevalsko_razsodisce/slovenski_oglasevalski_kodeks)

<sup>2</sup> Available at: [http://www.soz.si/oglasevalsko\\_razsodisce/arhiv-razsodb](http://www.soz.si/oglasevalsko_razsodisce/arhiv-razsodb)

- 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?

So far, no concrete suggestions to extend or modify the black list of the UCPD have been presented. It seems, however, that an extension of the list would be seen as beneficial.

- Are there other measures that could improve the effectiveness of the UCPD in establishing a high level of consumer protection in your country? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

According to the stakeholders, particular problems arise from the fact that some unfair commercial practices are performed by business in other Member States, which are very difficult to persecute. The example given does not refer to B2C but to B2B practices (Invitations to join a 'European business register', followed by invoices and with difficult cancellation). However, the stakeholders suggest that an enhancement of cooperation between the responsible bodies in different Member States would be very useful.

#### 1.1.2. Effectiveness of the PID in establishing 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;

PID was transposed in Slovenian law by the Rules on price indication for goods and services (original Slovenian title: *Pravilnik o načinu označevanja cen blaga in storitev*, OJ 63/99, last amended 65/03, hereinafter also referred to as 'the Rules') in 1999, which was five year prior to the accession of Slovenia to the European Union. The Rules were issued by the Minister of Economy. Price indication is one of the areas where relatively good regulation and its supervision by the Market Inspectorate existed already prior to the implementation of the PID.

The stakeholders are unanimous that the consumers are well informed about the unit selling price, especially when it is indicated per 1 kg or 1 litre. In practice, prices of specific food products, especially tropical fruit (e.g. avocado), are sometimes indicated per unit. Despite the fact that the price per unit is also marked with the price per 1 kg, this might still be confusing to the consumer.

- 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?

The Rules on price indication for goods and services do not prescribe that the unit price for specific products should be indicated per product's performance. However, in practice such indications do exist (e.g. number of glasses for instant vitamin drink, number of bread slices for spread, number of washloads for detergents). All stakeholders consider that consumers prefer measurement unit per 1 kg or 1 litre and that such indication shouldn't be replaced by the indication per product's performance.

- The effects of the regulatory choices/derogations allowed by the Directive and applied by Member States. [*Key aspects to consider are: Is the derogation relevant? Do companies make use of it? Are there consumer complaints because of this? If so, approximately how many per year?*]

Pursuant to Art. 15 of the Rules on price indication for goods and services businesses with a selling area of less than 500 m<sup>2</sup> are not bound by the provision of the Rules which imposes an obligation to mark the products with a unit price. It seems, however, that the derogation for small businesses is not causing significant problems in practice, since they mainly comply with the provision on the unit price contained in the Rules, even though they are not technically obliged to do so. Small businesses seek to act consumer friendly as well and are therefore following the rules on unit price marking.

### 1.1.3. Effectiveness of the MCAD in providing protection for businesses

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

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

For B2B relations, Articles 12-15a of the Consumer Protection Act (OJ 20/98, last amendment 19/15), implementing the MCAD (Directive 2006/114) contain rules on misleading and comparative advertising. These provisions also apply to non-consumers, i.e. businesses (competitors). With regard to misleading advertising to consumers, a reference is made to the Consumer Protection against Unfair Commercial Practices Act.

Indeed, the notion of 'advertising' is much narrower than the notion of a 'commercial practice'. In this sense the MCAD cannot be considered as providing complete protection to business against unfair commercial practices by other business. There is, however, other legislation protecting the competitors against unfair business practices. Firstly, unfair competition is prohibited by Art. 74 (3) of Constitution of the Republic of Slovenia. Further, Art. 63a of the Prevention of Restriction of Competition Act (ZPOmK-1, OJ 36/08, 40/09, 26/11, 87/11, 57/12, 39/13, 63/13, 33/14 in 76/15) contains a general clause of the law of unfair competition: Unfair competition is prohibited. Unfair competition involves acts of a business at the market, which are not compatible with good commercial practices and which cause or may cause damage to competitors. Art. 63 a (3) Prevention of Restriction of Competition Act provides eight examples of acts of unfair competition. A competitor has a right to claim damages for the damage caused, furthermore, a prohibition of further such acts, destruction of the objects used as well as publication of the judicial decision in the media may be claimed (See Art. 63 b Prevention of Restriction of Competition Act). However, it seems that the business rarely opts for private enforcement as the case law is scarce.

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

The principle-based approach to misleading advertising, as prescribed in Art. 2 (b) and Art. 3 MCAD seems to adequately address misleading advertising.

- The effects of the minimum harmonisation provisions on misleading advertising; [*Key aspects to consider are: Which national rules that go beyond the MCDA, 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 Consumer Protection Act contains some provisions, which also apply B2B and which go beyond the provisions of the MCDA on misleading advertising: a prohibition of indecent advertising (Art. 12a Consumer Protection Act), a demand that advertising messages must be written in a language easily understood by the consumers in Slovenia (Art. 12 Consumer Protection Act) 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 (Art. 15).

As stated earlier, Art. 63a of the Prevention of Restriction of Competition Act (ZPOmK-1) contains a general clause of the law of unfair competition: Unfair competition is prohibited. Unfair competition means acts of a business at the market, which are not compatible with good commercial practices and which cause or may cause damage to competitors. Art. 63 a (3) Prevention of Restriction of Competition Act provides some examples which 'in particular' represent acts of unfair competition. The third example refers to 'sale of goods with denominations, marks or information which cause or could cause confusion as to the origin, production, quantity, quality or other characteristics of the goods'.

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

Art. 4 MCAD is implemented in Art. 12c (1) and (2) Consumer Protection Act. The provision applies to B2B relations. Art. 12c (3) Consumer Protection Act contains an additional rule, according to which any comparison, relating to a special offer, is to clearly state the date the offer ends. If the offer is not yet effective, the date of its coming into effect is to be stated, too. If a special offer only relates to limited amounts of goods or services, this must be clearly stated, too.

The effect of the full harmonisation provisions on comparative advertising are difficult to assess, as the publicly available databases reveal no case law and as the literature doesn't seem to address this issue.

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

In Slovenia, the rules protecting the competitors from misleading and non-conforming comparative advertising are enforced by a combination of private and public enforcement. A competitor may file a claim at the civil court for the recovery of damages, prohibition of further acts, destruction of the objects used as well as publication of the judicial decision in the media. Very little case law has been published. This may be partly attributed to the fact that the Slovenian judiciary is burdened with serious backlogs and that it generally enjoys a very low confidence in the public.

With regard to cross border transactions the European international private law and the law of European civil procedure apply.

According to Art 6 (2) Rome II Regulation (No 864/2007), if an act of unfair competition affects exclusively the interest of a specific competitor, the applicable law is the law of the country in which the damage occurs. In case of a competitor damaged in Slovenia this means Slovenian law. Slovenian law would also be applicable where an act of unfair competition affects the competitive relations or the collective interests of consumers in Slovenia, see Art. 6 (1) Rome II.

The Brussels I Regulation (No 44/2001) contains rules on the international jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. In addition to the general rule from Art. 2 (2) according to which any defendant may be sued in the courts of the Member State where he is domiciled Art. 5(3) provides for an additional possibility for delicts: the courts of the Member state where the harmful event occurred or may occur. Regulation 1393/2007 contains rules on the service of documents in other Member States.

Public enforcement means that the Market Inspectorate may impose penalties for the breach of rules on misleading or comparative advertising, see Art. 77 (1) Nr. 3-6. With regard to enforcement of penalties against business in other Member States the

Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties and Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union are relevant, in addition to bilateral conventions.

- Are there measures that could improve the effectiveness of the MCAD in providing protection for businesses (see also 1.1.6 below)? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

No such measures or practices have been suggested.

#### 1.1.4. Effectiveness of current rules 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;

Surely, the application of the national laws transposing the UCPD is not uniform. The national differences in the application and implementation of the UCPD are among the factors the businesses have to take into account. However, the business representatives haven't reported any impact on cross-border trade due to these disparities. It seems that the disparities, if any, did not influence their business strategies. Also, Slovenian companies don't do that much retail business abroad. Foreign businesses, when coming to Slovenia, usually set up a branch and are then subject to Slovenian law. In this respect, the business associations haven't reported any problems mentioned by the question.

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

Unlike the general clause, where there is some room for disparities between the Member States in its application, the application of the black list is much more uniform. In this sense, the impact on the black list on the elimination of obstacles to the free movement of goods and services is greater than the impact of the general clause. However, the stakeholders haven't reported concretely on these effects.

- Whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade. [*Do the national differences play a role in a business perspective? Have they caused problems?*]

The stakeholders haven't reported about any such barriers.

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;

Theoretically, such disparities are possible. But the business associations haven't reported any, nor their impact on cross-border trade. It seems that the regulation on EU level succeeded in establishing uniform concepts.

- Whether the minimum harmonisation character of provisions on misleading advertising represents a barrier to cross-border trade;

Again, this seems reasonable. But the stakeholders have not identified any such barriers.

- 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;

It seems that the full harmonisation of Art. 4 of the MCAD is an appropriate legal framework for cross-border advertising. However, the stakeholders offered no concrete answers.

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

It would appear that a cross-border enforcement mechanism would certainly contribute to elimination of barriers in cross-border trade. However, no answers to this effect were offered by the stakeholders.

#### 1.1.5. Interplay amongst UCPD information requirements according to Article 7(4) with the information requirements in the horizontal consumer law instruments

Regarding the information requirements according to Article 7(4) UCPD ("invitation to purchase") in the advertising stage, please analyse:

- The level of awareness of traders as regards information requirements at the advertising stage, as in particular demonstrated by their practical application; [*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?*]

It seems that the traders are much less aware of the information requirements from Art. 7(4) UCPD than they are aware of the information requirements from the CRD. Not many misleading omission are being reported by the Market Inspectorate. It seems that one of the reasons could also be the legislative technique of the UCPD. Stakeholders agree that clearly stated concrete information duties would be much more effective than a prohibition of misleading omission, indirectly establishing a general duty to provide essential information. Furthermore, it would seem reasonable to have all information to be provided to the consumers regulated in one act. This would benefit the businesses, too.

- 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?

There is some overlap with regard to information duties but no extra costs due to this problem have been reported.

#### 1.1.6. Relevance for business-to-business transactions

Regarding the area of unfair commercial practices/marketing, please analyse:



- 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 cross-border trade;

Whether such an extension would bring benefits for cross-border trade is difficult to say. It would certainly contribute to a clearer and more uniform regulatory framework of law of unfair competition, which would be beneficial per se.

- 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;

The limitation of the sphere of application to B2C relations was subject to criticism already before the adoption of UCPD. It was suggested that the interests of consumers, competitors and general public are inseparably connected and that the limitation of UCPD to B2C relations causes fragmentation of law of unfair competition.

In Slovenia, the regulation is fragmented as well. The Consumer Protection against Unfair Commercial Practices Act, implementing the UCPD, only regulates B2C relations. However, the Consumer Protection Act, implementing the MCAD, regulates mostly B2B relations, with some provisions (Art. 12a – prohibition of indecent advertising), Art. 12 (advertising in the language easily understood by the consumers in Slovenia) and Art. 15 (advertising may not contain elements which may harm the children or exploit trustfulness or inexperience) applicable also B2C. Art. 63a of the Prevention of Restriction of Competition Act (ZPOmK-1) contains the general clause of the law of unfair competition for B2B.

Already before the transposition of the UCPD it was suggested that the legislator should add its application to B2B relations, as there is little sense in fragmenting the law of unfair competition. The argument was put forward that the core of the general clause of UCPD and the Slovenian general clause for B2B is the same or very similar: acts contrary to good commercial practices which affect the decisions of consumers or cause or may cause damage to competitors.

It has been suggested that very small businesses ('micro-companies') need protection as they are often victims of unfair commercial practices. In this respect, the extension of the UCPD would be beneficial.

However, both regimes cannot be fully aligned. Already the idea of private enforcement through damages in B2B relations cannot be automatically transferred to B2C relations.

- 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 also cover unfair commercial practices during and after the transaction;

It would appear that a complex regulation of unfair commercial practices should cover unfair commercial practices during and after the transaction, too.

- Whether there is a need to have a black-list of practices in the business-to-business marketing area;

Yes, a black list seems beneficial also in the field of B2B marketing. Such a black list is already a part of Slovenian B2B law of unfair competition - Art. 63 a (3) Prevention of Restriction of Competition Act.

- What should be the enforcement cooperation mechanism in the business-to-business marketing area;



According to the stakeholders some kind of enforcement cooperation in the B2B area would be very beneficial; however, no concrete suggestions were made.

- Whether there is a need to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive;

There seems to be no such need.

- Whether there is a need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive.

No such suggestions were put forward.

#### 1.1.7. Relevance of contractual consequences of unfair commercial practices

Please analyse whether there are in your country:

- 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;
- Any case law (enforcement decisions, court rulings) providing for such consequences;

In Slovenian law, there are no provisions on the contractual consequences of unfair commercial practices. There is also no case law to this effect yet. But it is not impossible to imagine that a court would declare a contract, concluded as a consequence of an unfair commercial practice, null, in particular when the contract is also contrary to the principle of good faith (Art. 35 Obligations Code) or it contains a non-individually negotiated clause which is contrary to good faith, or causes a significant imbalance to the detriment of the consumer or contains a 'surprise clause' (Art. 24 Consumer Protection Act). For example, the Administrative Court (II U 296/2013 from 12.3.2014) held an unfair commercial practice (overcharging the cost of payment reminder under insurance contracts, triggering a decree by the Market Inspector against which a claim was filed and dismissed) to represent also an unfair term. No reference to EU law was made.

- Whether there is, based on past experience in your country, a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

There is no pressing need to establish contractual consequences of unfair commercial practices. In civil law, there are some traditional institutes which seem sufficient for situations, where it would be unjust to enforce a contract. They are a result of careful balancing between the general interest that the contracts be upheld (*pacta sunt servanda*) and the interest of the prejudiced party as well as the public interest about fair conclusion of contracts.

Firstly, there is mistake (Art. 46 Obligations Code) and fraud (Art. 49 Obligations Code). Some of these situations may be similar to (misleading) unfair commercial clauses as defined in the UCPD. A mistake must be essential (i.e. regarding essential elements of contract) and excusable. A fraud means that a party causes mistake of the other party or keeps her in mistake with the intention of concluding a contract. In both cases, contract is avoidable within one year after the claimant has learned of the circumstances that enable avoidance, and not later than three years after the conclusion (Art. 99 Obligations Code). According to the case law, only a court can dissolve a contract due to mistake, fraud or threat. As a consequence, the case law is almost non-existent.

Furthermore, a usurious contract is not just avoidable, but automatically void. Usury means that someone abuses someone's difficult situation, state of distress, or difficult

economic position or inexperience, or light-mindedness or dependence to conclude a contract where his obligation is clearly disproportionate to the obligation of the other party (Art. 119 Obligations Code).

## 1.2. Contract conclusion and performance

### 1.2.1. Effectiveness of the current rules in establishing 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;

Before we assess the effectiveness of the national law transposing the directive, some important differences in comparison with the UCTD should be highlighted as they concern the general clause.

Firstly, Slovenian law contains no reference to non-individually-negotiated-clauses, but refers only to 'contractual terms, determined by the business, in particular those in the form of a formular contract (not defined) or general terms of operation (not defined)', see Art. 22 (1) Consumer Protection Act.

Secondly, in order for the 'contractual terms' to become a part of contract, the consumer must be 'acquainted with their entire wording', Art. 22(2) Consumer Protection Act. It is presumed, that the consumer got acquainted with them, if the business made an explicit reference to them and if they were easily accessible to the consumer, Art. 22 (3) Consumer Protection Act. Furthermore, the contract terms should be clear and understandable, Art. 22 (4) Consumer Protection Act; otherwise they do not become a part of the contract.<sup>3</sup>

Thirdly and most importantly, the general clause from the UCTD was transferred into Slovenian law in a peculiar way. The general clause Art. 3 (1) UCTD is made out of two elements: contrariety to good faith and significant imbalance in rights and obligations to the detriment of the consumer. However, the general clause in Slovenian law does not contain these two elements. Unfair terms are forbidden and null (Art. 23). A term is unfair, if it either a) causes significant imbalance in the rights and obligations of the parties to the detriment of the consumer, or b) contravenes the good faith principle, or c) cause the performance of contract unjustifiably to be detrimental to the consumer, or d) cause the performance of contract essentially different of what the consumer had reasonably expected it to be. However, there is little case law where a term would be considered unfair without both elements of the general clause of the UCTD (i.e. violation of good faith and significant imbalance).<sup>4</sup>

There are also some further differences in Slovenian law in comparison to the UCTD. Art. 4 (1) of the UCTD (no assessment of core terms) was not transposed. Therefore the Consumer Protection Act enables assessment of the definition of the subject matter or the adequacy of price. There is, however, no case law to support it.

<sup>3</sup> See Higher Court of Ljubljana, II Cp 1518/2015 from 15 July 2015. However, the Court held an unclear term is null and void.

<sup>4</sup> See e.g. Administrative Court, II U 41/2013 from 6 November 2013. The Court upheld the decree by the Market Inspector prohibiting the use of an unfair term (allowing for overcharging the cost of payment reminder in case of default with instalments and complaint of the consumer). The Court, although arguing that the contract is void according to the general clause of Art. 24 (1) Consumer Protection Act, which is different from the UCPD, however, the Court also applied two of the examples from the grey list of Art. 24 (3) Consumer Protection Act.

Furthermore, according to Art. 25 (2) Consumer Protection Act, goods or service must be sold to all consumers under the same terms.<sup>5</sup>

In Slovenian law, a contractual term in a B2C contract can be regarded unfair under fundamentally different conditions than under the UCTD. It can be alternatively contrary to good faith or cause significant imbalance (even if not contrary to good faith), or cause the performance to be detrimental or surprising for the consumer.

This provision was adopted in 1998. It seems that it was modelled after the general clause, in force at the time- Art. 143 Act on obligations (Yugoslavia, 1978), which contained a general clause on unfair terms (contract terms "determined" by one party are null, if they are contrary to the purpose of contract or good commercial practices). The Consumer Protection Act became a *lex specialis* for B2B contracts. It seems that in the negotiation procedures before the accession of Slovenia to the EU it was somehow established that the standards from the UCTD were satisfied.

However, although the possibilities for annulling contracts due to unfairness in Slovenian law are very wide, it seems that they are rarely used. The available case law of civil courts is scarce.<sup>6</sup> One of the reasons for scarce case law of the civil courts is that the decisions of first instance courts are not publicly available in Slovenia. Secondly, the consumers don't decide for filing claims at the courts also because of high cost, long duration of procedures and general distrust in the judicial system.

There are some, but not many (10) decisions of Administrative, which has jurisdiction over complaints against the decrees of the Market Inspectorate (after their review by the second instance body – the ministry of economic affairs).<sup>7</sup> The latter may prohibit sale of goods and services based on unfair terms, but it cannot annul the contract. The Administrative Court proves whether the contractual term was unfair and the decree of Market Inspectorate justified (8 out of 9 cases). In none of the decisions the courts made references to the UCTD or the case law of the CJEU. There is also relatively little legal literature on unfair contract terms in Slovenia.

Overall, the principle-based approach under the UCTD is effective. However, due to the peculiarities of its implementation into Slovenian law (i.e. substantially different general clause) the effectiveness of its general clause in Slovenia is difficult to assess.

- 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 your MS? Does this work in practice or are there problems?*]

The indicative list of the UCPD ('grey list') was transposed in Art. 24 (3) Consumer Protection Act. 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 the general clause.<sup>8</sup> It may therefore be concluded that the indicative list is effective.

<sup>5</sup> See Supreme Court of Slovenia, II Ips 248/2006 from 8 May 2008; claimant bought an apartment from defendant. He found out that the defendant sold apartments of the same kind to third parties for a lower price and claimed nullity of the contract. The Supreme Court rejected the claim on the grounds that a contract can only be null if ground for nullity exist at the time of conclusion.

<sup>6</sup> See e.g. Higher Court in Ljubljana, VSL I Cp 1816/2011 from 18 January 2012; VSL I Cp 292/2009 from 4 March 2009; VSL II Cp 1467/2015 from 4 November 2015; VSL II Cp 1753/2015, from 19 August 2015; VSL II Cp 1956/2012, 12 December 2012.

<sup>7</sup> Administrative Court, UPRS I U 563/2013 from 1 April 2014; UPRS II I 296/2013 from 12 March 2014; UPRS II I 470/2012 from 20 November 2013; UPRS II U 41/2013 from 6 November 2013; UPRS I U 1432/2012 from 23 May 2013; UPRS I U 1144/2012 from 12 March 2013; UPRS I U 1955/2011 from 10 July 2012; UPRS I U 1499/2009 from 20 October 2010; UPRS U 172/2004 from 10 October 2006; UPRS II U 203/2014 from 15 October 2014.

<sup>8</sup> 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.

- 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; [*Note: If a black/grey list exists in your country, key aspects to consider are: How does the list work in practice? Does it make a difference to have such a list?*]

The list was meant to be an indicative list. Art. 24 (3) Consumer Protection Act, containing the list of 20 situations, refers explicitly to the general clause. However, as it was already mentioned, the courts rely quite strongly on the indicative list. If they find that the case corresponds to one of the situations from the list, they usually find that there is an unfair term without much debate on the general clause.

In any case, the list is very useful for the practice of the courts and of the Market Inspectorate.

- 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: In your country, have the effects of court decisions establishing the unfairness of an unfair term been extended to all contracts of the trader concerned or to the contracts of any other trader containing such a term? If so, how does this work in practice? What are the impacts on businesses? If there are no such effects of court decisions on unfair terms: what are the effects of this situation?*]

A civil court may only find that an unfair contract terms is null. However, a Market Inspectorate, although formally not entitled to annul the contract, may issue a decree forbidding the business the selling of goods or services under contracts containing unfair terms. E.g. the Market Inspectorate has forbidden to the business the sale of electronic communication services until the business stops using unfair contract terms (*in casu*, the contract provided the possibility for the mobile phone network operator to unilaterally change the customers phone number).<sup>9</sup> This means that the decision of the Market Inspectorate is extended to all contracts of the trader containing unfair clauses. However, the contracts of other traders containing the same or similar clauses are not affected.

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

The stakeholders agree that in practice, contract terms are often not clear and understandable. However, it seems that this issue never comes up in the courts. Furthermore, the Market Inspectorate has no jurisdiction over the transparency requirement.

- 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. [*Note: Question only relevant for MS that have put in place extensions of application of UCTD*]

As mentioned earlier, in Slovenia the courts can assess the adequacy of price and the main subject matter, as Art. 4 (1) UCTD was not transposed. However, there are no actual court cases on this issue yet. The stakeholders disagree whether this option is an advantage for consumer protection; the consumer associations seem to think that it is, while the regulators and ministries call the attention to the fact that this idea is contrary to the principles of contractual justice in Slovenian law. Namely, in order for a

<sup>9</sup> See Administrative Court, UPRS I U 563/2013 from 1 April 2014.

contract to be considered usurious, inadequacy of price must be accompanied by abuse of undue influence on one of the parties. In principle, there are no reasons why B2C relations shouldn't be treated along these lines, too.

- 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?*]

The sanction foreseen by the UCTD, i.e. the term is null, is only relevant in the civil courts. These cases are very rare, also because the consumers fear the costs, the length of procedures and the uncertainty of outcome. The Market Inspectorate does not have the possibility to annul the contract but can, more importantly, prohibit the use of unfair clauses to the business.

The national courts do not follow the instructions of the CJEU regarding the ex officio invoking of unfairness. They rely on a demand of the party and only consider facts which were put forward by the parties.<sup>10</sup> In execution procedure, the possibilities of invoking any kind of substantive law issues are even smaller.<sup>11</sup>

- In a forward looking perspective: Are there other measures that could improve the effectiveness of the UCTD in establishing a high level of consumer protection in your country? Would a graphical presentation model improve the readability and comprehension by consumers of the T&Cs? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

A better implementation of the UCTD and above all, the attention to the case law of the CJEU would certainly improve the effectiveness of UCTD in establishing a high level of consumer protection in Slovenia. In addition, the jurisdiction of Market Inspectorate, acting ex officio which represents an essential advantage, as the consumer bears no costs, should be continued.

Furthermore, it has been suggested that the legislation should provide for standardized sets of information for consumers – not in the sense of long lists of pre-contractual information to be provided (as in the CRD), but as short, clear and understandable messages which would effectively 'warn' the consumer of the risks involved, in plain and intelligible language.

### 1.2.2. Effectiveness of the current rules 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 disparities have an impact on cross-border trade; [*Key aspects to consider are: Do national differences in the application/implementation of the Directive play a role for businesses? Have these differences led to changes in their business strategy? Have these differences caused problems?*]

The Slovenian version of the general fairness clause (see supra) can serve as a proof of existence of disparities in the understanding of this principle. For various reasons there is, however, very little case law on unfair terms in Slovenia.

<sup>10</sup> See e.g. Higher Court in Celje, Cp 1283/2006 from 24 May 2007; High Court in Ljubljana, VSL I Cp 1214/2012 from 21 November 2012.

<sup>11</sup> See e.g. Higher Court in Celje I Ip 181(2011 from 14.7.2011; II Ip 169/2011 from 6 October 2011.

Surely, these disparities have to be taken into account by the businesses. But, as it seems, not to an extent of any noticeable effect on cross border trade.

- 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;

The stakeholders report of no such influences.

- 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.

Theoretically, any modification in the implementation and application of the directives in the Member States can represent a barrier to cross-border trade. But not all of them do in fact hinder cross-border trade. For example, although in Slovenia there is a possibility of fairness assessment of the adequacy of the price and main subject, it hasn't been applied in practice. Differences in legislation can have some influence on cross border trade, but if they are not used in practice, this influence is minimal.

### 1.2.3. Relevance for business-to-business transactions

Regarding the area of contractual fairness and in relation to the Unfair Contract Terms Directive, please analyse:

- Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;

A possibility to invoke an unfair term in B2B contracts already exists in Slovenian law (Art. 121-122 Obligations Code). From this point of view an extension of the UCTD to B2B contracts is not needed. However, the existing regulation has some shortcomings (see *supra*). From this point of view an improvement would be welcome.

- 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;

It appears that a system of protection based on the concept of good faith and significant imbalance would be appropriate also for B2B transactions. 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. In any case, there is little case law regarding unfair terms in B2B relations.

A uniform general clause would be appropriate for both B2B and B2C contracts, with modifications as to its interpretation.

- 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;

It seems that neither businesses nor consumers are in need of UCTD-protection with regard to individually negotiated terms and the adequacy of price and main subject-matter of the contract. Some decisions should be left up to contractual parties. Any potential unfair consequences can be averted by using 'classical' institutes such as the notion of a usurious contract (Art. 119 Obligations Code).



- 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;

In practice, such terms probably exist but they were not identified by the stakeholders.

- Whether there is a need for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive;

The same general clause for unfair contract terms should apply for both B2C and B2B contracts. However, this doesn't mean that the level of protection should be the same in both categories of contracts. In the application of the general clause, the question of the parties to the contract (i.e. whether there is a B2C or a B2B contract) is of crucial importance.

If the legislator should opt for the extension of the UCTD to B2B transactions, the transparency requirement should be extended to these contracts, too. But it should be interpreted differently as the need for protection is fundamentally different with regard to consumers and business. However, the *contra proferentem* rule is applicable to B2B and B2C relations equally.

- Whether an extension of the Unfair Contract Terms Directive to B2B transactions can bring benefits for cross-border trade;

In principle, the extension of the UCTD to B2B transactions could be beneficial to cross-border trade as it would help reduce the disparities between the Member States. However, from the point of view of Slovenia (where B2B contract terms can be assessed, but this rarely happens), it seems that such an extension would hardly bring about concrete benefits.

- Whether the consequences of such an extension would have an effect on innovation by or market opportunities for SME providers/suppliers;

The stakeholders did not mention any such effect.

- Whether the benefits of extending the scope to business-to-business transactions would exceed the negative consequences of such an extension.

As already mentioned (see *supra*), Slovenian law already provides for a possibility of fairness assessment of standard terms in B2B contracts.

### 1.3. Injunctions

#### 1.3.1. Effectiveness of the current rules in establishing a high level of consumer protection

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

- To what extent is the use of the injunction procedure in your country contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment?<sup>12</sup>

<sup>12</sup> 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.



The injunction procedure as prescribed by the Injunctions Directive was transposed into Slovenian law by the Consumer Protection Act (Art. 74 and 75). The injunction procedure is a court procedure and is one of the enforcement mechanisms for protection of consumer rights beside the administrative procedure and minor offence procedure regulated in the Consumer Protection Act. However, in contrast to the administrative procedure and minor offence procedure, the publicly available databases reveal no case law on injunction actions. The Consumer Association and the Chamber of Commerce and Industry, which are qualified entities for bringing injunction actions according to Art. 75 of Consumer Protection Act, have not filed any injunction lawsuits yet. It would appear that the costs were the main reason for inactivity on this matter. Namely, if they lose the litigation before the court, they are obliged to refund the costs incurred by the winning party according to Art. 154 of the Civil Procedure Act (OJ 26/99, last amended 48/15). If the Consumer Association notices a breach of consumer rights in practice, it informs the Market Inspectorate to start an administrative procedure pursuant to the Consumer Protection Act (e. g. to issue an administrative order) instead of filing an injunction action. It should be noted that this inactivity of the qualified legal entities regarding the injunction actions has already been criticised by legal scholars in Slovenia.<sup>13</sup> It has been expressly pointed out that the burden of costs should not be a reason for inactivity on this issue, particularly in the light of the fact that some consumer organisations have been abundantly financed by the State.<sup>14</sup>

- What measures in your national legislation on injunction procedure are considered to be particularly effective, if any: measures regarding the cost of the procedure, the 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?

As no injunction action has been filed before the court yet, the effectiveness of measures as implemented in Consumer Protection Act is difficult to assess. It would appear that the measures are not effective at all. As explained above, the rules on costs of proceedings are deemed to be too burdensome in the eyes of the authorized entities. Since the Consumer Protection Act does not contain any specific rules regarding the costs of proceedings, the general rules of civil procedure apply. According to these rules the losing party bears the costs of the winning party.

It is generally accepted among the stakeholders that the sanctions for non-compliance with the injunction order are regulated appropriately. Since the Consumer Protection Act does not contain any specific rules on this issue, Articles 226 and 227 of the Claim Enforcement and Security Act (OJ 51/98, last amended 76/15) apply. According to these provisions, the court orders the infringer to cease the violations. At the same time a penalty for acting against the order is determined. For natural persons it can amount to EUR 10 000 and for legal entities and sole traders up to EUR 500 000. If the infringer acts against the order, the court executes the penalty (fine) and sets the next one higher. This can be repeated. The publication of the decision is also considered to be efficient. The summary procedure and the prior consultation are not regulated in the national legislation.

- Has your country extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunction Directive? If yes, what are the additional consumer rights covered?

Slovenia has extended the scope of application of the injunction procedure in a way that 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

<sup>13</sup> See Galič, Skupinske tožbe na področju potrošniškega prava, Pravni letopis 2011, p. 221.

<sup>14</sup> Ibidem.

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.

- Analysis of the obstacles to the effective use of the injunction procedure, in particular by analysing which progress in removing obstacles has been made and/or new difficulties that have emerged in your country since 2012.

The main obstacle to the effective use of the injunction procedure in Slovenia seems to be the burden of costs. Namely, according to the rules of the civil procedure, the losing party is obliged to refund the costs incurred by the winning party. The qualified entities for filing the injunction actions are not able or willing to bear the financial risk. The Consumer Association would be hardly able to pay the costs of the winning party, if it would lose a case before the court. As mentioned above, the criticism of such excuse for inactivity is widespread among the scholars. Nevertheless, there hasn't been any progress in removing this obstacle since 2012.

- In a forward looking perspective: Should the coverage of the Injunctions Directive be extended (by including additional legislation into Annex I to the Directive)? If so, which EU legislation should be included? Are there other measures that could improve the effectiveness of the ID in establishing a high level of consumer protection? Should the scope of the Injunctions Directive be extended to the protection of collective business' interests? Are there best practices in your country that could be relevant for other countries and considered as model for the injunction procedure at EU level?

The stakeholders are of the opinion that there is currently no need to extend the scope of protection of the Injunctions Directive. It should be noted, that Slovenia has already extended the scope of protection as foreseen by the Directive. According to Art. 74 of the Consumer Protection Act, the injunction claims can be 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.

### 1.3.2. 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:

- How effective is the injunction procedure in addressing infringements originating in another EU country?

Publicly available databases reveal no case law regarding the injunctions addressing infringements originating in another EU country. According to the data of the European Consumer Centre in Slovenia such injunctions haven't been filed yet. Neither the literature nor the stakeholders have explained the inactivity on this matter.

- How effective is it to address infringements originating in another EU country that qualified entities in your country are enabled to seek injunctions in the other Member State (Article 4 of the Injunctions Directive)?

According to the 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 to bring an action under Article 2 of this Directive (OJ of the EU 2016/C 87/01) there are 14 entities in Slovenia, which are entitled to bring an injunction action in another Member State. Beside the Chamber of Commerce and

Industry and the Chamber of Craft all of them are non-governmental consumer organisations. The qualified entities haven't filed any injunction actions in other Member States yet.

- In a forward looking perspective: Are there non-legislative or/and legislative measures that could improve the effectiveness of the injunction procedure in addressing infringements originating in another EU country? Are there best practices in your country that could be relevant for other EU countries and could be considered as a model for the injunction procedure at EU level?

All the stakeholders are well informed about the injunction procedure as regulated in the Consumer Protection Act. They seem to agree that the procedure is regulated properly and that there is no need to change the legislation on this issue. In spite of that the injunction procedure is ineffective in practice. The main reason for ineffectiveness at national level is financial risk. In analysing the reasons for ineffectiveness of the injunction procedure in addressing infringements originating in another EU country, similar conclusions can be drawn. Further reasons for inactivity of qualified entities on this issue could be a foreign language and the foreign law, also causing extra cost.

### 1.3.3. Interplay between the Injunctions Directive and other enforcement instruments of consumer law

Please analyse:

- Is the injunction procedure as designed by the Injunctions Directive regulated separately in your country (in a separate legal act or as a separate procedure regulated within the same legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (UCPD, UCTD and by the Consumer Rights Directive)?

The injunction procedure is regulated in the Consumer Protection Act and represents a uniform model of court procedure as foreseen by other EU Consumer Directives (UCPD, UCTD and CRD). For the questions of the injunction procedure, which are not regulated in the Consumer Protection Act, the general rules of civil procedure as contained in the Civil Procedure Act and executive rules as contained in the Claim Enforcement and Security Act apply. Other procedures which represent implementation of enforcement measures from other EU Consumer Law Directives are of administrative nature, mainly inspector orders, and minor offence procedures in which fines can be imposed on infringers.

- If these procedures are regulated separately: What are the main differences between them? How is the coherence between these procedures ensured? If these procedures are regulated in a single legal act (possibly as a single procedure): In what way do these procedures (or this procedure) go beyond measures foreseen by the Injunctions Directive?

The injunction procedure is a court procedure and is governed by the rules of civil procedure. Beside the court procedure, other enforcement procedures are regulated in the Consumer Protection Act (as foreseen by other EU Consumer Law Directives). These are administrative procedures and minor offence procedures. In administrative procedures the inspectors (mainly the Market Inspectorate) are entitled to issue orders. Many breaches of provisions which implement EU Consumer Law Directives are treated as minor offences and infringers are punished by a fine.

It should be noted that administrative measures are not applicable to all cases covered by the injunction procedure, since the scope of protection as foreseen by the national provisions implementing the Injunctions Directive is wider. Moreover, the injunction procedure as a court procedure goes beyond measures foreseen by the

Injunctions Directive as it provides a possibility to bring an action for finding the contract between a defendant and a consumer invalid.

## 1.4. Cross-cutting issues

### 1.4.1. Cost and benefits of the directives covered by the study

- To what extent is there evidence for benefits for consumers stemming from the protection provided by both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of benefits for consumers from the protection against unfair commercial practices and unfair standard terms in contracts; [*Note: a relevant aspect in this context is whether the costs for consumers in exercising their rights under these directives are limiting these benefits or not.*]

Both the UCPD and UCTD have doubtlessly contributed to a higher level of consumer protection in Slovenia. In this respect, particular importance can be attributed to the Market Inspectorate of Slovenia – an independent body within the Ministry of the Economy, responsible for supervision over compliance with the legislation in the areas such as consumer protection, fair competition, and copyrights. The Market Inspectorate has the power to forbid selling or advertising products or services based on unfair commercial practice or unfair contract terms. Furthermore, it may impose financial penalties for breaches of legislation. However, it cannot annul a contract or award damages. The Market Inspectorate can start an inspection procedure on its own motion, in practice this procedure is often based on complaints by the consumers. For them, this bears no costs. As the consumers in Slovenia are not prone to file claims in the court (due to, among other reasons, their fear of high cost and the length of disputes), the public enforcement of consumer protection legislation via the Market Inspection is the most effective means of achieving protection from unfair commercial practices and unfair standard contract terms. Individual (private) enforcement via the courts is much less effective. Among the reasons are costs, duration, uncertainty about the outcome and the general distrust in the judicial system.

- To what extent is there evidence for benefits for traders stemming from both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of creating a level playing field for honest traders by providing a legal basis to eliminate or at least constrain dishonest market practices, such as the use of unfair standard terms in contracts or unfair commercial practices, including through the application of the Injunctions Directive;

A level playing field for honest traders in the sense of creating harmonised rules on consumer protection is a long-term benefit for the traders. Not only it creates a much more harmonized legal environment to conduct business across the EU, but it also helps improving consumer trust and thus contributes to the growth of economy.

- What are costs for traders due to the need to respect the requirements under the directives covered by the study? [*Note: Such as costs of research, legal advice and compliance as well as the amount of time necessary to comply with the directives*]

Compliance with the legislation bears costs. However, the stakeholders suggest that these costs are relatively low. Also, businesses who invest in compliance with consumer protection legislation tend to be more successful in the long run.

- What are the costs involved in the public enforcement of these rules?

Of course, the public enforcement of consumer protection rules bears costs, too. The Market Inspectorate employs about 100 inspectors and 25 of other staff. Its yearly

budget is about EUR 4.8 million.<sup>15</sup> However, the Inspectorate has a wide range of competences, by far exceeding consumer protection. It is our estimation that these costs are relatively well spent as the Market Inspectorate offers effective protection at no extra costs for the consumers. It has, however, limited resources and powers.

- Are there indications that the directives covered by the study are not implemented in your country in a cost-effective manner?

There are no such indications.

- Could the costs for implementing and enforcing the rules of the directives covered by the study be reduced without lowering the level of protection for consumers? If so, how?

There is certainly room for improvement. If the judicial system worked, more consumers would opt for individual enforcement. This would also contribute to much more clear answers to legal questions connected to the application of the directives, particularly the UCTD. As there is only very little case law there is a lot of uncertainty as to how the courts would apply the legislation.

Slovenia is a very small country, with not that many people writing about law in general, and consumer protection law in particular. The market of legal literature is small. For example, there is no usable commentary of Consumer Protection Act. As a consequence, there is not enough adequate literature and commentaries. This is a further reason for uncertainty as to what exactly the law is or should be. If the state or EU would financially support making of such literature (e.g. a commentary of Consumer Protection act or Consumer Protection against Unfair Commercial Practices Act) or adopt detailed guidelines for the application of the UCTD and UCPD this would contribute to legal certainty and better and more cost-efficient enforcement of the legislation.

#### 1.4.2. Interplay with EU sector-specific consumer protection legislation

Regarding the interplay of the horizontal EU consumer legislation [mainly UCPD and UCTD] with EU sector-specific consumer protection legislation in the areas of electronic communications, passenger transport, energy and consumer financial services, please:

- Analyse the levels of awareness of the requirements of the horizontal EU consumer legislation (mainly UCPD and UCTD) of businesses and consumers and the specific public enforcement bodies in the relevant sectors, as in particular demonstrated by their practical application; [*Key question here is: Are UCPD and UCTD applied in practice by national authorities and courts as a legal basis to combat unfair commercial practices and unfair standard terms in contracts in the regulated sectors?*]

The stakeholders seem to suggest that the level of awareness of businesses and consumers with the horizontal EU consumer legislations in the sense of UCPD and UCTD is relatively low.

The UCPD and the UCTD represent general legal bases for combating unfair commercial practices and unfair contract terms in the sectors of electronic communications, energy, passenger transport and consumer financial services (consumer credit, distance marketing of financial services). However, there is very little case law of the courts and of the Market Inspectorate in these areas.

<sup>15</sup> See Yearly report of the Market Inspectorate for 2014, available at: <http://www.ti.gov.si/fileadmin/ti.gov.si/pageuploads/dokumenti/TirsPoslovnoPorocilo2014.pdf> (20.7.2016)

- Specify whether in your country the same authority is responsible for the enforcement of the horizontal EU consumer law 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 UCPD/UCTD in the regulated sectors, as specified in the previous bullet?*]

The Market Inspectorate is responsible for the enforcement of horizontal EU consumer law in the areas of electronic communications, energy and consumer financial services (consumer credit, distance marketing of financial services). In the field of passenger traffic, there are specialized agencies, such as Civil Aviation Agency, responsible for the supervision of passenger rights under the regulations No 261/2004 and (EC) No 1107/2006. The case law of the courts (exercising judicial control over the decrees of the Market Inspectorate) seems to suggest that the Market Inspectorate is rarely active in the mentioned areas. Limited resources (and a wide range of competences) as well as lack of specialized skills of the Market Inspectorate might be among the reasons.

- Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning contractual fairness, 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.?*]

From the point of view of the legislation, the combination of UCPD and UCTD and sector-specific rules seems to provide for a relatively clear legal framework concerning contractual fairness, unfair commercial practices, and information obligations regarding advertising. There is, very little enough publicly available case law (i.e. decisions of the courts of first instance and Market Inspectorate are not publicly available, only decisions of Administrative Court, Higher Courts and the Supreme Court) for an assessment as to how this legal framework is functioning in practice.

- What are the benefits of the complementary application of the UCPD and UCTD in the regulated sectors? What are the costs due to the complementary application with the sectoral EU consumer protection legislation?

It would appear that the application of the same general principles of consumer protection is a benefit of applicability of horizontal consumer provisions in regulated sectors.

- Assess any need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law.

A clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law would provide a clearer regulatory framework. Any future horizontal EU consumer law legislation should contain a list (e.g. in an Annex) of all EU sector specific rules, which it affects or which represent a special regulation.

#### 1.4.3. Relevance of consumer law directives for consumer-to-business transactions

- Please analyse the need and potential for the application of the consumer law directives (mainly UCPD and UCTD) to 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 stakeholders did not see any need for the application of consumer law directives in C2C relations.

#### 1.4.4. Specific protection for vulnerable consumers

Please analyse:

- Whether the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined in the consumer law directives and relevant jurisprudence, and as applied by national authorities and courts in your country, continue to be valid and fit for purpose.

The concepts of 'consumer', 'vulnerable consumer' and 'average consumer' as currently defined in the EU directives and case law of the CJEU are valid and fit for purpose.

- To what extent the existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers and whether, based on the experiences in your country, specific provisions should be introduced in other directives concerned, in particular the Unfair Contract Terms Directive.

The existing UCPD rules on the protection of vulnerable consumers represent an adequate basis for their protections. However, so far there is no case law with regard to corresponding provision of national law – Art. 3 (4) Consumer Protection against Unfair Commercial Practices Act.

#### 1.4.5. EU added value

- Overall, would you consider that protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in your country since the implementation of the UCPD and the UCTD in national legislation?

Certainly, the implementation of UCTD and UCPD has substantially improved the consumer protection against unfair commercial practices and unfair standard terms in Slovenia. Prior to the implementation of the UCPD, there was some legislation in force (*Zakon o varstvu konkurence*, OJ 18/93), but it focussed on the B2B aspect. The UCPD has set up a coherent legal framework. Particularly the black list has improved the situation, as it offered very clear examples to the enforcement authorities (Market Inspectorate).

Prior to the implementation of the UCTD (2004) there was a general clause on unfair standard contract terms as from 1978 (Yugoslav Act on Obligations), applicable both in B2B and B2C relations, but with very little case law. The Consumer Protection Act in 1998 has established a general clause, very different from the general clause of the UCTD (see *supra*) which remained in force even after the accession to the EU. However, in the application the differences are not that great. With regard to the case law it should be pointed out that Slovenian courts never make any reference to the UCTD and case law of the CJEU. With regard to the latter some fundamental differences exist with regard to the application of the UCTD, in particular regarding the duties of the court *ex officio*. Slovenian courts do not follow the instructions of the CJEU.

- Overall, would you consider that the information of consumers regarding unit prices has improved since the implementation of the PID in national legislation?

The stakeholders agree that the information of consumers has improved.



- Overall, would you consider that the protection of businesses against unfair marketing in your country has improved since the implementation of the MCAD in national legislation?

The stakeholders agree that the protection of business has against unfair marketing has improved since the implementation of the MCAD. However, the case law is scarce and the exact degree of the improvement is difficult to assess.

- Overall, would you consider that it has become easier for businesses in your country to directly trade cross-border to final consumers located in other EU countries in recent years? Has it become easier for consumers in your country to directly purchase cross-border from traders located in other EU countries?
- To what extent are these improvements, if any, due to the mentioned directives?

The stakeholders agree that the EU consumer protection legislation has made it easier for the businesses to trade to final consumers across borders. However, there are not that many businesses in Slovenia trading in this way. The regulatory framework is certainly not one of the reasons for this situation.

It has also become easier for consumers to shop from traders in other EU countries, above all, over the internet. Harmonization of consumer protection rules by the UCTD and UCPD might be one of the factors, contributing to greater trust of the consumers. In the opinion of the stakeholders, however, the majority of consumers care little for the legal framework of their transactions or advertising. Much more important are other factors or barriers to the cross border trade, such as relatively high cost of delivery to Slovenia which is, as a rule, disproportionately higher than for deliveries e.g. to the neighbouring Austria.

## Annex

## A. Transposition fact sheet

**Table 1: Fact sheet on transposition of directives in Member States' law – SLOVENIA**

Directive	Transposition legislation (National law, Article)	Comments	Specific provisions going beyond minimum harmonisation requirements/use of exemptions	Included in national legislation	Comments
<b>Directive 93/13/EEC on unfair terms in consumer contracts</b>	Art. 1 of the Consumer Protection Act	A general provision on the scope of the Consumer Protection Act. The Unfair Contract Terms are not specifically mentioned.	'Black list' of terms considered unfair in all circumstances	No	
	Art. 22 of the Consumer Protection Act		'Grey list' of terms which may be considered unfair	Yes	Art. 24 (3) of the Consumer Protection Act
	Art. 22 (1) of the Consumer Protection Act	Any contract term, drafted by the seller/supplier, especially in the form of a pre-formulated standard contract or general contract terms.	Extensions of the application of Directive to individually negotiated terms	No	

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Art. 22 (2) of the Consumer Protection Act	Contract terms are only binding on the consumer if, prior to the conclusion of the contract, he was acquainted with their text.	Extensions of the application of Directive terms on the adequacy of the price and the main subject-matter	Yes		<i>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.</i>
Art. 22 (5) of the Consumer Protection Act	Contra proferentem rule: interpretation most favourable to the consumer shall prevail.				
Art. 23 of the Consumer Protection Act					
Art. 23 (2) of the Consumer Protection Act	Unfair Contract Terms shall be null and void. The express provision on a continuing existence of the rest of the contract is lacking.				
Art. 24 of the Consumer Protection Act					

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	Art. 24 (1) of the Consumer Protection Act	Terms are regarded as unfair if they either: - cause a significant imbalance in the parties' rights and obligations; -are contrary to the requirement of good faith; -cause that the performance of the contract is to an unacceptable detriment of the consumer; - cause that the performance of the contract substantially differs from what the consumer could reasonably anticipate. Contrary to Directive, the conditions are alternative and not cumulative. It is not required that the contractual term has not been individually negotiated.				
	Art. 24 (2) of the Consumer Protection Act	A provision on the circumstances which have to be taken into account in assessing the unfairness of a contractual term				
	Art. 24 (3) of the Consumer Protection Act	Grey list	'Grey list' of terms which may be considered unfair (the general clause must still be applied)			
	Art. 24 (3) 1st indent of the Consumer Protection Act	A vague transposition: Contract term is unfair if the seller may unilaterally dissolve the contract at any time.				
	Art. 24 (3) 6th indent of the Consumer Protection Act	A vague (inaccurate) transposition: Contract term is unfair if the seller may unilaterally alter the fundamental provisions of the contract.				

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	Art. 24 (3) 9th indent of the Consumer Protection Act	Possibility of transferring the rights and obligations to a third person, whose name is not specifically mentioned in the contract. The absence of the consumer's consent is not a requirement under Slovenian Consumer Protection Act.				
	Art. 22 (5) of the Private International Law and Procedure Act	By choosing the applicable law, the consumer shall not be deprived of the mandatory rules protecting his rights under the laws of the country of his domicile. The provision is included in Private International Law and Procedure Act.				
	Art. 74 (1), Art. 76 of the Consumer Protection Act	Consumer protection organizations (legal persons) may take legal action before court in order to have unfair contract terms declared null and void. A positive judgement has an "erga omnes" effect: anybody may rely on its wording.				
<b>Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market</b>	Art. 1 – 15 of the Consumer Protection against Unfair Commercial Practices Act		Provisions regarding financial services going beyond minimum harmonisation requirements	No		
			Provisions regarding immovable property going beyond minimum harmonisation requirements	No		
			Application of UCPD to B2B transactions	No		

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<b>Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers</b>	Articles 1, 2, 4, 5, 8, 12, 15 of the Rules on Price Indication for Goods and Services		Extension of the application to other sectors (e.g. for immovable property)	No		
	Art. 1 of the Consumer Protection Act		Use of specific regulatory choices/derogations	No		
<b>Directive 2006/114/EC concerning misleading and comparative advertising</b>	Art. 12, 12b – 14, 15a of the Consumer Protection Act	These rules apply also to non-consumers, i.e. businesses (competitors). With regard to misleading advertising to consumers, a reference is made to the Consumer Protection against Unfair Commercial Practices Act.				
	Art. 63a of the Prevention of Restriction of Competition Act	This rule represents legislation protecting the competitors against unfair business practices (it contains a general clause of the law of unfair competition).				
<b>Directive 2009/22/EC on injunctions for the protection of consumers' interests</b>	Art. 74 of the Consumer Protection Act					
	Art. 75 of the Consumer Protection Act					

**Table 2: Fact sheet on Injunctions Directive – SLOVENIA**

Issue	Answer	Comments
Is the injunction procedure as foreseen by the Injunctions Directive regulated in your country separately (as a separate procedure or/and in a 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)?	No, single procedure.	<i>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.</i>
Who is entitled to bring an action seeking an injunction?	<ul style="list-style-type: none"> <li>- Designated public bodies</li> <li>- Specified consumer associations</li> <li>- Other</li> </ul>	<i>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.</i>
Is the injunction procedure a court or an administrative procedure? If your country legislation foresees both forms of the procedure, please explain in the comments column for which infringements the court or administrative procedure is foreseen	Court procedure.	
Who bears the costs of an injunction procedure? If qualified entities (or some of their categories e.g. consumer organisations are entitled to an exemption of some/all cost related to the procedure please explain the characteristic of such exemption in the comments column.	The costs are as a rule borne by the losing party.	



<p>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?</p>	<p>Yes, scope of application extended to cover areas of consumer law that are not part of Annex I of the Directive.</p>	<p><i>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.</i></p>
<p>Is protection of business' interests covered by the injunctions procedure? If scope of application extended to the protection of business' interests, please provide details in the comments column regarding type of business' interests covered by the injunctions procedure</p>	<p>No.</p>	
<p>Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations</p>	<p>No.</p>	
<p>Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID)</p>	<p>No.</p>	
<p>Has your Member State taken specific measures regarding the prior consultation (Article 5 of the Injunctions Directive)?</p>	<p>No such requirement.</p>	<p><i>After the amendment of the Consumer Protection Act the requirement regarding the prior consultation with the state Office for the protection of consumers was left out.</i></p>
<p>Does the national legislation provide for measures ensuring summary procedure? Please specify main characteristics of the procedure (subject matter/time limits) in the comments column.</p>	<p>No.</p>	

<p>Are there sanctions for non-compliance with the injunction order (Article 2(1) of the Injunctions Directive)?</p> <p>If sanctions in form of penalty or fine foreseen please specify in the comments column to who exactly should they be paid</p>	<p>Yes, sanctions in form of fine.</p>	<p><i>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.</i></p>
<p>Has your Member State taken specific measures regarding the publication of the decision and/or the publication of a corrective statement?</p>	<p>Yes.</p>	<p><i>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.</i></p>
<p>Is it possible to claim within the injunction procedure for sanctions for the infringement?</p>	<p>Yes.</p>	<p><i>Art. 76 of the Consumer Protection Act provides a possibility to bring an action for finding the contract between a defendant and a consumer invalid. This can be claimed also within the injunction procedure. A fine cannot be claimed within the injunction procedure.</i></p>
<p>Can an action for the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to other beneficiary be brought within the injunction procedure?</p>	<p>No.</p>	
<p>Can an action for damages to be paid to the qualified entity or the public purse be brought within the injunction procedure?</p>	<p>No.</p>	
<p>Can an action for damages or redress to be paid to the consumers concerned be brought within the injunction procedure?</p>	<p>No.</p>	<p><i>According to the proposal of the Class Action Act from 2016 the qualified entity can also claim damages to be paid to the consumers. The proposal is currently in a legislative procedure.</i></p>

<p>Can individual consumers base their individual claims for damages/remedies on the injunctions order?</p>	<p>Yes.</p>	<p><i>If consumers bring an action for damages, they bear a burden to prove three elements of damage liability. Firstly, they must prove the existence of damage, secondly, an unlawful (illegal) act of the defendant, and thirdly, a causal link between damages and unlawful act. In order to prove that the defendant has acted unlawfully, the plaintiff can base his argumentation on the injunction order.</i></p>
<p>Can the qualified entity claim other measures beyond the injunction, e.g. evidence of compliance with the judgment?</p>	<p>Yes.</p>	<p><i>The qualified entity can claim also to find the contract between a defendant and a consumer invalid.</i></p>
<p>Are the effects of individual injunctions orders extended to the future infringements and/or same or similar illegal practices (of other traders)?</p>	<p>No.</p>	

## B. Data tables

*Number of B2C disputes*

Please indicate how many B2C disputes have been decided in your country on the basis of consumer law directives covered by this study (UCPD, UCTD, PID) as a proportion of the total number of B2C disputes decided on the basis of other national consumer legislation (based on statistics, or based on estimates by enforcement authorities and other stakeholders, where this is not available).

**Table 3: B2C disputes decided on the basis of consumer law directives covered by this study in comparison with total B2C disputes decided on the basis of other legislation (most recent year for which data is available)**

Year	Type of data	Total number of B2C disputes (number of cases)	Share of B2C disputes decided on basis of ...					Comments
			UCPD	UCTD	PID	other EU consumer protection legislation (e.g. CRD, Sales Directive, sectoral legislation)	national consumer legislation not based on EU directives	
2015	Court statistics	25	28 %	12 %	0 %	56 %	4 %	
2014	Court statistics	23	35 %	8.7 %	4.3 %	47.7 %	4.3 %	
2013	Court statistics	25	28 %	16 %	0 %	44 %	12 %	
2012	Court statistics	29	17.2 %	17.2 %	0 %	55.2 %	10.4 %	
2011	Court statistics	10	30 %	10 %	0 %	60 %	0 %	
2010	Court statistics	20	25 %	20 %	5 %	35 %	15 %	

Note: The survey of case law is incomplete in Slovenia, the decisions of Courts of first instance are not publicly available. Only the decisions of Administrative Court, Higher Courts (courts of appeal) and the Supreme Court are public (in anonymized form). Source of court statistics: <http://www.iusinfo.si/>

*Costs of obtaining redress for a hypothetical case of invoking unfairness of a standard contract term*

- Please estimate the costs, including time, for consumers in obtaining redress when invoking the unfairness, and thereby the non-binding character of standard contract terms in a contract they concluded. Please provide the estimate for the hypothetical example below, focusing on costs (and needed time) of a lower court procedure and the use of ADR or other relevant procedure (if applicable).<sup>16</sup>

<sup>16</sup> For the hypothetical example it is assumed that both the provider and the consumer are located in your country.

**Table 4: Estimate of costs for consumers in obtaining redress when invoking the unfairness of standard contract terms in a contract they concluded (for the hypothetical example provided in the box below)**

Redress mechanism	Estimated court fees (national currency)	Estimated lawyer's fees (national currency)	Other costs, if any (national currency)	Estimated time involved for consumer (hours)	Comments
<b>Lower court procedure</b>	EUR 255 (according to the Court Fees Act, OJ 37/08, last amended 30/16)	EUR 640.38 (according to the Attorney Tariff, OJ 2/15; the estimated lawyer's fee contains a fee for an action, a fee for a written submission, a fee for a main hearing and a fee for administrative costs)	-	14 - 22 hours (The calculation is based on the assumption that the consumer would authorize an attorney for the proceedings before the court. The consumer would spend 4 - 6 hours for contacting the travel agency, 4 – 6 hours for contacting the Consumer Association and the Market Inspectorate, 4 – 6 hours for correspondence with his attorney and 2 - 4 hours for a hearing before the court.)	This calculation is based on the assumption that the value of the matter in this dispute is EUR 5 000. The estimated court fee should be paid in advance by the plaintiff. The estimation of the lawyer's fee represents the costs of plaintiff's attorney. In practice smaller lawyers associations usually agree with their clients to be paid for their services pursuant to the Attorney Tariff. However, some of the lawyers also charge for their services on an hourly basis.

**Hypothetical example: Terms which inappropriately exclude/limit consumers' rights to compensation**

A consumer went on a package holiday with a friend to Kenya for which they paid € 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 €5,000 (€4,000 for the cost of the package and €1,000 for lost time and enjoyment). The tour operator agreed to compensate them €1,000 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/unfair-contract-terms/index\\_en.htm](http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-contract-terms/index_en.htm)]

- Please estimate how often court and ADR procedures are used in your country for invoking the unfairness, and thereby the non-binding character of standard contract terms (i.e. the number of cases per year)?

The Out-of-Court Resolution of Consumer Disputes Act was adopted 2015 (OJ 81/15) and is in force from 14 November 2015. No information on its application has been published yet.

## C. Interviews conducted and literature reviewed

**Table 5: Interviews conducted for this study**

Organisation	Stakeholder type	Date
Commercial Chamber of Slovenia	Business association	26 July 2016
Tržni Inšpektorat Republike Slovenije (Market Inspectorate)	National enforcement authority	19 July 2016
Ministry of Economic Development and Technology, Consumer and Competition Protection Division	Ministry – national regulatory authority	26 July 2016
Evropski potrošniški center	European Consumer Centre	27 July 2016
Zveza za varstvo potrošnikov (Slovene Consumers' Association)	Consumer organisation	25 July 2016



**Table 6: Literature reviewed for country report**

Author/Source	Year	Title of publication
Andrić, Andrej, Pravna praksa 2/2003, p. 19.	2003	Uveljavitev directive 93/13/EGS o nepoštenih klavzulah v potrošniških pogodbah v pravnem sistemu Republike Slovenije (The implementation of the Directive 93/13/EEC on unfair terms in consumer contracts in the law of the Republic of Slovenia)
Rajko Knez, Podjetje in delo, 6-7/200z, p. 1125.	2007	Spremembe potrošniškega prava in prakse zaradi sodb Sodišča ES (Changes in consumer law and practice due to the judgements of the ECJ)
Trstenjak, Verica/Knez, Rajko/Možina, Damjan	2005	Evropsko pravo varstva potrošnikov (European consumer protection Law)
Varanelli, Luigi, Pravna praksa 27/2004, p. 23	2004	Nepošteni pogodbeni pogoji po zakonu o varstvu potrošnikov (Unfair contract terms in Consumer Protection Act)
Aleš Ferčič, Pravna praksa 2/2010, p. 9-11.	2010	((Nepošteni) pogodbeni pogoji v potrošniških pogodbah ((Unfair) terms in consumer contracts)
Klemen Podobnik, Podjetje in delo 6-7/2006, p. 1289-1295.	2006	Implementacija Direktive o nepoštenih poslovnih praksah (Implementation of the Unfair Commercial Practices Directive)
Zoran Skubic, Pravna praksa 5/2014, p. 26	2014	Znatno neravnotežje pravic pogodbenih strank in nepoštenost pogojev potrošniških pogodb (Significant imbalance in the rights of contractual parties and unfairness of terms in consumer contracts)
Damjan Možina, Podjetje in delo, 6-7/2006, p. 1296-1308.	2006	Direktiva o nepoštenih poslovnih praksah – odprta vprašanja (Unfair commercial practices directive – open issues),
Damjan Možina, Podjetje in delo, 6-7/2004, p. 1139-1352.	2004	Razvojne težnje v evropskem pravu nelojalne konkurence in varstva potrošnikov (Development trends in the European law of unfair competition and consumer protection)
Damjan Možina, Podjetje in delo, 6-7/2012, p. 1437-	2012	Kaj je narobe z Zakonom o varstvu potrošnikov? (What is wrong with the Consumer Protection Act?)
Luka Rejc, Pravna praksa 37/2011, p. 15.	2011	Pavšalni zneske v luči ZVPNPP (Lums sums from the point of view of Act on the protection of consumers against unfair commercial practices)
Robert Geisler, Pravna praksa 13/2013, p. 9.	2013	Pogodbena kazen v potrošniški pogodbi o posredovanju kot nepošteni pogodbeni pogoj (Contractual penalty in the consumer brokerage contract as an unfair term)
Zoran Skubic, Pravna praksa 2/2014, p. 29.	2014	Je manjkajoči izdelek v akciji že sam po sebi nepoštena poslovna praksa? (Is a not-available product, advertised as discount, an unfair business practice <i>per se</i> ?)
Katarina Vatovec, Pravna praksa 47/2010, p. 24.	2010	Prodaja časopisa z možnostjo nagrade (še) ne pomeni nepošteno poslovno prakso (The sale of newspaper with a possibility of a prize is not (yet) an unfair commercial practice)

Peter Grilc, in: Hilty/Henning-Bodewig (ed.), Law against unfair competition, Springer	2007	Unfair Competition Law in Slovenia
Bojan Zabel	1999	Tržno pravo (Market law)
Aleš, Galič, Pravni letopis	2011	Skupinske tožbe na področju potrošniškega prava (Class actions in the field of consumer law)
Aleš, Galič, Podjetje in delo	2000	Procesni vidiki prava varstva potrošnikov (Procedural aspects of consumer protection law)
Ana Vlahek, Matija, Damjan (ed.)	2015	Pravo in politika sodobnega varstva potrošnikov (Law and policy of modern consumer protection law)
Ministrstvo za pravosodje (Ministry of Justice)	2016	Predlog Zakona o kolektivnih tožbah (Class Action Act proposal)
Državni zbor (Parliament)	2012	Resolucija o Nacionalnem programu varstva potrošnikov 2012 – 2017 (National program of consumer protection law 2012 – 2017)
Vanja, Žgur, Pravna praksa	2010	Ukrepi proti oglaševanju v nasprotju z zakonom so v praksi neučinkoviti (Measures against unlawful advertisement are in practice ineffective)

## 1. Study to support the Fitness Check of EU Consumer law – Country report SPAIN

### 1.1. Unfair commercial practices and marketing

#### 1.1.1. Effectiveness of the UCPD in establishing a high level of consumer protection

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

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

As in the UCPD, Article 4 of Act 3/1991 in Spain foresees a general test of fairness:

‘1. Any behaviour that objectively fails to abide by the requirements of good faith shall be deemed unfair.

In relations with consumers and users, entrepreneurs or professionals shall be deemed to be in breach of the requirements of good faith where their conduct is in breach of professional diligence, the latter meaning the standard of special skill and care which an entrepreneur may reasonably be expected to exercise towards consumers, commensurate with honest market practice, and significantly distorts or could significantly distort the economic behaviour of the average consumer or of the average member of the target group of the practice in question if the latter is a commercial practice targeting a particular group of consumers.

For the purposes of this Act, economic behaviour of consumers or users shall mean any decision taken by the latter to act or refrain from acting having regard to:

- a) The selection of an offer or offeror.
- b) The engagement of a good or service and, if relevant, the way in which and under what conditions it is engaged.
- c) Payment of the price, total or partial, or any other form of payment.
- d) The conservation of the good or service.
- e) The exercise of contractual rights having regard to goods and services.

Also, for the purposes of this Act, significantly distorting the economic behaviour of the average consumer means using a commercial practice to appreciably impair consumers' capacity to adopt an informed decision thus causing them to make a decision on their economic behaviour which they otherwise would not have made’.

The general unfairness clause receives meaning via a double test. Firstly, professional diligence of traders has to be determined and, secondly, the actual commercial behavior of the individual trader has to be assessed against this standard. The violation of the standard is a pre-condition for unfairness.

However, setting optimal standards is no easy task. Several factors make this task very difficult in this setting:

- Firms engaging in commercial practices are extremely diverse. To determine the professional diligence standards for all of them on the basis of a general formulation seems almost unrealistic;
- The optimal determination of professional diligence standards in commercial B2C practices cannot be accomplished without looking at the harm resulting from the alternative feasible practices;
- The likelihood that legislators, regulators and Courts may have divergent views upon the role and content of such standard is very high. In order to effectively govern the behavior of firms and effectively protect consumers, the likely results of

the unfairness test applied to commercial practices have to be anticipated, at least approximately, so that firms can plan their commercial strategies in accordance with the required standards;

- Finally, standards of behavior in the commercial setting are notoriously difficult to establish because legislators and Courts are not business experts.

On the other hand, the material distortion notion corresponds, broadly speaking, to the idea of effective and relevant harm to the 'average consumer'. However, the notion of 'average consumer' also remains controversial (see *infra*).

In the opinion of the Catalan Consumer Agency (ACC), the UCPD would be more effective if it had been implemented through a consumer law (Royal Legislative Decree 1/2007) instead of a law that basically refers to unfair competition (Act 29/2009).

A representative from the Spanish Agency for Consumer Affairs, Food Safety and Nutrition (AECOSAN) said that the UCPD has had a significant impact in relationships between businesses and consumers. Companies have become increasingly aware that certain clauses, offers and sales are subject to European legislation. The UCPD has also had a double impact for consumers: firstly, it has fostered a greater demand of respect for their rights and for the principle of good faith (the so-called 'fair play' in European directives) and, secondly, it has fostered the awareness that those rights are enforceable in all EU companies that sell products and offer services in the EU. The latter is significant since there is a current opinion among Spanish consumers and associations that buying products from non-EU companies involves lack of protection and rights in potential disputes with sellers.

Consumer associations see the effectiveness of the UCPD as relative because implementation of general principles is not an easy task.

To sum up, the effectiveness of the principle-based approach under UCPD is not absolute due to uncertainty or vagueness inherent to general principles.

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

Annex I of UCPD was transposed by Act 29/2009 by providing new content to Articles 20-31 of Act 3/1991 ('commercial practices with consumers and users').

These provisions make it easier to identify commercial practices that are prohibited in all circumstances (1) by providing both legal certainty to consumers and a valuable guide to courts and administrative authorities in their application, and (2) by avoiding case-by-case assessments against other provisions of Act 3/1991 (in particular, the general clause of unfairness foreseen by Article 4 and the requirements of unfair commercial practices foreseen by Articles 5-18). Accordingly, consumers do not have to provide evidence that a commercial practice is objectively contrary to good faith requirements or to the rules of professional practice diligence, that it contains misleading information or that this information, due to its content or presentation, is likely to induce consumers to mistake, etc.

Due to recent incorporation, case law does not provide evidence about the practical application and the practical benefits of the black list of unfair commercial practices.

According to the ACC, the black list has allowed them to sanction the following practices: (1) telephone companies that indicated prices of services without including taxes payable by users; (2) bait advertising cases; (3) aggressive marketing practices by electricity suppliers that coerced consumers or asked them for invoices and financial data regarding their contractual link with their current supplier of electricity.

According to AECOSAN, the best example of the practical benefits of the black list can be found in point 7 of Annex I UCPD: 'Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice'. This provision has given

legal basis for controlling offers and imposing administrative sanctions in bait advertising cases.

Consumer associations consider that the black list facilitates both the detection and punishment of unfair commercial practices.

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

As in Article 3.9 of UCPD, Article 19.5 of Royal Legislative Decree 1/2007 states that Spanish legislators can impose rules that establish a greater degree of protection to consumers and users in the field of financial services and immovable property. This rule is consistent with both the complexity of transactions dealing with financial services and housing as well as the serious risks facing consumers in these fields. Both financial services and immovable property involve complex transactions where investments of money can be significant. As consumers are potentially exposed to more important losses in these fields, and given that enforcement levels are not likely to be increased due to the current fiscal crisis in Spain, it appears advisable to keep the exemption and to allow legislators to subject financial entities and individuals who participate in the sale or lease of housing to more specific requirements and obligations in order to improve consumers' protection.

In the field of financial services, Article 19.4 of Royal Legislative Decree 1/2007 states that rules on unfair commercial practices in respect of consumer credit, distance marketing of financial services addressed to consumers and users, collective investment in transferable securities and public offering will prevail, in case of conflict, over general legislation on unfair commercial practices. In general terms, the level of protection provided by the Spanish legislative framework is higher than that provided by the UCPD since several specific provisions exist that try to improve the transparency of financial transactions and to protect the rights and interests of financial clients. These provisions deal with the following issues: the obligation of financial entities to inform about the essential features of financial products and their effects; the obligation of financial entities to observe rules on financial advertising and to establish internal controls to guarantee that these rules are met; the obligation of financial entities to establish mechanisms (for example, claim services) to protect their clients, and the obligation of some financial firms or some financial transactions to be registered. The most common unfair commercial practices in Spain are precisely related to the breach of these obligations. As these practices are covered by Spanish legislation that deals with the transparency of financial transactions and the protection of financial clients, it is possible to conclude that their prevalence is mainly not a product of legislative gaps but of problems regarding enforcement of the rules by financial entities.

In the field of immovable property, two types of rules on unfair commercial practices must be distinguished:

- Rules applicable to commercial practices on financial products addressed to fund the acquisition of immovable property (see Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2011, which has not been transposed yet into the Spanish legal system); and
- Rules addressed to regulate the acquisition of this type of property (see, for instance, Article 64 of Royal Legislative Decree 1/2007 that enumerates the information that must be provided for first-time sales). In this field, specific provisions exist that deal with the pre-contractual information that must be provided to those who purchase or lease housing in offers, promotions and advertising. The most common unfair commercial practices seem to be related to misdescription or omission of the essential features of the property and misleading advertising. As these practices are covered by Spanish legislation, again it is fair to

conclude that their prevalence is not due to legislative gaps but mainly to problems regarding enforcement of the Spanish rules on immovable property.

ACC notes that since 2015, Catalan Act 22/2010 contains provisions on advertising and pre-contractual and contractual information in consumer loans and mortgage loans. For instance, art. 262-1.3 of the Catalan Act 22/2010 states that the ACC must inspect periodically contractual documentation to guarantee that it does not contain unfair clauses. If unfair practices or clauses are discovered, the Agency may initiate disciplinary proceedings against banks *ex officio*.

According to AECOSAN, unless contractual information in consumer credit contracts (and the control of consumer credit contracts signed by financial entities that are not registered in the Bank of Spain), financial services have been excluded from the scope of Spanish consumer authorities.

Consumer associations consider that minimum harmonization clauses for financial services provide legal certainty. However, they should be more explicit due to high specialization of financial contracts and the trust relationship between the parties in this sector.

- 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 what 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?*]

It is difficult to assess the effectiveness and practical benefits of Act 3/1991 in these fields because Spanish courts have applied this Act to disputes that deal directly or indirectly with environmental and energy issues in few cases:

- SJMer Barcelona num. 5, 1.4.2014 (JUR 2015\31151): *Asociación Nacional de Empresas de Aguas de Bebida Envasadas* filed an injunction against Brita Iberia, S.L.U. alleging that its water filter advertisements on the TV, its webpage and Youtube were unlawful and unfair according to Article 3 of Act 34/1988 and Article 5 of Act 3/1991, respectively. The first instance court ruled in favour of the plaintiff and stated that advertisements were misleading because they put on the same level filtered water and bottled mineral water and they conferred filtered water advantages in economic and environment terms that were misleading. Moreover, they contained environmental information without any reference to the environmental policy of the entities represented by the claimant and hence they gave information that was able to harm the reputation of bottled water businesses in the market;
- SJMer Madrid num. 10, 19.5.2014 (AC 2016\755): Iberdrola, S.A. filed an injunction against *Organización de Consumidores y Usuarios* alleging that the advertisement *Iberdrola: reclame lo que es suyo!* ('Iberdrola: claim what is yours!'), where it charged the energy company with an illicit capital increase and encourage consumers to seek legal advice in order to bring a claim against the company, was unfair according to Articles 5 and 9 of Act 3/1991. The first instance court ruled in favour of the plaintiff. The information about the capital increase was misleading and led consumers to seek legal advice and to present a claim against Iberdrola, S.A. Moreover, it was able to cause harm to the reputation of the company and to have influence on consumers' preferences and decisions.

According to the ACC, these sectors are not supervised by consumer authorities, but the Catalan Ministries for Energy and for Business and Knowledge. From the point of view of misleading advertising, no relevant complaints have been received.

AECOSAN notes that environmental and energy authorities deal with environmental and energy issues, respectively, by applying sectoral rules. The UCPD only applies to offers of energy supply. Both consumer and energy authorities deal with fuel supply.

While consumer authorities control both the fuel quality and the price information, energy authorities control the veracity of the amount supplied.

Furthermore, according to AECOSAN, complaints in the field of energy after liberalization have increased because of the following reasons: (1) a continuous increase of prices; (2) an aggressive practice with off-premises contracts that has even led to arrest commercial agents because of signature falsification; (3) subcontractors checking meter boxes without the presence of consumers have allowed supplier companies to penalize consumers with EUR 1000 – 2000. This practice has been sanctioned by regional energy authorities and is being investigated by the ombudsman.

- 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 your country rigidly?*]

As interpreted by the European Court of Justice (ECJ), the concept of 'average consumer' refers to the person who is reasonably well-informed and reasonably observant and circumspect, considering social, cultural and linguistic factors. Therefore, this is not a static concept but a dynamic one.<sup>1</sup> In order to establish the concept of average consumer, three steps are considered useful: firstly, to determine the group of persons to whom the commercial practice is addressed; secondly, to determine the degree of attention and formation as well as the standards of conduct of this group; finally, to determine the existence of causation between the commercial practice and the decision-making.

Several criticisms have been raised against this concept and the average consumer test. First, the notion of average consumer has no immediate real world correspondence. There is no average consumer, just individual consumers each with his or her own endowment of information, attention, and set of beliefs and preferences. Furthermore, the average consumer test is not a statistical test. Courts and authorities have to exercise their own faculty of judgement to determine the typical reaction of the average consumer in a given case.

For some legal scholars, the best way to know the opinion of the average consumer consists of conducting surveys based on objective and verifiable criteria that represent the average consumer of the group to whom the commercial practice is addressed.

In the opinion of the Ministry of Justice, the concept of 'average consumer' has a limited application because relevance is put on how businesses fulfil the requirements foreseen by consumer law (for instance, the provision of pre-contractual information).

The ACC considers that the concept of 'average consumer' is applied in a relaxed way, allowing greater flexibility and adaptability to the specific circumstances.

According to AECOSAN, the concept of 'average consumer' is firmly recognized by consumer authorities and Spanish courts.

Consumer associations stated that the concept of average consumer is not applied in a strict sense, but on a case-by-case basis.

<sup>1</sup> See, after the transposition of the UCPD by Act 29/2009, STS, 1ª, 1.6.2013 (RJ 2013\6716), SAP Barcelona 4.7.2011 (JUR 2011\425697).



- 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 in your country recognised new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted)?*]

Article 5.3 of UCPD has been incorporated into the Spanish legal system by Article 4.3 of Act 3/1991 in identical terms: 'commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally'. This provision has not recognized other categories of vulnerable consumers different to that foreseen by the UCPD.

There is no case law on the application of Article 4.3 of Act 3/1991 after its implementation by Act 29/2009. However, legal scholars consider that this exception to the application of the average consumer test must be applied restrictively.

In the opinion of the Ministry of Justice, indebted debtors and mortgage debtors with limited resources who have given their habitual residence as a guarantee in mortgage loan agreements receive protection beyond the concept of 'consumer' through special rules (see, for instance, Royal Decree-Law 6/2012, Act 1/2013 and Royal Decree-Law 1/2015).

According to the ACC, courts and arbitration boards recognise different levels of vulnerable consumers in the field of basic utilities (water, electricity) and financial services (for instance, mortgage loan agreements).

AECOSAN notes that in regional laws, childhood, youth, the elderly and persons with disabilities are collectives that need special protection. The concept of 'consumer affected by energy poverty' has also been developed to guarantee the provision of basic utilities (electricity, water and gas).

According to consumer associations, different categories of vulnerable consumers have been recognised because the concept of 'vulnerable consumer' is constantly adapted by Courts to current circumstances. However, this recognition has not always involved a real benefit for consumers.

- 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?*]

According to Article 37.1 of Act 3/1991, commercial, professional and consumer corporations, associations and organizations can adopt voluntary codes of conduct on commercial practices with consumers to increase their protection. Additionally, Article 37.3 states that public administrations will promote the participation of business and professional organizations on the elaboration of these codes at EU level. Finally, Article 37.4 orders the creation of independent organisms to control companies that voluntarily adhere to these codes. Codes of conduct will include, among others, individual or collective self-control previous measures for advertisements and out-of-court systems for dealing with consumer complaints. These systems will be notified to the European Commission according to the Council Resolution of 25 May 2000 on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes.

AUTOCONTROL (Association for Self-Regulation of Commercial Communications) is a non-profit organization that deals with the advertising self-regulation in Spain. It fulfils the requirements foreseen by Article 37 of Act 3/1991: (1) it consists of businesses that have adopted and submitted themselves voluntarily to a code of conduct; (2)

businesses accept to be judged by a Jury of independent persons if they violate the code of conduct; and (3) the European Commission was informed about its existence.

AUTOCONTROL only deals with advertising activities. Therefore, it is not a self-regulation system for unfair activities other than advertising.

In 2015, the Association received 27 271 inquiries from advertisers, agencies and media. A total of 21 716 of these inquiries asked for the Advice Copy service, which is a voluntary, confidential and non-binding service to analyse draft campaigns from an ethical and legal perspective. 85% of the ads submitted to review received a positive assessment; in 11.5% of cases, modifications were suggested; finally, in 3.5% of cases media campaigns were not recommended. Similarly, in 2015, the Advertising Jury of AUTOCONTROL solved 305 claims, which means that it is the preferred dispute resolution system in Spain for advertising.

Press releases sum up the advantages and effects of AUTOCONTROL's activities:<sup>2</sup>

- The advertising industry is increasingly responsible;
- Self-regulation improves the quality of commercial communication;
- The diversity of sectors and stakeholders participating in AUTOCONTROL ensures its credibility and independence;
- It does not generate costs to taxpayers or the Administration because its activities are funded by the contribution of partners depending on the use that they do of its services;
- Self-regulation is extremely useful for courts and, therefore, for the society as a whole since it allows that courts focus on other types of conflicts;
- It provides a model for conflict resolution in the field of advertising that has been proven effective, fast and free to citizens.

Possible challenges in this field refer to (1) the globalization of self-regulation, (2) the consolidation of the self-regulation system for commercial communication disputes and (3) the configuration of the decisions of the Jury as a prerequisite for the admission of claims before courts.

The Ministry of Justice considers that self-regulation is a useful instrument for advertising as it reduces court's workload and provides for a faster and cheaper mechanism to deal with consumer complaints.

According to the ACC, self-regulation and co-regulation are not consolidated mechanisms because they are not known by consumers.

AECOSAN notes that codes of conduct usually duplicate European or national rules. Moreover, they do not foresee penalty mechanisms for companies that do not adhere to codes. The breach of the code usually results in an administrative sanction.

According to consumer associations, self-regulation and co-regulation actions are not known by consumers and their enforcement is difficult.

- 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?

Legal scholars have noted that Annex I of UCPD does not refer to passive misleading commercial practices. This would be a field where the black list can be extended. Additionally, some practices included in the list are irrelevant or incidental in practice. For instance: claiming to be a signatory to a code of conduct when the trader is not; claiming that a code of conduct has an endorsement from a public or other body which

<sup>2</sup> See: [http://www.autocontrol.es/pdfs/NP\\_Aniversario\\_AUTOCONTROL.pdf](http://www.autocontrol.es/pdfs/NP_Aniversario_AUTOCONTROL.pdf);  
[http://www.autocontrol.es/pdfs/NP\\_Balance\\_AUTOCONTROL\\_2015\\_17.03.2016.pdf](http://www.autocontrol.es/pdfs/NP_Balance_AUTOCONTROL_2015_17.03.2016.pdf);  
[http://www.lawyerpress.com/news/2015\\_04/2404\\_15\\_006.html](http://www.lawyerpress.com/news/2015_04/2404_15_006.html)

it does not have; and undertaking to provide after-sales service to consumers with whom the trader has communicated prior to a transaction in a language which is not an official language of the Member State where the trader is located and then making such service available only in another language without clearly disclosing this to the consumer before the consumer is committed to the transaction or creating the false impression that after-sales service in relation to a product is available in a Member State other than the one in which the product is sold.

Finally, some unfair commercial practices are not 'always' able to distort the economic behaviour of consumers or do not 'always' present the misleading element (for instance, claiming that products are able to facilitate winning in games of chance).

Given that commercial practices evolve rapidly, especially in areas linked to new technologies or new marketing channels, a system that dynamically allows including new practices may be helpful. It is true that there are general notions and clauses that could be able to cover such developments, but still, in theory, if some of the detrimental practices in the past have been specifically considered, there does not seem to be a reason why the new ones should only be addressed through the general clauses.

ACC stated that the black list should include objective practices (for instance, invitations to purchase) and should explain omissions in detail (for instance, in high-cost short-term credits, the ACC proposes that the offeror provides a clear and concise graphical information in form of graphic labels with gradual symbols and colours depending on the risk of the product).

According to AECOSAN, it is expected that the list in Annex I of the UCPD will not be interpreted similarly in all EU countries. It is important to periodically review the Guide on the application of the UCPD to promote the application of uniform criteria. There are three cases where the revision of the list is considered necessary: (1) Prohibition of codes of conduct that do not improve the relationship between companies and consumers; (2) the obligation to inform about the existence of some rights (Paragraph 10 of Annex I UCPD) set out by the Directive 2011/83/EU may lead to confusion when assessing certain contractual conditions or information; (3) practices consisting of falsely claiming that a product can cure illnesses, dysfunction or malformations (Paragraph 17 of Annex I UCPD) need to be clarified to collect the reality of these practices, since AECOSAN finds allegations as 'adjuvant', 'potential effects' or the like. Moreover, advertising claims in this regard are endorsed by the opinions of non-EU doctors or legal scholars, making it impossible to verify the scientific sources, and pseudoscientific movements, such as homeopathy.

From the perspective of the public authorities, the case law of ECJ and the Application Guide of the UCPD published by the European Commission is very important to justify the requirements and administrative measures, including sanctions.

The list of Annex I of the UCPD was a step forward in consumer protection. However, some practices require a complex evidentiary proof. See, for instance, section 27 of Annex I of the UCPD: 'Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent that is justified, under national law, to enforce a contractual obligation'. Complaints by consumers that receive repeated phone calls for hiring services such as telephony or power supply are difficult to prove because, unless it is expressly requested by the customer, there is no record of incoming calls. Moreover, in some cases, harassment is done by subcontractors and contractors reject any responsibility.

Finally, it must be noted that assessment of unfair commercial practices is made by courts of different nature: actions brought by individual or consumer associations will be known by a commercial or civil court; when companies appeal an administrative measure, actions will be known by administrative courts. This has involved a curious situation: a sexist advertisement was sanctioned by a regional authority and an injunction was brought by the State authority. A commercial court dismissed the injunction and the administrative sanction has been appealed before an administrative court that can conclude that the administrative measure is correct.

Consumer associations argue that an effective mechanism should be found to ensure that the black list is periodically updated. It should be a very interesting way to share experiences and to prevent unfair commercial practices.

- Are there other measures that could improve the effectiveness of the UCPD in establishing a high level of consumer protection in your country? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

As most relevant unfair commercial practices are covered by Spanish legislation, the ineffectiveness of Act 3/1991 is not a product of legislative gaps but of problems regarding enforcement of the rules. Improvement of procedures for collective actions for injunctive relief, definition of contractual remedies for individual claims and promotion of cooperation between national authorities in cross-border transactions would ensure a high level of consumer protection.

According to the ACC, it is necessary to extend the black list of unfair commercial practices through self-regulation actions. The ACC is collaborating with financial service providers to elaborate codes of conduct in the field of high-cost short-term credit.

AECOSAN considers that it is necessary for there to be a joint assessment of unfair commercial practices and unfair terms.

Consumer associations think that existing measures are correct. Emphasis should be put on enforcement.

#### 1.1.2. Effectiveness of the PID in establishing 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;

The PID was transposed into the Spanish legal system by Royal Decree 3423/2000 and rules adopted by the Spanish regions with exclusive competence on consumer protection (in particular, the Catalan Decree 73/2002)<sup>3</sup>.

Articles 1 and 3 of Royal Decree 3423/2000, and Articles 1 and 3 of the Catalan Decree 73/2002, foresee a general obligation to indicate the selling price and the unit price for all products, regardless of whether they are food or non-food products, to enable consumers to evaluate and compare their prices in an optimum manner and hence to make informed choices on the basis of simple comparisons. Products supplied in the course of the provision of a service, sales by auction and sales of works of art and antiques are excluded from the scope of application of these rules.

Businesses are exempted from the obligation to indicate the unit price when it does not provide any useful information to consumers. According to Articles 3.3 of Royal Decree 3423/2000 and 3.3 of the Catalan Decree 73/2002, the unit price need not be indicated (a) if it is identical to the selling price and (b) for the following products: 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 a controlled denomination of origin or a typical geographic indication; fantasy food products). Additionally, Article 4 of the

<sup>3</sup> Spanish Courts have stated that the purpose of the PID and Royal Decree 3423/2000 is to ensure that the consumer has clear, precise and detailed information about the selling price, *id est*, the amount that he/she has to pay for the purchase of the product (the 'purchase price'), so that it cannot be extrapolated to the criminal protection against theft of goods: SAP Madrid 12.5.2014 (ARP 2014\1237); SAP Madrid 22.9.2014 (JUR 2014\289003).

Catalan Decree 73/2002 states that jewellers and furriers are exempted from the obligation to indicate prices for security reasons.

Special units of measurement are recognized by Royal Decree 3423/2000 and Catalan Decree 73/2002 for cosmetic products and food complements (100 g or 100 ml), pipe tobacco (100 g) and eggs (dozen). Royal Decree 3423/2000 also establishes a specific unit of measurement for household detergents (necessary amount for washing in normal dirt and water hardness of 25 French degrees).

Articles 4 of Royal Decree 3423/2000 and 5 of the Catalan Decree 73/2002 state that the selling price and the unit price must be unambiguous, easily identifiable and clearly legible, standing in the same visual field and remaining visible to the consumer without having to request such information. Article 3.1 of the Catalan Decree also requires that the initials PVP goes before the selling price. In packing products where the net weight and the drained net weight must be indicated, it is enough to indicate the unit price of the drained net weight.

Regional consumer authorities and businesses have formulated several questions to AECOSAN (Agency for Consumer Affairs, Food Safety and Nutrition) regarding the interpretation of Royal Decree 3423/2000.<sup>4</sup> These questions provide evidence of difficulties experienced by traders to indicate the price per measurement unit.

After the appraisal of the PID in 2004,<sup>5</sup> no recent surveys have been conducted in Spain to assess to what extent consumers are effectively informed about the unit selling price.

According to the ACC, the Spanish legislation is clear; prices are displayed correctly and consumers are familiar with the system.

AECOSAN considers that the PID allows consumers to compare products with different presentations. For products that add 14% or 33% over the ordinary format, their real value can only be known by comparing them with sizes of 1 kg or 1 litre. Annex IX of Regulation 1169/2011 has created uncertainty about the application of the PID because information about net amounts is not compulsory for food in this rule.

Consumer associations differ in this respect. While some of them consider that consumers are in general effectively informed, others understand that there is lack of information and that labels usually lead to confusion.

- 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 measurement unit for a product's performance is not foreseen by Spanish law.

In the opinion of the ACC, a product's performance is not an objective and standardized standard.

According to AECOSAN, a product's performance is an inadequate measure because it cannot be verified by independent experts or administrative authorities. The price per kilogram or litre should be added.

Consumer associations consider that a product's performance can be a way to verify that the information corresponds to that foreseen by the package or label.

- The effects of the regulatory choices/derogations allowed by the Directive and applied by Member States. [*Key aspects to consider are: Is the derogation*

<sup>4</sup> See: [http://www.aecosan.msssi.gob.es/AECOSAN/web/consumo/subseccion/interpretaciones\\_normativa\\_consumo.htm](http://www.aecosan.msssi.gob.es/AECOSAN/web/consumo/subseccion/interpretaciones_normativa_consumo.htm)

<sup>5</sup> See the final report published at [http://ec.europa.eu/consumers/archive/cons\\_int/safe\\_shop/price\\_ind/disclaimer\\_en.pdf](http://ec.europa.eu/consumers/archive/cons_int/safe_shop/price_ind/disclaimer_en.pdf)

*relevant? Do companies make use of it? Are there consumer complaints because of this? If so, approximately how many per year?]*

No derogation for small businesses from the requirement to indicate the unit price is foreseen in the Spanish legal system.

### 1.1.3. Effectiveness of the MCAD in providing protection for businesses

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

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

According to Article 2 of Act 34/1988, advertising consists of 'every form of communication made by an individual or legal person, public or private, in the exercise of a commercial, industrial, craft or professional activity in order to promote directly or indirectly the hiring of movable or immovable property, services, rights and obligations'. This definition, which is similar to that foreseen by Article 2 of the MCAD, has been regarded as too generic and ambiguous to prevent actual and future misleading commercial practices. The reference to 'every form of communication' emphasizes that the advertising activity does not only refer to written or spoken texts but also to graphics, photos, sounds, etc. Moreover, advertising is not restricted to 'information' since forms of communication that *prima facie* do not intend to inform their addressees fall within the scope of application of Act 34/1998.

The Ministry of Justice is of the opinion that the national laws transposing MCAD give effective protection both in national and cross-border transactions.

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

According to Article 3 of Act 34/1998, misleading advertising is a form of unlawful advertising and must be regarded as an unfair commercial practice if requirements foreseen by Act 3/1991 are met<sup>6</sup>. On the effectiveness of the principle-based approach under Act 3/1991 see section 1.1.1.

- The effects of the minimum harmonisation provisions on misleading advertising; [*Key aspects to consider are: Which national rules that go beyond the MCDA, 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)?]*

Rules on advertising are usually classified into four groups:

- a) General laws applicable to advertising: Act 34/1988, Act 3/1991, Royal Legislative Decree 1/2007, the Penal Code and Consumers Codes of the Regions (for instance, Catalan Act 22/2010).
- b) Sectoral rules on advertising included in legislation on commercial sectors and practices (industrial products, food products, special offers, repair shops, supply of services on durable goods, housing, sending SMS messages, indoor tanning centres, travel agencies, financial sector, medical devices, etc.).
- c) Sectoral legislation on certain advertising media: audiovisual media and the Internet.

<sup>6</sup> For some examples of misleading advertising, see SAP Barcelona 26.6.2014 (AC 2014\1457), SAP Madrid 17.6.2011 (AC 2011\1476), AJMerc 3.9.2015 (AC 2015\1375). Cfr. SAP Madrid 23.6.2009 (AC 2009\1912) and SJMerc 21.1.2014 (AC 2014\628).



- d) Self-regulation and deontological rules and, in particular, codes of conduct developed by certain business sectors (including advertising sector itself). Rules and principles contained in these codes only become binding for businesses that have voluntarily committed to fulfil them.

These rules deal essentially with B2C transactions.

Spain has not passed a 'general' Act protecting advertising in B2B transactions. However, some rules on advertising applicable to both consumers and businesses can be found in sectoral laws. For instance, in the field of financial services, Article 5 of Order EHA/2899/2011 states that advertising by financial entities must be clear, objective and non-misleading according to Order EHA/1718/2010 and *Circular of the Banco de España* 6/2010.

According to AECOSAN, it is necessary to review the MCAD to develop the concept of parasitic advertising on the Internet (advertising that is found when, after introducing the search for specific brands or official technical services, competitors or technical services other than those of the manufacturer are listed first). Some judgments and administrative sanctions for this type of advertising already exist.

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

In the Spanish literature there does not seem to be a position on this issue. Arguably, given the very different contexts that Member States present in terms of the cultural circumstances that affect modes of advertising and responses to it, full harmonisation seems too rigid an approach.

According to AECOSAN, no particular problems have been detected in comparative advertising, but parasitic advertising. A particular difficulty in comparative advertising of food exists.

- 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;

There is no information available.

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

Article 6 of Act 34/1998, on the actions and remedies against unlawful advertising, refers to the legal regime of Act 3/1991. As a consequence, actions and remedies foreseen by Article 32 of Act 3/1991 will be applicable to any unlawful advertising:

'1. The following actions may be taken against acts of unfair competition, including unlawful advertising:

1. Declaratory action for bad faith.
2. Injunction against the unfair conduct or prohibition of its continued practice. An injunction may also be brought to forestall the practice before it occurs.
3. Action to counter the effect produced by the unfair practice.
4. Action to rectify misleading, incorrect or false information.
5. Action to compensate damage sustained though unfair practice in the event of fraud or fault on the part of the agent.
6. Action against unjust enrichment, which shall only apply when the unfair practice prejudices a legal position protected by an exclusive right or some other of similar economic content.'



The statute of limitations foreseen by Article 35 of Act 3/1991 will also be applicable to actions for unlawful advertising:

'The actions against unfair competition laid down in Article 32 lapse one year after the person entitled to take action discovered who was responsible for the act of unfair competition and, in any case, three years as from the time that such conduct ceased.

The time bar for legal action in defence of the general, collective or diffuse interests of consumers and users is governed by the terms of Article 56 of the consolidated text of the General Consumer and User Protection Act and other supplementary laws'

It must be noted that originally the dual regime in the fields of unfair commercial practices and unlawful advertising was a major obstacle to bring judicial claims. The unification of both legal regimes has removed the problem of accumulation of actions.

Moreover, originally Act 34/1998 did not contain rules on limitation periods and the silence of the Spanish legislator on this issue had led legal scholars to defend that actions against unlawful advertising had the 15-year statute of limitation foreseen by Article 1964 of the Spanish civil code for personal actions (this period has been reduced to 5 years by Act 42/2015).

According to AECOSAN, there is not an effective tool for cross-border infringements, except for Regulation 765/2008. Judicial and administrative measures are not effective because its effects occur when the advertising campaign has finished.

- Are there measures that could improve the effectiveness of the MCAD in providing protection for businesses (see also 1.1.6 below)? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

It seems necessary to make clear the relationship between Act 34/1988 and Act 3/1991 by clarifying the definition of misleading commercial practices. In addition, it seems essential, especially to increase protection in cross-border transactions, to adopt measures for efficient enforcement of the Act, such as mechanisms that promote cooperation between national authorities, the appointment of national authorities that can enforce the national provisions on advertising *ex officio*, an obligation of mutual assistance between EU States or proportionate and dissuasive sanctions applicable to infringements of Act 34/1998.

AECOSAN comments that in campaigns of fashion products, only complaints in the media by consumer and feminists associations have effects. In these cases, the company usually alleges that a cultural element exists because no claims have been presented in their countries of origin. For instance, advertising campaign by Dolce & Gabbana was withdrawn in Spain because it promoted female submission and violence. Since 2012, advertising that presents the woman's body unrelated to the advertised product is banned in Art. 3 of Act 34/1988: unlawful advertising made by professionals (individuals or public or private legal persons) to those who the advertisement is addressed, include 'advertisements that portray women in a degrading or discriminatory fashion, either by specifically and directly using their bodies or parts thereof as mere objects unrelated to the product being promoted, or their image associated with stereotyped behaviours which violate the basis of our legal system while contributing to generate the sort of violence referred to in Organic Law 1/2004 of 28 December 2004 on comprehensive protection measures against gender-based violence'. This prohibition has allowed consumer authorities to sanction sexist advertising.

#### 1.1.4. Effectiveness of current rules 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;
- The effects of the uniform black list of unfair commercial practices annexed to this directive on the free movement of goods and services;
- Whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade. [Do the national differences play a role in a business perspective? Have they caused problems?]

It has not been possible to obtain feedback from businesses in Spain on the effectiveness of UCPD in terms of reducing obstacles to cross-border trade.

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

It has not been possible to obtain feedback from businesses in Spain in this regard.

#### 1.1.5. Interplay amongst UCPD information requirements according to Article 7(4) with the information requirements in the horizontal consumer law instruments

Regarding the information requirements according to Article 7(4) UCPD ("invitation to purchase") in the advertising stage, please analyse:

- The level of awareness of traders as regards information requirements at the advertising stage, as in particular demonstrated by their practical application; [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?]

Article 7.4 of UCPD was incorporated into the Spanish legal system by Article 20 of Royal Legislative Decree 1/2007:

‘Commercial practices that, in a manner appropriate to the medium, include information on the characteristics of the good or service and its price, enabling consumer or user to make a decision on the conclusion of a contract must contain, if not already apparent from the context, at least the following information:

(a) name, trading name and full address of the trader and, where applicable, name, trading name and full address of the trader on whose behalf he is acting;

- (b) the main characteristics of the product, to an extent appropriate to the medium and the product;
- (c) the price inclusive of taxes as well as all additional increases or discounts that may be applicable and any additional charges;
- (d) the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence;
- (e) for products and transactions involving a right of withdrawal, the existence of such a right'.

There is no data available regarding the application of these information requirements. However, the few court decisions that apply Article 20 of Royal Legislative Decree 1/2007 provide evidence that these requirements do not seem controversial:

- STS 11.11.2015 (RJ 2015\4986): unfairness of standard terms included in loan agreements with consumers whereby the firm by the borrower of a promissory note is foreseen as a guarantee and the amount of this promissory note is complemented by the lender unilaterally in trial;
- STSJ Madrid 8.10.2015 (RJCA 2015\964): infringement by a telephone and Internet company of its obligation to inform about the final price to be paid by the customer;
- SAP Madrid 16.5.2014 (AC 2014\1608): there is no infringement of the information requirements by a travel company because its website offer informed that passengers had to meet government requirements for both leaving the country and entering the destination. It also warned passengers to be in possession of the documentation required by the destination countries, indicating that they were responsible for carrying the ID, passport and/or visa;
- SAP Madrid 17.5.2013 (JUR 2013\215258): infringement by a home funeral company of its obligation to inform about the final price to be paid by the customer, who contracted the funeral services under the belief that they were free for persons without economic sources;
- SAP Madrid 12.6.2012 (AC 2013\539): infringement by a travel agency for failing to forward its client the information about his flight and booking cancellation.

According to the ACC, advertising should not be confused with invitations to purchase (the latter understood as the minimum requirements about the information of the product and its price). In Catalonia, businesses are properly informed about these minimum requirements. The ACC controls the application of the European rules and initiate disciplinary procedures if violations are detected. Most businesses correct their business practices on time.

Information requirements are regarded by the ACC as useful because the CRD provides that pre-contractual information must be delivered at any time prior to the signature of the contract and the UCPD provides that, in case of an invitation to purchase, information must be provided at the beginning of the negotiations so consumers will no longer need to search for additional information because they are fully informed.

According to AECOSAN, requirements of Article 7.4 of the UCPD are known by businesses. The most common problem refers to the information requirements of the right of withdrawal foreseen by Article 7.4.e) of the UCPD because of the following reasons: (1) some companies ignore that the period to exercise the right of withdrawal was extended to 14 days; (2) some companies are reluctant to recognize the right of withdrawal without giving a reason. They understand that they cannot resell the products returned by consumers.

A debate exists on the content of Article 7.4.a) of the UCPD in online sales. For instance, whether the content of labels must be incorporated into the product information in relation to textile products (composition, manufacturer data and washing conditions if they are incorporated by the manufacturer on the label), footwear (composition and manufacturer data), toys (CE marking, legends of warning

and manufacturer data) and electronic products (CE marking, instructions of use and manufacturer data).

Consumer associations commented that although the level of knowledge of information requirements has improved, traders still use coercive systems to induce consumers, especially those most vulnerable, to buy or to carry out behaviours with unknown consequences for them. Moreover, they often implement and model rules to create confusion. Therefore, Information requirements are useful but overlaps may exist depending on the means by which the invitation to buy is made.

To sum up, the level of awareness of traders as regards information requirements at the advertising stage is high and the application of these requirements does not seem controversial, although some consumer associations point out that some traders try to confuse consumers about the content of these requirements.

- 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?

Act 34/2002, which transposes the E-Commerce Directive into the Spanish legal system, foresees information requirements in Articles 10 (General Information), 12.bis (Obligation to inform about safety), 20 (Information required in commercial communications, special promotions and tenders), 27 (Obligations before the conclusion of the contract), 28 (Information after the conclusion of the contract). Moreover, Article 19 states that commercial communications and promotional offers will be governed by the provisions of Act 34/2002, its specific rules and commercial and advertising rules.

Act 17/2009, which transposes the Services Directive into the Spanish legal system, imposes on service providers the obligation to provide the information foreseen by Article 22 in a clear and unequivocal manner, and in an easily accessible way, before the conclusion of the contract or the supply of the service.

In general terms, the information requirements in these Acts are similar.

In the opinion of the ACC, there are overlaps that must be solved by removing them from the Directives. For instance, the Services Directive provides that consumers must receive information about the price of the service when requested while the CRD states that consumers must receive this information in any case; the Information Society Directive requires contractual information different to that required by the CRD, etc.

According to AECOSAN, consumer rights should be collected in a single rule to avoid conflicting interpretations. The legal regime of consumer protection established by the E-Commerce Directive has been rendered outdated by Directive 2011/83/EU.

#### 1.1.6. Relevance for business-to-business transactions

Regarding the area of unfair commercial practices/marketing, please analyse:

- 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 cross-border trade;

The extension of the UCPD to B2B transactions will involve a high level of harmonization in the internal market provided that regulations on unfair commercial practices between businesses are consistent in different business areas (see, for instance, the Green Paper on 'Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe') and do not have discriminatory and uncertainty effects.

- 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;

According to legal scholars, division of legal regimes for B2B and B2C is fictitious and only creates legal uncertainty because Chapter II of Act 3/1991 does not typify unfair commercial practices addressed exclusively to businesses. Article 19 of Act 3/1991 expressly states that practices foreseen by Articles 4, 5, 7 and 8 will be considered unfair practices to consumers. Moreover, many of the behaviours listed in Chapter II are implicitly unfair commercial practices with consumers. For instance, unlawful advertising foreseen by Article 18; sales at a loss foreseen by Article 17 are unfair when it is likely to mislead consumers about the level of prices of other products or services in the same establishment; acts of confusion and imitation foreseen by Articles 6 and 11 can be addressed against consumers, etc.

- 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 also cover unfair commercial practices during and after the transaction;

Given that unfair commercial practices concern both pre-contractual (both informative and advertising issues) as well as contractual and post-contractual issues (guarantee schemes, right of withdrawal, etc.), it seems appropriate to cover all stages.

- Whether there is a need to have a black-list of practices in the business-to-business marketing area;

While a black-list of practices makes sense in B2C transactions, where consumers are homogeneous, it seems preferable to give judges discretion to assess commercial practices in B2B transactions, where the economic interests of businesses may be very different.

- What should be the enforcement cooperation mechanism in the business-to-business marketing area;

There is no information available.

- Whether there is a need to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive;

There is no information available.

- Whether there is a need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive.

According to Article 10 of Act 3/1991,

'Public comparison, including comparative advertising, by an explicit or implicit reference to a competitor will be allowed if the following requirements are met:

- a) The goods or services compared must have the same purpose or meet the same needs.
- b) The comparison will be made between one or more essential, relevant, verifiable and representative features of the goods or services, which may include price.

- c) In the case of products with a protected certificate of origin or geographical indication, specific name or protected traditional specialty, the comparison can only be made with other products of the same name.
- d) Goods or services cannot be presented as imitations or replicas of others to which a trademark or protected trade name is applied.
- e) The comparison may not contravene Articles 5, 7, 9, 12 and 20 relating to acts of deception, denigration and exploitation of another's reputation.'

This definition of comparative advertising has been criticised because of two reasons: firstly, it refers to allusive advertising, which includes several types of advertising that do not consist of comparative advertising despite the fact that they refer to competitors. Second, this definition does not refer to an essential feature of comparative advertising, namely that it must contrast one's own products or services with those of others, emphasizing the superiority of the former against the latter.

According to AECOSAN, Spanish legislation only refers to actions before public authorities in cases of antitrust. In other cases, businesses must bring a claim before courts. Lawsuits between companies are filled in exceptional cases where there is a large and quantifiable economic loss. However, they are not common due to the so-called 'fear factor'.

#### 1.1.7. Relevance of contractual consequences of unfair commercial practices

Please analyse whether there are in your country:

- 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;

Actions arising from unfair commercial practices in Article 32 of Act 3/1991 do not refer to the avoidance of the contract. The mere fact that a commercial practice can be regarded as unfair by misleading according to Articles 5 and 7 of Act 3/1991 does not mean that this practice has contractual consequences since the assessment of unfairness is not based on the effects of the misleading behaviour but on the decision of the contracting party to conclude a specific contract. However, the existence of an unfair practice may lead to the application of the avoidance regime foreseen by the Spanish Civil Code (Article 1265 CC) if there is evidence that the misleading behaviour has caused an essential and excusable mistake of the contracting party (Article 1266 CC).

According to the ECJ in *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r.o.* (ECJ 15.3.2012, Case C-453/10), 'a finding that a commercial practice is unfair is one element among others on which the competent court may base its assessment of the unfairness of contractual terms under Article 4(1) of Directive 93/13. (...) That element, however, is not such as to establish, automatically and on its own, that the contested terms are unfair. It is for the referring court to decide on the application of the general criteria set out in Articles 3 and 4 of Directive 93/13 to a specific term, which must be considered in relation to all the circumstances of the particular case'. As a consequence, where unfair commercial practices lead to an unfair term this is subject to the nullity regime foreseen by Royal Legislative Decree 1/2007 (Article 83).

Finally, the nullity of the contract is foreseen by Article 1 of the Spanish Usury Act of 1908 for 'any loan agreement that stipulates a significantly higher interest rate than normal and manifestly disproportionate to the specific circumstances or with conditions that render the contract unfair, where there is reason to believe that such an agreement has been accepted by the borrower as a result of being in a desperate situation, through their inexperience or their limited mental faculties'. According to Article 3 of this Act, the borrower will be obliged to return only the amount received. If the borrower had only paid back part of the loan received, including principal and



interest due, the lender will have to return to the borrower any amount which exceeds the borrowed capital.

According to the ACC, national provisions and courts can remove unfair clauses and commercial practices. However, they usually focus on the unfairness of the contracting terms (for instance, usury would be an unfair clause rather than an unfair commercial practice; the imposition of judicial jurisdiction would be an unfair clause rather than an unfair commercial practice, etc.).

AECOSAN notes that the concept of unfair commercial practice has been expanded to cases where the use of a woman's body is unrelated to the product or service being offered. Courts or administrative authorities cannot act against immoral behaviours. Only some regional authorities prohibit offers or sales of erotic and pornographic products to minors. For instance, it has been established that these products cannot be purchased directly, as in vending machines in public places, or be offered in shop windows near schools or places of meeting children (such as public parks with elements of children's game). Usury is a controversial issue in the Spanish system. The only legal regulation is a rule passed in 1909, now completely out-of-date. The Bank of Spain avoids ruling on this question, limiting control to checking information requirements regarding the interest that will be charged for the loan.

According to consumer organisations, some courts apply such contractual consequences based either on legal rules or the principle of good faith.

- Any case law (enforcement decisions, court rulings) providing for such consequences;

There is no case law on contractual consequences of unfair commercial practices.

- Whether there is, based on past experience in your country, a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

Given the Spanish experience in a related field (information on financial products as arising from the Markets in Financial Instruments Directive), where the contractual consequences of the infringement of information duties linked to interest rate swaps and hybrid securities (*participaciones preferentes*) has given rise to large amounts of litigation, and relevant debates over those issues, it is probably the case that covering the contractual consequences of unfair commercial practices would be a welcome development. See, for instance, STS, 1<sup>a</sup>, 20.1.2014 (RJ 2014\781), on the effects of the violation of information duties by a financial entity in the rendering of a contract as voidable for mistake.

According to the Ministry of Justice, businesses are aware of contractual consequences because actions are perfectly described by the law. It does not seem necessary a legal modification now.

The ACC is of the opinion that the Services Directive, the UCPD and the UTPD should be unified and harmonized. The dispersion of consumer laws should be improved and overcome.

According to AECOSAN, it seems be necessary to apply the same principle to both unfair terms and unfair commercial practices and to allow consumers to invoke court decisions or administrative sanctions to avoid their effects.



## 1.2. Contract conclusion and performance

### 1.2.1. Effectiveness of the current rules in establishing 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 use of the general clause of unfairness foreseen by Article 82.1 of Royal Legislative Decree 1/2007 has had an important impact on mortgage-floor clauses. On May 2013, the Spanish Supreme Court ruled that floor clauses included by some financial entities (BBVA, Caixa Galicia and Caja Mar) in mortgage loan agreements were unfair contract terms and hence null and void [STS, 1ª, 9.5.2013 (RJ 2013\3088)]. As a consequence, the Supreme Court ordered the abovementioned financial entities to remove the floor clauses from their contracts and to refrain from using them in the future. However, the Court did not declare the retroactivity of its judgment because of the risk of serious harm to public economic policy, which means that payments made up by consumers to the date of the publication of the judgment would not be reimbursed. Subsequent decisions have declared the nullity of floor clauses used by other Spanish financial entities. Due to the controversial nature of the legal reasoning of STS, 1ª, 9.5.2013 (RJ 2013\3088), a Commercial Court in Granada raised a prejudicial question to the ECJ on whether banks should reimburse the amounts overcharged to their customers from the moment that the floor clause was applied instead of from 9 May 2013. The final decision of the ECJ is expected in the end of 2016.<sup>7</sup>

Moreover, it must be noted that the UCTD has had important procedural effects. The ECJ has ruled that Spain's mortgage law is incompatible with the UCTD in several occasions:

- ECJ 14.3.2013, Case C-415/11, Mohamed Aziz v. Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa): Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which, while not providing in mortgage enforcement proceedings for grounds of objection based on the unfairness of a contractual term on which the right to seek enforcement is based, does not allow the court before which declaratory proceedings have been brought, which does have jurisdiction to assess whether such a term is unfair, to grant interim relief, including, in particular, the staying of those enforcement proceedings, where the grant of such relief is necessary to guarantee the full effectiveness of its final decision;<sup>8</sup>
- ECJ 17.7.2014, Case C-169/14, Sánchez Morcillo-García Abril v. Banco Bilbao Vizcaya, S.A.: Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as precluding a system of enforcement, such as that at issue in the main proceedings, which provides that mortgage enforcement proceedings may not be stayed by the court of first instance, which, in its final decision, may at most award compensation in respect of the damage suffered by the consumer, inasmuch as the latter, the

<sup>7</sup> The ECJ ruled on 21st of December 2016 that floor clauses were null and void, and that temporary limitation of the consequences of a clause declared null and void was contrary to European Union Law, and more specifically to Article 6 of Directive 93/13. A clause declared unfair or null must be understood as if it had never existed, and therefore, it must be possible to claim the repayment of overpaid interest, etc., from the beginning of the contract, and not only from the date indicated by the Spanish Supreme Court.

<sup>8</sup> The doctrine of the ECJ regarding default interests in this court decision is applied by AAP Barcelona 27.2.2015 (AC 2015\649). Moreover, the doctrine of the ECJ regarding the term concerning the unilateral determination by the lender of the amount of the unpaid debt, linked to the possibility of initiating mortgage enforcement proceedings, is applied by AAP Girona 5.5.2016 (AC 2016\1167)

debtor against whom mortgage enforcement proceedings are brought, may not appeal against a decision dismissing his objection to that enforcement, whereas the seller or supplier, the creditor seeking enforcement, may bring an appeal against a decision terminating the proceedings or ordering an unfair term to be disapplied;

- ECJ 21.1.2015, Case C-482/13, Unicaja Banco, SA v. José Hidalgo Rueda and Others and Caixabank SA v. Manuel María Rueda: Article 6 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as not precluding a national provision under which the national court hearing mortgage enforcement proceedings is required to adjust the amounts due under a term in a mortgage-loan contract providing for default interest at a rate more than three times greater than the statutory rate in order that the amount of that interest may not exceed that threshold, provided that the application of that national provision is without prejudice to the assessment by that national court of the unfairness of such a term and does not prevent that court removing that term if it were to find the latter to be 'unfair', within the meaning of Article 3(1) of that directive;<sup>9</sup>
- ECJ 29.10.2015, Case C-8/14, BBVA, S.A. v. Fernández Gabarro, Peñalva López, López Durán: Articles 6 and 7 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that they preclude a national transitional provision, such as that at issue in the main proceedings, which, as regards mortgage enforcement proceedings which were instituted before the date of entry into force of the law of which that provision forms part and which were not concluded at that date, imposes a time-limit on consumers calculated from the day following the publication of that law, to object to enforcement on the basis of the alleged unfairness of contractual terms.

Court rulings had led to mortgage law reforms and other complimentary regulatory changes to comply with these court decisions. Act 1/2013 and Royal Decree-Law 11/2014 were passed in compliance with that established by ECJ Decisions of 14.3.2013 and 17.7.2014, respectively.

According to the ACC, the principle-based approach is assessed positively as it favours consumers.

AECOSAN is of the opinion that Spain has transposed the UCTD in a tight and faithful way. Some legislative amendments have been made at the request of the European Commission in the case of PILOT projects or as a result of judgments of the ECJ, especially in relation to the execution procedure of mortgage loans to allow consumers to claim the existence of unfair terms in loan agreements.

Consumer associations assess the principle-based approach positively as it enables judges to apply rules with sufficient safeguards for consumers' rights.

To sum up, the principle-based approach must be assessed positively since the application of the general clause of unfairness has allowed for specification of the effects of unfairness in terms of the non-retroactivity of judgments and has also led to important procedural reforms in Spain.

- 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 your MS? Does this work in practice or are there problems?*]

In Spain, clauses foreseen by the Annex of UCTD are apparently regarded as a black list. However, some legal scholars have noted that the list includes some grey clauses (for instance, clauses foreseen by Articles 85.1 (excessively long or insufficiently specified term), 85.2 (deadline that effectively prevents the consumer from stating an intention not to automatically extend a contract), 85.3 (unilateral modification without

<sup>9</sup> This doctrine is applied by AAP Barcelona 27.2.2015 (AC 2015\649).

valid reasons), 85.4.I, second paragraph (disproportionately short term), 85.4.II (serious reasons), 85.6 (disproportionately high compensation), 85.10 (objective reasons to determine or alter the price), 86.1.I (exclusion or limitation of inadequate legal rights), 86.3 (reducing guarantees of the debtor), 87.6 , 88.1 (disproportionate guarantees)). To sum up, 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). See, in this sense, AAP Girona 5.5.2016 (AC 2016\1167).

Article 82.4 of Royal Legislative Decree 1/2007 group unfair clauses into 6 general groups:

- '(...) unfair terms will include those which, in accordance with Articles 85 to 90:
- a) Bind the contract to the businesses' will
  - b) Limit the consumers and users' rights
  - c) Establish a lack of reciprocity in the contract
  - d) Impose disproportionate guarantees on consumers and users or wrongfully impose the burden of proof upon them
  - e) Are disproportionate in relation to the performance or execution of the contract, or
  - f) Contravene the rules on competence and applicable law'.

Some criticisms have been raised against the list of unfair clauses. Firstly, it is said that Articles 85 to 90 contain a long, tedious and non-systematic list. Secondly, the list repeats some situations (for instance, Articles 85.4 and 87.3, Articles 85.5 and 86.5, Articles 86.5 and 87.1). Thirdly, the basis of unfairness is not homogeneous. In some cases the material basis of unfairness is considered (for instance, Articles 84.4 a), b) and c) whereas in other cases the type of relationship or the clause's subject-matter are relevant (Article 84 d), e) and f). Finally, it combines specific clauses that sometimes replicate legal obligations with general clauses (for instance, Article 86.7).

To sum up, the indicative list of unfair clauses theoretically facilitates the judicial task and provides certainty to consumers. However, it cannot be considered as completely effective in terms of its application due to the length of the list, the lack of systematization of the terms foreseen by the list and the repetition of contents.

- 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; [*Note: If a black/grey list exists in your country, key aspects to consider are: How does the list work in practice? Does it make a difference to have such a list?*]

The black list foreseen by Articles 85-90 of Royal Legislative Decree 1/2007 has a number of advantages. It facilitates the judicial task and provides foreseeability to consumers regarding the result of proceedings. Additionally, it provides criteria to solve cases that are not explicitly foreseen by the list through the use of the general clause of Article 82.1. Finally, it encourages businesses to adapt their contractual clauses to the standards legally established.

The impression of the Ministry of Justice is that the functioning of the list is correct in practice.

AECOSAN comments that it would be necessary to include clauses that were regarded as unfair by the ECJ.

ACC notes that in Spain, a grey list exists, but some courts interpret it as a black list. Consumer organisations, in contrast, comment that a black list exists in Spain. Gray

lists are used where judgments of value are needed. The indicative list currently covers or can cover current unfair clauses. According to consumer organisations, this list works in practice but a faster mechanism is needed to update it.

Having this list makes a difference since courts do not have to analyse whether clauses are unfair and they can declare them unfair *ex officio*.

- 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: In your country, have the effects of court decisions establishing the unfairness of an unfair term been extended to all contracts of the trader concerned or to the contracts of any other trader containing such a term? If so, how does this work in practice? What are the impacts on businesses? If there are no such effects of court decisions on unfair terms: what are the effects of this situation?*]

According to Article 221.1.b) of Act 1/2000, that deals with judgments passed in procedures initiated by consumers' associations, 'if a specific activity or behaviour is declared illicit or contrary to the law (...), the judgement shall determine whether this declaration shall have procedural effects beyond those who had been a party to the corresponding proceedings'. However, case law has denied the spread of these effects when clauses are illicit due to lack of information. In these cases, procedural effects are limited to defendants. For instance, in STS, 1ª, 9.5.2013 (RJ 2013\3088), beneficiaries of the judgment were those consumers that had concluded mortgage loan agreements with the sued financial entities and whose standard terms included identical clauses to that considered unfair and non-transparent by the judgement. According to the court, 'identical' clauses were those that, despite the fact of using different words, had essentially identical content because they had the same effects.

According to the ACC, in Spain, effects are limited because injunctions only affect the plaintiffs and defendants. The rest of consumers affected must present collective claims.

In the opinion of AECOSAN, individual and collective actions must be distinguished. In collective actions, effects of judicial decisions benefit all consumers. In individual actions, effects of judicial decisions can be invoked by third parties or public authorities if they have public effects (for instance, because they have been included in legislative collections). In collective actions, companies usually do not adhere to judgments. For instance, Ryanair has not eliminated the clause that states that the contract is governed by Irish law despite the fact that two commercial courts stated that this clause was null and void; or banks have not eliminated settlement clauses limited to those who have alleged them or floor clauses in mortgage contracts. Consumer authorities have initiated a market control campaign in 2017 to ensure that unfair terms are not still used by businesses.

Consumer associations consider that the effects are established by the court decisions themselves. They must be established accurately to facilitate their enforcement.

To sum up, in Spain the effects of court decisions establishing the unfairness of terms are limited to the individual relationships between the specific traders and the consumers, unless these court decisions extend the effects of unfairness to third parties.

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

In the Spanish literature there does not seem to be a position on this issue.

Most important debate on transparency is due to STS, 1<sup>a</sup>, 9.5.2013 (RJ 2013\3088), which ruled that mortgage floor clauses were not null and void because of unfairness, but lack of transparency.<sup>10</sup>

This judgement applied to mortgage floor clauses a new control of transparency that was independent from the incorporation control foreseen by Articles 5 of Act 7/1998 and 80.1.b) of Royal Legislative Decree 1/2007, the content control foreseen by Articles 82 and following of Royal Legislative Decree 1/2007, and the control applied by general contract law to defects of information (for instance, the legal regime of mistake foreseen by Article 1266 of the Spanish Civil Code).

This control of transparency requires providing evidence that contract terms are sufficiently transparent so that consumers have a real understanding of their importance in a reasonable performance of the contract. According to the court, 'it is necessary that the information provided to the consumer allows him to notice that the clause defines the main object of the contract and that affects or may affect the content of his payment obligation, and allows him to have a real and reasonably complete knowledge of the role that the clause plays or may play on the contract economy'. However, the Supreme Court has not set the criteria to assess that consumers are sufficiently informed in each case.

The ACC assesses positively the transparency requirements as they have been interpreted by courts in a favourable manner to consumers.

Transparency requirements are assessed positively by consumer organisations and are increasingly used by courts to rule in favour of consumers. However, consumer organisations consider that an effective enforcement with coercive measures should be required.

- 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. [*Note: Question only relevant for MS that have put in place extensions of application of UCTD*]

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).

Act 7/1998 and Royal Legislative Decree 1/2007 did not incorporate Article 4.2 of UCTD. However, STS, 1<sup>a</sup>, 9.5.2013 (RJ 2013\3088) and subsequent court decisions have considered that this provision is also applicable in Spain. As a consequence, courts cannot assess the unfairness of clauses defining the main subject-matter or dealing with the quality/price relationship 'if these clauses have been written in a clear and understandable way'.

Until 2013, the Spanish law only established a control of incorporation (formal) previous to a control of content (material). STS, 1<sup>a</sup>, 9.5.2013 (RJ 2013\3088) added a third control of transparency (material, not merely formal) when examining the validity of floor clauses in mortgage loan agreements. The Supreme Court considered that, although these clauses described the main object of the contract, art. 4.2 of Directive 93/13 was applicable because there is a first general control of incorporation (formal transparency) applicable to all terms that have not been individually

<sup>10</sup> On the lack of transparency of mortgage floor clauses, see also SJMerc Valladolid 3.12.2015 (JUR 2015\308309).



negotiated and a second specific control of transparency applicable to the essential elements of consumer contracts. If contracting terms do not pass the control of transparency, they will be regarded as unfair.

According to the ACC, case law and public authorities recognize that unfair clauses can exist in individual contracts (mortgages) or when fixing rates to update prices. This is a benefit for consumers because they do not remain helpless or vulnerable.

- 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?*]

Article 83 of Royal Legislative Decree 1/2007, which was modified by Act 3/2014 in order to comply with ECJ 14.6.2012 (Case C-618-10, Banco Español de Crédito SA v Joaquín Calderón Camino), states that unfair contract terms are null and void, and cannot be modified or revised by judges.<sup>11</sup>

Act 42/2015 has modified Articles 552.1 and 815.4 of Act 1/2000. According to this provision, judges will be able to control *ex officio* unfairness of contract terms included in consumer contracts in enforcement procedures and payment procedures (*procedimiento monitorio*).

ACC is of the opinion that the sanction works in practice, but it does not always benefit consumers. It would be good that judges could moderate it. It is not sufficient to have CJEU guidance. The Catalan Consumer Code allows consumer authorities to recognize damages to consumers in administrative proceedings, although this practice is not usual.

AECOSAN comments that administrative sanctions are the usual measures used by public authorities for unfair commercial practices. They are effective in cases where a consumer has filed a complaint against a company before the public authorities. First, mediation is tried. If the mediation agreement is not accepted or there are other consumers affected, disciplinary proceedings are initiated. Businesses are given the opportunity to correct their irregularities. If they do not take the required measures, disciplinary proceedings are initiated. The amount of sanctions depends on the number of affected consumers, whether the company has corrected the irregularities and whether consumers have recovered their rights. Moreover, this sanction can be appealed by the company before administrative judges, which can confirm or cancel the sanction to be paid. Companies do not usually appeal sanctions due to fear that the clauses are deemed unfair. The administrative sanction is not usually effective for consumers who have not filed the claim or complaint before the public authority, but it has an important deterrent effect to force companies to rectify certain behaviors. A good example can be found on the market control campaign conducted in 2015 that involve that most companies corrected their webpages. However, this campaign revealed that small businesses did not have a high level of knowledge of requirements foreseen by the EU Directives so they often copy the content and organization of their webpages imitating greater businesses.

According to AECOSAN, the experience shows that alternative dispute resolution mechanisms are not enough for companies that have several claims or complaints. Administrative sanctions must be imposed to prevent unfair behaviour being repeated.

<sup>11</sup> See, in this sense, SAP Granada 19.1.2016 (AC 2016\988). The clause included on an elevator maintenance contract was unfair because it stated an automatic extension of contractual relationship up to ten years and it sanctioned consumer who wanted to terminate the contract within the period of extension to pay the total amount, for services not provided, for more than four years.

In a recent conference organized by a consumer association with judges, judges said that the obligation to assess *ex officio* the existence of unfair terms involved a novelty that they were incorporating into its working procedures.

Judges have different views depending on the jurisdiction. While civil and commercial judges seem to have understood that they must act *ex officio*, it does not seem to be the approach taken by administrative judges when resolving appeals against administrative sanctions.

AECOSAN considers that the European *acquis* is very important. A systematized and easily searchable compilation of court decisions should exist within Eurlex and the website of the European Commission on the UCPD.

According to consumer organisations, the sanction works in practice, but it is not sufficient because the consequence for traders is the same as if the unfair term had not been included in the contract. Courts take up an active role by invoking unfairness *ex officio* in some procedures. It is not sufficient to have CJEU guidance.

- In a forward looking perspective: Are there other measures that could improve the effectiveness of the UCTD in establishing a high level of consumer protection in your country? Would a graphical presentation model improve the readability and comprehension by consumers of the T&Cs? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

There is evidence that consumers, in e-transactions and in other forms of contracting relying on standard form terms governing the contract, do not commonly read the contract terms before entering into the contract, do not have the capacity, or the willingness, to read and understand the implications of standard contract terms, and do not value the opportunity to read the terms prior to contract, nor they value typically the more advantageous contract terms they may hypothetically be able to find if they read standard contract terms in advance and shop around for more favourable ones. Moreover, there is also evidence that the opportunity to read the standard terms before signing the contract does not change the substantive content of the contract terms. Thus, the available empirical evidence does not seem to give a clear indication that imposing duties to disclose standard contract terms and providing consumers with opportunities to read them actually improve the material situation of consumers in terms of the welfare they obtain from the transaction.

The ACC proposes the practice to inform in a graphic and symbolic way about the level of risk of financial products.

According to AECOSAN, in Spain, there is a tendency to group pre-commercial information in a 'Legal Notice' section of the website where the identification of the company and some consumer rights are included. On the contrary, information about the right of withdrawal is not clear and identifiable for consumers. Confusion exists between the right of withdrawal and the return of the product due to non-conformity. Moreover, the model of withdrawal foreseen by Directive 2011/83 is not usually used. It is necessary to organise this online information into sections or paragraphs and to establish when and how the information concerning the characteristics of the product (composition, manufacturer, CE marking) must be given to consumers (for instance, whether it should appear next to the product or in a link).

Regarding best practices, it must be noted that Royal Legislative Decree 1/2007 introduced the concept of 'abusive practice' to cover cases where a contractual term correctly formulated was interpreted or applied differently (for instance, telephone companies charge consumers for violating the period of permanence with an amount different to that foreseen by the penalty clause or they use a different method of calculation).

In the opinion of consumer organisations, measures that improve the drafting of terms and the training of consumers would improve the effectiveness of the UCTD.



### 1.2.2. Effectiveness of the current rules 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 disparities have an impact on cross-border trade; [*Key aspects to consider are: Do national differences in the application/implementation of the Directive play a role for businesses? Have these differences led to changes in their business strategy? Have these differences caused problems?*]
- 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;
- 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.

It is not possible to conclude about the effectiveness of UCTD in terms of eliminating obstacles to cross-border trade due to lack of feedback from Spanish associations and authorities.

### 1.2.3. Relevance for business-to-business transactions

Regarding the area of contractual fairness and in relation to the Unfair Contract Terms Directive, please analyse:

- Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;

In Spain, a general rule that allows the application of the concept of 'unfair contract term' to non-individually negotiated clauses in B2B contracts does not exist. It is not possible to apply to B2B transactions either the general content control applicable to unfair contract terms nor the control of transparency of clauses that refer to essential elements of contracts (Article 4.2 UCTD) according to the requirements established by STS, 1ª, 9.5.2013 (RJ 2013\1388). As a consequence, protection of businesses must be articulated through traditional instruments of civil law.

Spanish courts, notaries and registrars have not applied the controls for B2C contracts to B2C transactions. Recently, STS, 1ª, 3.6.2016 (JUR 2016\126397) confirmed that the control of transparency was limited to unfair contract terms included in B2C contracts. However, a dissenting opinion exists arguing that the control of transparency should be integrated within the control of incorporation and hence it would be applicable to businesses. Similarly, Resolution of the General Directorate for Registries and Public Notaries of 10.2.2016 did not apply the control of transparency to a clause of excessive interest rates included in a business mortgage loan.

However, legal scholars state that major protection to businesses without bargaining power or with a limited bargaining power (for instance, because they depend economically on large companies that control the market) is needed.

Spanish legal scholars and case law have given several options to be able to submit unfair contract terms to a content control:

- The integration of the control of transparency within the incorporation control, which is applicable to both B2C and B2B transactions [SAP Soria 18.2.2016 (JUR 2016\58367)];
- The application of the unfair contract terms regime for B2C transactions is foreseen by Legislative Royal Decree 1/2007 to B2B contracts by using analogy. However, STS, 1ª, 3.6.2016 has explicitly said that the aim of legislator was not to put on the same level the content control of unfair contract terms in B2C and B2B transactions;

- The literal meaning of the Preamble of Act 7/1998: 'nothing prevents that an unfair contract term may be legally declared invalid when it is contrary to good faith and cause a significant imbalance between the rights and obligations of the parties, even in the case of contracts between professionals or entrepreneurs. But it must take into account in each case the specific features of the contracts between companies';
- The relationship between the Preamble of Act 7/1998 and Articles 1255 (public order), 1256 (the prohibition to leave validity and performance of contracts to the discretion of one of the contracting parties) and 1258 (contracts bind parties to all consequences in compliance with good faith) of the Spanish Civil Code;
- The violation of mandatory or prohibitive rules, although it must be noted that private autonomy prevails in B2B contracts.

AECOSAN is of the opinion that conditions established by companies for B2B transactions do not resemble to that for B2C transactions. The bargaining power is quite different depending on the sector. For instance, the average term of guarantees in the sale of industrial products is a six months period. A two years period exists for the sales of these products to consumers.

- 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;

As standard terms are widely used in B2B transactions and may cause problems similar to those affecting B2C contacts, the system of protection established by Royal Legislative Decree 1/2007 would be appropriate for B2B transactions. However, special features of B2B transactions as commercial relationships should be considered. In particular, the content control should take into account the need of protection of businesses by considering several criteria (for instance, their bargaining power, the legal and economic advice received, etc.).

As a rule, the concept of good faith should not be so rigidly applied in B2B transactions. In these transactions, businesses usually know each other, they act in closed business sectors, they usually conclude standard term contracts, they enter into long-term contracts where the contracting party is an essential term of the contract, etc. As a consequence, response of businesses to unfair clauses is not as important as in B2C transactions. On the contrary, when unfair clauses affect small businesses linked by occasional or unique contracts, the general clause of good faith should be applied as rigidly as in B2C transactions.

- 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;

No information is available.

- 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;

Some court decisions that have been able to deal with the unfairness of standard terms in B2B contracts should be mentioned:

- STS, 1ª, 10.3.2014 (RJ 2014\1467): *Ascensores Zener Elevadores SLU vs. Sanitas Residencial SL*. The content control of Royal Legislative Decree 1/2007 is not applied to a penalty clause with disproportionate compensation foreseen in a contract for elevator maintenance;
- STS, 1ª, 28.5.2014 (RJ 2014\3354): *Augusto (lawyer) vs. 'INMO CONSULT INVESTMENTS, S.L.'* and *'PONDERANCE 2000, S.L.'*. The content control of Royal

Legislative Decree 1/2007 is not applied to termination clauses in a contract for the sale of a professional office;

- STS, 1ª, 24.11.2014 (RJ 2014\5985): '*ONAGE PROMOCIONES E INVERSIONES S.L.*', '*BAHER 93 S.L.*' y '*CRISMORA S.L.*' c. '*CAJA DE AHORROS Y MONTE DE PIEDAD DEL CÍRCULO CATÓLICO DE OBREROS DE BURGOS*'. The content control of Royal Legislative Decree 1/2007 is not applied to an acceleration clause in a mortgage loan;
- STS, 1ª, 30.4.2015 (RJ 2015\2019): '*Promoción Urbana Logroñesa, S.L.*' vs. *Cirilo* (businessperson that buys houses for resale). The content control of Royal Legislative Decree 1/2007 is not applied to a clause that imposes on the buyer the obligation to pay expenses, taxes, etc;
- STS, 1ª, 3.6.2016 (RJ 2016\2306): *Teodora (businessperson) vs. Banco Pastor*. The content control of Royal Legislative Decree 1/2007 is not applied to a floor clause.

In addition, some sectoral rules foresee content control for B2B transactions that refer to some unfair contract terms:

- According to Article 9 of Act 3/2004, 'in any case, clauses agreed by the parties or practices that are contrary to the requirements to ask for default interest (...) or those that exclude the payment of such default interest or the compensation for costs payment (...) are void. Clauses and practices agreed by the parties that exclude default interest, or any other on the legal default interest (...) will also be void when they have an abusive content to the detriment of the creditor, understanding that the content is abusive when the agreed interest rate is 70 percent lower than the default legal interest, unless (...) it can be proved that the interest charged is not abusive (...);
- Article 41.3 of Act 15/2009, concerning default clauses in transport contracts, refers to the rules of Article 9 of Act 3/2004. Additionally, Article 38.4 states that any agreement that excludes the revision of prices according to fluctuations in fuel prices will be void when it has a clearly unfair content to the detriment of the carrier;
- According to Article 3.1 of Act 50/1980, 'standard terms, which shall in no case be prejudicial for policyholders, will be included by the insurer in the insurance proposal and necessarily in the policy contract or in an accompanying document, to be signed by the insured, who will receive a copy thereof. The general and particular conditions shall be written clearly and precisely. Clauses limiting the rights of policyholders will be highlighted in a special way and must be specifically accepted in writing;
- Standard terms shall be subject to the supervision of the Public Administration under the terms provided by law;
- Once the Supreme Court declares the nullity of a standard term, the competent Public Administration will force the insurers to modify identical clauses in their policies';
- According to Article 1 of Usury Act of 1908, 'any loan agreement that stipulates a significantly higher interest rate than normal and manifestly disproportionate to the specific circumstances or with conditions that render the contract unfair, where there is reason to believe that such an agreement has been accepted by the borrower as a result of being in a desperate situation, through their inexperience or their limited mental faculties', will be void;
- See also rules on financial transparency (Order EHA2899/2011).

According to AECOSAN, there are some clauses that should be unfair in all circumstances and economic sectors. For instance, the right to conclude the relationship with a very short notice term (between 7 days and one month) without having to provide a reason.

- Whether there is a need for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive;

As some sectoral rules on transparency requirements exist for some B2B transactions (for instance, requirements of transparency in the field of financial services foreseen by Order EHA2899/2011), it would probably be a welcome development to provide generally for the contractual transparency requirements to apply to B2B transactions.

According to AECOSAN, the problem is not transparency, but the absence of claims and complaints to enforce them because of the abovementioned 'fear factor'.

- 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;

An extension of the UCTD to B2B transactions can be attractive because the likelihood that strong companies can easily impose standard terms depending on their interests or the need to negotiate the applicable law are significant obstacles to cross-border trade.

AECOSAN considers that an extension of the UCTD to B2B transactions will only be effective if national authorities are entitled to adopt administrative measures without any need for previous complaints.

- Whether the benefits of extending the scope to business-to-business transactions would exceed the negative consequences of such an extension.

According to AECOSAN, the 'fear factor' will prevent the extension of the scope of the Directive if specific measures are not adapted to the business reality. Codes of conduct will be more effective in B2B transactions (for instance, by establishing alternative dispute resolution mechanisms).

### 1.3. Injunctions

#### 1.3.1. Effectiveness of the current rules in establishing a high level of consumer protection

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

- To what extent is the use of the injunction procedure in your country contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment?<sup>12</sup>

The injunction is considered, from a deterrent perspective, a preventive mechanism to protect collective interests of consumers and users. This deterrent effect is usually related to the publication of the judgment. According to Article 21 of Act 7/1998, final judgments resulting from collective actions as well as affected clauses may be ordered by judges to be published in the Official Gazette of the Commercial Registry or/and in a newspaper of the largest circulation in the province where the judgment has been passed. The costs of publication will be borne by the losing defendant in a period of 15 days from the notification of the judgment. Similarly, Article 221.2 of Act 1/2000 states that judges may order the total or partial publication of a judgement granting an injunction at the defendant's expense or, where the effects of the infringement may persist over time, a corrective statement.

Legal scholars raised the issue of whether courts could agree on the publication of the judgment *ex officio* as it could be contrary to the request or rogation principle. SAP Salamanca 26.2.2013 (JUR 2013\130394) concluded that the publication foreseen by Articles 21 of Act 7/1998 and 221.2 of Act 1/2000 consisted of a judicial faculty that could be adopted *ex officio* or at the parties' request. It did not consist of a principal but a secondary action that depended on the judge's discretion.

Due to the reputational impact of these measures and the consequent risk of losing clients, businesses will adopt measures to avoid negative publicity (for instance, by avoiding unfair clauses in both standard term contracts and consumer contracts).

According to AECOSAN, injunctions have a limited effect due to the lack of enforcement of judgments. For instance, Ryanair has not yet removed an unfair clause on the applicable law to conflicts with consumers. On the contrary, judgments on unfair commercial practices and unfair terms used by financial institutions have had a great social impact. Consumer associations have requested both the enforcement of judgments and the spread of their effects to all companies of the same sector.

Consumer associations comment that in Spain there is little experience in bringing injunctions. Although they are useful, their effectiveness is difficult due to problems of workload in courts.

- What measures in your national legislation on injunction procedure are considered to be particularly effective, if any: measures regarding the cost of the procedure, the 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?

In Spain there are several such measures:

- Summary procedure: according to Article 250.1.12º of Act 1/2000, injunctions consist of a summary procedure that is faster and less complex than the ordinary procedure;
- Publication of the decision and/or the publication of a corrective statement (see above);

<sup>12</sup> 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.

- Sanctions for non-compliance with the injunction order: according to Article 711 of Act 1/2000, a judgement granting an injunction will impose a fine ranging from EUR 600 to EUR 60 000 per day of delay in the enforcement of the judgement within the time limit set forth therein. The amount will depend on the nature and relevance of the damage caused and the economic capacity of the condemned party. Such fine shall be paid to the Public Treasury;
- Prior consultation: such requirement is not foreseen by Act 1/2000 or Royal Legislative Decree 1/2007. Some sectoral laws foresee prior requirements to be able to bring a claim. Article 13 of Act 7/1998 states the possibility to ask for a conciliation opinion before the registrar of standard terms. Article 105 of Act 29/2006 foresees a request to the person conducting the advertising activity to avoid the subsequent procedure. Finally, Articles 38 and 39 of Act 3/1991 state preliminary actions against persons responsible for codes of conduct or entrepreneurs and professionals who are signatories of codes of conduct;
- Effects of judgments: according to Article 221.1 of Act 1/2000, judgements are subject to the following rules:
  1. The judgement upholding the claim shall individually determine the consumers and users who shall be deemed as beneficiaries from the judgement. Where an individual determination of such users or consumers is not possible, the judgement shall set forth the necessary details, characteristics and requirements to be in a position to require payment or, as appropriate, apply for enforcement. Article 519 of Act 1/2000 states that, when judgments referred to in Article 221.1.1<sup>o</sup> do not state the individual consumers or users benefiting from this, at the request of one or several of the parties concerned and with a hearing of the losing party, the court for the enforcement shall issue a court order to decide whether it recognises the applicants as beneficiaries of the judgment.
  2. If a specific activity or behaviour is deemed illicit, the judgement shall determine whether this declaration shall have procedural effects beyond those who had been parties in the proceedings.

This rule was interpreted by STS, 1<sup>a</sup>, 1.7.2010 (RJ 2010\6554). According to this decision, the effects of the judgment can be extended *ultra partes, id est*, beyond the parties in the proceedings. However, these effects cannot be extended to those who offer 'similar' clauses but only to those who offer 'identical' clauses to that regarded as null and void by the judgment. Similarly, see SSAP Asturias 28.3.2014 (AC 2014\491), Barcelona 14.10.2014 (AC 2014\1849), Asturias 23.1.2015 (JUR 2015\94221).
  3. If individual consumers or users have appeared before the court, the judgement shall expressly issue a ruling on their pleas.

According to AECOSAN, when a public authority intends to bring an injunction, a prior request to the company should be made. Royal Legislative Decree 1/2007 states that the public prosecutor can bring the injunction. As a consequence, consumer associations do not need to submit the case before the court directly, but may encourage an action by the public prosecutor.

Consumer associations comment that publication and effects of court decisions are especially effective.

- Has your country extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunction Directive? If yes, what are the additional consumer rights covered?

Before Act 39/2002, several specific sectors had specific regulations of injunctions:

- Advertising: Article 25 of Act 34/1998;
- Unfair commercial practices: Article 32 of Act 3/1991;
- Standard contract terms: Article 19 of Act 7/1998.



Act 39/2002 implemented Directive 98/27/EC, modified Act 1/2000 (Articles 6, 11, 15, 52, 221, 250, 711 and 788) and introduced an injunction of general application in the field of consumer law through the Third Additional Provision of Act 26/1984: 'in the absence of specific sectoral rules', it is possible to exercise the injunction against 'behaviours of businessmen or professionals contrary to this Act that are detrimental to collective or diffuse interests of consumers and users'. This provision is the precedent of the general injunction foreseen by Article 54.3 of the Royal Legislative Decree 1/2007. This general injunction co-exists with sectoral injunctions. In this sense, Act 39/2002 modified various sectoral laws to introduce the injunction procedure into them or to accommodate this procedure to the European legislation in cases where injunctions were already foreseen. In addition to modifications of the abovementioned Acts 34/1998, 3/1991 and 7/1998, the following consumer laws were modified to introduce specific injunction procedures:

- Time-share property for tourist use (originally, Article 16 bis of Act 42/1998; now Article 21 of Royal Decree-Law 8/2012);
- Advertising of drugs and medical devices (originally, Articles 120 and 121 of Act 25/1990; now Articles 105 and 106 of Act 29/2006);
- Television broadcasting (originally, Articles 21 and 22 of Act 25/1994; this act was repealed by Act 7/2010, which does not foresee a specific injunction);
- Consumer credit contracts (originally, Article 20 of Act 7/1995; now Article 36 of Act 16/2011).

After Act 39/2002, injunctions have been regulated in other sectors:

- Services of the information society and electronic commerce (Articles 30 and 31 of Act 34/2002);
- Spanish Agency of Food Safety and Nutrition (Article 2 of Act 11/2001);
- Distance marketing of consumer financial services (Article 15 of Act 22/2007);
- Loans, mortgages and intermediation services with consumers (Article 11 of Act 2/2009)

The ID was transposed into national law by Act 29/2009. This Act modified, among others, Act 3/1991, whose Article 32.1.2.<sup>a</sup> refers to the injunction that can be brought against acts of unfair competition and unlawful advertising. Moreover, it expressly allows the exercise of this procedure against behaviours that have not been occurred. According to the provisions of Article 2 of Directive 2009/22/EC, this specific injunction allows consumers to ask for the cessation of the unfair activity, the prohibition that the behaviour is repeated in the future and the preventive ban of a future conduct which has not yet occurred.

Directive 2006/123 was implemented in Spain by Act 17/2009, whose Article 26 states that it is possible to bring the injunction provided by Article 53 of the Royal Legislative Decree 1/2007 against behaviours that violate the provisions of this Act that may affect collective or diffuse interests of consumers and users.

According to AECOSAN, the scope of application of the injunction procedure has also been extended to sexist advertising.

- Analysis of the obstacles to the effective use of the injunction procedure, in particular by analysing which progress in removing obstacles has been made and/or new difficulties that have emerged in your country since 2012.

A number of obstacles can be identified.

1) Lack of uniformity regarding rules on legal standing:

- 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 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 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 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;
  - Entities authorised pursuant to EU Regulations to exercise injunctions in defence of collective interest and the diffuse interest of consumers and users: Articles 6 and 11 of Act 1/2000.
- 2) Length of proceedings: according to Article 447 of Act 1/2000, judgments in summary proceedings will be passed within 10 days after the termination of the hearing;
- 3) Free legal aid and costs of proceedings: citizens who, while engaged in or intending to initiate any kind of legal action, lack sufficient assets to litigate, may apply for free legal aid (Act 1/1996). The right to free legal aid is recognised for those individuals who lack sufficient assets and have a gross annual household income, computed for all items, falling below the following thresholds:
- Twice the Multi-Purpose Public Income Index (IPREM, per its Spanish initials) in force when the application is made in the case of people who are not part of a household. (By 2016 EUR 12 780.26);
  - Two and a half times the Multi-Purpose Public Income Index (IPREM, per its Spanish initials) in force when the application is made in the case of individuals from a household type with less than four members. (By 2016 EUR 15 975.33);
  - Three times the IPREM in the case of households made up of four or more members. (By 2016 EUR 19 170.39).

Specifically, the following shall be entitled to free legal assistance: (1) Spanish citizens, natives of other European Member States and foreigners resident in Spain, when they can demonstrate insufficient means for litigation; (2) Management Entities and Social Security Common Services; (3) The following entities, when they can demonstrate insufficient means for litigation: Public Interest Associations and foundations registered in the corresponding Administrative Register.

Moreover, consumer associations are exempted from costs without having to prove lack of sources to bring a claim (Second Additional Provision of Act 1/1996).

The right to free legal assistance covers, broadly speaking, the following benefits: (1) Free advice and guidance prior to the start of the proceedings; (2) assistance of a lawyer for the arrested individual or prisoner; (3) free defence and representation by a lawyer and court lawyer during the legal proceedings; (4) free publication of the announcement or edicts, in the course of the proceedings, which must be prescriptively published in official newspapers; (5) exemption from the payment of deposits for the lodging of appeals; (6) free assistance from experts during the proceedings; (7) free procurement of copies, testimonies, writs and notary certificates; (8) eighty percent reduction in tariffs corresponding to certain notary actions; (9) eighty percent reduction in tariffs corresponding to certain actions carried out in relation to the Land and Company Registers.

According to Article 394 of Act 1/2000, 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. On appeal, none of the litigants shall be ordered to pay the costs of appeals;

- 4) Enforcement: When judgments referred to in the first rule of Article 221 of Act 1/2000 do not state the individual consumers or users benefiting from this, the competent court for the enforcement shall issue a court order in which it shall decide, in accordance with the data, characteristics and requirements established in the judgement, whether it recognises the applicants as its beneficiaries. After Act 16/2011, which entered into force in September 25, 2011, the Public Prosecutor will be able to ask for the enforcement of the judgment on behalf of the consumers and users;
- 5) Accumulation of actions: Articles 12.2 of Act 7/1998 and 53 of Royal Legislative Decree 1/2007 state that it is possible to accumulate injunctions (principal action) and other actions (accessory actions). According to Article 12.2 of Act 7/1998, injunction may be cumulated to actions for the restitution of profits and damages. Similarly, Article 53 of Royal Legislative Decree 1/2007, after its modification by Act 3/2014, states that, at request of the parties, it is possible to accumulate injunctions with claims for absolute and relative nullity, termination, restitution of profits and damages. These secondary actions will be solved by the judges responsible of the principal action. This rule will also be applicable in cases where injunctions have been brought by consumers and users associations<sup>13</sup>;
- 6) Lack of a preliminary procedure (see above);
- 7) Cross-border rules: there is no official data regarding cross-border injunctions in Spain. Spanish legislation refers only to legal standing in these injunctions. According to Article 55 of Royal Legislative Decree 1/2007, AECOSAN and the similar bodies or agencies in Regions and local administrations, as well as consumer and users associations participating in the Council of Consumers and Users, when included on the list published in the Official Journal of the European Communities, will be able to bring an injunction in other EU Member States

On the other hand, Article 6 of Regulation 593/2008 and Articles 17-19 of Regulation 1215/2012 foresee rules on the applicable law and the jurisdiction applicable to consumer contracts but there is no specific provision regarding injunctions. Similarly, Article 6 of Regulation 864/2007 only refers to non-contractual obligations arising out of an act of unfair competition.

According to AECOSAN, the main obstacle to the effective use of the injunction procedure is the lack of enforcement of judgments (the case of Ryanair is significant).

According to consumer organisations, the main pitfalls are to the complexity and costs of the injunction procedure.

- In a forward looking perspective: Should the coverage of the Injunctions Directive be extended (by including additional legislation into Annex I to the Directive)? If so, which EU legislation should be included? Are there other measures that could improve the effectiveness of the ID in establishing a high level of consumer protection? Should the scope of the Injunctions Directive be extended to the

<sup>13</sup> 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). First instance court, appeal court and Supreme Court ruled in favor 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.

protection of collective business' interests? Are there best practices in your country that could be relevant for other countries and considered as model for the injunction procedure at EU level?

In the opinion of the Ministry of Justice, the main challenge consists in creating a specific regulation for injunctions in Act 1/2000.

According to AECOSAN, it is important to update periodically the ID and its implementation Guide in order to include the case law of the ECJ.

According to consumer organisations, measures should be addressed to have a faster and more effective injunction procedure.

### 1.3.2. 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:

- How effective is the injunction procedure in addressing infringements originating in another EU country?

In the opinion of the ACC, cooperation between legitimized institutions is the most effective mechanism, in particular through the Consumer Protection Cooperation (CPC) network, the Regulation 2006/2004 and the electronic communication and coordination system.

According to AECOSAN, except for the two actions against Ryanair brought by a consumer and a consumer association before Spanish courts, there is no knowledge of actions of this kind in Spain.

- How effective is it to address infringements originating in another EU country that qualified entities in your country are enabled to seek injunctions in the other Member State (Article 4 of the Injunctions Directive)?

There is no data about injunctions sought by institutions foreseen by Article 55 of Royal Legislative Decree 1/2007 in other EU Member States.

According to the ACC, the experience shows that consumer authorities do not bring injunctions because they are little known and effective.

AECOSAN has no knowledge about actions of this nature. Consumer authorities receive information about infringements through the system implemented by Regulation 765/2008.

Consumer associations consider that they do not have sufficient information and means to bring injunctions in other countries.

- In a forward looking perspective: Are there non-legislative or/and legislative measures that could improve the effectiveness of the injunction procedure in addressing infringements originating in another EU country? Are there best practices in your country that could be relevant for other EU countries and could be considered as a model for the injunction procedure at EU level?

According to legal scholars, the following measures can improve the effectiveness of the ID in establishing a high level of consumer protection:

- Clarification of the applicable law in cross-border cases;
- Clarification of the extension of effects of injunctions obtained in a domestic context;
- Mutual recognition of judgments in consumer collective mechanisms;
- Establishment of a European enforcement system;

- Introduction of the power to ask for compensation and creation of mechanisms to establish the loss caused and to identify beneficiaries.

According to AECOSAN, a best practice was introduced by Royal Legislative Decree 1/2007 by recognizing legal standing to the public prosecutor.

### 1.3.3. Interplay between the Injunctions Directive and other enforcement instruments of consumer law

Please analyse:

- Is the injunction procedure as designed by the Injunctions Directive regulated separately in your country (in a separate legal act or as a separate procedure regulated within the same legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (UCPD, UCTD and by the Consumer Rights Directive)?

There is not a separate regulation.

- If these procedures are regulated separately: What are the main differences between them? How is the coherence between these procedures ensured? If these procedures are regulated in a single legal act (possibly as a single procedure): In what way do these procedures (or this procedure) go beyond measures foreseen by the Injunctions Directive?

Not applicable.

## 1.4. Cross-cutting issues

### 1.4.1. Cost and benefits of the directives covered by the study

- To what extent is there evidence for benefits for consumers stemming from the protection provided by both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of benefits for consumers from the protection against unfair commercial practices and unfair standard terms in contracts; [*Note: a relevant aspect in this context is whether the costs for consumers in exercising their rights under these directives are limiting these benefits or not.*]

It must be emphasized the important impact for both financial entities and financial clients of case law on mortgage-floor clauses in terms of costs and benefits because Spanish Courts have forbidden extending the retroactivity of court decisions establishing the unfairness of mortgage-floor clauses.

In 2013, the Spanish Supreme Court concluded that mortgage-floor clauses were null and void, and ordered defendant entities to remove them from their mortgage contracts. However, the Supreme Court did not declare the retroactivity of the judgement because of the risk of serious harm to public economic policy. As a consequence, financial entities only had to reimburse payments made in excess by consumers due to the unfair mortgage-floor clauses since 9 May 2013.

Subsequent judgments upheld the Supreme Court decision and required other Spanish financial entities to eliminate the mortgage-floor clauses of their agreements.

Nevertheless, some first instance courts ignored the position of the Supreme Court and ordered banks to reimburse the amounts received in excess from the date on which the floor clause was implemented.

This led to the ECJ being asked about the retroactivity of mortgage-floor clauses.

Although the final decision of the ECJ is expected at the end of this year, the report of Advocate General Paolo Mengozzi of the EU Court of Justice says that the banks should not be required to fully reimburse borrowers.

According to the Association of Users of Banks, Saving Banks and Insurance (ADICAE), there are 2 000 000 consumers affected by mortgage-floor clauses. Most mortgage contracts were signed during the property boom in Spain.

A report of the *Banco de España* points out that if the ECJ rules in favour of consumers, financial entities will have to reimburse more than EUR 7 600 million (EUR 5 000 million for payments made in excess before 9 May 2013 and EUR 2 600 million for payments between 9 May 2013 and 31 December 2015). Moreover, International Financial Analysts (AFI), a leading Spanish provider of advisory, consultancy and training services in economics and finance, assesses that the lost profit of financial entities, assuming that most of them have removed floor-clauses from their agreements, will amount to EUR 6 022 million between 2016 and 2019.

The reimbursement of payments in excess will also have tax effects for consumers. If taxpayers only recover the interests paid in excess, they will not have to pay tax on them. If taxpayers apply the deduction for investment property, they will have to regularize their tax situation by returning part of what was deducted at that time. Those who sued a bank to remove the floor-clause will be able to deduct legal expenses incurred. Legal fees will be added to the mortgage payments to calculate the amount of the deduction in the year when the judgment that declares the clause null and void becomes final, with a total limit of EUR 9 040, according to the criteria set by the Tax Agency.<sup>14</sup>

According to AECOSAN, the benefits of the consumer directives are undeniable. Consumer associations are reluctant to bring injunctions due to several reasons: the cost of legal representation, the risk of liability for unjustified claims and the duration of the procedure. They prefer filing complaints before consumer authorities because of their knowledge on the subject-matter, their experience and the duration of disciplinary procedures (6 months; appeal: 3 months).

According to consumer associations, the exercise of consumer rights results in excessive costs of time and money.

- To what extent is there evidence for benefits for traders stemming from both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of creating a level playing field for honest traders by providing a legal basis to eliminate or at least constrain dishonest market practices, such as the use of unfair standard terms in contracts or unfair commercial practices, including through the application of the Injunctions Directive;

According to AECOSAN, entrepreneurs consider that all traders must fulfil the same rules and that those who act dishonestly must be punished. Moreover, they consider that compliance with the law promotes confidence and security, since it prevents consumers from requesting rights that are not foreseen by the Directives or that have not been offered by the company.

- What are costs for traders due to the need to respect the requirements under the directives covered by the study? [*Note: Such as costs of research, legal advice and compliance as well as the amount of time necessary to comply with the directives*]

No information available.

<sup>14</sup> Sources: <http://www.elmundo.es/economia/2016/04/08/5706c3e622601d5d638b460d.html>;  
<http://www.elmundo.es/economia/2016/06/03/5744271dca474133328b4627.html>;  
[http://www.elconfidencial.com/empresas/2016-06-08/bce-banca-espanola-clausulas-suelo\\_1213378/](http://www.elconfidencial.com/empresas/2016-06-08/bce-banca-espanola-clausulas-suelo_1213378/);  
[http://cincodias.com/cincodias/2016/06/09/mercados/1465492496\\_358832.html](http://cincodias.com/cincodias/2016/06/09/mercados/1465492496_358832.html).

- What are the costs involved in the public enforcement of these rules?

According to AECOSAN, it is difficult to assess the cost of public resources addressed to ensure the compliance with these directives. Consumer authorities in Spain devote all their resources to the protection of consumer rights (webpages to inform about the rights of consumers and the obligations of businesses; revision of training and competence of the officials responsible of controlling the compliance with the directives, etc.).

- Are there indications that the directives covered by the study are not implemented in your country in a cost-effective manner?

There are no indications that the directives covered by the study are not implemented in a cost-effective manner.

- Could the costs for implementing and enforcing the rules of the directives covered by the study be reduced without lowering the level of protection for consumers? If so, how?

According to AECOSAN, in addition to suggestions made in previous sections, costs of implementing and enforcing the rules of the directives would be reduced by passing sectoral Directives, since horizontal legislation does not give an adequate answer to specific problems of specific sectors (for instance, in the field of car rental without driver, which is generating cross-border complaints, a directive is necessary to provide for pre-contractual information requirements in relation to additional charges, such as the cost of additional insurance or the amount of bail that must be paid in cash or by credit card).

#### 1.4.2. Interplay with EU sector-specific consumer protection legislation

Regarding the interplay of the horizontal EU consumer legislation [mainly UCPD and UCTD] with EU sector-specific consumer protection legislation in the areas of electronic communications, passenger transport, energy and consumer financial services, please:

- Analyse the levels of awareness of the requirements of the horizontal EU consumer legislation (mainly UCPD and UCTD) of businesses and consumers and the specific public enforcement bodies in the relevant sectors, as in particular demonstrated by their practical application; [*Key question here is: Are UCPD and UCTD applied in practice by national authorities and courts as a legal basis to combat unfair commercial practices and unfair standard terms in contracts in the regulated sectors?*]

According to the ACC, companies are increasingly aware that they must comply with both sectoral and general consumer rules. Several requests were made to national agencies, such as the Spanish Agency of Air Security, the Bank of Spain, the National Commission of Competition and Markets, etc., to make them see that sectoral contracts were also subject to consumer rules.

AECOSAN notes that business associations often invoke the UCPD before public authorities to claim against companies that perform unfair commercial practices. However, they do not usually bring claims because of the existence of unfair terms (an exception may be found in the field of car rental without a driver). On the other hand, consumer associations bring both types of claims. Finally, consumer authorities take into account both Directives to undertake the market control.

According to consumer associations UCPD and UCTD are sufficiently known by judges, who usually refer to national or regional legislation in their court decisions. They are also known by traders and this explains that they try to avoid their application.



- Specify whether in your country the same authority is responsible for the enforcement of the horizontal EU consumer law 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 UCPD/UCTD in the regulated sectors, as specified in the previous bullet?*]

According to the ACC, except for some exceptional cases, consumer authorities (regions) are responsible for the enforcement of the horizontal EU consumer law. National bodies are responsible for the enforcement of sectoral legislation. There is no institutionalized cooperation between regional and national entities. Cooperation only occurs in specific cases.

AECOSAN notes that consumer authorities are responsible for the enforcement of the UCPD and UCTD but, at the same time, there is sectoral legislation that makes companies of energy supply, banking and financial services and, to a lesser extent, phone companies reluctant to supervisory actions by consumer authorities. Particularly problematic has been the case of banks that refused to submit their contracts to have them checked for the presence of unfair terms, which led to legislative amendments to force them to send this information. In this sector, regulations of the Bank of Spain have been strongly criticized by consumer associations due to the following reasons: decisions of the Claims Service are not mandatory for the Bank and the Inspection Service does not give value to the evidence provided by the Claims Service. Consumers must submit their complaints before the customer service or the customer ombudsman before filling a complaint before the Claims Service of the Bank of Spain. If the decisions of the Claims Service are favorable to consumers, their enforcement by the bank or financial institution is voluntary. If the decisions are not enforced, consumers can contact the Inspection Service of the Bank of Spain to start a new procedure. However, the decisions of the Claims Service will not have value in this new procedure.

There are no agreements of institutionalized cooperation between consumer authorities and sectoral authorities. In the field of telecommunications, there are decisions of sectoral bodies (such as the Secretary of State for Telecommunications and Information Society) that have considered correct behaviors of phone companies that had been sanctioned by consumer authorities.

Although it is not strictly an authority, attention must be drawn to the European Consumer Centre (ECC). There is no coordination between the ECC and consumer authorities. As a consequence, they apply different criteria for conflict resolution (for instance, the ECC considered that the airline company was not responsible for damage to baggage, while consumer authorities sanctioned the company).

- Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning contractual fairness, 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.?*]

Legal scholars agree that the wide range of both State and regional legislation existing in different texts and sectors prevents a general understanding of problems in practice and creates legal uncertainty for consumers and businesses.

Coordination of general/sectoral consumer legislation has been regulated by Article 59.2 of Royal Legislative Decree 1/2007. According to this provision, the contractual regime of Royal Legislative Decree 1/2007 is applicable anywhere and in any sector, unless there are sectoral (or special) rules establishing a higher level of protection, where possible, according to the EU law:



'Contracts with consumers and users shall be governed, in respect of all that is not expressly established herein or in special laws, by the general rules of civil contract law.

The sectoral regulation of consumer contracts must comply with the level of protection established by this law, without prejudice that sectoral provisions prevail for those issues expressly provided for in the EU law.

Notwithstanding the provisions of the preceding paragraph, sectoral regulation may raise the level of protection conferred by this law provided that, in any case, it complies with the provisions of EU law'.

In the opinion of the ACC, horizontal and sectoral rules are not coordinated (additional requirements are required by sectoral rules and companies consider that they are not obliged to fulfil them). Contradictions also exist between sectoral rules.

AECOSAN notes that Royal Legislative Decree 1/2007 created the concept of 'abusive practice' to identify cases where unwritten terms apply, standard terms are differently applied or different terms apply depending on the customer.

Consumer associations consider that in general terms, the coordination is fine.

- What are the benefits of the complementary application of the UCPD and UCTD in the regulated sectors? What are the costs due to the complementary application with the sectoral EU consumer protection legislation?

Regarding benefits, the ACC considers that a high level of protection for consumers has been achieved. As to costs, duplication of administrative procedures and high costs for companies to fulfill requirements exist. These costs are not quantifiable.

As to costs, AECOSAN points out the lack of collaboration between horizontal and sectoral authorities (for instance, sectoral authorities do not inform consumer authorities about irregularities of the UCPD and UCTD directives).

Consumer associations consider that in general terms, complementary application is beneficial.

- Assess any need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law.

According to the ACC, there is a need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law. An only judicial body – administrative or judicial- is needed to check the enforcement of horizontal-sectoral rules, at least in terms of consumer protection. This function should fall into a specialized body.

AECOSAN considers that there is no need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law because in Spain this issue has been solved by introducing the concept of 'abusive practice'.

#### 1.4.3. Relevance of consumer law directives for consumer-to-business transactions

- Please analyse the need and potential for the application of the consumer law directives (mainly UCPD and UCTD) to 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 ACC is of the opinion that consumer directives must be applied to C2B relationships. In Spain and Catalonia, competent authorities are working to expand the concept of 'consumer' (for instance, service platforms in collaborative economics).

AECOSAN is of the opinion that the concept of 'consumer' applies to C2B relationships. For instance, some years ago, at the onset of the economic crisis, shops that bought gold or jewellery from consumers increased and control actions were taken because of the misleading information about prices in both advertising and establishments. In sales of foreign currency in currency exchange offices, the concept of consumer also applies.

Consumer associations also consider that consumer law directives should be applied to C2B relationships, since the aim of these rules is both to protect consumers and to avoid the dominant position of some companies.

#### 1.4.4. Specific protection for vulnerable consumers

##### Please analyse:

- Whether the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined in the consumer law directives and relevant jurisprudence, and as applied by national authorities and courts in your country, continue to be valid and fit for purpose.

According to Article 3 of Royal Legislative Decree 1/2007, the Spanish concept of consumer refers to both (1) individuals acting for purposes that fall outside their trade, business or professional activity, and (2) non-profit legal persons and entities without legal personality acting in a field that fall outside their trade or business activity. This notion does not seem to be controversial.

Regarding the concepts of 'vulnerable consumer' and 'average consumer', see section 1.1.1 above.

In the opinion of the ACC, these concepts are valid and suitable, consolidated by case law.

AECOSAN states that the concept of average consumer is applied to assess commercial business practices of businesses. Children and youth, the elderly and disabled consumers are considered vulnerable consumers. The concept of 'energy poverty', as well as the protection of consumers in situations of economic insolvency in specific and limited situations, has been introduced in consumer legislation.

According to consumer associations, the definition of vulnerable consumer is not clear enough in both regional and state laws. As these concepts are generic, analysis by courts is made on a case-by-case basis.

- To what extent the existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers and whether, based on the experiences in your country, specific provisions should be introduced in other directives concerned, in particular the Unfair Contract Terms Directive.

In the opinion of the ACC, the UCPD protects vulnerable consumers and the grey list should contain a differentiated treatment for these consumers.

According to AECOSAN, some Spanish courts consider unfair the practice that consists of transferring non-performing loans to third parties, for a lower amount than its nominal value, because the debtor is insolvent or several years have passed since the loan was given. Note that, in the Spanish legislation, approval or prior notice to debtors is not needed in credit transfers to third parties. According to some Spanish judges, in the case of personal loans and mortgages, a prior offer to the debtor for repurchasing should exist. It does not make sense that the consumer loses his home and maintains his obligation to pay a higher debt than that the third party has paid to the bank.

Consumer associations commented that the rules of the UCPD are appropriate to protect vulnerable consumers, but they should be periodically updated.

#### 1.4.5. EU added value

- Overall, would you consider that protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in your country since the implementation of the UCPD and the UCTD in national legislation?

Protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in Spain since the implementation of the UCPD and the UCTD in Spanish legislation because these rules have provided legal certainty to consumers and have given a valuable guide for courts and administrative authorities to identify, assess and sanction these practices and terms.

According to AECOSAN, the UCPD and the UCTD have given consumers, consumer associations and authorities some instruments to react against infringements of consumers' rights. They have also promoted the adoption of measures by business associations to comply with the consumer Directives.

- Overall, would you consider that the information of consumers regarding unit prices has improved since the implementation of the PID in national legislation?

Information of consumers regarding unit prices has improved since the implementation of the PID in Spanish legislation. Both consumers and traders have become increasingly familiar to the unit selling price system. However, stakeholders point out that a revision of rules that deal with indication of prices is needed to avoid inconsistencies or overlaps.

According to the ACC, the information about price per unit of measurement is known and implemented.

AECOSAN considers a revision of Regulation 1169/2011 is needed because it establishes unjustified exceptions that have left the PID without effect.

- Overall, would you consider that the protection of businesses against unfair marketing in your country has improved since the implementation of the MCAD in national legislation?

Protection of businesses against unfair marketing has improved since the implementation of the MCAD in the Spanish legislation. However, the use of co-regulation and self-regulation actions must be promoted and an effective tool to deal with cross-border infringements must be established.

According to AECOSAN, protection of businesses against unfair marketing has improved but some limits exist. Decisions of AUTOCONTROL are binding only for companies that sign the code of conduct; in other cases, companies must bring a claim before Spanish courts. Moreover, it seems necessary to regulate parasitic advertising on the Internet.

- Overall, would you consider that it has become easier for businesses in your country to directly trade cross-border to final consumers located in other EU countries in recent years? Has it become easier for consumers in your country to directly purchase cross-border from traders located in other EU countries?

Cross-border trade has become easier for businesses and consumers in recent years. However, it seems necessary that bringing claims in other EU countries also becomes easier.

In the opinion of the ACC, cross-border trade is easier for all parties. Economy, as trade, has become more globalized.

According to AECOSAN, the e-commerce and the number of companies or individual businesses that have created webpages to sell products in different EU countries have increased. It is necessary that mandatory information on webpages become homogeneous to increase consumers' confidence in cross-border transactions.

- Consumer associations: cross-border purchases are easier but bringing claims is more difficult. To what extent are these improvements, if any, due to the mentioned directives?

According to the general impression provided by lawyers, the Ministry of Justice concludes that protection of consumers has improved after incorporation of the directives into the Spanish legal system.

In the opinion of AECOSAN, the consumer law directives have had an important impact on cross-border trade. Companies are aware that authorities are supervising their activities and consumers rely on EU transactions because they have national authorities whom they can address. In order to increase confidence, ECCs should inform national authorities about irregularities.

Consumer associations commented however that improvements do not depend on the rules on consumer protection, but on technical progress.

## Annex

## A. Transposition fact sheet

**Table 1: Fact sheet on transposition of directives in Member States' law – SPAIN**

Directive	Transposition legislation (National law, Article)	Comments	Specific provisions going beyond minimum harmonisation requirements/use of exemptions	Included in national legislation	Comments	
<b>Directive 93/13/EEC on unfair terms in consumer contracts</b>	Act 7/1998. This Act modified Article 10 of Act 26/1984, which was the main legislation about unfair terms in consumer contracts before the adoption of the Directive  Act 26/1984 was included within the Royal Legislative Decree 1/2007	<i>Act 7/1998 only regulates the incorporation and interpretation control of standard terms in B2B and B2C contracts. Royal Decree 1/2007 regulates the content control for B2C contracts</i>	'Black list' of terms considered unfair in all circumstances, although some legal scholars understand that some terms are grey clauses	Yes	Royal Legislative Decree 1/2007, Articles 85-91	<i>National provisions going beyond Directive 93/13/EEC: Articles 85.1, 85.3, 85.4, 85.5, 85.10, 85.8, 85.11, 86.1 (2nd paragraph), 86.5, 86.6, 86.7, 87.5, 87.6, 88.1, 88.2, 88.3, 89.2, 89.3, 89.4, 89.5, 89.6, 89.7, 89.8, 90.1, 90.2, 90.3, 91 of Royal Legislative Decree 1/2007</i>
			Extensions of the application of Directive to terms on the adequacy of the price and the main subject-matter, even in the case where those terms are drafted in plain, intelligible language	Yes	Royal Legislative Decree 1/2007 of November 16, Article 19.5	<i>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 [cfr. ECJ 3.6.2010 (C-484/08, Caja de Ahorros v. Ausbanc), and the Spanish Supreme Court Decision 9.5.2013 (RJ 2013\3088)]</i>

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<b>Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market</b>	Act 29/2009. This Act modified, among others, Act 3/1991 and the abovementioned Royal Legislative Decree 1/2007		Provisions regarding financial services going beyond minimum harmonisation requirements	Yes	Royal Legislative Decree 1/2007, Article 19.5	
			Provisions regarding immovable property going beyond minimum harmonisation requirements	Yes		

<p><b>Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers</b></p>	<p>Royal Decree 3423/2000 and Catalan Decree 73/2002</p>		<p>Extension of the application to other sectors (e.g. for immovable property)</p>	<p>No</p>		
			<p>Use of specific regulatory choices/derogations</p>	<p>Yes</p>	<p>Royal Decree 3423/2000 Article 1.2, Catalan Decree 73/2002 Article 1.3</p> <p>Formal requirements: Royal Decree 3423/2000, Article 4.1 Catalan Decree 73/2002, Article 3.1 and 5</p>	<p><i>Use of option with regard to products supplied in the course of the provision of a service (Traders are not obliged to indicate the unit price for products supplied in the course of the provision of a service)</i></p> <p><i>Use of option with regard to sales by auction (Traders are not obliged to indicate the unit price for products sold by auction)</i></p> <p><i>Use of option with regard to sales of works of art and antiques (Traders are not obliged to indicate the unit price for works of art and antiques)</i></p> <p><i>Formal requirements (Stricter provisions: price must be located in the same visual ambit. Moreover, Catalan Decree requires that the initials PVP goes before the selling price)</i></p>



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			Use of specific regulatory choices/derogations	Yes	Royal Decree 3423/2000, Article 3.3, Annex I  Catalan Decree 73/2002, Article 3.3 and 4	<i>Exclusions of the obligation to indicate the unit price: 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</i>
			Use of specific regulatory choices/derogations	Yes	Royal Decree 3423/2000, Sole Transitory Provision	<i>Derogation for a transitional period that expired on 30 June 2002. Legislative competence was delegated to the Regions, which had the faculty to establish a transitional period to indicate the unit price for products pre-wrapped in pre-fixed quantities and distributed by small retail businesses where the sale was concluded by a seller who dealt personally with the customer and offers the products, and also in the case of itinerant traders</i>

<p><b>Directive 2006/114/EC concerning misleading and comparative advertising</b></p>	<p>Act 29/2009. This Act modified, among others, Act 3/1991 of January 10 on Unfair Competition and Act 34/1988 of November 11 on Advertisement</p>	<p><i>Sole Additional Provision of Act 3/1991 states that “advertising” is defined by reference to Article 2 of Act 34/1988.</i></p> <p><i>Article 18 of Act 3/1991 states that unlawful advertising according to Law 34/1988 is also unfair. If they affect the economic behaviour of consumers, misleading and comparative advertising are subject to the legal regime for misleading and comparative unfair commercial practices in Act 3/1991</i></p>			
<p><b>Directive 2009/22/EC on injunctions for the protection of consumers' interests</b></p>	<p>Act 3/1991, Articles 32-36</p>	<p><i>Other Acts on consumer protection that regulate injunctions: (1) Act 7/1996, Second Additional Provision; (2) Act 34/2002, Articles 30-31; (3) Act 22/2007, Article 15; (4) Act 16/2011, Article 36; (5) Act 4/2012, Article 21.</i></p>			
<p>Act 7/1998, Articles 12, 13, 16, 17, 19</p>					
<p>Act 1/2000, Articles 6, 11, 13, 15, 52, 221, 249, 250, 256, 711 and 728</p>					
<p>Royal Legislative Decree 1/2007, Articles 53-56</p>					

**Table 2: Fact sheet on Injunctions Directive – SPAIN**

Issue	Answer	Comments
<p>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)?</p>	<p>- Yes, separate procedures in a single legal act</p>	<p><i>Act 3/1991 regulates (1) standing, (2) statute of limitations and (3) preliminary proceedings for actions against unfair commercial practices, including injunctions</i></p> <p><i>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</i></p> <p><i>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.</i></p> <p><i>All these rules contain cross-references to external legal texts (usually, Royal Legislative Decree 1/2007 and Act 1/2000).</i></p> <p><i>Act 1/2000 does not provide for tailor-made rules for injunctions (id est, a single procedure), but general rules on civil procedure.</i></p>
<p>Who is entitled to bring an action seeking an injunction?</p>	<p>- Designated public bodies - Specified consumer associations - Individual consumers - Other</p>	<p><i>- 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;</i></p> <p><i>- 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;</i></p> <p><i>- 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);</i></p> <p><i>- Associations, professional corporations or representatives of economic interests: Articles 32 of Act 3/1991, 16 of Act 7/1998;</i></p> <p><i>- 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;</i></p> <p><i>-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.</i></p>

<p>Is the injunction procedure a court or an administrative procedure?</p> <p>If your country legislation foresees both forms of the procedure, please explain in the comments column for which infringements the court or administrative procedure is foreseen</p>	<p>- Court procedure</p>	
<p>Who bears the costs of an injunction procedure?</p> <p>If qualified entities (or some of their categories e.g. consumer organisations are entitled to an exemption of some/all cost related to the procedure please explain the characteristic of such exemption in the comments column.</p>	<p>- Costs are as a rule borne by the losing party: Articles 394.1 (first instance) and 398.1 (appeal) of Act 1/2000</p> <p>- Each party bears its own costs and share common costs if cases are partially upheld or dismissed: Article 394.2 of Act 1/2000</p> <p>-The qualified entities are exempted from costs: Second Additional Provision of Act 1/1996</p>	<p><i>The costs are as a rule borne by the losing party, unless the case poses serious de facto or de iure doubts.</i></p> <p><i>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.</i></p> <p><i>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.</i></p>
<p>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?</p>	<p>- Yes</p>	<p><i>General application of Royal Legislative Decree 1/2007 and Act 1/2000.</i></p>
<p>Is protection of business' interests covered by the injunctions procedure?</p> <p>If scope of application extended to the protection of business' interests, please provide details in the comments column regarding type of business' interests covered by the injunctions procedure</p>	<p>- No</p>	
<p>Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations</p>	<p>- Yes</p>	<p><i>This situation is explicitly foreseen by Article 17 of Act 7/1998 for traders from the same economic sector and their associations when they use identical standard terms that are considered null and void.</i></p>
<p>Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID)</p>	<p>- Yes</p>	<p><i>Article 13 of Act 7/1998 states that parties are able to submit controversial standard terms to the standard terms Registrar before the injunction procedure. The opinion of the Registrar is not binding</i></p>
<p>Has your Member State taken specific measures regarding the prior consultation (Article 5 of the Injunctions Directive)?</p>	<p>- No such requirement</p>	

<p>Does the national legislation provide for measures ensuring summary procedure? Please specify main characteristics of the procedure (subject matter/time limits) in the comments column.</p>	<p>- Yes</p>	<p><i>Summary procedure is regulated by Act 1/2000. According to Article 250, it applies, among others, to (1) injunctions for the protection of collective and diffuse consumers' interests, regardless of their amount; (2) claims whose amount does not exceed EUR 6 000.</i></p> <p><i>Main characteristics (Articles 437-447 Act 1/2000): (i) written claim/counterclaim; (ii) if it is not requested by any of the parties, hearing is not necessary; (iii) legal representatives are needed unless for claims whose amount does not exceed EUR 2 000; (iv) no time limits foreseen by the law.</i></p>
<p>Are there sanctions for non-compliance with the injunction order (Article 2(1) of the Injunctions Directive)? If sanctions in form of penalty or fine foreseen please specify in the comments column to who exactly should they be paid</p>	<p>- Yes, penalty of a fine for each day of non-compliance</p>	<p><i>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.</i></p>
<p>Has your Member State taken specific measures regarding the publication of the decision and/or the publication of a corrective statement?</p>	<p>- Yes</p>	<p><i>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</i></p>
<p>Is it possible to claim within the injunction procedure for sanctions for the infringement?</p>	<p>- No</p>	
<p>Can an action for the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to other beneficiary be brought within the injunction procedure?</p>	<p>- Yes</p>	<p><i>Articles 12.2 of Act 7/1998 and 53 of Royal Legislative Decree 1/2007 state that it is possible to accumulate injunctions (principal action) and actions for the restitution of profits (accessory action)</i></p>
<p>Can an action for damages to be paid to the qualified entity or the public purse be brought within the injunction procedure?</p>	<p>- No</p>	
<p>Can an action for damages or redress to be paid to the consumers concerned be brought within the injunction procedure?</p>	<p>- Yes</p>	<p><i>Articles 12.2 of Act 7/1998 and 53 of Royal Legislative Decree 1/2007 state that it is possible to accumulate injunctions (principal action) and actions for the restitution of profits (accessory action)</i></p>
<p>Can individual consumers base their individual claims for damages/remedies on the injunctions order?</p>	<p>- No</p>	
<p>Can the qualified entity claim other measures beyond the injunction, e.g. evidence of compliance with the judgment?</p>	<p>- No</p>	

Are the effects of individual injunction orders extended to the future infringements and/or same or similar illegal practices (of other traders)?	- No	
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## B. Data tables

*Number of B2C disputes*

Please indicate how many B2C disputes have been decided in your country on the basis of consumer law directives covered by this study (UCPD, UCTD, PID) as a proportion of the total number of B2C disputes decided on the basis of other national consumer legislation (based on statistics, or based on estimates by enforcement authorities and other stakeholders, where this is not the available).

**Table 3: B2C disputes decided on the basis of consumer law directives covered by this study in comparison with total B2C disputes decided on the basis of other legislation (most recent year for which data is available)**

Year	Type of data	Total number of B2C disputes (number of cases)	Share of B2C disputes decided on basis of ...					Comments
			UCPD	UCTD	PID	other EU consumer protection legislation (e.g. CRD, Sales Directive, sectoral legislation)	national consumer legislation not based on EU directives	
n.a.								

No official data is available on B2C disputes decided on the basis of consumer law directives covered by this study.



*Costs of obtaining redress for a hypothetical case of invoking unfairness of a standard contract term*

- Please estimate the costs, including time, for consumers in obtaining redress when invoking the unfairness, and thereby the non-binding character of standard contract terms in a contract they concluded. Please provide the estimate for the hypothetical example below, focusing on costs (and needed time) of a lower court procedure and the use of ADR or other relevant procedure (if applicable).<sup>15</sup>

**Table 4: Estimate of costs for consumers in obtaining redress when invoking the unfairness of standard contract terms in a contract they concluded (for the hypothetical example provided in the box below)**

Redress mechanism	Estimated court fees (national currency)	Estimated lawyer's fees (national currency)	Other costs, if any (national currency)	Estimated time involved for consumer (hours)	Comments
Lower court procedure	EUR 175	EUR 3 150	EUR 150 (procurador)	6 months	
ADR or other relevant procedure	0	0	0	6 months	

Hypothetical example: Terms which inappropriately exclude/limit consumers' rights to compensation

*A consumer went on a package holiday with a friend to Kenya for which they paid € 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 €5,000 (€4,000 for the cost of the package and €1,000 for lost time and enjoyment). The tour operator agreed to compensate them €1,000 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/unfair-contract-terms/index\\_en.htm](http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-contract-terms/index_en.htm)]*

- Please estimate how often court and ADR procedures are used in your country for invoking the unfairness, and thereby the non-binding character of standard contract terms (i.e. the number of cases per year)?

ADR procedures on unfairness: no official information is available.

General information on consumer arbitration in some regions has been obtained from press releases and stakeholders:

<sup>15</sup> For the hypothetical example it is assumed that both the provider and the consumer are located in your country.

- Madrid (1994-2015): 49 000 cases<sup>16</sup>
- Extremadura: 1 070 cases (2012), 700 cases (2014)<sup>17</sup>
- Catalonia: 1 672 arbitration awards (2011), 1 430 arbitration awards (2012), 11 771 arbitration awards (2013)<sup>18</sup>
- Valencia (2015): 44.50% of 11.594 claims referred to contractual offers (29.4% referred to telecommunication claims). 2 423 requests for arbitration before the Consumer Arbitration Board of Valencia of a total of 3 167 requests referred to contractual issues. 740 disciplinary proceedings were opened in Valencia (25 referred to unfair commercial practices and 11 to unfair terms).<sup>19</sup>

<sup>16</sup> Source: <http://ecodiario.eleconomista.es/espana/noticias/6541466/03/15/La-Comunidad-ha-resuelto-49000-casos-de-arbitrajes-de-consumo-en-22-anos.html>.

<sup>17</sup> Source: <http://www.hoy.es/extremadura/201603/16/caen-arbitrajes-consumo-20160316002356-v.html>.

<sup>18</sup> Source: [http://www.govern.cat/pres\\_gov/AppJava/govern/notespremsa/255272/lagencia-catalana-consum-consolida-mecanisme-defensa-drets-consumidors-catalunya.html](http://www.govern.cat/pres_gov/AppJava/govern/notespremsa/255272/lagencia-catalana-consum-consolida-mecanisme-defensa-drets-consumidors-catalunya.html).

<sup>19</sup> Source: AECOSAN.

## C. Interviews conducted and literature reviewed

**Table 5: Interviews conducted for this study**

Organisation	Stakeholder type	Date
Ministry of Justice	Ministry	29.7.2016
Agencia Española de Consumo, Seguridad Alimentaria y Nutrición (AECOSAN; Spanish Agency for Consumer Affairs, Food Safety and Nutrition)	Ministry	2.9.2016
Agència Catalana del Consum (ACC) – Generalitat de Catalunya (Catalan Consumer Agency – Catalan Government)	Ministry	14.10.2016
CUS: Salut, Consum i Alimentació	Consumer associations	16.11.2016
Federació Unió Cívica de Consumidors i Mestresses de Casa de Catalunya (UNAE)	Consumer associations	16.11.2016

**Table 6: Literature reviewed for country report**

Author/Source	Year	Title of publication
Albiez Dohrmann, K. J.	2009	La protección jurídica de los empresarios en la contratación con condiciones generales, Thomson Civitas
Alfaro, J.	2015	La transparencia de las cláusulas suelo según las Audiencias Provinciales
Ariza Colmenarejo, M. J.	2012	La Acción de cesación como medio para la protección de consumidores y usuarios, Aranzadi
Asencio Mellado, J. M. (coord.)	2013	Ley de Enjuiciamiento Civil comentada y con jurisprudencia, La Ley
Bercovitz Rodríguez-Cano, A. (dir.)	2011	Comentarios a la Ley de Competencia Desleal, Aranzadi
Bercovitz Rodríguez-Cano, R. (coord.)	2015	Comentario del Texto Reunido de la Ley General para la Defensa de los Consumidores y Usuarios y otras Leyes Complementarias, Aranzadi
Cámara Lapuente, S.	2016	Control de cláusulas predispuestas en contratos entre empresarios, Almacen de Derecho ( <a href="http://almacenederecho.org/">http://almacenederecho.org/</a> )
Cámara Lapuente, S.	2013	¿De verdad puede controlarse el precio de los contratos mediante la normativa de cláusulas abusivas?, Cuadernos de Derecho Transnacional 5 (2), pp. 209-233
Carrasco Perera, Á.	2010	Derecho de contratos, Aranzadi
Carrasco Perera, Á.	2012	Un mapa de situación: directivas de cláusulas abusivas, de prácticas desleales y de 'derechos' de los consumidores, Revista CESCO de Derecho de consumo, núm. 1/2012 ( <a href="http://www.revista.uclm.es/index.php/cesco">http://www.revista.uclm.es/index.php/cesco</a> )
Carrasco Perera, Á.; Cordero Lobato, E.	2013	El espurio control de transparencia sobre condiciones generales de la contratación, Revista CESCO de Derecho de consumo, núm. 7/2013 ( <a href="http://www.revista.uclm.es/index.php/cesco">http://www.revista.uclm.es/index.php/cesco</a> )
Collins, H.	2005	The Unfair Commercial Practices Directive, European Review of Contract Law 1(4), pp. 417-441 ( <a href="http://eprints.lse.ac.uk/23465/1/Collins_Unfair-commercial-practices-directive_2005.pdf">http://eprints.lse.ac.uk/23465/1/Collins_Unfair-commercial-practices-directive_2005.pdf</a> )
Cordero, E.	2014	¿Protección sectorial y protección consumerista general? De minimis y de maximis. Sobre la reforma del artículo 59.2 del TRLCU, Revista CESCO de Derecho de consumo, núm. 9/2014 ( <a href="http://www.revista.uclm.es/index.php/cesco">http://www.revista.uclm.es/index.php/cesco</a> )
Fernández Cornago, M.	2015	La retroactividad de la declaración de nulidad de las cláusulas abusivas, REDUR 13/2015, pp. 249-268 ( <a href="http://www.unirioja.es/dptos/dd/redur/numero13/fernandez.pdf">http://www.unirioja.es/dptos/dd/redur/numero13/fernandez.pdf</a> )
Gomez Pomar, F.	2006	The Unfair Commercial Practices Directive: A Law and Economics Perspective, InDret 1/2006 ( <a href="http://www.indret.com/pdf/330_en.pdf">http://www.indret.com/pdf/330_en.pdf</a> )
Gomez Pomar, F.; Ganuza, J. J.	2014	The Role of Choice in the Legal Regulation of Consumer Markets: A Law and Economic Analysis, InDret 1/2014 ( <a href="http://www.indret.com/pdf/1035.pdf">http://www.indret.com/pdf/1035.pdf</a> )
González Vaqué, L.	2014	La protección de los consumidores vulnerables en el derecho del consumo de la UE [el Programa plurianual para el período 2014-2020], Revista CESCO de Derecho de consumo, núm. 10/2014 ( <a href="http://www.revista.uclm.es/index.php/cesco">http://www.revista.uclm.es/index.php/cesco</a> )

González Vaqué, L.	2013	La Directiva UE sobre las prácticas comerciales desleales: una cosa es predicar y otra dar trigo..., <i>Deloitte - CISS (grupo Wolters Kluwer)</i> Iss. No. 77 ( <a href="http://works.bepress.com/luis_gonzalez_vaque/33/">http://works.bepress.com/luis_gonzalez_vaque/33/</a> )
Lema Devesa, C. (Dir.)	2012	Prácticas comerciales desleales de las empresas en sus relaciones con los competidores y consumidores, Bosch
Mambrilla Rivera, V.	2008, 2009, 2010	Prácticas comerciales y competencia desleal: Estudio del derecho... (I), (II), (III), <i>Revista de Derecho de la Competencia y la Distribución</i> , 2008, (4): 89-120; 2009, (5): 107-152; 2010, (6): 75-116
Marín Castán, F. (dir.)	2015	Comentarios a la Ley de enjuiciamiento civil, Tirant lo Blanch
Marín López, M. J.	2010	La 'lista negra' de prácticas comerciales engañosas con consumidores ( <a href="http://www.administracion.usmp.edu.pe/institutoconsumo/wp-content/uploads/2013/08/Practicas-comerciales-enga%C3%B1osas-Espa%C3%B1a-2010.pdf">http://www.administracion.usmp.edu.pe/institutoconsumo/wp-content/uploads/2013/08/Practicas-comerciales-enga%C3%B1osas-Espa%C3%B1a-2010.pdf</a> )
Martí Moya, Vanessa	2012	Consecuencias del principio de armonización plena de la Directiva 2005/29 sobre prácticas comerciales desleales, a la luz de la reciente jurisprudencia del TJUE, <i>Revista de Derecho mercantil</i> 283, pp. 325-342
Massaguer, J.	2006	El nuevo derecho contra la competencia desleal, Thomson Civitas
Newman Rodríguez, S.	2010	La protección de los competidores en Europa: comentario a la Directiva 2006/114/CE sobre publicidad engañosa y publicidad comparativa (versión codificada), <i>Revista General de Derecho Europeo</i> 22 ( <a href="http://www.iustel.com/v2/revistas/detalle_revista.asp?id=13&amp;numero=22">http://www.iustel.com/v2/revistas/detalle_revista.asp?id=13&amp;numero=22</a> )
Pertiñez Vilchez, F.	2013	Información precontractual obligatoria, error, prácticas comerciales desleales, in Carrasco Perera, Á. (dir.), <i>Tratado de la compraventa</i> , vol. I, Aranzadi, pp. 379-388
Pertiñez Vilchez, F.	2013	Falta de transparencia y carácter abusivo de la cláusula suelo en los contratos de préstamo hipotecario, <i>InDret</i> 3/2013 ( <a href="http://www.indret.com/pdf/995.pdf">http://www.indret.com/pdf/995.pdf</a> )
Ribón Seisdedos, E. (coord.)	2010	Las prácticas comerciales desleales, CEACCU ( <a href="https://www.uclm.es/profesorado/mjmarin/invest_cap_16.pdf">https://www.uclm.es/profesorado/mjmarin/invest_cap_16.pdf</a> )
Ruiz Peris, J. I.	2011	La Reforma de la ley de competencia desleal, Tirant lo Blanch
Schulte-Nölke, H; Twigg-Flesner, Ch.; Ebers, M. (eds.)	2008	EC Consumer Law Compendium, Sellier
Tejedor Muñoz, L.	2010	Algunos supuestos de publicidad engañosa, <i>Revista crítica de derecho inmobiliario</i> 717, pp. 337-350

# 1. Study to support the Fitness Check of EU Consumer law – Country report SWEDEN

## 1.1. Unfair commercial practices and marketing

### 1.1.1. Effectiveness of the UCPD in establishing a high level of consumer protection

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

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

The UCPD is transposed into Swedish law in the Marketing Act (2008:486). The aim of the Act is to promote the interests of consumers and business regarding the marketing of products and to work against unfair marketing practices in the interests of consumers and business operators. The Marketing Act is based partly on three general provisions and partly on a number of more detailed prohibitions (catalogue rules). The first general provision concerns good marketing practices. The second concerns aggressive practices. The third general provision concerns advertising that is misleading. The catalogue rules apply to specific types of unfair marketing. The Swedish national system covers both court and administrative injunction procedure. Claims can be brought to the Patent- and Market Court (MD)<sup>1</sup> by the Consumer Ombudsman or a business operator affected by the advertising or an association of consumers, business operators or employees. Less important cases can be determined by the Consumer Ombudsman themselves based on an administrative injunction procedure, which procedure is only available for the Consumer Ombudsman. If the Consumer Ombudsman decides not to take action in a particular case, an individual business operator who has been affected by the advertisement or an association of business operators can take action.

As mentioned above, the aim of the Marketing Act is to set a general standard on marketing and market competition. There is an ongoing debate as to whether the Marketing Act and other related acts are effective.<sup>2</sup> According to Nordell,<sup>3</sup> the market is considered to function effectively. The number of court cases from the Patent- and Market court is approximately 30 cases per year. Given that today's average consumer is relatively aware and familiar with modern methods of marketing and knowledgeable about their legal protection, many have started to ask if some parts of legislation for marketing are becoming over-regulated. On the other hand, there are still a number of unfair marketing measures that also stubbornly recur. The clearest example relates to weight loss and health products, but also to consumer credit in the form of instant loans.

There are several court cases from the Patent- and Market Court referring to the black list. In MD 2010:15, for example, a company marketed a margarine mixture as 'softened butter', but the margarine mixture did not meet the requirements to qualify as butter under food legislation. The Market Court stated that, according to p. 9 of the blacklist, it was forbidden to state or otherwise create the impression that it was legal to sell a product as butter when that was not the case. The marketing was therefore misleading under the Directive.

The Supervisory Authority, which mainly supervises financial institutions, is satisfied with overall effectiveness of this Directive in the area of financial services. The

<sup>1</sup> In 2016 the Patent- and Market Court changed its name from the Market Court to the Patent- and Market Court.

<sup>2</sup> See Nordell, P J, *Marknadsrätten*, 5 ed., p. 122-124.

<sup>3</sup> Professor of private law and expert on intellectual property law and market law at Department of law, Stockholm University.

problem areas that exist are connected to payment services, insurance services and investment advisors.

Another stakeholder expressed satisfaction with the overall effectiveness of this Directive. The Directive inhibits certain behaviours and harmonizes the market, but there is still a question of how to update the black list. The stakeholder questions the guidelines on the application of the UCPD which were updated on 25 May 2016. The purpose of the guidelines is to facilitate the proper application of the UCPD. However, business organisations are uncertain about the legal status of these guidelines. The stakeholder stresses that the UCPD is not on top of the minds of the traders just now. On their minds is the Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

Some stakeholders express that the Directive is effective and important for consumer protection, in particular because it is applicable to all situations, goods and services. The overall picture is that the traders generally obey the rules in the Marketing Act, thus the Directive is effective.

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

The enforcement authority considers that it is useful to have a black list. If such a list would not exist, the authority would have to use the general clauses regarding good market practice in the Marketing Act in order to argue that a certain condition would be against good marketing practice. This is more difficult than using a black list. With a black list, the enforcement becomes more effective.

According to the Patent- and Market Court practice, the black list is binding to all traders but the list should not be interpreted extensively. See court cases MD 2009:33, 2013:3, and MD 2016:9. If a certain term is not listed on the black list, it means that the competent authority must argue that the condition is against good market practice. The list is difficult to apply, for example, in the case of credit agreements. In order to solve this problem, the Consumer Agency points to the regulation in the Act regarding insurance agreements (2005:104), which gives good protection for the consumers. In Chapter 2 of the Act regarding insurance agreements, which regulates insurance for consumers, there is minimum regulation on what kind of information should be given to a consumer regarding insurance. Similar provisions are found in Chapter 3 of the Act (2005:59) regarding distance contracts (financial services). There is also an agreement between the Consumer Agency and the Swedish Investment Fund Association regarding guidelines for marketing and information and advice on funds.

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

The Supervisory Authority stresses that the Swedish legislator has been careful not to go further than what is required in the Directive. They adopt the perspective that it is better for the consumers if the rules are as harmonised as possible, as business is cross-border in its character. One stakeholder is positive toward minimum harmonization for financial services and immovable property.



- 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 what 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?*]

As of yet, the enforcement authority has not applied the UCPD in the context of environmental claims. The stakeholders point to the fact that there are hardly any recent court cases. Several court cases from the Patent- and Market Court were decided more than ten years ago. It is also difficult to use environmental arguments for new technology. Therefore, it is difficult to draw any conclusions on the efficiency of the Directive. However, the International Chamber of Commerce (ICC) rules on marketing can provide some guidance.

Some traders have been fined for misleading practices in the energy/environmental context. One stakeholder in the energy retail business acknowledges that misleading environmental practices are quite common in the energy area. Thus, the Consumer Agency has inspected the use of misleading practices on the energy market and has said that it will impose future measures. These two court cases MD 2011:12 and MD 2004:12 can be mentioned as example of misleading practices. In the first case, a company had in its advertising for passenger cars used the term 'environmentally friendly'. This advertising was *inter alia* considered contrary to good marketing practice.<sup>4</sup> The company had also used terms like 'green diesel', 'help the environment' and 'good for the environment'. This part of the marketing was not considered contrary to good marketing or misleading.<sup>5</sup>

- 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 your country rigidly?*]

As the preamble to the UCPD states, the concept of the average consumer is not static. In some cases, the circumstances require that the court must differ from the average consumer as a hypothetical norm. If the marketing is directed at children, it is desirable that the assessment is made in the perspective of the average recipient of this consumer group.

The overall picture is that concept of 'average consumer' works well in practice as it can be adjusted for different markets. Swedish consumers are also well informed and educated of their rights. However, Swedish consumers are usually unsure when they act on the energy market and therefore more vulnerable to unfair commercial practices. Due to the Swedish social welfare acts, 'energy poverty', i.e. being unable to afford heating or electricity, is not common.

Some stakeholders are not content with the concept as it could be 'narrowed down'. It would also be helpful if there were a better or more detailed guide explaining how to interpret the average consumer concept. The concept has been given different meanings depending on the business sector in question. In court cases, legal representatives have put in a lot of time to argue that an average consumer within a specific sector is more knowledgeable in that sector than an average consumer overall (see court cases MD 2011:30 and MD 2011:12). See also MD 2014:18, where the concept of average consumer was discussed. There is a discussion in scholarly writing regarding the cognitive abilities of consumers and the balance between the consumer

<sup>4</sup> It was contrary to 5 § of the Marketing Act, which is the first general provision in the Marketing Act on good market practice. See above.

<sup>5</sup> See also Consumer Agency's guidelines for information on new passenger car fuel consumption and carbon dioxide emissions (KOVFS 2010:3).

and the trader, especially when it comes to contracts regarding consumer credit.<sup>6</sup> Such contracts are more complex and when such a standard contract is used with consumers as a whole, there will always be a number of consumers which may not be adequately protected as they cannot comprehend the contract.

- 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 in your country recognised new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted)?*]

Neither the enforcement authorities nor the courts have recognised new categories of vulnerable consumers. Unfair contracts terms for these categories of consumers are dealt with in section 36 of the Contract Act. This provision provides that a contract condition may be adjusted or disregarded if it is unfair, having regard to the content of the agreement, the circumstances in which the agreement was made, and the supervening conditions and circumstances generally. Some of the stakeholders suggest that senior citizens and over-indebted consumers should as a group be given more attention as vulnerable consumers.<sup>7</sup> They also point to new categories of vulnerable consumers – migrants – due to the migration crisis. These new consumers that come from an entirely different market may have problems in the Swedish market as they may not be as well informed or educated about their rights as native Swedes.

- 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?*]

In Sweden, there is a long tradition of self-regulation in consumer affairs.<sup>8</sup> It is also quite common that the Consumer Agency and the organisations of business traders conclude agreements on good market practices. It is common that the business organisations have their own 'Complaint Boards'. The overall conclusion is that self-regulation is useful and effective. Organisations such as the Swedish Banker's Association, the Swedish Securities Dealers Association and the Association of Swedish Finance Houses develop industry guidance and standards of best practice for their members in the financial sector, which take care of many issues. In order to ensure that the International Chamber of Commerce's regulatory system for marketing measures are met in the areas not covered by the Marketing Act and related legislation, the business sector has on its own initiative set up the Advertising Ombudsman (RO) and the Advertising Ombudsman's opinion committee. RO examines matters of advertising that are unethical or otherwise contrary to good marketing ethics. It can act on its own initiative or following a complaint from the public, businesses, governments and other organizations. In addition, RO provides guidance and information regarding marketing ethics. In clear cases, RO provides an acquittal or a conviction decision. More complex or fundamental questions are submitted for consideration to the committee.

As mentioned above, the business sector has on its own initiative taken up self-regulation. Agreements are often reached between the Consumer Agency and the industry. However, sometimes the industry can without much notice deviate from the agreement, which can be detrimental towards consumers. As an example, the Consumer Agency points to an ethical rule regarding marketing that the industry now

<sup>6</sup> See Henrikson, Ann-Sofie, Överskuldssatt och skyldig. En rättsvetenskaplig analys av konsumentskyddet mot överskuldssättning, 2016, pp. 225 and there given references.

<sup>7</sup> See Patent- and Market court cases, MD 2007:17, MD 2010:6 and MD 2010:31.

<sup>8</sup> Haglund, Lars., Lagstiftning eller självreglering- vad tycker lagstiftaren? SvJT 2001 p. 263 ff.

ignores, namely that it is not acceptable to send information through text messages in mobile phones to persons who have not consented to it.

Other self-regulation initiatives are for example SWEDMA, which is an association of companies and organizations that work with direct and data-driven marketing. SWEDMA (Swedish Direct Marketing Association) contributes *inter alia* to the ethics committee for direct marketing. The Board examines matters relating to the implementation of good market ethics. The Board also issues opinions, holds discussions with the authorities and provides information on matters related to direct marketing. Another actor is Insurance Sweden, whose aim is to promote good business conditions for the insurance industry. They also work to increase confidence for the industry as well as knowledge of the importance of private insurance in society.

In the energy market, there is an action plan for ethical business practices for traders owning the networks. The action plan deals with some infringements, for example with unfair contract terms and misleading advertising. The plan is prepared by the Consumer Authority and an organisation owned by the telecom operators. Thus, the Consumer Agency and this organisation have the mission to provide impartial and free information to consumers. A challenge in this area is the rapid technological development in this area: it is difficult to connect law and rules with the technology. It is also difficult to find a good balance between general rules and specific rules.

To conclude, it can be drawn from the above that it is vital to stimulate the market to self-regulation, in dialogue with the authorities. It is a better choice in order to create a well-functioning market. The traders are often also willing to form sector based agreements and this works well. Self-regulation works more efficiently than the Marketing Act when it comes to protecting traders in business-to-business situations. Taking a case to court is time-consuming and expensive. Self-regulation is also more familiar to traders.

- 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?

Most stakeholders do not suggest any amendments. However, the Consumer Agency seems to favour an extension of the list and welcomes the following changes:

- Prohibition of the seller pretending to be an authority or organization;
- Prohibition against indicating that the selling company is acting on someone's behalf, when this is not the case. It is common in Sweden for the seller claiming to act on behalf of a large telephone company, for example, which is not true;
- Prohibition against subscription traps. The seller 'lures' the customer with a gift for free, but in reality, the customer agrees to buy 30 pieces of this product;
- Prohibition against sellers that claim that they can deliver a product even though they cannot guarantee it. It is common that the seller advertises to sell tickets to a concert that will be purchased from the concert organizer, but the tickets have not even been released by the organizer yet;
- Prohibition of the so-called negative contractual effect. The main rule in Swedish law is that you have to accept an agreement to be bound by it. A consumer cannot be bound because of his or her inaction. Negative sales methods are not accepted. An example of this is that sometimes a seller submits invoices for goods without the consumer having ordered anything actively. As for renewals of insurance or subscriptions, these may be allowed with negative contractual effect: the seller can send out an invoice with a payment slip and the recipient becomes liable if they do not actively indicate that they do not want to renew the agreement.

The Consumer Agency also emphasizes that it should be easier to introduce new practices to the list. They suggest that the list could be updated.

- Are there other measures that could improve the effectiveness of the UCPD in establishing a high level of consumer protection in your country? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

In Sweden, there have been several proposals and amendments of the legislation to promote a higher level of protection for consumers. A good measure to strengthen consumer protection has been to require that the contract should be in writing if it concerns a service regarding pension plans and the contract has been offered by telephone. See Chapter 3, Section 4a § of the Swedish distance Contract Act (2005:59).

The Consumer Agency points to Art. 13 in the Directive, where it is stipulated that the Member States shall lay down penalties for infringements of national provisions adopted in the Directive and take necessary measures to ensure that these are enforced. The penalties must be effective, proportionate and dissuasive. The Consumer Agency suggests that it would be better to have harmonised rules for penalties. In Sweden the penalty is low in comparison to some other Member States. Stakeholders suggest that it would be better if the penalty was not a fixed sum and rather tied to the seller's percentage of turnover. See also Chapter 3, 6 § in the Swedish Competition Act (2008:579) and the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. See also the 2016 Proposal of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws (COM (2016) 283) and the current Regulation on Consumer Protection Cooperation ([EC] No. 2006/2004).

#### 1.1.2. Effectiveness of the PID in establishing 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;

The Pricing Act (2004:347) is partly an implementation of the PID and the codification of the Consumer Agency's guidelines as interpreted by the Patent- and Market Court practice. The purpose of this Act is to promote good price information for consumers. Price information must be accurate and clear, and must be submitted in such a way that it is clear to consumers to which product the information relates. Similar legislation is being implemented for financial services through Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features.<sup>9</sup>

The overall picture is that the traders obey the PID rules. One stakeholder points out that it is difficult to judge if an advertisement is an invitation to purchase or if it is not. Most stakeholders have not noted any severe problems. Court cases and complaints are rare. However, the Consumer Agency has exercised its supervision and found that some prices suffered from insufficient clarity.<sup>10</sup> According to Nordell, the Pricing Act runs into difficulty in practice. The requirements in the Act to specify the correct prices, which also apply in shop windows, are not sufficiently being observed. The problem is more evident in some sectors than in others. There are also few opportunities for the Consumer Authority to prosecute such violations.<sup>11</sup>

<sup>9</sup> See lag (2016:415) om förmedlingsavgifter för kortbaserade betalningstransaktioner.

<sup>10</sup> See Consumer Agency's regulations on price information (KOVFS 2012:1.(Konsumentverkets föreskrifter om prisinformation).

<sup>11</sup> See Nordell, J. P, Marknadsrätten, 5 ed., 2010, p. 124.

- 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?

Liquid products such as detergents and soaps tend to have the price per litre. Consumer Agency regulations for price information state that the price should be indicated per litre if the seller has not set a recommended dose. It has been argued that it would be better if the Consumer Agency demanded that the recommended dose be specified and that the unit price be provided per dose. With the unit price per litre the producers are encouraged to supply more diluted products.<sup>12</sup>

- The effects of the regulatory choices/derogations allowed by the Directive and applied by Member States. [*Key aspects to consider are: Is the derogation relevant? Do companies make use of it? Are there consumer complaints because of this? If so, approximately how many per year?*]

Not relevant for Sweden.

### 1.1.3 Effectiveness of the MCAD in providing protection for businesses

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

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

The Directive is implemented in the Marketing Act. The supervising authority is the Swedish Competition Authority. Sweden has taken advantage of the minimum harmonisation level of the Directive and thus introduced a wider scope of protection than the Directive demands. The provisions on misleading and comparative advertising are covered by the entire Marketing Act, which means that businesses enjoy the same legal protection as consumers. This wider scope has been favourable. The Marketing Act applies to marketing which refers to advertising and other measures of economic activity that are likely to promote the sale and availability of products to consumers and business actors. A fundamental flaw in the Swedish Marketing Act is that it provides no principle of protection against purely unfair competition. Unfair marketing is only one type of unfair competition. Against unfair conduct between competitors, there is not much protection. It can be compared against the legal situation in other countries where there is a general ban on unfair competition.<sup>13</sup> However, according to 47 § Marketing act any trader can sue another trader for breaking the rules in the Marketing Act. The Patent- and Market Court has several such cases every year, but it is difficult to have an opinion about the effectiveness of the principle-based approach to misleading advertising under this Directive. No authority supervises compliance with the Directive in B2B relations.

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

See above.

<sup>12</sup> See Domeij, Å, Kan fel jämförpris leda till mer transporter?,<sup>1st</sup> of June 2012.

<sup>13</sup> See Nordell PJ., Marknadsrätten, 5ed, p. 124.



- The effects of the minimum harmonisation provisions on misleading advertising; *[Key aspects to consider are: 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)?]*

In Sweden, the Directive has been implemented in the form of a specific provision on comparative advertising in section 18 of the Marketing Act. As a general rule, comparisons in advertising with other businesses' operations and products are allowed. There are, however, demands that the comparisons should be accurate, relevant and otherwise appropriate. The Patent- and Market Court has ruled that when comparisons are made, high demands are put on the comparison, especially when referring to named competitors' goods and services. The requirements for a comparison to be permitted are listed in the legal provisions in eight points. The requirements are cumulative; all specified requirements have to be satisfied and the demands are high. However, the requirements largely overlap with what is already demanded according to the Marketing Act's general rules. According to Bernitz, it is difficult to design comparative advertising which simultaneously meets the requirements and is commercially powerful.<sup>14</sup>

If a trader violates 18 § of the Marketing Act (accurate comparisons in advertising with other businesses' operations and products), the other company can bring an action against that trader at a general civil court, if the Consumer Ombudsman decides to not bring an action, according to 29 § of the Marketing Act. According to a forthcoming amendment in the Marketing Act, a trader whose marketing is contrary to the Marketing Act can either be prohibited from continuing with the particular marketing campaign or be required to provide information so that the marketing is no longer misleading. Originally, the infringing trader would have to accept the order of the Consumer Ombudsman within a certain amount of time for the order to become valid and approved as a final judgement. On the 1<sup>st</sup> of October 2016, a new law to strengthen the authority of the Consumer Ombudsman came into effect, proposing that the prohibitions and obligations which the Consumer Ombudsman may decide upon would no longer be dependent on whether or not the infringing trader accepted the order of the Consumer Ombudsman. It is proposed by the legislator that the Consumer Ombudsman should be given the opportunity to decide that such decisions should apply immediately.<sup>15</sup>

Another observed problem is that it takes a long time from the observation of misleading or comparative advertising until a legal action against such advertising is taken. In many cases the legal action is taken too late and may introduce distortions of competition.

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

There are no specific effects of full harmonization. However, the general opinion is that full harmonisation is good. As already mentioned, however, there are overlaps between different acts. At the same time some questions remain unresolved. Whether copyright or other intellectual property rights in some cases give way to enable comparative advertising is still an open question. From a Swedish perspective, it may seem strange that an author whose work is used in comparative advertising cannot argue that this use constitutes copyright infringement.<sup>16</sup> Clarifications on issues that distinguish lawful from unlawful comparison would be welcomed by the traders.

<sup>14</sup> See Bernitz, U, *Svensk och europeisk marknadsrätt* 2, 2013 p. 133.

<sup>15</sup> See proposition 2015/16:168 and Ds 2015:45.

<sup>16</sup> See Cederlund, K., *Bubbel eller champagne? Om immateriella rättigheter i jämförande reklam*, Festskrift till Marianne Levin, 2008, s. 194.

- 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;

No specific experiences reported other than those stated above.

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

No specific experiences reported other than those stated above.

- Are there measures that could improve the effectiveness of the MCAD in providing protection for businesses (see also 1.1.6 below)? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

In order to protect businesses, the Swedish legislator has taken vigorous action against the problem of false invoices. A false invoice is an invoice that is sent out without prior contact between the trader and another trader or a consumer. Also falling within this category are 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 where it is difficult to see that it is actually an offer. A false invoice can also refer to a claim for payment for a good or service that the trader/consumer has never ordered. It can also refer to a product or service where the cost is not in proportion to what has been delivered. As already mentioned, the legislator has taken vigorous action and proposed several amendments in private law, marketing law and penal law in order to address the problem of false invoices.<sup>17</sup>

#### 1.1.4 Effectiveness of current rules 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;

The UCPD has been implemented in the Member States with very different methods and at different levels.<sup>18</sup> Thus, this principle-based approach leaves room for divergences. However, the stakeholders do not report any major problems.

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

No specific experiences reported other than above.

- Whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade. [*Do the national differences play a role in a business perspective? Have they caused problems?*]

No specific experiences reported other than above.

<sup>17</sup> See SOU 2015:77.

<sup>18</sup> Bernitz, Ulf, Den europeiska avtalsrätten och standardavtalen mellan näringsidkare. Festschrift till Lars Gorton, 2008 pp. 35. See also Bernitz, U., Svensk standardavtalsrätt och EG-direktivet om oskäliga avtalsvillkor, SvJT 1995 pp. 625.



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;

No specific experiences reported.

- Whether the minimum harmonisation character of provisions on misleading advertising represents a barrier to cross-border trade;

No specific experiences reported other than above.

- 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;

No specific experiences reported other than above.

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

No specific experiences reported other than above.

#### 1.1.5 Interplay amongst UCPD information requirements according to Article 7(4) with the information requirements in the horizontal consumer law instruments

Regarding the information requirements according to Article 7(4) UCPD ("invitation to purchase") in the advertising stage, please analyse:

- The level of awareness of traders as regards information requirements at the advertising stage, as in particular demonstrated by their practical application; [*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?*]

Article 7 (4) is incorporated in § 12 of the Marketing Act. A trader or anyone acting on their behalf may be required to pay a special fee to the State, if the trader intentionally or negligently violates 12 §, cf. § 29. According to Nordell, misleading prices have become increasingly common.<sup>19</sup> This is most evident particularly concerning marketing claiming to be the cheapest. In the court case, MD 2009:38, a company was forbidden to advertise its prices as the cheapest, as they could not prove that this was true. In another court case, MD 2015:2, marketing regarding an online dating service was considered to be in violation with 12 §, as the price and the right of withdrawal and cancellation of the contract were unclear or/and misleading, and contact information was incorrect.

The level of awareness of traders regarding the information requirements is good, but the level is different in different sectors.<sup>20</sup> Relatively new business operators, which provide for example instant loans to consumers, do not conform to the rules in the same way.<sup>21</sup> The energy market is strictly regulated in the Energy Act regarding

<sup>19</sup> See Nordell, P J., *Marknadsrätten*, 5 ed, 2010, p. 72.

<sup>20</sup> See Directive 2007/64/EC on payment services which contains several information obligations for the service provider. The directive is implemented through the law (2010:751) om betaltjänster.

<sup>21</sup> See Persson, A. H., & Henrikson, A-S., *Regulation of instant loans and other credits in Swedish law*, *Juridica International* 2014 p. 57-70.

advertisement and how an invoice should be drafted. The traders comply with these regulations.

However, one issue that attracts criticism is the amount of information that must be provided to the consumer, who for various reasons often will not read it. According to stakeholders, 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.<sup>22</sup> However, another issue is that the traders usually argue that there are limitations in the medium used which stop them from including all necessary information. Therefore, it should be discussed whether the information requirements in Article 7(4) should be applicable to all types of products depending on the medium. A third issue is that the information requirements in the UCPD and CRD are not the same.<sup>23</sup> The stakeholders think that the information requirements should be aligned. A fourth issue regards misleading advertisements with pop-ups on social media, for example subscription traps or car evaluation services. A lot of companies do not know how they should make the advertisement and how clear it must be. Therefore, the traders often do not provide information about the cooling off period and price information.

- 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?

Overlap between the UCPD and the E-commerce Directive is reported by stakeholders. The E-commerce Directive (2000/31/EC) is implemented in the Act (2002:562) on electronic commerce and other information services. According to § 8, the service provider must provide, *inter alia*, information about their name, address, email address, and where applicable, registration number, VAT number and the competent licensing authority. If the service provider is indicating prices, these must be clear and unambiguous. The Service Directive (2006/123/EC) is implemented in the law (2009:1079) on services on the internal market. According to 10 §, the service provider must always on their own initiative provide the consumer with information that makes it possible for the consumer to get in touch with the service provider. Where appropriate, information shall also be provided, *inter alia*, regarding registration number, contact information for the competent licensing authority, VAT number, standard terms and conditions, terms of applicable law and the competent courts.

The multiplicity of information obligations naturally creates costs for the traders. These Directives should be brought in line with each other.

#### 1.1.6 Relevance for business-to-business transactions

Regarding the area of unfair commercial practices/marketing, please analyse:

- 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 cross-border trade;

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,

<sup>22</sup> See requirement of information before a consumer contract is entered, 22a § of the Marketing Act.

<sup>23</sup> See 22a § p. 4 in the Marketing Act, which is based on CRD and 12 § p. 4 in the Marketing Act, which is based on UCPD regarding additional costs on delivery. The requirements are not the same. Compare also the time to give information, 12 § Marketing Act regarding invitation to purchase and 22a § Marketing Act regarding information requirements before a contract is entered into.

which has been updated in order to fulfil the Unfair Contract Terms Directive. The purpose of the law concerning contract terms between traders is to prevent big businesses taking advantage of a smaller firm's inferior position to extort terms to the smaller company's disadvantage. There are only a small numbers of court cases from the Patent- and Market Court, even though the law has been in force for 30 years (see inter alia MD 1995:3, MD 2006:30 and MD 2010:12). According to both Bernitz and Nordell,<sup>24</sup> the law on contract terms between traders has not had any real impact in practice. According to Bernitz, it may have played a role such as an argument in trade negotiations regarding standard contractual issues. There is also a possibility to adjust an unfair term with 36 § of the Contract Act. Such an application may only be made by an association of traders, by another association which has a legitimate interest in representing the trader or by a single trader against which the current clause has been set up.

There is no specific authority that protects the small companies against the bigger ones. Problems with increasingly longer payment periods are still present, which may be a concern for small businesses. This is especially true when trading with companies in another country.<sup>25</sup> On the other hand, there is no need reported that requires the application of consumer legislation to business-to-business transactions.

- 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;

No specific experiences or literature to mention other than stated above.

- 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 also cover unfair commercial practices during and after the transaction;

No specific experiences or literature to mention other than stated above.

- Whether there is a need to have a black-list of practices in the business-to-business marketing area;

No specific experiences or literature to mention other than stated above.

- What should be the enforcement cooperation mechanism in the business-to-business marketing area;

No specific experiences or literature to mention other than stated above.

- Whether there is a need to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive;

No specific experiences or literature to mention other than stated above.

- Whether there is a need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive.

No specific experiences or literature to mention other than stated above.

<sup>24</sup> Bernitz, U., Standardavtalsrätt, 8 ed. 2013, p. 204-207 and Nordell, PJ, Marknadsrätten, 2010, p. 103.

<sup>25</sup> Compare Directive 2011/7 on combating late payment in commercial transactions.

### 1.1.7 Relevance of contractual consequences of unfair commercial practices

Please analyse whether there are in your country:

- 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;

According to Swedish law a contract is not void just because it is misleading. If a condition is unfair to the consumer, the Patent- and Market Court can prohibit a trader from using such a condition in the future, see law (1994:1512) Consumer Contracts Terms Act. The ban can be combined with a fine. The application for such a prohibition may be made by the Consumer Ombudsman. If the Consumer Ombudsman decides not to file such an application, it can be made by an association of traders, consumers or employees.

A contract term that is unfair can also be reconciled or disregarded according to 36 § of the Contract Act after being proved to be unfair in a general court or by the Swedish National Board for Consumer Complaints. The rule is designed in such a way that it can be applied in particular to benefit a weaker party, such as a consumer in relation to a trader, even though the rule can also be applied to equal parties to a contract. The idea of 36 § is that it shall serve as a last resort for situations involving rights worthy of protection if and when specific consumer protection legislation cannot be applied.

The main scheme for settlement of disputes between individual consumers and individual business operators is through the Swedish National Board for Consumer Complaints. This is a public body for out of court dispute settlements specializing in business to consumer matters. The Board's main task is to adjudicate disputes between consumers and traders concerning a product, service or other commodity which the trader has provided to the consumer. The verdict of the Board is not enforceable. Nevertheless, there is a high rate of compliance to the recommendations of the Board, with approximately 75% of business operators following the Board's recommendations.

The stakeholders all stress that the traders are familiar with the legislation such as the 36 § of the Contract Act, the law (1994:1512) on contracts terms in consumer relationships, and the fact that the consumer can turn to the National Board for Consumer Complaints. Some stakeholders stress that there is a need in some sectors to achieve better compliance with the legislation. Problems have been noticed regarding subscription traps and car evaluation services. According to the stakeholders, there should be contractual consequences if the trader does not comply with the legislation. The stakeholders hope that there will be a case raised in court regarding contractual consequences in respect of misleading advertisement and the outcome of that case would be that the contract should be declared void and/or damages awarded to the consumer. The Consumer Agency also points to 19 § of the Swedish Consumer Sales Law (1990:932), where it is stated that a fault exists if the goods do not conform to such data on the characteristics of goods or use the vendor supplied in the marketing. The consumer has in such a situation the right to cancel the contract and claim damages, 22 §.<sup>26</sup> A similar provision can be found regarding services in the Consumer Services Act (1985:715). Disputes between a trader and a consumer regarding a fault in the goods are decided by the general courts or National Board of Consumer Complaints (ARN), not the Consumer Agency.

<sup>26</sup> See case law regarding consumer sales, ARN 1995/96 ref. 49 where a consumer bought a car that had electronic immobilizer that did not meet the foregoing in marketing. See similar questions in ARN 1998 ref. 31 and ARN 1995/96 ref. 74.

- Any case law (enforcement decisions, court rulings) providing for such consequences;

Example of case law regarding the law on contract terms towards consumers (1994:1512) are for example MD 2009:35. A company had used terms in a consumer contract for internet and telephone subscriptions to the effect that during the term of contract the company had the right both to immediately raise the price by 10%, and in some cases increase the price by up to 100% and also raise the price due to conditions that the company had no control over or could not reasonably foresee. These conditions were considered unfair.

- Whether there is, based on past experience in your country, a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

See above.

## 1.2. Contract conclusion and performance

### 1.2.1. Effectiveness of the current rules in establishing 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;

A new law was introduced in 1994 (SFS 1994:1512) to transpose the UCTD. However, Swedish law and practice already corresponded to the UCTD and the new law resulted only in some amendments and clarifications. An important change, however, has been its indicative list of unfair terms.<sup>27</sup>

The overall impression from the evidence is that this Directive is effective and the application of the Directive works well. The indicative list is a good tool in order to be able to interpret what is meant by unfair terms. The industry wants rules that are applied in the same way across the single market, which the list facilitates. A disadvantage is that the wording of the list is sometimes unclear, which can give rise to competing interpretations. It is sometimes difficult to say if a term is unfair or not. On the other hand, the advantage with the list is that it is not limited to certain situations or terms. A grey list is good when an authority is having discussions with the business sector in order to reach market agreements. It is very handy to have examples from the beginning in the discussion as to what could be an unfair term. There are no serious problems with unfair contracts terms on the Swedish Market. However, some noticeable problems are connected with automatic prolonging of contracts, negative contractual effects etc.<sup>28</sup> There is also a concern that the list can give rise to different interpretations, with the result that the Directive is being applied differently in different countries.<sup>29</sup>

<sup>27</sup> See Bernitz, Ulf, Standardavtalsrätt, 2013, p. 184.

<sup>28</sup> See court cases NJA 2012 p. 776, MD 2004:29, MD 2005:34, MD 2009:30 and MD 2009:32.

<sup>29</sup> The Financial Supervisory authority points to the Key Information Document (KID) (a standardized and simple document giving key facts on the product) which investment product manufacturers must provide to retail customers when they are considering buying investment products.

- 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 your MS? Does this work in practice or are there problems?*]

In Swedish law, the list is not annexed to the legal text, but can be found in the *travaux préparatoires* to the legal text. The European Commission has brought infringement proceedings towards Sweden in the European Court of Justice regarding this matter.<sup>30</sup> The European Court has, however, accepted the Swedish procedure with reference to the significance of the *travaux préparatoires* as a source of law in Sweden. Bernitz has suggested, however, that it would have clearly been more appropriate if the list had been submitted as part of the legal text, as there is a risk that one does not pay attention to the list in the *travaux préparatoires*.<sup>31</sup> The Market Court has in several cases forbidden companies to use contract terms as they have been contrary to the indicative list.<sup>32</sup> Concerning the practical application, there are diverging experiences. For instance, few traders look at the indicative list. Stakeholders suggest that several types of contracts that can be found on the internet in the credit and financial services sectors have unfair contract terms. Sector specific self-regulation would therefore be more effective, as would be the implementation of a black list rather than a grey list.

- 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; [*Note: If a black/grey list exists in your country, key aspects to consider are: How does the list work in practice? Does it make a difference to have such a list?*]

See above.

- 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: In your country, have the effects of court decisions establishing the unfairness of an unfair term been extended to all contracts of the trader concerned or to the contracts of any other trader containing such a term? If so, how does this work in practice? What are the impacts on businesses? If there are no such effects of court decisions on unfair terms: what are the effects of this situation?*]

According to Swedish law there are two different ways to combat the use of unfair contract terms. The first is that the Consumer Ombudsman can sue the trader in the Patent- and Market Court according to Consumer Contracts Terms Act. The Patent- and Market Court can prohibit the trader under penalty from using the unfair term in the future. The other way is the opportunity for an individual consumer to sue the trader in a general court. The court can according to 36 § of the Contract Act adjust a contract term or put the whole contract aside, in which case, according to Swedish law, the contract is not nullified but will not applied.

If the Consumer Ombudsman has brought an action against a trader, it has an impact on all traders on the market. This applies also to court decisions from the Patent- and Market Court. However, if a consumer enters into a contract that contains a term that the court has prohibited the trader to use, there will be no automatic invalidity of that term or the contract.<sup>33</sup> However one can expect that a general court will almost

<sup>30</sup> See C-478/99.

<sup>31</sup> See Bernitz, Ulf, *Standardavtalsrätt*, 2013, p. 194-195.

<sup>32</sup> See MD 2000:24, MD 2003:12, MD 2002:23 and MD 2004:22.

<sup>33</sup> Bernitz, Ulf, *Standardavtalsrätt*, 8 ed. 2013, p. 186.



always find the term unfair and set it aside. In the same way it is also likely - in a case where a banned term under comparable circumstances is used by a trader other than the one covered by the ban - that a general court will almost always find the term unfair and set it aside. If the Patent and Market Court has banned a trader from using a contract term because it is unfair, it does not have to mean that this term shall be deemed unfair when it occurs in older, existing contracts. The fact that the Patent and Market Court states that the term is not unfair does not prevent the term from being considered unfair by a general court according to 36 § of the Contract Act.

Even though the decisions from the Consumer Ombudsman or the Patent- and Market Court have an impact towards all traders, supervision is needed. The Consumer Agency needs to conclude sector specific agreements (soft law) with the business sector. If it is a decision from the National Board of Consumer Complaints, it is not binding towards the trader. It is only a recommendation, although most traders adhere to the decision. The decision has also an impact on other traders as it is a guideline of what is an acceptable term or behaviour.

In court case MD 2006:4, the Court found in an agreement on trade in financial instruments between online brokers and consumers, that certain conditions were unfair under the Consumer Contracts Terms Act (1994:1512) (based on the UCTD). The conditions were relating to disclaimers of liability due to outages or other disruptions in computing, telecommunications and electrical systems or omissions in the information, etc. The conditions were also relating to omissions in information regarding the financial instruments that were due to negligence on the part of the online broker. Finally, the conditions related to contractual terms that prevented the consumer from demanding damages caused by the online broker's gross negligence.

In the court case MD 2005:23, a standard contract for digital TV had as a condition a requirement of written cancellation of the contract by the consumer. The Court found the term to be unfair according to 1994:1512 on contracts terms in consumer relationships, but acknowledged that the trader was free to recommend a certain form for termination (for security reasons). The practical experience is that many businesses still demand written cancellations, despite this court case. The business sector tries to add weight to the Court's statement allowing them to recommend a certain form of termination. According to some stakeholders, the reason for not accepting the judgment from the Patent and Market Court is mainly the costs, as the businesses must change the terms in their standard contracts.

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

The practical experience is that the overall effectiveness of the contractual transparency requirements is mixed. Art. 5 in the Directive is used by the Swedish courts and the National Board of Consumer Complaints. On the other hand the wording in Art. 5 is unclear. Art 5. has been interpreted differently and therefore applied differently by the Members States and their authorities. The following example can be given. It is stated in Art. 5 that the terms must always be 'drafted in plain, intelligible language'. If a term is written in English in a contract for the Swedish market, is the term automatically unfair? This issue should therefore be reviewed and resolved.

- 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. *[Note: Question only relevant for MS that have put in place extensions of application of UCTD]*

The question is not relevant for Sweden.



- 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?*]

The overall picture is that the sanction works in practice and that it helps the consumers. The consumers are not bound by the unfair term. There is no specific remuneration to the consumer. If the term is unfair, the consumer must bring an action for damages according to the general principles and rules in tort law. On the other hand, neither the Patent- and the Market Court nor the general civil courts are willing to invoke unfairness *ex officio*. The case is brought to the National Board on Consumer Complaints. The courts refer to the Swedish Code of Procedure (1942:740) where it is stated that a court cannot go beyond what the parties have requested. However the case C-473/00 by the European Court of Justice, where found that the Directive precluded a national provision which, in proceedings brought by a seller or supplier against a consumer on the basis of a contract concluded between them, prohibited the national court, on expiry of a limitation period, from finding of its own motion or following a plea raised by the consumer that a term of the contract was unfair.<sup>34</sup>

- In a forward looking perspective: Are there other measures that could improve the effectiveness of the UCTD in establishing a high level of consumer protection in your country? Would a graphical presentation model improve the readability and comprehension by consumers of the T&Cs? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

The stakeholders point to different measures. First, contracts regarding financial services should be in writing. As there is so much information given to the consumer, it would be good if the most important information could be highlighted or marked in some way, for example, through the use of different colours.<sup>35</sup> A graphical presentation could also improve the readability. Another suggestion is a provision regarding how a contract should look. Stakeholders suggest that a standardised contract would be helpful. Finally, it would be helpful to have a more harmonised interpretation of the Directive.

### 1.2.2. Effectiveness of the current rules 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 disparities have an impact on cross-border trade; [*Key aspects to consider are: Do national differences in the application/implementation of the Directive play a role for businesses? Have these differences led to changes in their business strategy? Have these differences caused problems?*]

The stakeholders have not seen any obstacles or noticed any disparities. There is no need expressed for an extended list. The stakeholders suggest that such a list could be an obstacle for trade.

<sup>34</sup> See also case C 377-14.

<sup>35</sup> Example of this kind of requirements can be seen in Chapter 2, 4 § of the Swedish Insurance Contract Act (2005:104).

- 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;

See above.

- 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.

See above.

### 1.2.3. Relevance for business-to-business transactions

Regarding the area of contractual fairness and in relation to the Unfair Contract Terms Directive, please analyse:

- Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;

A deficiency in Swedish law is when the unfair contract terms affect a trader that is not part of the contract. According to 3 § lag (1984:292) om avtalsvillkor mellan näringsidkare (Traders Contracts Terms Act), an action can only be brought by an association of traders, by another association which has a legitimate interest in representing the trader or by a single trader against which the current clause has been set up. It could be argued that the unfair contract term is actually an unfair advertisement, but it is uncertain if that would be upheld in court.<sup>36</sup>

There is no need expressed among stakeholders to strengthen the protection of businesses. Sweden has the 1984 law on unfair contract terms for businesses and 36 § of the Contract Act where a contract term can be adjusted due to imbalance between the parties. There is already a provision to invoke contracts contrary to good faith, 33 §, usury 32 § etc., all provisions in the Contract Act. As example the following case can be mentioned. In MD 2010:12, a company set up terms for a competition ban when it entered into an agreement with another trader. This contract term was not considered unfair under the law of contract terms between traders. Another case is NJA 1988 p. 230, where the dispute was whether an exclusion clause in a leasing contract between traders was unfair to the leasee according to § 36 of the Contracts Act.

- 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;

See above.

- 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;

See above.

<sup>36</sup> Holtz, Hajo Michael, Oskäliga avtalsvillkor som otillbörlig marknadsföring. Får konkurrenter väcka talan enligt marknadsföringslagen? SvJT 2016 p. 383.

- 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;

As already mentioned, the practical experience is that there are no specific contractual terms often used in B2B transactions which could be regarded as unfair. The problems for most businesses are the problems with long payment periods towards small companies by large ones, despite legislative changes in the Swedish Interest Rate Act (1975:635).<sup>37</sup>

- Whether there is a need for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive;

A similar rule as in Art. 5 UCTD applies already by Swedish law between traders.

- Whether an extension of the Unfair Contract Terms Directive to B2B transactions can bring benefits for cross-border trade;

See above.

- Whether the consequences of such an extension would have an effect on innovation by or market opportunities for SME providers/suppliers;

See above.

- Whether the benefits of extending the scope to business-to-business transactions would exceed the negative consequences of such an extension.

See above.

### 1.3. Injunctions

#### 1.3.1. Effectiveness of the current rules in establishing a high level of consumer protection

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

- To what extent is the use of the injunction procedure in your country contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment?<sup>38</sup>

In the absence of clear data, it is very difficult to assess the extent to which the use of the injunction procedure is contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment. Our view is that injunction procedures contribute to a higher level of consumer protection. Injunction procedures already existed in Sweden before the ID; therefore there was no need for transposition of the ID to the national legislation at the time of implementation of the Directive. The legislative models with injunction procedure are common in Sweden and can be found in a number of national laws, i.e. not only those transposing the ID but also laws with other aims than the protection of consumer's rights.

<sup>37</sup> Compare directive 2011/7 on combating late payment in commercial transactions.

<sup>38</sup> 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.

The Directive 2009/22/EC, which, for cross-border transactions, is implemented in the Swedish Law (2000:1175) om talerätt för vissa utländska konsumentmyndigheter och konsumentorganisationer has not been used. There are no data or information showing that the opportunities opened by the Directive with regards to cross-border transactions have been used in Sweden. The Consumer Agency points to the principle on choice of law (the EU law principle of effectiveness) which says that the question of whether a particular country's law should be followed in the case of conduct that extends across national borders should be determined on the basis of the conduct's impact in the particular country. In marketing law this means that if the marketing is specifically aimed at a Swedish audience, the Swedish Marketing Act applies, even if it is carried out by a foreign company. Thus, the Consumer Agency can act against the foreign trader by suing it in the Swedish courts. However, the verdict may not be recognised or have any effect abroad. To sue the company in its home country is not a viable alternative as it is associated with large costs and high knowledge demands, and also includes difficulties with language, different procedural rules, etc. The conclusion is that the injunction procedure is not effective enough. The practical implementation rather than the legislation is the problem. The Consumer Agency thinks it would be helpful to have a provision like Art. 19 and 20 in 2015/848 of the Insolvency Regulation (recast), former Art. 16 and 17 in 2000/1346, namely a general provision on the recognition and effects of a judgement.

- What measures in your national legislation on injunction procedure are considered to be particularly effective, if any: measures regarding the cost of the procedure, the 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?

This is difficult to assess on the basis of the interviews conducted and the available data. If for example a business operator is in breach of the market Act by using aggressive marketing or misleading advertising, actions for issuing a prohibition or granting an order must be commenced in the Patent- and Market Court, subject to certain exceptions. Claims can be brought by the Consumer Ombudsman or a business operator affected by the advertising or an association of consumers, business operators or employees. Less important cases can be determined by the Consumer Ombudsman himself. The prohibition or order must be combined with a fine, Article 28 Marketing Act. Should the business operator ignore the prohibition/order, the amount of the fine may be disputed. Such an action can be commenced in the Patent- and Market Court. If the business operator wilfully or negligently contravenes any of the catalogue rules as provided in Articles 7–10, 12–18,20 or points in appendix 1 Directive 2005/29/EC, he or she may also be liable to pay a fine for market distortion. Actions as regards these fines may be commenced in the Patent- and Market Court, whose decision can be appealed to the Supreme Patent- and Market Court. If the Consumer Ombudsman decides not to take an action in any particular case, an individual business operator who has been affected by the advertising or an association of business operators can take an action. Finally, a business operator who wilfully or negligently contravenes a prohibition or order which was made under Articles 23–25 in the Market Act, or contravenes the rules in Articles 7–10, 12–22a in the Market Act or points in Appendix 1 Directive 2005/29/EC shall be liable in damages for the harm suffered by the individual consumer or business operator. Claims for damages can be commenced in the Patent- and Market Court.

- Has your country extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunction Directive? If yes, what are the additional consumer rights covered?

As mentioned above, injunction procedures already existed in Sweden before the ID. Therefore, there was no need for transposition of the ID to the national legislation. The legislative models with injunction procedure are common in Sweden and can be

found in a number of national laws, not only those transposing the ID. As the Swedish Market Act has a wide scope of application, it is possible that the scope of the application of the injunction procedure has extended beyond the pieces of EU legislation listed in the Annex I to the ID.

- Analysis of the obstacles to the effective use of the injunction procedure, in particular by analysing which progress in removing obstacles has been made and/or new difficulties that have emerged in your country since 2012.

No opinions or data were provided on this question.

- In a forward looking perspective: Should the coverage of the Injunctions Directive be extended (by including additional legislation into Annex I to the Directive)? If so, which EU legislation should be included? Are there other measures that could improve the effectiveness of the ID in establishing a high level of consumer protection? Should the scope of the Injunctions Directive be extended to the protection of collective business' interests? Are there best practices in your country that could be relevant for other countries and considered as model for the injunction procedure at EU level?

No opinions or data were provided on this question.

### 1.3.2. 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:

- How effective is the injunction procedure in addressing infringements originating in another EU country?

See answers in the previous section.

- How effective is it to address infringements originating in another EU country that qualified entities in your country are enabled to seek injunctions in the other Member State (Article 4 of the Injunctions Directive)?

See answers in the previous section.

- In a forward looking perspective: Are there non-legislative or/and legislative measures that could improve the effectiveness of the injunction procedure in addressing infringements originating in another EU country? Are there best practices in your country that could be relevant for other EU countries and could be considered as a model for the injunction procedure at EU level?

See answers in the previous section.

### 1.3.3. Interplay between the Injunctions Directive and other enforcement instruments of consumer law

Please analyse:

- Is the injunction procedure as designed by the Injunctions Directive regulated separately in your country (in a separate legal act or as a separate procedure regulated within the same legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (UCPD, UCTD and by the Consumer Rights Directive)?

For cross-border transactions, the Directive 2009/22/EC is implemented in a separate act, the Swedish Law (2000:1175) om talerätt för vissa utländska konsumentmyndigheter och konsumentorganisationer.

For national transactions, some acts have a separate injunction procedure regulated in the act, e.g. certain aspects of the Consumer Credit Act and the Law on Consumer Contracts, but other acts simply refer to the injunction procedure in the Marketing Act.

- If these procedures are regulated separately: What are the main differences between them? How is the coherence between these procedures ensured? If these procedures are regulated in a single legal act (possibly as a single procedure): In what way do these procedures (or this procedure) go beyond measures foreseen by the Injunctions Directive?

The main difference is in practice.

## 1.4. Cross-cutting issues

### 1.4.1. Cost and benefits of the directives covered by the study

- To what extent is there evidence for benefits for consumers stemming from the protection provided by both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of benefits for consumers from the protection against unfair commercial practices and unfair standard terms in contracts; [*Note: a relevant aspect in this context is whether the costs for consumers in exercising their rights under these directives are limiting these benefits or not.*]

The overall picture according to the stakeholders is that the directives have a clear benefit for the consumers and the directives are an important part of sound market regulation. According to the Financial Supervisory Authority, these directives and these type of rules provide a clear benefit for the consumer. The result is that the consumer feels confident entering into a contract. If such rules were not implemented, there would be more dishonest market players, but now these dishonest market players are removed from the market through enforcement of consumer law.

It is not expensive for the consumers to exercise their rights. They can turn to the National Board of Consumer Complaints which can handle the consumers' claims against the trader free of charge. On the other hand, it is still unusual that a consumer brings an action to a court, due to the costs involved. All companies in the financial market also have a so-called 'complaints manager' where the consumer can turn with a complaint.

The consumer organization also states that there are lots of benefits stemming from the rules based on the directives, but that the enforcement is not working well. The public enforcement takes time and does generally not lead to compensation for the individual consumer. Swedish consumers shop a lot on e-commerce, but avoid cross-border shopping because they do not trust foreign traders. It is very difficult for the consumer to get his or her money back as a result of misleading advertisements in a cross border transaction. Danish traders and traders from the Baltic States are causing the most problems at the moment for the Swedish consumers.

- To what extent is there evidence for benefits for traders stemming from both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of creating a level playing field for honest traders by providing a legal basis to eliminate or at least constrain dishonest market practices, such as the use of unfair standard terms in contracts or unfair commercial practices, including through the application of the Injunctions Directive;



The stakeholders state that there are benefits for the traders stemming from these rules. The business traders want rules that are applied in the same way across the European market. According to business stakeholders, these rules create a level playing field. In order to open up for more cross-border trade, it is necessary to minimize the fragmentation of the legislation and its application. That will bring confidence to the traders and the consumers.

- What are costs for traders due to the need to respect the requirements under the directives covered by the study? [*Note: Such as costs of research, legal advice and compliance as well as the amount of time necessary to comply with the directives*]

It is difficult to quantify the costs for traders in order to respect consumer law. The business organizations, however, remark as a general rule that if the number of rules increases, the costs increase as well.

- What are the costs involved in the public enforcement of these rules?

It is difficult to quantify the costs involved in public enforcement of these rules. There is no statistics available on the matter. The costs for the National Board of Complaint are approximately EUR 330 for every decision of the board.<sup>39,40</sup>

- Are there indications that the directives covered by the study are not implemented in your country in a cost-effective manner?

The stakeholders think that the rules have been implemented in the most cost effective manner.

- Could the costs for implementing and enforcing the rules of the directives covered by the study be reduced without lowering the level of protection for consumers? If so, how?

The rules have been implemented in the most cost effective manner. According to stakeholders, the costs could not be lowered without the level of protection also being lower.

#### 1.4.2. Interplay with EU sector-specific consumer protection legislation

Regarding the interplay of the horizontal EU consumer legislation [mainly UCPD and UCTD] with EU sector-specific consumer protection legislation in the areas of electronic communications, passenger transport, energy and consumer financial services, please:

- Analyse the levels of awareness of the requirements of the horizontal EU consumer legislation (mainly UCPD and UCTD) of businesses and consumers and the specific public enforcement bodies in the relevant sectors, as in particular demonstrated by their practical application; [*Key question here is: Are UCPD and UCTD applied in practice by national authorities and courts as a legal basis to combat unfair commercial practices and unfair standard terms in contracts in the regulated sectors?*]

<sup>39</sup> SOU 2014:47 p.79.

<sup>40</sup> The Consumer Agency presents the following annual costs for supervision and market control in 2015: For supervision: EUR 4 356 000 in total, approximately EUR 4 751 to EUR 110 971 for each case. For market control: EUR 492 983 in total, approximately EUR 1 161 for each case. Cooperation with traders in order to reach market agreements etc. cost EUR 802 246 in total. See: [http://www.konsumentverket.se/Global/Konsumentverket.se/Best%3%a4lla%20och%20ladda%20ner/%c3%85rsredovisning/Dokument/KOV\\_Arsredovisning2015.pdf](http://www.konsumentverket.se/Global/Konsumentverket.se/Best%3%a4lla%20och%20ladda%20ner/%c3%85rsredovisning/Dokument/KOV_Arsredovisning2015.pdf)



## Electronic communications

The practical experience is that the national authorities and the courts and the traders in the electronic communications sector are well informed of the requirements of the UCPD and UCTD. The Consumer Agency applies the legislation regularly in cases against traders in the electronic communication sector.

As an example the following court case can be mentioned, MD 2010:14. Here a company in the marketing of mobile subscriptions on its website used the term 'fixed-price' and statements that gave the impression of an unlimited use of the subscription at a certain fixed price with no additional charges. As the service was limited in its scope, the marketing was considered misleading about the actual content and the concepts and statements were such that they were likely to have influenced the consumer's ability to make an informed business decision. In the court case MD 2011:26, a telecommunications provider used conditions that gave the telephone company the right to close the subscription. The term was not considered unfair.

There are two authorities responsible for the enforcement of the horizontal EU consumer law and the sector specific rules in electronic communications. The Consumer Agency supervises the general rules and the Swedish National Post and Telecom Agency supervise the specific sector rules. There is an institutionalized and systematic cooperation between the two Supervisory Authorities. When sector specific rules cannot be applied, the Consumer Agency investigates whether it can act. There are no overlaps between the rules of the UCPD and UCTD with the sector-specific rules. The benefits for both consumers and traders are more uniform and predictable application of the rules. The rules apply to all traders.

## Passenger transport

The practical experience is that the traders in the passenger transportation sector have a basic knowledge of the requirements of the UCPD and UCTD. However, the trader's knowledge could be better and the traders could have a deeper understanding of the rules. Consumers have a pretty good idea of their rights but they may not know that the rights come from a directive. Regulators have good knowledge of the rules, but they often refer in their judgements and decisions to Swedish law rather than to a specific article in existing directives.

There are several authorities responsible for the enforcement of the horizontal EU consumer Law and the sector specific rules. The Consumer Agency supervises the general rules and the Transport Board (Transportstyrelsen) and the Transport Agency (Trafikverket) supervise the specific sector rules. There is no formal cooperation between the authorities because it is clear which authority is responsible for what. The authorities have meetings when necessary.

There are no overlaps between the general rules of the UCPD and UCTD and the sector specific rules. The specific rules are supplemented by the general rules. Sector-specific rules are complemented with the sanctions in the Marketing Act. The benefits for the consumers and the traders are more uniform and predictable application of the rules. Harmonised rules on marketing and contract terms are appreciated. The sector specific rules fill gaps in the general rules. The rules apply to all traders.

## Energy

The practical experience is that the traders in the energy business sector have general knowledge of the requirements of the UCPD and UCTD. There is better knowledge of the requirements among the larger companies than the smaller ones. However, an exception to this is the following case, MD 2014:9, in which a smaller company sued a larger company for deceptive marketing of electricity. The large company had in its advertising said that it was the only company providing environmentally clean energy. This comparison was not accurate, and so the advertising was found to be deceptive.

Consumers often have a general perception that something is not allowed, but do not always understand the legal basis for such a perception. The Consumer Agency has of course very good knowledge of the rules. It has used the UCPD more than the UCTD in exercising supervision over the regulations. As example is the following court case. In

MD 2016:9, the issue was whether the marketing of management / brokerage service of electricity contracts were misleading. In MD 2015:8, the issue was whether marketing to consumers by calling the consumer's mobile phone was consistent with good marketing. The court approved the marketing.

There are two authorities responsible for the enforcement of the horizontal EU consumer Law and the sector specific rules. The Consumer Agency supervises the general rules and the Energy Market Inspectorate supervises the sector specific rules. The Energy Market Inspectorate does not supervise the UCTD and the UCPD. It supervises the District Heating Act (2008:263, Fjärrvärmelagen), the Electricity Act (1997:857, Ellagen) and the Natural Gas Act (2005:403, Naturgaslagen). There is cooperation between the authorities in the form of consultation meetings, where the Consumer Agency, the Inspectorate and also the Energy Agency will meet and discuss problems. If one authority engages in an issue, it will inform the others so that overlapping measures will not take place. The other authorities will then know what has been done. Usually, the Consumer Agency sees a greater need to engage in issues than the other authorities. There is no reference in the Electricity Act to the Marketing Act, but this may not be a significant problem because the trade agreements between the authorities and the businesses relates to both the specific legislation and the Marketing Act.

#### Financial services

The practical experience is that the traders in this sector have a good knowledge of the requirements of the UCPD and UCTD. However, there are some problems with the sector-specific legislation and the general legislation. Some traders believe that they only need to follow the sector specific rules. That is not correct as it is clear that the UCPD and UCTD are applicable in the financial services sector as well.

Here the following court cases can be mentioned. In MD 2006:4, certain terms of an agreement on trade in financial instruments between online brokers and consumers were found to be unfair. In MD 2010:6, two companies in the marketing of occupational pensions had compared their funds with another company savings product. The comparison was considered misleading and unfair because it lacked essential information and context regarding the time period. The companies' argument that their occupational pension had given 400 percent more in return than another company's form of savings was misleading and considered as unfair marketing as it was assumed to have affected the recipient's ability to make an informed business decision. In MD 2010:31, a company's marketing of funds towards consumers was found to be contrary to good marketing. The company was forbidden to highlight a certain period of time as it gave a skewed overall impression of the fund's performance.

There are two authorities responsible for the enforcement of the EU consumer law and the sector specific rules. The Consumer Agency supervises the general rules and the Financial Supervisory supervises the sectoral rules. If a question relates to compliance with the Marketing Act, the Consumer Agency acts. There is much formalized cooperation between the authorities. There is a cooperation agreement and each authority has explicit instructions regarding who supervises what. They have several meetings among the administrators, at least two times per year. The specific legislation is complemented by the general rules on marketing. To the extent an issue is not specifically regulated in terms of a specific area, the general rules on marketing apply. Thus, if a financial service is being marketed, both the conditions under any specific legislation for the business and the requirements for reliable marketing under the Marketing Act must be met.<sup>41</sup>

#### Consumer Credit

<sup>41</sup> See proposition 2007/2008:115 p. 125.

The practical experience is that the traders in the consumer credit business sector have good knowledge of the requirements of the UCPD and UCTD. However, there are some problems with instant loans. As example the following court case can be mentioned, MD 2009:34. Instead of interest, a company had taken a special charge for the consumer credit. The special charge covered the company's expenses and generated its profits. The condition was found to be contrary to § 12 of the former Consumer Credit Act (1992:830). The term in question was also considered unfair under the terms of contract law. Another example is MD 2009:13. Here a creditor violated § 12 of the Consumer Credit Act when the creditor was using a term in a credit agreement towards consumers. The term specified that a special fee for the loan had to be paid as a predetermined percentage of the credit granted.

There are two authorities responsible for the enforcement of the EU consumer law and the sector specific rules. The Consumer Agency supervises the general rules and the Financial Supervisory supervises the sectoral rules. If a question relates to compliance with the Marketing Act, the Consumer Agency acts. There is formalized cooperation between these authorities (see above). The Credit Consumer Law is *lex specialis* and the UCPD and UCTD are *lex generalis*. The Consumer Credit Act refers to the Marketing Act. The legislation in question is coherent and clear.

- Specify whether in your country the same authority is responsible for the enforcement of the horizontal EU consumer law 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 UCPD/UCTD in the regulated sectors, as specified in the previous bullet?*]

As stated above, it is often different authorities that are responsible for the enforcement of EU consumer law and sector specific rules. However, there is formalised cooperation between the authorities. As stated above, in the energy market there are two different authorities responsible for the enforcement of the horizontal EU consumer law and the sector specific rules, namely the Energy Market Inspection and the Consumer Agency. Despite this, the supervision is not complete and some actions can go uninspected.

- Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning contractual fairness, 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.?*]

Stakeholders have not noticed any overlaps or conflicts between the horizontal consumer provisions and the sector specific rules. However, sector specific regulation consists now of more binding rules than before when it used non-binding guidelines.

- What are the benefits of the complementary application of the UCPD and UCTD in the regulated sectors? What are the costs due to the complementary application with the sectoral EU consumer protection legislation?

It is difficult to estimate the benefits of the complementary application of the UCPD and UCTD. The benefit with complementary application is that provides legal certainty. There is a much clearer line what is permissible and what is not permissible. There is no data pertaining to the costs of complementary application.

- Assess any need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law.

No need has been noticed.

#### 1.4.3. Relevance of consumer law directives for consumer-to-business transactions

- Please analyse the need and potential for the application of the consumer law directives (mainly UCPD and UCTD) to 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 overall picture is very diverse and it is therefore very difficult to draw any conclusions. Interviewed stakeholders held different views on whether the UCPD and UCTD are applicable in C2B transactions. Problems with consumers selling gold to a traders and auctions with unexpected fees are a well-known phenomenon. According to the energy companies, there is a need for more regulation regarding C2B relations in the energy market. For example, regarding the question of whether consumers - owning solar or wind turbine - can sell energy to traders. This sort of business is getting more and more common and will probably need some form of supervision in the future. The Consumer Agency points to the increase in the so-called sharing economy. The consumer legislation must be applicable to this area, but legal certainty is unclear. If the consumer legislation is not applicable, it will be detrimental for the consumers.

#### 1.4.4. Specific protection for vulnerable consumers

Please analyse:

- Whether the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined in the consumer law directives and relevant jurisprudence, and as applied by national authorities and courts in your country, continue to be valid and fit for purpose.

The overall picture is that the concept of consumer, vulnerable consumer and average consumer is valid and fit for its purpose, but the picture is also diverse. As the concept is not static, it can be adjusted to fit consumers in different areas of e.g. the financial sector.<sup>42</sup> However, it is argued that it is necessary to have different concepts in different countries. As stated above, energy poverty is not a question for the energy industry in Sweden, because the consumer is protected by social welfare acts. Some stakeholders state that there are high demands on the average consumer. The question is whether the average consumer really matches with the real consumer. There are also problems with the definition of a consumer in new business transactions on web-platforms. When is a consumer really a consumer and when does a consumer become a trader? The consumer definition needs in this context to be clarified. Finally, there are sector-specific stakeholders that are not familiar with the specific terms consumer, average consumer and vulnerable consumer. These terms are not used in sector specific regulation, which they are responsible for; however, they are familiar with the problem that old persons or young children, in other words vulnerable consumers, are subjected to unfair contract terms in their sector. Thus, they recognize the situation but not the legal concepts.

- To what extent the existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers and whether, based on the experiences in your country, specific provisions should be introduced in other directives concerned, in particular the Unfair Contract Terms Directive.

<sup>42</sup> Compare the Swedish law (2003:862) on financial advice to consumers, where the adviser has the burden of proving that he has dissuaded the consumer from taking measures which cannot be considered appropriate to the consumer's needs, financial status or other circumstances.

The question of whether the UCPD currently provides adequate protection for vulnerable consumers or whether specific provisions should be introduced is not easy to answer based on the available responses. The stakeholders state that vulnerable consumers in many situations are protected by social welfare acts. There are also other provisions in Swedish legislation that protect consumers. Therefore, according to stakeholders, there is no need for new provisions in the Market Act. The current provisions are sufficient and they work well.

On the other hand the question of whether a consumer should be categorized as a vulnerable consumer is determined from case to case. A consumer can be vulnerable in a given situation but not in another. Children, the elderly, and persons with disabilities are currently considered vulnerable, but there may be others. The enforcement authorities lack a more flexible interpretation of the concept. The UCPD is adequate to protect vulnerable consumers but the concept of vulnerability must be clarified. A concept of vulnerable consumers should be introduced in the UCTD. It would improve protection of consumers.

#### 1.4.5. EU added value

- Overall, would you consider that protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in your country since the implementation of the UCPD and the UCTD in national legislation?

The stakeholders believe that the protection of consumers has improved slightly since the implementation of the UCPD and UCTD. The consumer protection in Sweden was also good before the implementation, but some stakeholders feel it has definitely improved. On the other hand, some stakeholders state that the level has not improved in Sweden but maybe on an EU level. The stakeholders stress that cross-border trade needs harmonised rules. It is not sufficient or satisfactory that the Member States have different sets of rules. On the other hand, the 'information flow' must be reconsidered. There are sometimes so many information requirements such that the consumer cannot perceive what is important.

- Overall, would you consider that the information of consumers regarding unit prices has improved since the implementation of the PID in national legislation?

The practical experience according to some stakeholders is that it might have improved slightly or is the same as before the implementation.

- Overall, would you consider that the protection of businesses against unfair marketing in your country has improved since the implementation of the MCAD in national legislation?

Stakeholders state that it is difficult to say if protection has improved. According to some stakeholders, there is probably no change.

- Overall, would you consider that it has become easier for businesses in your country to directly trade cross-border to final consumers located in other EU countries in recent years? Has it become easier for consumers in your country to directly purchase cross-border from traders located in other EU countries?

Business organisations state that it has not become easier for businesses to directly trade cross border to final consumers located in other EU countries. The reason is not linked to the directives. It is due to language barriers, different demands, and taxes. On the other hand, the consumer organisation states that it has become easier, maybe not because of the directives but as a result of technical improvements.

- To what extent are these improvements, if any, due to the mentioned directives?

According to the consumer organizations, the directives have been a suitable basis for developing fair market practice.

## Annex

## A. Transposition fact sheet

**Table 1: Fact sheet on transposition of directives in Member States' law – Sweden**

Directive	Transposition legislation (National law, Article)	Comments	Specific provisions going beyond minimum harmonisation requirements/use of exemptions	Included in national legislation		Comments
<b>Directive 93/13/EEC on unfair terms in consumer contracts</b>	lag (1994:1512) om avtalsvillkor i konsumentförhållanden		'Black list' of terms considered unfair in all circumstances	No		
	In the <i>travaux préparatoires</i> , prop 1994/95:17.		'Grey list' of terms which may be considered unfair	No		
			Extensions of the application of Directive to individually negotiated terms	No		
			Extensions of the application of Directive terms on the adequacy of the price and the main subject-matter	No		
<b>Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market</b>	Marketing Act "Marknadsföringslag (2008:486)"		Provisions regarding financial services going beyond minimum harmonisation requirements	No		
			Provisions regarding immovable going beyond minimum harmonisation requirements	No		
			Application of UCPD to B2B transactions	Yes	Marketing Act, except 12 §	



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<b>Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers</b>	Prinsinformationslag (2004:347)		Extension of the application to other sectors (e.g. for immovable property)	No		
			Use of specific regulatory choices/derogations	No		
<b>Directive 2006/114/EC concerning misleading and comparative advertising</b>	Comparative advertising: 18 § Marketing Act (marknadsföringslag (2008:486))					
	Misleading advertising: 10 § Marketing Act					
<b>Directive 2009/22/EC on injunctions for the protection of consumers' interests</b>	Lag (2000:1175) om talerätt för vissa utländska konsumentmyndigheter och konsumentorganisationer					

**Table 2: Fact sheet on Injunctions Directive – Sweden**

Issue	Answer	Comments
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)?	- Yes, separate procedures in a single legal act.	<i>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.</i>
Who is entitled to bring an action seeking an injunction?		<i>A public body or a consumer organisation, according to a special list organized by the European Union and published in Official Journal</i>
Is the injunction procedure a court or an administrative procedure? If your country legislation foresees both forms of the procedure, please explain in the comments column for which infringements the court or administrative procedure is foreseen	Court procedure	
Who bears the costs of an injunction procedure? If qualified entities (or some of their categories e.g. consumer organisations are entitled to an exemption of some/all cost related to the procedure please explain the characteristic of such exemption in the comments column.	- The costs are as a rule borne by the losing party	
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?	- No, scope of the Directive not extended	
Is protection of business' interests covered by the injunctions procedure? If scope of application extended to the protection of business' interests, please provide details in the comments column regarding type of business' interests covered by the injunctions procedure	- No	
Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations	- No	
Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID)	- No	
Has your Member State taken specific measures regarding the prior consultation (Article 5 of the Injunctions Directive)?	- Yes, requirement for party seeking injunction to consult with the defendant	
Does the national legislation provide for measures ensuring summary procedure? Please specify main characteristics of the procedure (subject matter/time limits) in the comments column.	- No	

Are there sanctions for non-compliance with the injunction order (Article 2(1) of the Injunctions Directive)? If sanctions in form of penalty or fine foreseen please specify in the comments column to who exactly should they be paid	- No, no sanction	
Has your Member State taken specific measures regarding the publication of the decision and/or the publication of a corrective statement?	- No	
Is it possible to claim within the injunction procedure for sanctions for the infringement?	- No	
Can an action for the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to other beneficiary be brought within the injunction procedure?	- No	
Can an action for damages to be paid to the qualified entity or the public purse be brought within the injunction procedure?	- No	
Can an action for damages or redress to be paid to the consumers concerned be brought within the injunction procedure?	- No	
Can individual consumers base their individual claims for damages/remedies on the injunctions order?	- No	
Can the qualified entity claim other measures beyond the injunction, e.g. evidence of compliance with the judgment?	- No	
Are the effects of individual injunctions orders extended to the future infringements and/or same or similar illegal practices (of other traders)?	- No	

## B. Data tables

*Number of B2C disputes*

Please indicate how many B2C disputes have been decided in your country on the basis of consumer law directives covered by this study (UCPD, UCTD, PID) as a proportion of the total number of B2C disputes decided on the basis of other national consumer legislation (based on statistics, or based on estimates by enforcement authorities and other stakeholders, where this is not available).

**Table 3: B2C disputes decided on the basis of consumer law directives covered by this study in comparison with total B2C disputes decided on the basis of other legislation (most recent year for which data is available)**

Year	Type of data	Total number of B2C disputes (number of cases)	Share of B2C disputes decided on basis of ...					Comments
			UCPD	UCTD	PID	other EU consumer protection legislation (e.g. CRD, Sales Directive, sectoral legislation)	national consumer legislation not based on EU directives	
2016	Market Court statistics	4	n.a.	n.a.	n.a.	n.a.	n.a.	
2015		6						
2014		8						
2013		4						
2012		2						
2011		5						
2010		6						

Note: Not possible to provide a breakdown of court cases by Directive, as most cases involve multiple Directives.

*Costs of obtaining redress for a hypothetical case of invoking unfairness of a standard contract term*

- Please estimate the costs, including time, for consumers in obtaining redress when invoking the unfairness, and thereby the non-binding character of standard contract terms in a contract they concluded. Please provide the estimate for the hypothetical example below, focusing on costs (and needed time) of a lower court procedure and the use of ADR or other relevant procedure (if applicable).<sup>43</sup>

**Table 4: Estimate of costs for consumers in obtaining redress when invoking the unfairness of standard contract terms in a contract they concluded (for the hypothetical example provided in the box below)**

Redress mechanism	Estimated court fees (national currency)	Estimated lawyer's fees (national currency)	Other costs, if any (national currency)	Estimated time involved for consumer (hours)	Comments
Lower court procedure	n.a.				
ADR or other relevant procedure	n.a.				

Beyond what has been stated in Section 1.4, there are no statistics on the costs available.

**Hypothetical example: Terms which inappropriately exclude/limit consumers' rights to compensation**

*A consumer went on a package holiday with a friend to Kenya for which they paid € 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 €5,000 (€4,000 for the cost of the package and €1,000 for lost time and enjoyment). The tour operator agreed to compensate them €1,000 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/unfair-contract-terms/index\\_en.htm](http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-contract-terms/index_en.htm)]*

- Please estimate how often court and ADR procedures are used in your country for invoking the unfairness, and thereby the non-binding character of standard contract terms (i.e. the number of cases per year)?

No statistics available.

<sup>43</sup> For the hypothetical example it is assumed that both the provider and the consumer are located in your country.

## C. Interviews conducted and literature reviewed

**Table 5: Interviews conducted for this study**

Organisation	Stakeholder type	Date
Svensk Handel	Business association	8 June 2016
Energiföretagen	Business association	20 June 2016
Stockholm Lokaltrafik	Business association	15 June 2016
Swedish Consumer Agency (Konsumentverket)	National consumer enforcement authority / National regulatory authority	21 June 2016
Konkurrensverket	National regulatory authority	29 June 2016
Energimarknads-inspektionen	Sectoral regulatory authority	13 June 2016
Post och telestyrelsen	Sectoral regulatory authority	21 June 2016
Finansinspektion-en.	Ministry	8 June 2016
ECC Sweden	European Consumer Centre	3 June 2016
Sveriges konsumenter	Consumer organisation	16 August 2016

**Table 6: Literature reviewed for country report**

Author/Source	Year	Title of publication
Bernitz, Ulf	2013	Svensk och europeisk marknadsrätt 2, Norstedts juridik, Stockholm
Bernitz, Ulf	2013	Standardavtalsrätt, 8 ed, Norstedts juridik, Stockholm
Cederlund, Karin	2008	Bubbel eller champagne? Om immateriella rättigheter i jämförande reklam. Festskrift till Marianne Levin, Norstedts juridik , Stockholm.
Consumer Agency	2010	Guidelines for information on new passenger car fuel consumption and carbone dioxide emissions. KOVFS 2010:3.
Consumer Agency	2012	Regulation on price information 2012:1
Domeij, Åsa,	2012	Kan fel jämförpris leda till mer transporter? <a href="http://www.axfood.se/sv/Hallbarhet/Bloggar/Asa-Domeij/Dates/2012/6/Kan-fel-jamforpris-leda-till-mer-transporter/">http://www.axfood.se/sv/Hallbarhet/Bloggar/Asa-Domeij/Dates/2012/6/Kan-fel-jamforpris-leda-till-mer-transporter/</a>
Ds 2015:45	2015	Stärkta sanktionsmöjligheter för Konsumentombudsmannen
Ervo, Laura & Persson, Annina. H.	2015	Finnish and Swedish legislation in light of the ADR-directive - boards and ombudsman, in Collective redress in Europe - Why and How? (ed. Lein, Eva et al.), 2015. British institute of international and Comparative law.
Henrikson, Ann-Sofie	2016	Överskuldssatt och skyldig. En rättslig analys av konsumentskyddet mot överskuldssättning.  <a href="http://umu.diva-portal.org/smash/get/diva2:915195/FULLTEXT04.pdf">http://umu.diva-portal.org/smash/get/diva2:915195/FULLTEXT04.pdf</a>
Holz, Michael Hajo	2016	Oskäliga avtalsvillkor som otillbörlig marknadsföring. Får konkurrenter väcka talan enligt marknadsföringslagen?, SvJT 2016. p 383.
Nordell, Per Jonas	2010	Introduktion till marknadsrätten, 5 ed. Norstedts juridik, Stockholm
Persson Annina H and Henrikson, Ann-Sofie	2014	Regulation of instant loans and other credits in Swedish law, Juridica international 2014 p. 57- 70.
Persson, Annina H	2010	Sweden, In (Colombi Ciacchi, Aurelia & Weatherhill, Stephen. Ed.,) Regulation unfair banking practise in Europe. The case of personal suretyships, p. 547-570. Oxford university press, Oxford.
Proposition 2015/16:168	2015	Stärkta sanktioner för Konsumentombudsmannen
SOU 2015:77	2015	SOU (Statens offentliga utredningar) Fakturabedrägerier
SOU 2014:47	2015	Förbättrad tvistelösning på konsumentområdet.
Årsredovisning från Konsument-verket	2015	<a href="http://www.konsumentverket.se">www.konsumentverket.se</a>



# 1. Study to support the Fitness Check of EU Consumer law – Country report UNITED KINGDOM

## 1.1. Unfair commercial practices and marketing

### 1.1.1. Effectiveness of the UCPD in establishing a high level of consumer protection

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

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

The UCPD was largely transposed in the UK by the Consumer Protection from Unfair Trading Regulations 2008 (CPUTR 2008).<sup>1</sup> The CPUTR 2008, which replaced 23 earlier enactments, closely follow the wording of the Directive.<sup>2</sup> A commercial practice is defined widely as ‘...any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader, which is directly connected with the promotion, sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product’.<sup>3</sup> Moreover in *R v. X Ltd*<sup>4</sup> the Court of Appeal confirmed that isolated incidents can constitute a commercial practice. Regulation 3(3)-(4) sets out when a commercial practice will be regarded as an unfair commercial practice:

‘(3) A commercial practice is unfair if—

(a) it contravenes the requirements of professional diligence; and

(b) it materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product.

(4) A commercial practice is unfair if—

(a) it is a misleading action under the provisions of regulation 5;

(b) it is a misleading omission under the provisions of regulation 6;

(c) it is aggressive under the provisions of regulation 7; or

(d) it is listed in Schedule 1.’<sup>5</sup>

The CPUTR 2008 originally relied on a dual system of enforcement consisting of (i) criminal sanctions and (ii) administrative sanctions. Initially the CPUTR 2008 did not specially provide for private rights of redress for consumers. More recently, however, the CPUTR 2008 has been amended to provide such rights of redress for consumers.<sup>6</sup>

In terms of the effectiveness of a principle-based approach under the UCPD, one concern is whether or not such an approach leads to an unacceptable level of uncertainty.<sup>7</sup> This was certainly a concern of some of those consulted recently in

<sup>1</sup> SI 2008/1277.

<sup>2</sup> See, generally, H.G. Beale (ed.), *Chitty on Contracts* (32<sup>nd</sup> edn., Sweet & Maxwell, London, 2015) para. 38-145ff.

<sup>3</sup> Regulation 2. Under the CPUTR 2008 a ‘consumer’ was initially defined as: ‘any individual who in relation to a commercial practice is acting for purposes which are outside his business’ (Regulation 2). This was subsequently amended to define a consumer as: ‘...an individual acting for purposes that are wholly or mainly outside that individual’s business’.

<sup>4</sup> [2013] EWCA Crim 818.

<sup>5</sup> Implementing UCPD, Article 5(5) and Annex I.

<sup>6</sup> See 1.1.7 below.

<sup>7</sup> Cf. C. Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Ashgate Publishing, Aldershot, 2007) at 431.

relation to whether or not the Property Misdescriptions Act 1991 should be repealed.<sup>8</sup> On the other hand, such an approach does allow some flexibility in responding to unfair commercial practices.<sup>9</sup> Early indications of proposed prosecutions under the CPUTR 2008 were low<sup>10</sup> and this, combined with the strain on the public purse post-financial crisis,<sup>11</sup> helped create the case for the introduction of private rights of redress under the CPUTR 2008.<sup>12</sup>

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

A purely black list approach to unfair commercial practices might have resulted in a reversal of the issues under the principle-based aspects of the UCPD: more certainty in terms of what constitutes an unfair commercial practice<sup>13</sup> but less flexibility in terms of regulating evolving commercial practices. For this reason, arguably a hybrid approach (consisting of a blend of principle-based provisions and rule-based provisions) is preferable. In terms of rule-based provisions, one issue is how to ensure the currency of such rules and it may be that an approach analogous to the approach adopted in the UK under the UCTD, whereby the Secretary of State can amend the so-called 'grey' list,<sup>14</sup> would be useful in this context.<sup>15</sup>

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

Such an approach can be justified on the grounds of the potential complexity of such transactions<sup>16</sup> and, to some extent, specific existing EU interventions in relevant fields.<sup>17</sup> In the UK, these justifications were reiterated for not extending specific rights of private redress under Part 4A, CPUTR 2008 to those areas.<sup>18</sup> On the other hand, this creates the potential for added complexity and duplication which was a key factor<sup>19</sup> in the recent repeal of the Property Misdescriptions Act 1991.<sup>20</sup>

<sup>8</sup> BIS, 'The Regulatory Framework for Home Buying and Selling: Government response to consultations on the Estate Agents Act and the Property Misdescriptions Act' (URN 12/1006 (2012)) at, for example, [39]: 'The Government understands the reasons why opponents to repeal of the PMA favour it over the CPRs. The PMA deals specifically with property and as such is easy to apply. The CPRs by contrast are not specific to the sector and, being principles-based, require traders to consider how they apply to their particular circumstances.'

<sup>9</sup> Cf. C. Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Ashgate Publishing, Aldershot, 2007) at 431. On the relevance of context see: *Secretary of State for Business, Innovation and Skills v PLT Anti-Marketing Ltd* [2015] EWCA Civ 76.

<sup>10</sup> Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Cm 8328 (2012)) 2.7.

<sup>11</sup> See J. Devenney, 'Private Redress Mechanisms in England and Wales for Unfair Commercial Practices', (2016) 5 EuCML 100. See also J. Garside, 'Trading standards institute: consumers are no longer protected', *The Guardian*, 7<sup>th</sup> August 2016.

<sup>12</sup> See 1.1.7 below.

<sup>13</sup> Although some may need to be unpacked through case law (for example the meaning of falsity under Schedule 1, para. 17 (or para. 17 of Annex I of the UCPD).

<sup>14</sup> See 1.2.1 below.

<sup>15</sup> Although, given the overall maximum harmonisation nature of the UCPD, this would need to be done at an EU level.

<sup>16</sup> See UCPD, Recital 9.

<sup>17</sup> See UCPD, Recital 10.

<sup>18</sup> Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Cm 8328 (2012)) 6.118.

<sup>19</sup> See BIS, 'The Regulatory Framework for Home Buying and Selling: Government response to consultations on the Estate Agents Act and the Property Misdescriptions Act' (URN 12/1006 (2012)) at para. 40: 'The Government remains of the view, however, that the CPRs provide broadly similar protection to the PMA. The queries and concerns raised are similar to those that were raised when the CPRs were first proposed and these fears do not seem to have materialised in other sectors. The Government believes this situation will continue so long as the PMA remains in place and that repealing the PMA would not significantly reduce levels of consumer protection. This is disputed by some stakeholders but not others and the Government does not find the arguments for a loss of consumer protection convincing. The Government will therefore lay before Parliament an Order to repeal the PMA. The current intention is that this will come into force not before October 2013.'

- 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 what 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?*]

Although there is not a discrete body of EU Law on environmental or green advertising, a number of EU initiatives make provision in this regard.<sup>21</sup> For example, Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91<sup>22</sup> provides:

'Use of terms referring to organic production

1. For the purposes of this Regulation a product shall be regarded as bearing terms referring to the organic production method where, in the labelling, advertising material or commercial documents, such a product, its ingredients or feed materials are described in terms suggesting to the purchaser that the product, its ingredients or feed materials have been obtained in accordance with the rules laid down in this Regulation. In particular, the terms listed in the Annex, their derivatives or diminutives, such as 'bio' and 'eco', alone or combined, may be used throughout the Community and in any Community language for the labelling and advertising of products which satisfy the requirements set out under or pursuant to this Regulation.

In the labelling and advertising of live or unprocessed agricultural products terms referring to the organic production method may be used only where, in addition, all the ingredients of that product have also been produced in accordance with the requirements laid down in this Regulation.

2. The terms referred to in paragraph 1 shall not be used anywhere in the Community and in any Community language for the labelling, advertising and commercial documents of a product which does not satisfy the requirements set out under this Regulation, unless they are not applied to agricultural products in food or feed or clearly have no connection with organic production.

Furthermore, any terms, including terms used in trademarks, or practices used in labelling or advertising liable to mislead the consumer or user by suggesting that a product or its ingredients satisfy the requirements set out under this Regulation shall not be used.

3. The terms referred to in paragraph 1 shall not be used for a product for which it has to be indicated in the labelling or advertising that it contains GMOs, consists of GMOs or is produced from GMOs according to Community provisions.<sup>23</sup>

It is also clear that the general provisions of the CPUTR 2008 can apply to environmental/green advertising.<sup>24</sup> However, given the specialised nature of this context, there is perhaps the need for some further guidance on the application of the CPUTR 2008 to such claims.<sup>25</sup>

<sup>20</sup> See Property Misdescriptions Act 1991 (Repeal) Order 2013.

<sup>21</sup> See D. Parry, R. Rowell, B.W. Harvey and C. Ervine, *Butterworths Trading and Consumer Law* (Lexis, 1996- ) at 2.5.1ff.

<sup>22</sup> Official Journal L 189, 20/07/2007 p. 1.

<sup>23</sup> Article 23.

<sup>24</sup> See D. Parry, R. Rowell, B.W. Harvey and C. Ervine, *Butterworths Trading and Consumer Law* (Lexis, 1996- ) at 2.5.1ff.

<sup>25</sup> Cf. DEFRA, *Green Claims Guidance* (PB13453 (2011)).

- 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 your country rigidly?*]

Regulations 5, 6 and 7 of the CPUR 2008 use the concept of an 'average consumer' as a benchmark. Regulation 2(2) provides some assistance in relation to this concept:

'In determining the effect of a commercial practice on the average consumer where the practice reaches or is addressed to a consumer or consumers account shall be taken of the material characteristics of such an average consumer including his being reasonably well informed, reasonably observant and circumspect.'

Some earlier directives did not, at least explicitly, provide a means of benchmarking relevant provisions which, of course, provided the more potential for uncertainty and inconsistency.<sup>26</sup> Thus, at a general level, the explicit indication of a relevant benchmark is arguably to be welcomed. Yet whether, given the non-homogeneous nature of consumer vulnerabilities,<sup>27</sup> an 'average consumer' test always results in a high level of consumer protection is debatable.<sup>28</sup> Moreover, the consumer organisation Which? has observed:

'... the evidence suggests that the main risks in the concept of the 'average consumer' are:

- The average consumer, being defined as reasonably well informed and reasonably observant, is mistakenly thought to refer to the real average consumer, which may or may not be one or both of these two things, likely depending on the specific context where the concept is applied.
- The concept of the 'average consumer' may be too ambiguous for practical purposes because it varies so much depending on the sector or market.

Behavioural science is an area that has developed considerably since the UCPD was adopted over a decade ago. In our view, REFIT provides a unique opportunity to modernise the UCPD in line with the way that consumers behave in the real world.'

- 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 in your country recognised new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted)?*]

On the other hand Regulation 2(4)-(5) of the CPUR 2008 provides:

'(4) In determining the effect of a commercial practice on the average consumer where the practice is directed to a particular group of consumers, a reference to the average consumer shall be read as referring to the average member of that group. (5) In determining the effect of a commercial practice on the average consumer— (a) where a clearly identifiable group of consumers

<sup>26</sup> Cf. UCTD and *Kásler v OTP Jelzálogbank Zrt* (C-26/13) [2014] 2 All E.R. (Comm) 443.

<sup>27</sup> J. Devenney, 'Conceptualising Consumers in the Law of England and Wales' in K. Riesenhuber and F. Klinck (eds), *Verbraucherleitbilder: Interdisziplinäre und Europäische Perspektiven* (de Gruyter, 2015) at p.161. The Consumer Council for Northern Ireland noted: 'Our research also found that younger consumers (those aged 16-24), older consumers (aged 65+), and consumers from a lower income bracket were less likely to feel well informed about their rights. We therefore prioritise our education campaign work to target these audiences in an effort to make them less vulnerable and better informed consumers.'

<sup>28</sup> As opposed, for example, to further internal market ambitions: see, for example, M. Himoni, *European consumer law: a law for the consumer or the internal market? The case of the consumer right directive and its application to the UK and Cypriot regimes* (unpublished Ph.D thesis, University of Leeds, 2016).

is particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, and (b) where the practice is likely to materially distort the economic behaviour only of that group, a reference to the average consumer shall be read as referring to the average member of that group.'

Thus the standard 'average consumer' test is, for example, adjusted where the commercial practice is directed at a particularly vulnerable group. For the reasons given above this is likely to result in a greater level of consumer protection although, perhaps justifiably from the point of view of the burden on traders,<sup>29</sup> it is limited to situations where the trader had a particular degree of knowledge of the situation.

- 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?*]

Advertising is an area where, in the UK, there is a multi-dimensional approach to regulation which includes '...many controls – some voluntary, some moral and some statutory.'<sup>30</sup> This includes self-regulation for non-broadcast advertising (through the independent Advertising Standards Authority (ASA)), co-regulation of broadcast advertising (through the ASA and Ofcom)<sup>31</sup> and trade codes of practice.<sup>32</sup> It also includes various statutory provisions including the CPUTR 2008 and s.319 of the Communications Act 2003 which provides:

'(1) It shall be the duty of OFCOM to set, and from time to time to review and revise, such standards for the content of programmes to be included in television and radio services as appear to them best calculated to secure the standards objectives.

(2) The standards objectives are—

(a) that persons under the age of eighteen are protected;

(b) that material likely to encourage or to incite the commission of crime or to lead to disorder is not included in television and radio services;

(c) that news included in television and radio services is presented with due impartiality and that the impartiality requirements of section 320 are complied with;

(d) that news included in television and radio services is reported with due accuracy;

<sup>29</sup> In the UK, for example, there has been a deregulation agenda in recent times. See the claim in Department for Business, Innovation and Skills, *Draft Consumer Rights Bill: Government Response to Consultations on Consumer Rights* (BIS/13/916, June 2013) p.5: 'The reforms taken together are estimated to be worth over £4 billion to the UK economy over 10 years in quantified net benefits. Clarification and simplification mean consumers should spend less time trying to understand their rights, less time and resource applying them, and no longer waste time when they have misunderstood their rights. Businesses should also spend less time having to interpret complex legislation. Where things do go wrong, the proposals allow wider options for redress for both businesses and consumers who have lost out when consumer or competition law has been broken. The proposals also reduce regulatory costs for business. Problems following consumer purchases should be addressed more quickly, with lower complaint handling costs and fewer cases taken to court.' See also GHK, 'Consumer rights and economic growth' (Final Report, 2013). Note also the comment from the UK European Consumer Centre: 'We are aware that Financial Conduct Authority does recognise individuals with unmanageable level of debt as potentially vulnerable.'

<sup>30</sup> See D. Parry, R. Rowell, B.W. Harvey and C. Ervine, *Butterworths Trading and Consumer Law* (Lexis, 1996-) at 5.1.

<sup>31</sup> See Contracting Out (Functions Relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004 (SI 2004/1975).

<sup>32</sup> See: <http://www.tradingstandards.uk/advice/ConsumerCodes.cfm>

- (e) that the proper degree of responsibility is exercised with respect to the content of programmes which are religious programmes;
- (f) that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material;
- (fa) that the product placement requirements referred to in section 321(3A) are met in relation to programmes included in a television programme service (other than advertisements);
- (g) that advertising that contravenes the prohibition on political advertising set out in section 321(2) is not included in television or radio services;
- (h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented;
- (i) that the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with;
- (j) that the unsuitable sponsorship of programmes included in television and radio services is prevented;
- (k) that there is no undue discrimination between advertisers who seek to have advertisements included in television and radio services; and
- (l) that there is no use of techniques which exploit the possibility of conveying a message to viewers or listeners, or of otherwise influencing their minds, without their being aware, or fully aware, of what has occurred.<sup>33</sup>

- 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?

Review mechanisms have been addressed above. As will be noted below, particular types of contractual term might be added to the 'black' list.<sup>34</sup>

- Are there other measures that could improve the effectiveness of the UCPD in establishing a high level of consumer protection in your country? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

The establishment of private rights of redress for unfair commercial practices and the ability to evolve, at an EU level, the 'black' list have been mentioned above. It could be suggested that it would be helpful to explore ways of further collating and categorising examples of unfair commercial practices arising from case law across the EU.<sup>35</sup>

<sup>33</sup> Emphasis added.

<sup>34</sup> See 1.2.1.

<sup>35</sup> Cf. in relation to the UCTD below.



### 1.1.2. Effectiveness of the PID in establishing 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;

The PID is, in general terms,<sup>36</sup> transposed by the Price Marking Order 2004 (PMO).<sup>37</sup> Article 5<sup>38</sup> makes provision in relation to unit prices.<sup>39</sup> The application of this provision, particularly in relation to promotional schemes, can vary.<sup>40</sup> The Department for Business, Energy and Industrial Strategy commented in the interview process that: 'We consider the Price Indication Directive to be a useful tool to enable consumers to identify the best deal, and that the minimum harmonisation measure is important, for example in allowing for other units of quantity that are widely and customarily used in a Member State, or the transitional derogation for certain small retail businesses.'<sup>41</sup>

On 21 April 2015 Which? submitted a super-complaint to the Competition and Markets Authority (CMA) concerning pricing practices in the groceries sector.<sup>42</sup> The CMA did '...not consider there to be a systemic problem in the groceries market in how retailers present prices, concluding that problems are not occurring in large numbers across the whole sector and that generally retailers are taking compliance with legislation seriously to avoid such problems occurring'.<sup>43</sup> However, the CMA did make a number of recommendations specifically in relation to unit pricing (which were generally endorsed by the Government):<sup>44</sup>

'Recommendation 2: The CMA recommends that BIS produces best practice guidelines on the legibility of unit pricing information, to provide greater clarity about the requirements of the PMO in this regard. This would help TSS and

<sup>36</sup> Cf. Price Marking Order (Northern Ireland) 2004 (SI 2004/368).

<sup>37</sup> SI 2004/102.

<sup>38</sup> '(1) Subject to paragraph (2), (3) and (4) and article 9, where a trader indicates that any product is or may be for sale to a consumer, he shall indicate the unit price of that product in accordance with the provisions of this Order.

(2) The requirement in paragraph (1) only applies in respect of products sold from bulk or required by or under Parts IV or V of the Weights and Measures Act 1985 to be:

(a) marked with an indication of quantity; or

(b) made up in a quantity prescribed by or under that Act.

(3) The requirement in paragraph (1) shall not apply in relation to:

(a) any product which falls within Schedule 2;

(b) any product the unit price of which is identical to its selling price;

(c) bread made up in a prescribed quantity which is or may be for sale in a small shop, by an itinerant trader or from a vending machine; or

(d) any product which is pre-packaged in a constant quantity which is or may be for sale in a small shop, by an itinerant trader or from a vending machine.

(4) The requirement in paragraph (1) applies in relation to an advertisement for a product only where the selling price of the product is indicated in the advertisement.'

<sup>39</sup> Defined in Article 1(2): "unit price" means the final price, including VAT and all other taxes, for one kilogram, one litre, one metre, one square metre or one cubic metre of a product, except (i) in respect of the products specified in Schedule 1, where unit price means the final price including VAT and all other taxes for the corresponding units of quantity set out in that Schedule; and (ii) in respect of products sold by number, where unit price means the final price including VAT and all other taxes for an individual item of the product.'

<sup>40</sup> See, generally, O'Keefe, *The Law of Weights and Measures* (2<sup>nd</sup>. Edn., Butterworth, London, 1996-) at 2.6539.

<sup>41</sup> 11 August 2016.

<sup>42</sup> See <https://www.gov.uk/government/news/cma-receives-super-complaint-from-which?>

<sup>43</sup> See BIS, *Pricing Practices in the Groceries Market: Government response to the Competition and Markets Authority's report and recommendations on the super-complaint made by Which?*, (BIS/15/568 (2015)) p.3. Similarly the UK European Consumer Centre noted: 'The UK European Consumer Centre noted: "Major retailers do indicate various unit prices (weight, liquid quantity) on the price tags. This information is provided in practical manner. The consumers can compare these prices, should they wish to do so.'

<sup>44</sup> See also Trading Standards Institute, *Pricing Practices Review: Call for Evidence Responses*, (2014).



Primary Authorities assess compliance. We also recommend that retailers introduce any resulting changes to labelling as soon as practicable...<sup>45</sup>

Recommendation 3: We recommend that BIS continues its review, with the Expert Working Group, of Schedule 1 to the PMO, but changes the focus to give particular consideration to:

- (a) Ways to clarify and simplify the requirements, considering evidence about the advantages and disadvantages of simpler and more future-proofed approaches, with fewer exceptions, used in other countries, and
- (b) What further research, building on the findings from our qualitative research, is needed into how consumers use unit prices to ensure the requirements help as many people as possible to use them in their decision-making...

Recommendation 4: To encourage a more consistent use of unit pricing for products on promotion,<sup>46</sup> the CMA recommends that BIS considers reviewing and clarifying the legal requirements set out in Article 9 of the PMO, and the associated guidance. This should be done with particular reference to the requirements of the CPRs and the ongoing review of the PPG...<sup>47</sup>

Recommendation 5: The CMA recommends that Which? and other consumer representative organisations consider whether there is a further role they can play in consumer education on the effective use of unit prices. Further, following any further work by BIS on our above recommendations, there will be a further need to educate consumers on any changes to unit pricing.<sup>48</sup>

- 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?

The definition of 'unit price' and the exceptions contained in Schedule 1 have already been noted. The indication of 'unit price' in specific performance measurement units could, if the process does not become too complicated,<sup>49</sup> be helpful to a consumer. The UK European Consumer Centre noted: 'We believe that offering this kind of weight indication may create confusion to consumers, as it may be more difficult to compare in this manner. The performance information is easier to consider by an average consumer at the point of purchase.'

<sup>45</sup> Which? noted: 'Article 3(1) of the PID provides that the unit price need not be indicated where it is identical to the sales price. While this may be an appropriate approach for many products, it is not clear why this is appropriate in the context of food and other consumables or groceries that are commonly purchased in a supermarket environment...Our fieldwork has found that - even for groceries - the unit price may not be shown where the selling price is the same. Yet, in an environment where unit prices are prolific (such as a supermarket shelf), consumers will not necessarily appreciate that this is the reason why the unit price is not included. Removing the requirement to provide unit prices in this scenario creates more, not less, confusion for shoppers. We would recommend that this exemption be removed for food products and groceries.'

<sup>46</sup> Which? noted: 'Our super-complaint found that unit prices were not being displayed for products that were on promotion (for example, '50% off' or 'buy-one-get-one-free' special offers). The PID must make clear that the obligation to display unit pricing does not fall away when goods are offered at promotional prices and should establish clear rules for how those unit prices should be calculated.'

<sup>47</sup> Which? also observed: 'Some degree of flexibility around the units available to traders is likely to be necessary and appropriate. However, we would suggest that the broad language in Article 2 is narrowed to ensure that confusion is not caused by consumers seeing a vast array of different units being used. Alternatively, the Directive could make clear that the ability to use different units should be granted only in exceptional circumstances, where there is clear, objective evidence that detriment would be caused if one of the core units had to be relied upon.'

<sup>48</sup> CMA, *Pricing Practices in the Groceries Market Response to a super-complaint made by Which? on 21 April 2015* (2015) at 8.6ff.

<sup>49</sup> Cf. See BIS, *Pricing Practices in the Groceries Market: Government response to the Competition and Markets Authority's report and recommendations on the super-complaint made by Which?*, (BIS/15/568 (2015)) at p.3 where there is an intention to simplify Schedule 1 in line with other EU countries.

- The effects of the regulatory choices/derogations allowed by the Directive and applied by Member States. [*Key aspects to consider are: Is the derogation relevant? Do companies make use of it? Are there consumer complaints because of this? If so, approximately how many per year?*]

The small business, or small shop,<sup>50</sup> exemption is contained in Schedule 2. There may be some debate on exactly how the floor area is calculated to determine whether or not a shop is a small shop.<sup>51</sup> The UK European Consumer Centre tentatively noted: 'Everyday observation suggests that smaller shops normally don't provide information about the unit price. Given the nature of our service (cross border consumer advice and mediation), we tend not to receive such complaints.'

Which? noted: 'While this exemption is presumably designed to protect small, independent retailers from incurring disproportionate cost, it does not reflect the fact that many small shops are part of national chains. This issue was considered when the Directive was appraised in 2004, but it has not been resolved. At that time, it was recommended that only those smaller businesses for which unit pricing poses a real burden are exempted from the requirements. REFIT presents an opportunity to ensure this recommendation is expressly enshrined in the PID.'

### 1.1.3. Effectiveness of the MCAD in providing protection for businesses

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

- 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 was primarily transposed in the UK by the Business Protection from Misleading Marketing Regulations 2008 (BPMR 2008).<sup>52</sup> Regulation 3 prohibits advertising which misleads traders, with Regulation 3(2) providing:

'Advertising is misleading which—

(a) in any way, including its presentation, deceives or is likely to deceive the traders to whom it is addressed or whom it reaches; and by reason of its deceptive nature, is likely to affect their economic behaviour; or

(b) for those reasons, injures or is likely to injure a competitor.'<sup>53</sup>

Under Regulation 2(1) advertising is defined widely to mean '...any form of representation which is made in connection with a trade, business, craft or profession in order to promote the supply or transfer of a product and 'advertiser' shall be

<sup>50</sup> Defined in Article 1(2) as: 'any shop which has a 'relevant floor area' not exceeding 280 square metres'.

<sup>51</sup> See, generally, O'Keefe, *The Law of Weights and Measures* (2<sup>nd</sup>. Edn., Butterworth, London, 1996-) at 2.6539.

<sup>52</sup> SI 2008/1276.

<sup>53</sup> Note also Regulation 2(3)-(5): '(3) In determining whether advertising is misleading, account shall be taken of all its features, and in particular of any information it contains concerning—(a) the characteristics of the product (as defined in paragraph (4)); (b) the price or manner in which the price is calculated; (c) the conditions on which the product is supplied or provided; and (d) the nature, attributes and rights of the advertiser (as defined in paragraph (5)). (4) In paragraph (3)(a) the 'characteristics of the product' include—(a) availability of the product; (b) nature of the product; (c) execution of the product; (d) composition of the product; (e) method and date of manufacture of the product; (f) method and date of provision of the product; (g) fitness for purpose of the product; (h) uses of the product; (i) quantity of the product; (j) specification of the product;(k) geographical or commercial origin of the product; (l) results to be expected from use of the product; or (m) results and material features of tests or checks carried out on the product. (5) In paragraph (3)(d) the 'nature, attributes and rights' of the advertiser include the advertiser's— (a) identity; (b) assets;(c) qualifications; (d) ownership of industrial, commercial or intellectual property rights; or (e) awards and distinctions.'

construed accordingly'.<sup>54</sup> The BPMMR 2008 do not affect the validity of an agreement<sup>55</sup> but they do provide criminal liability for misleading advertising.<sup>56</sup>

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

Given the many different possible forms of advertising, particularly under the extended definition in the BPMMR 2008, it would seem that a principle-based approach is appropriate.<sup>57</sup> One issue, however, surrounds the use of criminal sanctions for misleading advertising and, more specifically, whether or not it is appropriate (and/or inhibits cross-border trade) to deploy criminal liability in cases which do not amount to fraud.<sup>58</sup> The BPMMR 2008 deal with that issue, to some extent, with a due diligence defence under Regulation 11:

'In any proceedings against a person for an offence under regulation 6 it is a defence for that person to prove—

(a) that the commission of the offence was due to—

(i) a mistake;

(ii) reliance on information supplied to him by another person;

(iii) the act or default of another person;

(iv) an accident; or

(v) another cause beyond his control;

And

(b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.'

- The effects of the minimum harmonisation provisions on misleading advertising; [*Key aspects to consider are: 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)?*]

Given the potential reach of the MCAD,<sup>59</sup> it is not clear that a public enforcement regime, as provided under the BPMMR 2008, would in itself sufficient. However, such a regime is, in the UK, supplemented by the availability of various private law actions.<sup>60</sup>

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

The full harmonisation provisions in the MCAD are restricted to '...comparative advertising as far as the comparison is concerned'<sup>61</sup> and this is, arguably, justified on

<sup>54</sup> Emphasis added. See also D. Parry, R. Rowell, B.W. Harvey and C. Ervine, *Butterworths Trading and Consumer Law* (Lexis, 1996-) at 227A.

<sup>55</sup> See Regulation 29.

<sup>56</sup> See Regulation 6. Regulation 8 makes provision in relation to the liability of companies.

<sup>57</sup> Cf. *Director General of Fair Trading v Tobyward Ltd* [1989] 1 W.L.R. 517.

<sup>58</sup> Cf., in a slightly different context, *South Australia Asset Management v. York Montague* [1996] All ER 365 at 374 *per* Lord Hoffmann. See also J. Devenney, 'Re-Examining Damages for Fraudulent Misrepresentation: Towards a More Measured Response to Compensation and Deterrence', in L. Di Matteo, K. Rowley, Q. Zhou & S. Santier, *Current Issues in Commercial Contracts: Transatlantic Perspectives* (Cambridge University Press, 2013).

<sup>59</sup> Cf. Recital 4.

<sup>60</sup> See, for example, A.M. Dugdale, M. Jones and M. Simpson, *Clerk and Lindsell on Torts*, (21<sup>st</sup> edn., Sweet & Maxwell, 2015) at 23-18.

<sup>61</sup> MCAD, Article 8(1).

the effect comparative advertising can have on competition.<sup>62</sup> Regulation 4 of the BPMMR 2008 provides:

'Comparative advertising shall, as far as the comparison is concerned, be permitted only when the following conditions are met—

- (a) it is not misleading under regulation 3;
- (b) it is not a misleading action under regulation 5 of the Consumer Protection from Unfair Trading Regulations 2008 or a misleading omission under regulation 6 of those Regulations;
- (c) it compares products meeting the same needs or intended for the same purpose;
- (d) it objectively compares one or more material, relevant, verifiable and representative features of those products, which may include price;
- (e) it does not create confusion among traders—
  - (i) between the advertiser and a competitor, or
  - (ii) between the trade marks, trade names, other distinguishing marks or products of the advertiser and those of a competitor;
- (f) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, products, activities, or circumstances of a competitor;
- (g) for products with designation of origin, it relates in each case to products with the same designation;
- (h) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;
- (i) it does not present products as imitations or replicas of products bearing a protected trade mark or trade name.'

- 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;

Regulation 4 of the BPMMR 2008 is enforced, under Part 3, by various enforcers including the CMA. Again it is not clear that a public enforcement regime, as provided under the BPMMR 2008, would in itself be sufficient. However, such a regime is, in the UK, supplemented by the availability of various private law actions.<sup>63</sup>

<sup>62</sup> Recital 6.

<sup>63</sup> See, for example, A.M. Dugdale, M. Jones and M. Simpson, *Clerk and Lindsell on Torts*, (21<sup>st</sup> edn., Sweet & Maxwell, 2015) at 23-18. Note, however, Lord Herschell's statement in *White v Mellin* [1895] A.C. 154 at 165 that the courts should not become '...a machinery for advertising rival productions by obtaining a judicial determination which of the two was the better'.

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

Part 3 of BPMMR 2008 outlines enforcement powers given, for example, to the CMA.<sup>64</sup> Thought should be given to whether or not the MCAD should also set-out private rights of redress.<sup>65</sup>

- Are there measures that could improve the effectiveness of the MCAD in providing protection for businesses (see also 1.1.6 below)? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

This has been covered under the last item.

#### 1.1.4. Effectiveness of current rules 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;

By way of background, the relevant literature identifies some disparities in approach to the UCPD in Member States.<sup>66</sup> However, as will be noted below, the impact of non-harmonised law on cross-border trade is keenly contested.<sup>67</sup>

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

Again by way of background, as will be noted below, the impact of non-harmonised law on cross-border trade is keenly contested. Moreover, as the (now) CJEU case law indicates, it is not clear that there is a single 'black' list.<sup>68</sup>

- Whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade. [*Do the national differences play a role in a business perspective? Have they caused problems?*]

Again by way of background, as will be noted below, the impact of non-harmonised law on cross-border trade is keenly contested. Nevertheless, given the complexity of this area of law,<sup>69</sup> it is possible to make a case that the minimum harmonisation

<sup>64</sup> Regulation 18 provides: '(1) The court on an application by an enforcement authority may grant an injunction on such terms as it may think fit to secure compliance with regulation 3, 4 or 5. (2) Before granting an injunction the court shall have regard to all the interests involved and in particular the public interest. (3) An injunction may relate not only to particular advertising but to any advertising in similar terms or likely to convey a similar impression. (4) The court may also require any person against whom an injunction (other than an interim injunction) is granted to publish in such form and manner and to such extent as the court thinks appropriate for the purpose of eliminating any continuing effects of the advertising— (a) the injunction; and (b) a corrective statement.'

<sup>65</sup> Cf. 1.1.7.

<sup>66</sup> Cf. G. Howells, H-W. Micklitz and T. Wilhelmsson, 'Towards a better understanding of unfair commercial practices', (2009) 51 Int. J.L.M. 69.

<sup>67</sup> See, for example, R. Halson and D. Campbell, 'Harmonisation and its Discontents: A Transaction Costs Critique of a European Contract Law' in J. Devenney and M. Kenny (eds), *The Transformation of European Private Law*, (Cambridge University Press 2013).

<sup>68</sup> See European Commission, *Report on the application of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market*, (COM(2013) 139 final) at 3.1ff.

<sup>69</sup> On which see above. See also J. Devenney & M. Kenny, 'Omission of Personal Property from the Proposed CESL: The Hamlet Syndrome...Without the Prince?' [2015] *The Journal of Business Law* 607.

derogation under the UCPD having, at least, some, negative, impact on cross-border trade.<sup>70</sup>

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;

By way of background and analogy, it should be noted that the relevant literature identifies some disparities in approach to the UCPD (the sister directive to the MCAD) in Member States.<sup>71</sup> However, as will be noted below, the impact of non-harmonised law on cross-border trade is keenly contested.<sup>72</sup>

- Whether the minimum harmonisation character of provisions on misleading advertising represents a barrier to cross-border trade;

Again by way of background, as will be noted below, the impact of non-harmonised law on cross-border trade is keenly contested.

- 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 noted above, the full harmonisation provisions in the MCAD are restricted to ‘...comparative advertising as far as the comparison is concerned’<sup>73</sup> and this is, arguably, justified on the effect comparative advertising can have on competition.<sup>74</sup> One challenge for the EU legislator is how to maintain the ‘currency’ of the MCAD following, for example, multiple decisions from the (now) CJEU.<sup>75</sup>

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

By way of background, it can be argued that the remedies/enforcement regime in relation to EU directives is, sometimes, insufficient and this can impact on the effectiveness of a particular directive.<sup>76</sup> This can also apply to the cross-border enforcement dimension.<sup>77</sup>

<sup>70</sup> Cf. L. Poro, ‘Unfair commercial practices in financial services: is the EU legal framework sufficient to protect consumers?’ (2014) 29 J.I.B.L.R. 422.

<sup>71</sup> Cf. G. Howells, H-W. Micklitz and T. Wilhelmsson, ‘Towards a better understanding of unfair commercial practices’, (2009) 51 Int. J.L.M. 69.

<sup>72</sup> See, for example, R. Halson and D. Campbell, ‘Harmonisation and its Discontents: A Transaction Costs Critique of a European Contract Law’ in J. Devenney and M. Kenny (eds), *The Transformation of Private Law*, (Cambridge University Press 2013).

<sup>73</sup> MCAD, Article 8(1).

<sup>74</sup> Recital 6.

<sup>75</sup> On which, in relation to comparative advertising, see D. Parry, R. Rowell, B.W. Harvey and C. Ervine, *Butterworths Trading and Consumer Law* (Lexis, 1996- ) at 229.

<sup>76</sup> J. Devenney, M. Kenny & L. Gillies, ‘The EU Optional Instrument: Absorbing the Private International Law Implications of a Common European Sales Law’, (2012) *Yearbook of Private International Law* 315 at 335-336.

<sup>77</sup> See J. Devenney & T. Pfeiffer, ‘Control of Standard Terms (Collective Proceedings)’ in G. Dannemann & S. Vogenauer, *The Common Frame of Reference for European Contract Law and its Interaction with English and German Law* (Oxford University Press, 2013).



1.1.5. Interplay amongst UCPD information requirements according to Article 7(4) with the information requirements in the horizontal consumer law instruments

Regarding the information requirements according to Article 7(4) UCPD ("invitation to purchase") in the advertising stage, please analyse:

- The level of awareness of traders as regards information requirements at the advertising stage, as in particular demonstrated by their practical application; [*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?*]

Regulation 6 of the CPUTR 2008 provides:

‘(1) A commercial practice is a misleading omission if, in its factual context, taking account of the matters in paragraph (2)<sup>78</sup>—

- (a) the commercial practice omits material information,
- (b) the commercial practice hides material information,
- (c) the commercial practice provides material information in a manner which is unclear, unintelligible, ambiguous or untimely, or
- (d) the commercial practice fails to identify its commercial intent, unless this is already apparent from the context,

and as a result it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.’<sup>79</sup>

Regulation 6(4), emanating from Article 7(4) of the UCPD, outlines ‘material information’ in the context of invitations to purchase:

‘(4) Where a commercial practice is an invitation to purchase, the following information will be material if not already apparent from the context in addition to any other information which is material information under paragraph (3)—

- (a) the main characteristics of the product, to the extent appropriate to the medium by which the invitation to purchase is communicated and the product;
- (b) the identity of the trader, such as his trading name, and the identity of any other trader on whose behalf the trader is acting;
- (c) the geographical address of the trader and the geographical address of any other trader on whose behalf the trader is acting;
- (d) either—
  - (i) the price, including any taxes; or
  - (ii) where the nature of the product is such that the price cannot reasonably be calculated in advance, the manner in which the price is calculated;
- (e) where appropriate, either—
  - (i) all additional freight, delivery or postal charges; or

<sup>78</sup> ‘(2) The matters referred to in paragraph (1) are—

- (a) all the features and circumstances of the commercial practice;
- (b) the limitations of the medium used to communicate the commercial practice (including limitations of space or time); and
- (c) where the medium used to communicate the commercial practice imposes limitations of space or time, any measures taken by the trader to make the information available to consumers by other means.’

<sup>79</sup> Emphasis added. Regulation 6(3) provides: ‘(3) In paragraph (1) ‘material information’ means—(a) the information which the average consumer needs, according to the context, to take an informed transactional decision; and (b) any information requirement which applies in relation to a commercial communication as a result of an EU obligation.’



- (ii) where such charges cannot reasonably be calculated in advance, the fact that such charges may be payable;
- (f) the following matters where they depart from the requirements of professional diligence—
  - (i) arrangements for payment,
  - (ii) arrangements for delivery,
  - (iii) arrangements for performance,
  - (iv) complaint handling policy;
- (g) for products and transactions involving a right of withdrawal or cancellation, the existence of such a right.'

The OFT provided detailed guidance on this provision (now adopted by the CMA).<sup>80</sup> However, the extent to which traders are aware of these requirements is unclear.<sup>81</sup> On the other hand the UK European Consumer Centre noted: 'Overall [there is a] good level of awareness in the United Kingdom. There are incidents where the companies may not provide some of the required information, this is dealt with by the appropriate Trading Standards authorities, based on proportionality... Generally speaking traders tend to adhere to the rules. This is only based on anecdotal knowledge of the market and complaints received.'

- 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?

By way of background, it should, first, be noted that the precise impact on consumer protection of the provision of information is contested and will vary depending on the context.<sup>82</sup> Secondly, it should be noted that there are now a plethora of information duties affecting contracts with consumers. For example, s.12 of the Consumer Rights Act 2015 ('[o]ther pre-contract information included in contract') provides:

'(1) This section applies to any contract to supply goods. (2) Where regulation 9, 10 or 13 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134)<sup>83</sup> required the trader to provide information to the consumer before the contract became binding, any of that information that was provided by the trader other than information about the goods and mentioned in paragraph (a) of Schedule 1 or 2 to the Regulations (main characteristics of goods) is to be treated as included as a term of the contract.'

This provision is not straightforward, not least as s.12(1) states that it 'applies to any contract to supply goods' whereas the Consumer Contracts (Information, Cancellation

<sup>80</sup> OFT, Consumer Protection from Unfair Trading Regulations 2008 Guidance on the Implementation of the Unfair Commercial Practices Directive, (OFT 1008 (2008)) at 7.20ff. The UK European Consumer Centre noted: 'These information requirements are generally the same as in the CRD. We believe these are useful, as a part of the UCPD (as well as national regulations), because the weight of breach of these tends to be considered as bigger than the information requirements under CRD.'

<sup>81</sup> Some of the requirements would, it is submitted, be routinely provided in many cases (e.g. the price).

<sup>82</sup> Cf. J. Luzak, 'Online disclosure rules of the Consumer Rights Directive: Protecting passive or active consumers?' (2015) 3 Journal of European Consumer and Market Law 79.

<sup>83</sup> Which partially implement the Consumer Rights Directive (CRD) (Directive 2011/83/EC).

and Additional Charges) Regulations 2013<sup>84</sup> sometimes limit a particular information requirement to a particular type of contract (for example a sales contract<sup>85</sup>).<sup>86</sup> Moreover it is not always clear exactly how some of these terms, emanating from the provision of particular information, is to operate,<sup>87</sup> particularly when read with s.12(3), Consumer Rights Act 2015.<sup>88</sup> For example, under Schedule 1, paragraph (b) 'the identity of the trader (such as the trader's trading name), the geographical address at which the trader is established and the trader's telephone number...'. Presumably this does not mean that, for example, the trader cannot change telephone number or cannot change it without the agreement of the consumer (or all relevant consumers!)? Is the relevant requirement to somehow make available<sup>89</sup> changes to a telephone number?<sup>90</sup>

There is also the risk of unnecessary overlap or fragmentation as demonstrated by Regulation 6<sup>91</sup> the Electronic Commerce (EC Directive) Regulations 2002<sup>92</sup> or the

<sup>84</sup> These Regulations, of course, implement Directive 2011/83/EU on consumer rights [2011] O.J. L304/64, Article 3(1) of which is expressed in wide terms: 'This Directive shall apply, under the conditions and to the extent set out in its provisions, to any contract concluded between a trader and a consumer. It shall also apply to contracts for the supply of water, gas, electricity or district heating, including by public providers, to the extent that these commodities are provided on a contractual basis.' The Regulations do not apply to a number of situations including contracts '(b) for services of a banking, credit, insurance, personal pension, investment or payment nature...' (Regulation 6).

<sup>85</sup> Defined by Regulation 5.

<sup>86</sup> See, for example, Schedule 2, para. (p).

<sup>87</sup> See also Regulation 18.

<sup>88</sup> 'A change to any of that information, made before entering into the contract or later, is not effective unless expressly agreed between the consumer and the trader.'

<sup>89</sup> See Regulation 8: 'For the purposes of this Part, something is made available to a consumer only if the consumer can reasonably be expected to know how to access it.'

<sup>90</sup> In Schedule 2 the corresponding requirement is expressed in slightly different terms: '...(c) the geographical address at which the trader is established and, where available, the trader's telephone number, fax number and e-mail address, to enable the consumer to contact the trader quickly and communicate efficiently...'

<sup>91</sup> '(1) A person providing an information society service shall make available to the recipient of the service and any relevant enforcement authority, in a form and manner which is easily, directly and permanently accessible, the following information—

(a) the name of the service provider;

(b) the geographic address at which the service provider is established;

(c) the details of the service provider, including his electronic mail address, which make it possible to contact him rapidly and communicate with him in a direct and effective manner;

(d) where the service provider is registered in a trade or similar register available to the public, details of the register in which the service provider is entered and his registration number, or equivalent means of identification in that register;

(e) where the provision of the service is subject to an authorisation scheme, the particulars of the relevant supervisory authority;

(f) where the service provider exercises a regulated profession—

(i) the details of any professional body or similar institution with which the service provider is registered;

(ii) his professional title and the member State where that title has been granted;

(iii) a reference to the professional rules applicable to the service provider in the member State of establishment and the means to access them; and

(g) where the service provider undertakes an activity that is subject to value added tax, the identification number referred to in Article 22(1) of the sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the member States relating to turnover taxes—Common system of value added tax: uniform basis of assessment 1.

(2) Where a person providing an information society service refers to prices, these shall be indicated clearly and unambiguously and, in particular, shall indicate whether they are inclusive of tax and delivery costs.'

Financial Services (Distance Marketing) Regulations 2004.<sup>93</sup> On a more general level the Consumer Council for Northern Ireland reported:

'...the Consumer Council undertook with NI businesses, we found just under a third of NI businesses, particularly SME's, reported finding it difficult to keep up to date with consumer law [...] A key factor to the successful implementation of new consumer law is the education campaign that accompanies them. Increasingly there has been a move towards producing concise, user-friendly, plain language guides that communicate key changes and signpost to more detailed guidance where needed. This is to be commended. However, there remains a challenge in ensuring such information is disseminated as widely as possible and that it reaches those who need it most, when they need it.'

#### 1.1.6. Relevance for business-to-business transactions

Regarding the area of unfair commercial practices/marketing, please analyse:

- 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 cross-border trade;

As noted above,<sup>94</sup> the CPUTR 2008 only apply to B2C<sup>95</sup> transactions although the definition of a consumer has been slightly widened recently.<sup>96</sup> As will be noted below, some (particularly small) businesses are affected by similar vulnerabilities to some consumers.<sup>97</sup> Nevertheless in the B2B context, creating, for example, a 'black' list of unfair commercial practices, which in line with the CPUTR 2008 attract criminal sanctions, is likely to be controversial and may, depending on the approach adopted, be regarded as too burdensome on businesses.<sup>98</sup> That is not, of course, to claim that there are not some commercial practices which in a B2B context would be regarded as being on a 'virtual' black list.<sup>99</sup>

The Department of Business, Energy and Industrial Strategy commented: 'In general the UK Government believes in the principle of freedom to contract for businesses. Our call for evidence on small businesses as consumers demonstrated that extension of Unfair Contract Terms to Business to Business was not needed and that there were risks involved in doing so. The Department for Business, Energy and Industrial Strategy also published a consultation exploring whether certain further protections for the smallest businesses were needed when dealing with the non-regulated sectors. Responses are currently being analysed and a full Government response, together

<sup>92</sup> SI 2002/2013, transposing Article 5 of the Electronic Commerce Directive (Directive 2000/31/EC). Regulation 6 refers to 'information society service' which is defined, in complicated terms, in Regulation 2: 'information society services' (which is summarised in recital 17 of the Directive as covering 'any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service') has the meaning set out in Article 2(a) of the Directive, (which refers to Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, as amended by Directive 98/48/EC of 20 July 1998)'.  
<sup>93</sup> SI 2004/2095 transposing Directive 2002/65/EC concerning the distance marketing of consumer financial services [2002] OJ L271/16. Financial services are excluded from the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134): see Regulation 6(1)(b).  
<sup>94</sup> See 1.1.1.  
<sup>95</sup> See also, for example, Regulation 27A(2)(b) on C2B transactions.  
<sup>96</sup> Under the CPUTR 2008 a "consumer" was initially defined as: "any individual who in relation to a commercial practice is acting for purposes which are outside his business" (Regulation 2). This was subsequently amended to define a consumer as: "...an individual acting for purposes that are wholly or mainly outside that individual's business".  
<sup>97</sup> See 1.2.3.  
<sup>98</sup> See above at 1.1.3.  
<sup>99</sup> See, for example, the Auctions (Bidding Agreements) Act 1927, s.1. It also needs to be considered whether the harmonisation of such individual rules would contribute to cross-border trade.

with any recommendations, will be issued later this year. Issues to be considered include freedom to contract, the needs of different sectors, competitiveness of SMEs and market functions, the impact on consumers of relevant case law and the potential weakening of consumer rights.<sup>100</sup>

- 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;

In recent years in the UK there has been some move to separate B2B and B2C regimes, most notably with the Consumer Rights Act 2015 which largely separates the laws on supply of goods and unfair terms along these lines. One reason for such a split is that different policy considerations may be involved in these two contexts.<sup>101</sup>

- 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 also cover unfair commercial practices during and after the transaction;

As suggested below,<sup>102</sup> there is an argument to cover the use of some types of contractual term in unfair commercial practices legislation even in the B2B context. Yet, overall, from a UK perspective this is likely to be controversial, not least due to what might be, at least, perceived as an interface with a doctrine of 'good faith' in contract performance.<sup>103</sup>

- Whether there is a need to have a black-list of practices in the business-to-business marketing area;

There may be some difficulty in drafting such a list. An alternative would be to supplement legislation with detailed indicative guidance.<sup>104</sup>

- What should be the enforcement cooperation mechanism in the business-to-business marketing area;

This has been commented on above.<sup>105</sup>

- Whether there is a need to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive;

This has been commented on above.<sup>106</sup>

- Whether there is a need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive.

As noted above,<sup>107</sup> on 21<sup>st</sup> April 2015 Which? submitted a super-complaint to the Competition and Markets Authority (CMA) concerned pricing practices in the groceries

<sup>100</sup> 11 August 2016

<sup>101</sup> Cf. H. Beale (ed.), *Chitty on Contracts*, (32nd Edn., Sweet & Maxwell, London, 2015) para. 38-462.

<sup>102</sup> See 1.2.3.

<sup>103</sup> Cf., for example, *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789 at [45] *per Moore-Bick LJ* (hostility to concept of good faith).

<sup>104</sup> Although cf. the rather brief OFT, *Business to Business Promotions and Comparative Advertisements: A Quick Guide to the Business Protection from Marketing Regulations 2008* (OFT 1056 (2008)).

<sup>105</sup> See 1.1.3.

<sup>106</sup> See 1.1.3.

<sup>107</sup> See 1.1.2.

sector.<sup>108</sup> The CMA did ‘...not consider there to be a systemic problem in the groceries market in how retailers present prices, concluding that problems are not occurring in large numbers across the whole sector and that generally retailers are taking compliance with legislation seriously to avoid such problems occurring’.<sup>109</sup> However, a further recommendation made by the CMA was:

‘Recommendation 6: The CMA recommends that retailers ensure the information they provide about their price match schemes is as clear and transparent as possible in terms and conditions, online FAQs and in store. In particular, consideration should be given to whether the information is sufficiently accessible and in plain English.’<sup>110</sup>

### 1.1.7. Relevance of contractual consequences of unfair commercial practices

Please analyse whether there are in your country:

- 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;

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:

‘The Regulations ‘concern public enforcement rather than private redress. They do not give consumers the right to start civil actions to obtain compensation or other remedies. Instead, consumers must rely on existing private law doctrines, such as the law of misrepresentation and duress.’<sup>111</sup>

Yet such an exercise was not always straightforward.<sup>112</sup> To some extent this was the result of the law of misrepresentation being an amalgam of (i) common law, equity and statute (e.g. Misrepresentation Act 1967) and (ii) tort and contract law.<sup>113</sup> However, there were wider issues. First, the concept of a misleading action under CPUTR is not necessarily the same as under the general law of misrepresentation.<sup>114</sup> Secondly, there are limited remedies for misleading omissions under the general law of misrepresentation.<sup>115</sup> Thirdly, there are particular limitations on the right to rescind including (i) the general unavailability of a right of partial rescission<sup>116</sup> and (ii) uncertainty on how long a right of rescission lasts.<sup>117</sup> Fourthly, there are difficulties in

<sup>108</sup> See <https://www.gov.uk/government/news/cma-receives-super-complaint-from-which?>

<sup>109</sup> See BIS, *Pricing Practices in the Groceries Market: Government response to the Competition and Markets Authority's report and recommendations on the super-complaint made by Which?*, (BIS/15/568 (2015)).

<sup>110</sup> CMA, *Pricing Practices in the Groceries Market Response to a super-complaint made by Which? on 21 April 2015* (2015) at 8.15.

<sup>111</sup> Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Cm 8328 (2012)) viii (referring to the original Regulations).

<sup>112</sup> ‘This is problematic: the law of misrepresentation is complex and uncertain...’ (Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Cm 8328 (2012)) viii); and on the various ways in which the misleading and aggressive practices concepts may be broader than traditional English private law doctrines like misrepresentation, duress and undue influence, see M. Koutsias and C. Willett, ‘The Unfair Commercial Practices Directive in the UK’ (2012) 5(4) *Erasmus Law Review*.

<sup>113</sup> See, generally, Devenney, ‘Re-Examining Damages for Fraudulent Misrepresentation: Towards a More Measured Response to Compensation and Deterrence’, in Di Matteo, Rowley, Zhou & Santier, *Current Issues in Commercial Contracts: Transatlantic Perspectives* (Cambridge University Press, 2013) especially at pp.417-418.

<sup>114</sup> See, for example, *OFT v. Purely Creative Ltd* [2011] EWHC 106 (Ch) where Briggs J. thought that the causation test was more onerous under the CPUTR 2008 than under the general law of misrepresentation.

<sup>115</sup> See, for example, *Turner v. Green* [1895] 2 Ch 205.

<sup>116</sup> See, generally, J. Poole and A. Keyser, *Justifying Partial Rescission in English Law* [2005] 121 *LQR* 273.

<sup>117</sup> Cf. also Law Commission, *Consumer Remedies for Faulty Goods* ((2009) Law Com 317).

the assessment of damages for misrepresentation<sup>118</sup> including possibly the types of losses a consumer might be able to claim.<sup>119</sup> Finally, there are issues surrounding the ability and willingness of a consumer to bring an action.

Similarly a consumer who has been subject to aggressive practices under the CPUTR 2008 might be able to fashion a private remedy from, for example, the general law of duress and/or undue influence (usually rescission). Yet these doctrines were/are not unproblematic in this context:

'...the present private law provides only patchy and inadequate safeguards against aggressive practices. The doctrines of duress and undue influence are ill-fitted to deal with high-pressure sales techniques used to exploit consumers. Furthermore, the law of unconscionable bargains is too uncertain to deliver effective consumer protection. Finally, the Protection from Harassment Act 1997 can be useful protection against a course of conduct, but does not usually apply to one-off incidents.'<sup>120</sup>

The foregoing resulted in calls for reform, especially against the backdrop of the strain on the public purse post-financial crisis:

'In 2009, Consumer Focus called for a private right of redress for all consumers who suffered loss through a breach of the Regulations. They pointed out that scams are all too common but relatively few prosecutions are brought. They thought that enforcement would be more effective if public authorities and consumers 'worked in tandem', using both private and public enforcement sanctions.'<sup>121</sup>

The Consumer Protection (Amendment) Regulations 2014 (CPAR 2014) inserted a new Part 4A into CPUTR 2008 giving consumers specific private rights of redress in relation to the CPUTR 2008: the remedies are the unwinding of a contract, a discount and damages. This is part of a significant overhaul of consumer law in the UK.<sup>122</sup> Consumers are given these private redress rights in relation to misleading actions and aggressive practices but not specifically misleading omissions.<sup>123</sup> Generally, and subject to rules on double recovery, these remedies operate in addition to existing possibilities for private redress under the general law.<sup>124</sup>

Unfortunately the CPAR 2014 is not a model of clarity in drafting. Regulation 27A is the gateway into the new provisions, setting out three preliminary conditions for the rights in Part 4A to be engaged. First, there must be a particular transaction involving a consumer. The relevant transactions are set out in Regulation 27A(2):

'(a) the consumer enters into a contract with a trader for the sale or supply of a product by the trader (a 'business to consumer contract'),

<sup>118</sup> See J. Poole & J. Devenney, *Reforming Damages for Misrepresentation: The Case for Coherent Aims and Principles* [2007] *Journal of Business Law* 269-305.

<sup>119</sup> Generally damages for disappointment and distress are not available in the Contract Law of England and Wales. However, in an action for misrepresentation damages for such losses may be available, at least for fraudulent misrepresentation: see *Archer v. Brown* [1985] Q.B. 401. See, generally, H. McGregor, *McGregor on Damages*, (19<sup>th</sup> edn., Sweet & Maxwell, London, 2014) para. 5-012.

<sup>120</sup> Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Cm 8328 (2012)) 3.51. In deed in *Niersmans v. Pesticcio* [2004] EWCA Civ 372 at [2] Mummery L.J. lamented: '...The striking feature of this appeal is that fundamental misconceptions [about the doctrine of undue influence] persist, even though the doctrine is over 200 years old and its basis and scope were examined by the House of Lords in depth...less than 3 years ago in the well-known case of ...Etridge (No.2)... The continuing confusions matter. Aspects of the instant case demonstrate the need for a wider understanding, both in and outside the legal profession, of the circumstances in which the court will intervene to protect the dependant and the vulnerable in dealings with their property.'

<sup>121</sup> Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Cm 8328 (2012)) viii.

<sup>122</sup> See, in particular, the Consumer Rights Act 2015, the aims of which were: to streamline consumer rights; to clarify aspects of consumer law; to modernise consumer law, particularly for the digital age; to deregulate for businesses; and to selectively enhance consumer protection in the UK.

<sup>123</sup> CPUTR 2008, Regulation 27B.

<sup>124</sup> See CPUTR 2008, Regulation 27L but cf. *Misrepresentation Act 1967* s.2(4).

(b) the consumer enters into a contract with a trader for the sale of goods to the trader (a 'consumer to business contract'), or

(c) the consumer makes a payment to a trader for the supply of a product (a 'consumer payment').'

The second condition is that the trader (or possibly the producer<sup>125</sup>) engages in a prohibited practice (viz., for these purposes, a misleading action or aggressive practice). The third condition is that the prohibited practice is a 'significant factor' in the consumer entering the contract or making the relevant payment.<sup>126</sup>

The remedy of unwinding is contained in the (amended) CPUR 2008, Regulations 27E-H, with Regulations 27E-F dealing with business to consumer contracts.<sup>127</sup> The consequences of unwinding are that the contract comes to an end, the trader may have to give the consumer a refund and the goods must be made available for collection by the trader.<sup>128</sup> Under 27E(1) unwinding is available '...if the consumer indicates to the trader that the consumer rejects the product, and does so (a) within the relevant period [90 days], and (b) at a time when the product is capable of being rejected.' Regulation 27E(8) provides:

'...a product remains capable of being rejected only if—

- (a) the goods have not been fully consumed,
- (b) the service has not been fully performed,
- (c) the digital content has not been fully consumed,
- (d) the lease has not expired, or
- (e) the right has not been fully exercised...'

Significantly a consumer is generally not required to account for use of the product:<sup>129</sup>

'We believe that in most cases, requiring an allowance for use would remove the simplicity and usefulness of the remedy. Any over-compensation would be limited because the complaint must be made within three months. Given that the trader has acted in a misleading or aggressive way, this is not wholly inappropriate.'<sup>130</sup>

In terms of the remedy of a discount Regulation 27L(1) provides:

'A consumer has the right to a discount in respect of a business to consumer contract if—(a) the consumer has made one or more payments for the product to the trader or one or more payments under the contract have not been made, and (b) the consumer has not exercised the right to unwind in respect of the contract.'

<sup>125</sup> 'The second condition is that—

- (a) the trader engages in a prohibited practice in relation to the product, or
- (b) in a case where a consumer enters into a business to consumer contract for goods or digital content—
  - (i) a producer engages in a prohibited practice in relation to the goods or digital content, and
  - (ii) when the contract is entered into, the trader is aware of the commercial practice that constitutes the prohibited practice or could reasonably be expected to be aware of it.'

<sup>126</sup> Regulation 27A(6) provides: 'The third condition is that the prohibited practice is a significant factor in the consumer's decision to enter into the contract or make the payment.'

<sup>127</sup> See above: 'a contract with a trader for the sale or supply of a product by the trader'. Regulations 27G and 27H deal respectively with the unwinding of a consumer to business contract and a consumer payment.

<sup>128</sup> Regulation 27F(1): 'Where a consumer has the right to unwind in respect of a business to consumer contract—(a) the contract comes to an end so that the consumer and the trader are released from their obligations under it, (b) the trader has a duty to give the consumer a refund (subject as follows), and (c) if the contract was wholly or partly for the sale or supply of goods the consumer must make the goods available for collection by the trader.'

<sup>129</sup> Cf. Regulation 27F(7) in relation to, for example, continuous contracts such as some utility contracts.

<sup>130</sup> Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Cm 8328 (2012)) 8.91.



The (amended) CPUR 2008 also provide a, fairly crude, sliding scale of the quantum of discounts.<sup>131</sup> In terms of damages, which is of course an established remedy for misrepresentation in England and Wales,<sup>132</sup> significantly a consumer is given the right to claim damages for 'alarm, distress or physical inconvenience or discomfort' subject to a remoteness test.<sup>133</sup> Unlike the other remedies, there is a due diligence defence (s27J(5)(b): 'the trader took all reasonable precautions and exercised all due diligence to avoid the occurrence of the prohibited practice').

- Any case law (enforcement decisions, court rulings) providing for such consequences;

This has been covered under the last item.

- Whether there is, based on past experience in your country, a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

As a result of the CPAR 2014 the UK now has specific private law remedies for some unfair commercial practices. Yet these remedies, which largely operate alongside remedies under the general law, have added complexity to this area of consumer law, not least as a result of the legislative drafting. Indeed, with concerns about fragmentation in mind, there is an argument that these reforms should have been absorbed into the Consumer Rights Act 2015. Moreover there are significant continuing issues around the ability and willingness of consumers to make full use of such remedies<sup>134</sup> as well as issues of consumer education; and it is ultimately those issues which may dull the potency of these reforms.

<sup>131</sup> Regulation 27I (4): 'Subject to paragraph (6), the relevant percentage is as follows—

- (a) if the prohibited practice is more than minor, it is 25%,
- (b) if the prohibited practice is significant, it is 50%,
- (c) if the prohibited practice is serious, it is 75%, and
- (d) if the prohibited practice is very serious, it is 100%.'

Regulation 27I(6) concerns products where the contract price exceeds £5,000.

<sup>132</sup> There is some authority that damages (or a similar remedy) may be awarded for undue influence and/or duress: see *Mahoney v Purnell* [1996] 3 All E.R. 61 and Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Cm 8328 (2012)) 3.57.

<sup>133</sup> Regulation 27J (1): 'Subject as follows, a consumer has the right to damages if the consumer—

- (a) has incurred financial loss which the consumer would not have incurred if the prohibited practice in question had not taken place, or
  - (b) has suffered alarm, distress or physical inconvenience or discomfort which the consumer would not have suffered if the prohibited practice in question had not taken place.
- (2) The right to damages is the right to be paid damages by the trader for the loss or the alarm, distress or physical inconvenience or discomfort in question.
  - (3) The right to be paid damages for financial loss does not include the right to be paid damages in respect of the difference between the market price of a product and the amount payable for it under a contract.
  - (4) The right to be paid damages under this regulation is a right to be paid only damages in respect of loss that was reasonably foreseeable at the time of the prohibited practice'.

<sup>134</sup> Cf. H.G. Beale, '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) on the importance of collective measures.

## 1.2. Contract conclusion and performance

### 1.2.1. Effectiveness of the current rules in establishing 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;

It is not clear that the main focus of the UCTD is on establishing a high level of consumer protection;<sup>135</sup> nor is it clear that a high level of consumer protection necessarily, or at least proportionately, contributes to increased consumer participation in the internal market.<sup>136</sup> Nevertheless it is clear that the regulation of terms in consumer contracts contributes to the level of consumer protection in any legal system.<sup>137</sup> Prior to the transposition of the UCTD in the UK, terms in consumer contracts were 'policed' in a number of ways in the UK. Thus terms in consumer contracts were regulated, for example, through approaches to interpretation,<sup>138</sup> principles of incorporation<sup>139</sup> and the rule against penalty clauses.<sup>140</sup> Parliament had also made provision for the regulation of terms in consumer contracts, most notably through the Unfair Contract Terms Act 1977 (UCTA 1977). In general terms, UCTA 1977 regulated exclusion/limitation clauses<sup>141</sup> in certain consumer and non-consumer contracts.<sup>142</sup> In relation to consumer contracts under UCTA 1977 some clauses were automatically rendered unenforceable<sup>143</sup> whilst others were rendered unenforceable if unreasonable.<sup>144</sup> The technique of automatically rendering some clauses unenforceable may have advantages<sup>145</sup> in terms of consumer protection but it also has

<sup>135</sup> See, generally, J. Devenney, 'Gordian Knots in Europeanised Private Law: Unfair Terms, Bank Charges and Political Compromises' [2011] NILQ 33.

<sup>136</sup> It may, for example, place too much burden on smaller businesses. Cf. Press Release IP/11/1175 (on the then proposed Common European Sales Law): 'On October 11th 2011, the European Commission proposed an optional Common European Sales Law will help break down these barriers and give consumers more choice and a high level of protection. It will facilitate trade by offering a single set of rules for cross-border contracts in all 27 EU countries. If traders offer their products on the basis of the Common European Sales law, consumers would have the option of choosing a user-friendly European contract with a high level of protection with just one click of a mouse. ...'

<sup>137</sup> Cf. I. Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Market* (2<sup>nd</sup>. Edn., Hart Publishing, 2007) Ch. 4.

<sup>138</sup> See, for example, *Houghton v. Trafalgar Insurance Co* [1954] 1 QB 247.

<sup>139</sup> See, for example, *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] Q.B. 433. See, for example, p.445 where Bingham LJ stated: 'The crucial question in the case is whether the plaintiffs can be said fairly and reasonably to have brought condition 2 to the notice of the defendants... In my opinion the plaintiffs did not do so... The defendants are not to be relieved of that liability because they did not read the condition, although doubtless they did not; but in my judgment they are to be relieved because the plaintiffs did not do what was necessary to draw this unreasonable and extortionate clause fairly to their attention.'

<sup>140</sup> See, for example, *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 but note the recent consideration of that case by the Supreme Court in *Makdessi v Cavendish Square Holdings BV; ParkingEye Ltd v Beavis* [2015] UKSC 67.

<sup>141</sup> Note the expanded definition of relevant clauses in s.13, UCTA 1977.

<sup>142</sup> Note s.12 on 'dealing as consumer'.

<sup>143</sup> See, for example, S.2(1), UCTA 1977: 'A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.'

<sup>144</sup> See, for example, S.3, UCTA 1977 [pre-Consumer Rights Act 2015 version]: '(1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business. (2) As against that party, the other cannot by reference to any contract term— (a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or (b) claim to be entitled— (i) to render a contractual performance substantially different from that which was reasonably expected of him, or (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all, except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness.'

<sup>145</sup> Cf. C. Scott & J. Black, *Cranston's Consumers and the Law* (3<sup>rd</sup> edn., Butterworths, 2000) at 96.

disadvantages.<sup>146</sup> The UCTD's principle-based approach is arguably more suitable for applying to a wide range of contractual terms<sup>147</sup> although, as will be noted below, it also presents challenges in interpretation/application.<sup>148</sup> The UK initially<sup>149</sup> transposed the UCTD alongside UCTA 1977, thus arriving at a blend of a principle-based approach<sup>150</sup> and a rule-based approach.<sup>151</sup> Thereafter the Consumer Rights Act 2015 (CRA 2015)<sup>152</sup> introduced significant structural reform in this area of law in the UK. In particular, UCTA 1977 was essentially confined to non-consumer cases;<sup>153</sup> and the UTCCR 1999 were repealed and replaced by a regime for 'policing' terms in consumer contracts in Part 2 of the CRA 2015. Significantly the latter regime includes a blend of principle-based approaches<sup>154</sup> and rule-based approaches.

- 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 your MS? Does this work in practice or are there problems?*]

The UTCCR 1999 essentially replicated in Schedule 2 the indicative list from the Annex of the UCTD (sometimes referred to as a 'grey' list). The Office of Fair Trading (OFT) and now the Competition and Markets Authority have made use of the indicative list in their guidance<sup>155</sup> and enforcement activity.<sup>156</sup> In so doing there was, at times, evidence of an expansive approach.<sup>157</sup> Moreover it seems that, following the bank charges litigation,<sup>158</sup> the grey list has gained greater prominence.<sup>159</sup> The relevant case

<sup>146</sup> See Law Commission, Report No 69, *Second Report on Exemption Clauses in Contracts*, 1975, para 58: 'It may still be said, however, that although a complete ban on exemptions from liability for negligence applicable to consumer and commercial transactions alike cannot be justified, there should be a complete ban in relation to consumer transactions. The arguments advanced in favour of this proposal are that the private consumer is at a serious disadvantage in the matter of bargaining power since normally he has no alternative but to accept the terms and conditions of a standard form contract imposed on him by a monopolistic or near-monopolistic industry; and that he is less likely to be insured than is a person receiving the service in the course of his business. Our Working Party rejected this proposal as being too rigid and in our joint document we agreed with their conclusion. There are many situations in which the arguments in support of the proposal should prevail, but we are convinced from the evidence we have summarised in the two preceding paragraphs that there are also situations in which such a ban would not operate to the advantage of consumers. Suppliers are not all monopolists; monopolists do not always insist on using standard forms of contracts which they will not vary; customers are sometimes given a choice between accepting the risk of loss and paying a lower rate for the service or paying a higher rate and leaving the risk with the supplier. In any event, where the liability in question is liability for death or personal injury the distinction between 'commercial' and 'consumer' transactions is irrelevant. In our view it would not be right to recommend a complete ban on exclusion or restriction of liability for negligence in all consumer transactions.'

<sup>147</sup> Cf. C. Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Ashgate Publishing, Aldershot, 2007) at 431.

<sup>148</sup> See 1.2.2.

<sup>149</sup> Unfair Terms in Consumer Contract Regulations 1994 (1994/3159), later replaced by the Unfair Terms in Consumer Contracts Regulations 1999 (1999/2083).

<sup>150</sup> For example, under UTCCR 1999, Regulation 5.

<sup>151</sup> For example, under UCTA 1977, s.2(1).

<sup>152</sup> The relevant provisions of the Consumer Rights Act 2015 came into force on 1 October 2015 (see Consumer Rights Act 2015 (Commencement No. 3, Transitional Provisions, Savings and Consequential Amendments) Order 2015/1630) and do not have retrospective effect.

<sup>153</sup> See Consumer Rights Act 2015, Schedule 4 paras 2-27.

<sup>154</sup> S.62(4) provides: '(4) A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.'

<sup>155</sup> See, for example, CMA, 'Contract Terms Guidance: Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015' (CMA37 (2015)), p.63ff.

<sup>156</sup> See, for example, OFT, *Unfair Contract Terms Guidance*, (OFT311, (2008)).

<sup>157</sup> For example, in relation to exclusion or limitation clauses under paragraphs (a), (b) or (q). See OFT, 'Unfair Terms Guidance' (OFT311 (2008)) para. 1.5: 'If a term achieves the same effect as an unfair exemption clause, it will be unfair whatever its form or mechanism. This applies, for instance, to terms which 'deem' things to be the case, or get consumers to declare that they are-whether they really are or not-with the aim of ensuring no liability arises in the first place.'

<sup>158</sup> *Office of Fair Trading v. Abbey National Plc* [2009] UKSC 6.

law demonstrates the role of interpretation of the relevant contract term(s) as a precursor to the application of the unfairness test, with or without reference to the indicative list.<sup>160</sup> The (now) Court of Justice of the EU (CJEU) has, of course, developed a jurisprudence around the 'grey' list. Thus in *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*<sup>161</sup> the ECJ noted 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.'<sup>162</sup>

That case, in effect, involved a provision which allowed the trader to vary the fees charged for a service (telephone services).<sup>163</sup> It thus touched upon paragraphs 1(j) and 1 (l) of the 'grey' list as well as paragraphs 2(b) and 2(d).<sup>164</sup> The ECJ, after referring to Article 5 of the UTCD (plain intelligible language requirement) concluded:

'Moreover, as is clear from the 20th recital in the preamble to the Directive, the consumer should actually be given an opportunity to examine all the terms appearing in the GBC and the consequences of those terms. Further, the obligation to draft terms in clear, intelligible language is laid down in Article 5 of the Directive... Consequently, in the assessment of the 'unfair' nature of a term, within the meaning of Article 3 of the Directive, the possibility for the consumer to foresee, on the basis of clear, intelligible criteria, the amendments, by a seller or supplier, of the GBC with regard to the fees connected to the service to be provided is of fundamental importance.'<sup>165</sup>

There is some doubt whether or not some of the relevant case law in the UK<sup>166</sup> is sufficiently in tune with this ruling from the ECJ (the consumer being able to foresee the amendments), although that case law did pre-date this ECJ ruling.<sup>167</sup>

<sup>159</sup> See Law Commission, 'Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills' (2013) at 5.3.

<sup>160</sup> See, for example, *Spreadex Ltd v Cochrane* [2012] EWHC 1290 (Comm) at [12].

<sup>161</sup> (C-472/10) April 26, 2012.

<sup>162</sup> 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."

<sup>163</sup> See *Nemzeti* at [17].

<sup>164</sup> "(j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract...

(l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded...

2. Scope of subparagraphs (g), (j) and (l)...

(b) Subparagraph (j) is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately.

Subparagraph (j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract...

(d) Subparagraph (l) is without hindrance to price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described."

<sup>165</sup> [27]-[28].

<sup>166</sup> In particular, *Du Plessis v. Fontgary Leisure Parks Ltd* [2012] EWCA Civ 409.

Prior to the Consumer Rights Act 2015, the Law Commission gave further advice to the Government in 2013 on the regulation of unfair terms in consumer contracts.<sup>168</sup> In 2005 the Law Commission had recommended the rewriting of the 'grey list' in clearer terms.<sup>169</sup> However, in its advice to the Government in 2013 advising against this course of action, not least on the grounds of the risk of wrongly implementing the UCTD.<sup>170</sup> The CRA 2015 does, however, make some minor adjustments in drafting to the 'grey' list (for example using the term 'trader' instead of 'seller or supplier') and there are some additions to the list.<sup>171</sup> The CRA 2015 also provided two further important clarifications: (i) terms listed on the 'grey' list will not be excluded from an assessment of fairness by the exclusion in Article 4(2) of the UCTD;<sup>172</sup> and (ii) the terms listed in Part 2 of Schedule 2 (this qualifies the list in Part 1 of Schedule 2) are assessable for fairness.<sup>173</sup>

- 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; [*Note: If a black/grey list exists in your country, key aspects to consider are: How does the list work in practice? Does it make a difference to have such a list?*]

The 'black' listed terms, and the advantages/disadvantages of such a technique, have been discussed above.<sup>174</sup> Which? noted: 'A clear prohibition against certain terms not only assists consumers and traders in understanding what is acceptable, it also allows for swift enforcement in clear-cut cases...The Commission should look across the black lists implemented by Member States and ensure that such prohibitions - derived from years of practical experience - are not lost.' Above the extended 'grey' list under the CRA 2015 has been noted. Two further points need to be made here. First, s.63(3)-(5) of the CRA 2015 gives the Secretary of State the power to amend (including adding to) the 'grey' list. Secondly, the OFT compiled a list, based on its experience, of terms likely to be unfair<sup>175</sup> and this has been adopted by the CMA.<sup>176</sup> At one level, and

<sup>167</sup> See H. Beale (ed.), *Chitty on Contracts*, (32nd Edn, Sweet & Maxwell, London, 2015) para. 38-288: 'Although the Court of Justice's guidance in *Invitel* was given in the context of a different type of consumer contract and a different type of variation clause, it is submitted that, had the Court of Appeal in *Du Plessis v Fontgary Leisure Parks Ltd* the benefit of the guidance given by the Court of Justice in *Invitel*, it might have reached a different conclusion on the fairness of the tariff review clause before it in that case. For, while the circumstances taken into account by the Court of Appeal would still have argued in favour of the fairness of the term, it could have been argued that the term which provided for an increase in the fee payable by the caravan owner (the consumer) having regard to 'any other relevant factor' (even though it describes the method of variation explicitly) did not allow the caravan owner 'to foresee, on the basis of clear, intelligible criteria, the amendments' of the fees, a possibility which the Court of Justice in *Invitel* considered to be of 'fundamental importance'.'

<sup>168</sup> Law Commission, 'Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills' (March 2013).

<sup>169</sup> Law Commission, 'Unfair Terms in Contracts', (Law Com 292, (2005)) at para. 3.116.

<sup>170</sup> See 5.41.

<sup>171</sup> Additions to the list since the UTCCR 1999 are: 'A term which has the object or effect of requiring that, where the consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high sum in compensation or for services which have not been supplied' (5); 'A term which has the object or effect of permitting the trader to determine the characteristics of the subject matter of the contract after the consumer has become bound by it' (12); and 'A term which has the object or effect of giving the trader the discretion to decide the price payable under the contract after the consumer has become bound by it, where no price or method of determining the price is agreed when the consumer becomes bound' (14).

<sup>172</sup> S.64(6).

<sup>173</sup> S.63(2).

<sup>174</sup> See, for example, 1.1.1.

<sup>175</sup> See OFT, 'Unfair Contract Terms Guidance' (OFT311 (2008)) at [18].

<sup>176</sup> See <https://www.gov.uk/government/publications/unfair-contract-terms-guidance--2>. Note also the view of Which? to the effect: 'Similarly, many Member States have supplemented the Annex to the UCTD with additional grey list terms in response to emerging practices either across markets or within specific sectors. This experience should be captured in any update to the UCTD and, in our view, Member States should remain free to add terms to national grey lists where serious problems are identified which are specific to a local market or national jurisdiction.'

subject to the comments above in respect of the approach to the 'grey' list, it can be argued that this is an advantage for consumer protection. The UK European Consumer Centre noted: 'this assists judges in courts, as well as helps the authorities and some more savvy consumers to formulate arguments in disputes.' Yet the extent to which most consumers are aware of formal or more informal 'grey' lists is debatable.<sup>177</sup> The Department for Business, Energy and Industrial Strategy commented to us:

'In general, the UK's preference is for grey lists rather than black lists which we view as potentially less effective because black lists can reduce flexibility for enforcers.'<sup>178</sup>

- 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: In your country, have the effects of court decisions establishing the unfairness of an unfair term been extended to all contracts of the trader concerned or to the contracts of any other trader containing such a term? If so, how does this work in practice? What are the impacts on businesses? If there are no such effects of court decisions on unfair terms: what are the effects of this situation?*]

S.62(1) of the CRA 2015 provides that an unfair term is not binding on the consumer.<sup>179</sup> Such a finding may, broadly, also impact on other consumers either through the doctrine of precedent<sup>180</sup> or through its impact on CMA formal and more informal enforcement activity.<sup>181</sup> Yet whether or not a finding that a particular term is unfair in a dispute between a consumer and a trader should impact more directly on the terms in like, or similar, contracts is more debatable. The circumstances of individual cases may differ materially<sup>182</sup> and so a non-rebuttable presumption of unfairness in other cases involving like or similar terms might be regarded as 'unfair' to the trader. Yet similar challenges arise when, for example, the CMA seeks a preventative injunction. The Court of Appeal in *OFT v. Foxtons Ltd*<sup>183</sup> confirmed that, although preventive proceedings do not generally bind subsequent individual proceedings by way of *res judicata*,<sup>184</sup> such an injunction can cover existing as well as future contracts.<sup>185</sup> In such cases the drafting of the injunction against the trader will be crucial.<sup>186</sup>

<sup>177</sup> Cf. I. Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Market* (2<sup>nd</sup> Edn, Hart Publishing, 2007) at p.510.

<sup>178</sup> 11 August 2016.

<sup>179</sup> Note s.62(3): 'This does not prevent the consumer from relying on the term or notice if the consumer chooses to do so.' Cf. *Mayhook v. National Car Parks*, unreported, November 29, 2012 where, surprisingly, the UTCCR 1999 affected the position of a third party (the owner, not the driver, of a car).

<sup>180</sup> 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.'

<sup>181</sup> See OFT, *Unfair Contract Terms Guidance*, (OFT311, (2008)).

<sup>182</sup> Cf. s.62(5)(b).

<sup>183</sup> [2009] EWCA Civ 288.

<sup>184</sup> *Ibid.* at [71].

<sup>185</sup> See [43]-[44].

<sup>186</sup> See [71].



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

Regulation 7 of the UTCCR 1999, following closely the language of Article 5 of the UCTD,<sup>187</sup> provided:

'(1) A seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language.

(2) If there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail but this rule shall not apply in proceedings brought under regulation 12.'

A number of issues arose in connection with Article 5 of the UCTD and its transposition in the UK by Regulation 7 of the UTCCR 1999. First, did the requirement of plain, intelligible language extend to, for example, legibility and availability?<sup>188</sup> Recital 20 and case law of the (now) CJEU<sup>189</sup> suggested that this was so. Secondly, what were the consequences of a lack of transparency beyond, in effect, the *contra proferentem* rule in Regulation 7(2)? For example could a lack of transparency itself found a claim for unfairness under the UCTD (as has been suggested in some Member States<sup>190</sup>)? Thirdly, could enforcement bodies act on the basis of a breach of Regulation 7?<sup>191</sup> Finally, what was the precise relationship between the transparency requirements and Article 4(2)<sup>192</sup> of the UCTD?<sup>193</sup>

The CRA 2015 attempted to tackle some of these uncertainties. First, s.68(1) requires written terms in consumer contracts to be 'transparent'. The concept of transparency in respect of contractual terms is mapped in s.64(3): 'A term is transparent for the purposes of this Part if it is expressed in plain and intelligible language and (in the case of a written term) is legible.'<sup>194</sup> This seems to better map the contours of the UCTD as interpreted by the (now) CJEU<sup>195</sup> although the standard to be applied in assessing those concepts is not, at least explicitly, clear in the CRA 2015.<sup>196</sup> Secondly, although the Law Commission stopped short of recommending that a lack of transparency always renders the term in question unfair,<sup>197</sup> CMA guidance places

<sup>187</sup> 'In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language.'

<sup>188</sup> See Law Commission, 'Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills' (2013) at 6.60: 'We have considered whether the legislation should specify that terms may be unfair principally or solely because they are not transparent. Given the strong arguments put by many consultees in favour of keeping the current fairness test, we have decided not to make this change. We think that the courts will be strongly influenced by the fact that terms are not transparent, but the fairness test must take account of 'all the circumstances attending the conclusion of the contract.' We would not wish to suggest that non-transparent terms are almost always unfair.'

<sup>189</sup> See, for example, *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* (C-92/11) [2013] 3 C.M.L.R. 10.

<sup>190</sup> See EC Commission, 'Report on the Implementation of Directive 93/13/EEC on unfair terms in consumer contracts' (COM (2000) 248 final) at p.18.

<sup>191</sup> The Law Commission thought so on the basis, *inter alia*, of the Injunctions Directive (Directive 98/27/EC on injunctions for the protection of consumers' interests, OJ 1998 L 166/51 which was replaced by a codifying Directive (Directive 2009/22/EC, OJ 2009 L 110/30)): see Law Commission, 'Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills' (2013) at 6.54.

<sup>192</sup> '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 supplied in exchange, on the other, in so far as these terms are in plain intelligible language'.

<sup>193</sup> Cf. *Office of Fair Trading v. Abbey National Plc* [2009] UKSC 6.

<sup>194</sup> Note also s.69: 'If a term in a consumer contract, or a consumer notice, could have different meanings, the meaning that is most favourable to the consumer is to prevail.'

<sup>195</sup> *Quaere*: whether this revised formulation reflects the full reach of the (now) CJEU jurisprudence (cf. *Kásler v OTP Jelzálogbank Zrt* (C-26/13) [2014] 2 All E.R. (Comm) 443 (link to understanding)).

<sup>196</sup> Cf., for example, *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* (C-92/11) [2013] 3 C.M.L.R. 10.

<sup>197</sup> See Law Commission, 'Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills' (2013) at 6.5.



emphasis on the link between 'good faith' and transparency.<sup>198</sup> On the other hand the CMA note that transparency is not, alone, sufficient to render a term 'fair'.<sup>199</sup> Thirdly, s.70(1) of the CRA 2015 confirms that enforcement bodies can act on the basis of a breach of s.68(1).

- 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. [*Note: Question only relevant for MS that have put in place extensions of application of UCTD*]

Three aspects of the transposition of the UCTD in the UK should be highlighted at this point. First, unlike the UTCCR 1999, the test of unfairness in the CRA 2015 is not limited to, in effect, standard form contracts. The significance of this should not, however, be over-estimated as consumers will normally in fact be dealing on standard terms.<sup>200</sup> Secondly, as alluded to above, under the CRA 2015, the CMA (and other Regulators) are able to enforce Part 2 of the Act.<sup>201</sup> Schedule 3 provides a framework for this type of enforcement action and applies to:

- '(a) a term of a consumer contract,
- (b) a term proposed for use in a consumer contract,
- (c) a term which a third party recommends for use in a consumer contract, or
- (d) a consumer notice.'<sup>202</sup>

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'<sup>203</sup> of a relevant term or notice.<sup>204</sup> Significantly, however, this power extends to terms or notices which are prohibited without the need to assess fairness (which relate, in particular, to sections of the Act which broadly replicate some of the more protection consumer provisions formerly found in UCTA 1977):

- 'A term or notice falls within this sub-paragraph if it purports to exclude or restrict liability of the kind mentioned in—
- (a) section 31 (exclusion of liability: goods contracts),
- (b) section 47 (exclusion of liability: digital content contracts),

<sup>198</sup> '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. The UK European Consumer Centre noted: 'Provisions are sufficient, [but] in some cases more education aimed at businesses may be required.'

<sup>199</sup> '...[O]penness is not enough on its own, since good faith relates to the content of terms as well as the way they are expressed. Fair dealing has been authoritatively said to require that, in drafting and using contract terms, a trader 'should not, whether deliberately or unconsciously, take advantage' of the consumers' circumstances to their detriment...The CMA considers the CJEU's approach demonstrates that businesses need, in formulating their contract terms, not just to resist the temptation to take advantage, but actively to take the legitimate interests of the consumer into account': CMA, 'Unfair contract terms guidance: Guidance on the unfair terms provisions in the Consumer Rights Act 2015' (July 2015) para. 2.23ff.

<sup>200</sup> Cf. F. Kessler, 'Contracts of Adhesion: Some Thoughts about Freedom of Contract' (1943) 43 Columbia L Rev 629.

<sup>201</sup> See s.70. In relation to investigatory powers see Schedule 5 which enhances the powers under the UTCCR 1999.

<sup>202</sup> Schedule 3, para 1.

<sup>203</sup> Schedule 3, para 3.

<sup>204</sup> This power is significant in terms of the CMA or other Regulator obtaining 'undertakings' instead of seeking an injunction etc. - see Schedule 3, para 6.

- (c) section 57 (exclusion of liability: services contracts), or
- (d) section 65(1) (business liability for death or personal injury resulting from negligence).<sup>205</sup>

This power also now extends to individually negotiated terms and to consumer notices,<sup>206</sup> neither of which was, at least clearly, required by the Unfair Terms Directive.

The public enforcement provisions in the Act are, in fact, part of tapestry of public enforcement provisions relevant to the regulation of unfair terms. In addition to the provisions under the Act, it is possible to take public enforcement action under Part 8 of the Enterprise Act 2002 (which relates, in particular, to infringements of Community legislation)<sup>207</sup> and under the Consumer Protection from Unfair Trading Regulations 2008.<sup>208</sup> The later provisions, or more accurately the Directive which gave rise to those Regulations, cause some difficulty in respect of the new provisions under the CRA 2015 which need to be explored at this point. The Consumer Protection from Unfair Trading Regulations 2008 ('CPUTR 2008') largely transpose the Unfair Commercial Practices Directive<sup>209</sup> into the UK. The CPUTR 2008, which replaced 23 earlier enactments, closely follow the wording of the Directive.<sup>210</sup> A commercial practice is defined widely as:

'...any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader, which is directly connected with the promotion, sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product'.<sup>211</sup>

Moreover in *R v. X Ltd*<sup>212</sup> the Court of Appeal confirmed that isolated incidents can constitute a commercial practice. Regulation 3(3)-(4) sets out when a commercial practice will be regarded as an unfair commercial practice:

- '(3) A commercial practice is unfair if—
  - (a) it contravenes the requirements of professional diligence; and
  - (b) it materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product.
- (4) A commercial practice is unfair if—
  - (a) it is a misleading action under the provisions of regulation 5;

<sup>205</sup> Schedule 3, para 3(2).

<sup>206</sup> Cf. H. Beale (ed.), *Chitty on Contracts*, (32nd Edn., Sweet & Maxwell, London, 2015) para. 38-392.

<sup>207</sup> S.212 of the Enterprise Act 2002 provides: 'In this Part a Community infringement is an act or omission which harms the collective interests of consumers and which—(a) contravenes a listed Directive as given effect by the laws, regulations or administrative provisions of an EEA State...(b) contravenes such laws, regulations or administrative provisions which provide additional permitted protections, (c) contravenes a listed Regulation, or (d) contravenes any laws, regulations or administrative provisions of an EEA State which give effect to a listed Regulation. (2) The laws, regulations or administrative provisions of an EEA State which give effect to a listed Directive provide additional permitted protections if—(a) they provide protection for consumers which is in addition to the minimum protection required by the Directive concerned, and (b) such additional protection is permitted by that Directive.' S.79 of the Consumer Rights Act 2015 enhances the measures that can be taken under Part 8 of the Enterprise Act 2002 and includes '(a) measures offering compensation or other redress to consumers who have suffered loss as a result of the conduct which has given rise to the enforcement order or undertaking, (b) where the conduct referred to in paragraph (a) relates to a contract, measures offering such consumers the option to terminate (but not vary) that contract, (c) where such consumers cannot be identified, or cannot be identified without disproportionate cost to the subject of the enforcement order or undertaking, measures intended to be in the collective interests of consumers' (the new s219A, Enterprise Act 2002).

<sup>208</sup> SI 2008/1277.

<sup>209</sup> Directive 2005/29/EC, OJ L149/22.

<sup>210</sup> See, generally, H.G. Beale (ed.), *Chitty on Contracts* (32<sup>nd</sup> ed, Sweet & Maxwell, London, 2015) para. 38-145ff.

<sup>211</sup> Regulation 2.

<sup>212</sup> [2013] EWCA Crim 818.

- (b) it is a misleading omission under the provisions of regulation 6;
- (c) it is aggressive under the provisions of regulation 7; or
- (d) it is listed in Schedule 1.'

For present purposes the key point is that the use of 'unfair terms' might be regarded as an unfair commercial practice under the CPUTR 2008 and, therefore, attract the public enforcement regime under those Regulations.<sup>213</sup> The difficulty is that the Unfair Commercial Practices Directive was a maximum harmonisation directive and, therefore within the scope of the Directive (and paying due regard to any exceptions in the Directive), Member States are not permitted to go beyond the protection provided by the Directive. Thus it is arguable<sup>214</sup> that some of those aspects of the CRA 2015 which go beyond the scope of the Unfair Terms Directive with regard to public enforcement fall foul of the maximum harmonisation clause in the Unfair Commercial Practices Directive.<sup>215</sup> For example, some terms (e.g. those mentioned in Schedule 3, para. 3(2)) are always prohibited and made subject to public enforcement under the CRA 2015. This is so whether or not an unfair commercial practice has been established for the purposes of the CPUTR 2008. In other words the protection extends beyond both directives and, arguably, conflicts with the maximum harmonisation nature of the Unfair Commercial Practices Directive<sup>216</sup> – an example, perhaps, of the unintended consequences of this consolidation.

Finally the CRA 2015 provides:

'(1) A term of a consumer contract may not be assessed for fairness under section 62 to the extent that—

- (a) it specifies the main subject matter of the contract, or
- (b) the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it.

(2) Subsection (1) excludes a term from an assessment under section 62 only if it is transparent and prominent.'

This provision is, of course, an evolution of the UTCCR 1999, Regulation 6(2). In, at least, two respects s.64(1)(b) appears to reinforce aspects of *Office of Fair Trading v. Abbey National Plc.*<sup>217</sup> First, s.64(2) states that '[s]ubsection (1) excludes a term from an assessment under section 62 only if it is transparent and prominent' which chimes with the analysis of *Office of Fair Trading v. Foxtons*<sup>218</sup> by the Supreme Court in *Office of Fair Trading v. Abbey National Plc.* Secondly, s.64(1)(b) clearly inclines to Lord Walker's view that only *monetary* payment terms are caught by Article 4(2) of the Directive.<sup>219</sup> Yet the bigger issue is whether the controversial reading of the exclusions from the test of unfairness Article 4(2) of the Directive by the Supreme Court in *Office of Fair Trading v. Abbey National Plc* should be used in relation to s.64(1)(b) of the Consumer Rights Act 2015.

<sup>213</sup> See, for example, *Office of Fair Trading v. Ashbourne Management Services Ltd* [2011] EWHC 1237 (Ch).

<sup>214</sup> Cf. H.G. Beale (ed.), *Chitty on Contracts*, (32nd Edn., Sweet & Maxwell, London, 2015) para. 38-393 for a possible contrary argument in relation to Directive 2009/22/EC on injunctions for the protection of consumers' interests, [2009] O.J. L110/30.

<sup>215</sup> Article 4.

<sup>216</sup> Unless it can be argued that the public enforcement regime in the CRA 2015 is contract law under Recital (9) of the Unfair Commercial Practices Directive: 'Directive 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, on intellectual property rights, on the health and safety aspects of products, on conditions of establishment and authorisation regimes, including those rules which, in conformity with Community law, relate to gambling activities, and to community competition rules and the national provisions implementing them...'

<sup>217</sup> [2009] UKSC 6.

<sup>218</sup> [2009] EWHC 1681. See above at 29.

<sup>219</sup> S.64(1)(b) is framed in terms of: '...the price payable under the contract...'

On the one hand, the legislative history of s.64 suggests an intention that such an approach should be retained. More specifically s.64 can be traced back to the Law Commission's advice that the issues surrounding the impact of *Office of Fair Trading v. Abbey National Plc* could be dealt with by the use of transparency and prominence requirements (rather than reverting to a previous interpretation of provisions transposing Article 4(2)):

'price or main subject matter terms should be exempt from review only if they are transparent and prominent. Both approaches distinguish between the terms which consumers take into account in their decision to buy the product and those which become lost in small print. The emphasis on prominence, however, offers a practical way of distinguishing between a headline price and other charges. It also emphasises that whether a term is exempt is within the control of the trader.'<sup>220</sup>

Leaving aside the concepts of transparency and prominence this approach creates a number of problems. First, as the Law Commission recognised, it is far from clear that such an approach is in conformity with EU Law:

'We think that the words of the judgment may be lulling some businesses into a false sense of security. There are other ways to interpret the judgment – and it could be overturned by the Court of Justice of the European Union (CJEU). The German Federal Supreme Court takes a different view on the UTD and has reviewed ancillary bank charges for fairness [...] In a world of price comparison websites, there is increasing pressure on traders to advertise low headline prices, whilst earning their profits through other charges. Given this potential undermining of competition, the law should provide effective tools to prevent abuse [...] The current uncertainty has the potential to damage businesses as well as consumers. If a business uses an ancillary price term to subsidise a low headline price, the business is put at risk if the term is later found to be unfair. It faces the substantial costs of litigation; the reputational damage to its business; the cost of repaying consumers; and the demise of its business model...we recommend that the exemption for subject matter and price should be reformed. The current law is unacceptably uncertain. It requires significant legal expertise to navigate, and even then the outcome is unpredictable. Both consumers and traders may suffer from this uncertainty.'<sup>221</sup>

Indeed subsequent judgments of the CJEU have cast more suspicion on the appropriateness of the approach in *Office of Fair Trading v. Abbey National Plc*. For example in *Kásler v. OTP Jelzálogbank Zrt*<sup>222</sup> the CJEU, in the context of a consumer credit agreement, held that a term which provided the exchange rate for the repayment of a loan in a foreign currency could be assessed for unfairness:

'in so far as it contains a pecuniary obligation for the consumer to pay, in repayment instalments of the loan, the difference between the selling rate of exchange and the buying rate of exchange of the foreign currency, cannot be considered as 'remuneration', the adequacy of which as consideration for a service supplied by the lender cannot be subject of an examination as regards unfairness under Article 4(2).'<sup>223</sup>

Given the incomplete nature of the map left by the Supreme Court,<sup>224</sup> it is not easy to compare the approach of the CJEU in *Kásler v. OTP Jelzálogbank Zrt* with the approach in *Office of Fair Trading v. Abbey National Plc*. Nevertheless the approach of the CJEU

<sup>220</sup> Law Commission, 'Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills' (2013) at S.18.

<sup>221</sup> Law Commission, 'Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills' (2013) at S.18. Law Commission, 'Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills' (2013) at S.11-S.14.

<sup>222</sup> (C-26/13); [2014] 2 All E.R. (Comm) 443.

<sup>223</sup> *Ibid.* at [59].

<sup>224</sup> See, generally, J. Devenney, 'Gordian Knots in Europeanised Private Law: Unfair Terms, Bank Charges and Political Compromises' [2011] NILQ 33.

does appear to be more nuanced than the rather more blunt focus on monetary terms by the Supreme Court.<sup>225</sup> For this reason, it has been stated by one distinguished commentator:

'...that in these circumstances English courts should seek to give effect to the interpretation and guidance of the Court of Justice of the EU in their application of s.64(1)(b) of the 2015 Act following the principle of the conforming interpretation of UK legislation implementing EU directives, though the difficulty in doing so would be whether the English court would consider this 'possible' given the wording of s.64(1)(b) and its background in the Law Commissions' earlier Advice.'<sup>226</sup>

Moreover Which? argued: 'In our experience, the exemptions for price and other core terms in Article 4(2) have proved deeply problematic to apply in practice. We believe they add disproportionate complexity and uncertainty to the regime and should be removed...This significant loophole in the effectiveness of the UCTD needs to be closed. In our view, the exemptions are not in line with modern behavioural economic evidence and should be abolished.'

- 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?*]

As noted above, s.62(1) of the CRA 2015 provides that an unfair term is not binding on the consumer. As is well known, the (now) CJEU placed a duty on national courts, in certain circumstances, to consider the fairness of a particular term of its own motion.<sup>227</sup> Such a duty is, perhaps, a little unusual from the perspective of UK courts who, sometimes, adopted quite a technical, pleadings based approach to proceedings under the UTCCR 1999.<sup>228</sup> Following a recommendation from the Law Commission,<sup>229</sup> the CRA 2015 sought to 'codify' this duty with s.71 providing: a '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.'<sup>230</sup> The extent to which courts will use this provision remains to be seen.<sup>231</sup>

<sup>225</sup> 'The services that banks offer to their current account customers are a comparable package of services. These include the collection and payment of cheques, other money transmission services, facilities for cash distribution (mainly by ATM machines either at manned branches or elsewhere) and the provision of statements in printed or electronic form': *Office of Fair Trading v. Abbey National Plc* [2009] UKSC 6 at [40] per Lord Walker. See also *Matei and another v SC Volksbank România SA* (C-143/13); [2015] 1 W.L.R. 2385.

<sup>226</sup> H. Beale (ed.), *Chitty on Contracts*, (32nd Edn., Sweet & Maxwell, London, 2015) para. 38-368.

<sup>227</sup> See, for example, *Pannon GSM Zrt v Erzsébet Sustikné Györfi* (C-243/08) [2009] E.C.R. I-4713.

<sup>228</sup> This was particularly the case in *Office of Fair Trading v. Abbey National Plc* [2009] UKSC 6.

<sup>229</sup> See Law Commission, 'Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills' (2013) at 7.90: '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'.

<sup>230</sup> This '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' (s.71(3)). For an argument that the duty under the Act is formulated in narrower terms than under the ECJ/CJEU see H.G. Beale (ed.), *Chitty on Contracts*, (32nd Edn., Sweet & Maxwell, London, 2015) para. 38-361.

<sup>231</sup> Cf. J. Devenney, 'Gordian Knots in Europeanised Private Law: Unfair Terms, Bank Charges and Political Compromises' [2011] NILQ 33.

- In a forward looking perspective: Are there other measures that could improve the effectiveness of the UCTD in establishing a high level of consumer protection in your country? Would a graphical presentation model improve the readability and comprehension by consumers of the T&Cs? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?

In addition to clarifying some of the issues mentioned above, some of which stem from a lack of clarity in the aims of the UCTD itself,<sup>232</sup> two factors need highlighting. First, it can be argued<sup>233</sup> that the regulation of unfair terms requires a multi-dimensional approach including, for example, a consideration of the role standard industry terms can, and could play, in this context.<sup>234</sup> Moreover Which? have argued:

'This assessment of the 'good faith' caveat has essentially stripped the unfair terms protections of any meaningful application in the UK. This is not what was intended when the UCTD was drafted. In our view, either:

- terms that create a significant imbalance in the parties' rights and obligations to the detriment of the consumer should be unfair and unenforceable, whether or not the trader imposed those terms 'in good faith'; or
- the meaning of 'good faith' must be made clear on the face of the Directive so that it cannot be used as a loophole to undermine the purpose and effect of the UCTD in practice.'

Secondly, if the regulation does impact on consumer confidence,<sup>235</sup> further thought, perhaps, needs to be given to strategies to disseminate consumer rights/protections in this regard.<sup>236</sup> The UK European Consumer Centre also noted: '[There are]... [s]ufficient legal provisions in place within a number of laws. In some cases, more swift and robust enforcement action may be the way forward, whenever traders choose to ignore the requirements or misinterpret the law.'

### 1.2.2. Effectiveness of the current rules 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 disparities have an impact on cross-border trade; [*Key aspects to consider are: Do national differences in the application/implementation of the Directive play a role for businesses? Have these differences led to changes in their business strategy? Have these differences caused problems?*]

By way of background, two points should be highlighted. First, under the CRA 2015 the test of unfairness is set-out, in reasonably familiar terms,<sup>237</sup> in s.62(4):

'(4) A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.'

<sup>232</sup> See generally, J. Devenney, 'Gordian Knots in Europeanised Private Law: Unfair Terms, Bank Charges and Political Compromises' [2011] NILQ 33.

<sup>233</sup> J. Devenney & M. Kenny, 'The Regulation of Unfair Terms in Non-Professional Suretyship Agreements: Lessons for the Wider EU Harmonisation Agenda' in K. Fairweather, P. O'Shea and R. Grantam (eds.), *Credit, Consumer and the Law: After the Global Storm* (in press, Ashgate 2016).

<sup>234</sup> C. Scott & J. Black, *Cranston's Consumers and the Law* (3<sup>rd</sup> edn., Butterworths, 2000) at pp.101-102.

<sup>235</sup> Cf. 1.2.1.

<sup>236</sup> Cf. I. Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Market* (2<sup>nd</sup> Edn., Hart Publishing, 2007) at p.510.

<sup>237</sup> Regulation 5(1) previously provided: 'A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.'

Under the UTCCR 1999 there was evidence of some differences in approach by the courts in respect of the interrelationship between the constituent elements of the unfairness test,<sup>238</sup> and indeed there was a question mark as to whether or not some of the approaches adopted were consistent with the case law of the (now) CJEU.<sup>239</sup> Accordingly it is disappointing that the opportunity was not taken to further unpack the unfairness test. It is, of course, true that the CMA has provided guidance on the interplay between the constituent elements to the unfairness test but some guidance is rather general.<sup>240</sup>

Secondly, even if the unfairness test is being interpreted consistently throughout the EU, the application may be different as a result of local considerations. To some extent, this was recognised in *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v. Ludger Hofstetter and Ulrike Hofstetter*<sup>241</sup> where the (now) CJEU noted that it 'may interpret general criteria used by the Community legislation in order to define the concept of unfair terms. However, it should not rule on the application of these general criteria to a particular term'.<sup>242</sup> More specifically this issue can be illustrated by the interaction of the unfairness test under the Unfair Terms Directive and background rules such as personal property law:

'the application of the same general criterion in two Member States may give rise to very different decisions, as a result of the divergences between the rules of substantive law that apply to different contracts. Hence harmonisation under the Directive is more apparent than real.'<sup>243</sup>

Thus in *UK Housing Alliance (North West) Ltd v Francis*<sup>244</sup> the (non-harmonised) protection that could be offered by courts in England and Wales in possession proceedings contributed to a finding that a term in a sale and leaseback arrangement was not unfair under the Unfair Terms in Consumer Contracts Regulations 1999. Indeed *Which?* has noted: 'Any move toward maximum harmonisation in this area must take into account the important additional protections that have been identified throughout the EU as essential for the adequate protection of consumers.'

- 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;

By way of background, it should be noted that the impact of non-harmonised law on cross-border trade is keenly contested.<sup>245</sup>

<sup>238</sup> See, for example, the differing nuances of Lord Bingham and Lord Steyn in *Director General of Fair Trading v First National Bank Plc* [2001] UKHL 52. Lord Bingham (at [17]) appeared to view 'good faith' as concerned with procedural fairness whereas Lord Steyn (at [36]-[37]) appeared to view good faith as concerned with procedural and substantive fairness. Cf. *West v Ian Finlay & Associates* [2014] EWCA Civ 316.

<sup>239</sup> 'With regard to the question of the circumstances in which such an imbalance arises 'contrary to the requirement of good faith', having regard to the sixteenth recital in the preamble to the directive ... the national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations': *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* (C-415/11) [2013] 3 C.M.L.R. 5.

<sup>240</sup> 'The fairness test thus includes the following main elements: significant imbalance to the detriment of the consumer and good faith. It must, however, be emphasised that the overall requirement is a unitary one – the question is whether a term is unfair... A rigid approach to assessing fairness, involving an artificial exercise broken into separate parts, is not appropriate': CMA, *Unfair contract terms guidance: Guidance on the unfair terms provisions in the Consumer Rights Act 2015* (July 2015) para. 2.10.

<sup>241</sup> [2004] ECR-I 3403.

<sup>242</sup> At [22].

<sup>243</sup> *Report on Directive 93/13/EEC on unfair terms in Consumer Contracts*, [Com (2000) 248 final] at p.30.

<sup>244</sup> [2010] EWCA Civ 117.

<sup>245</sup> See, for example, R. Halson and D. Campbell, 'Harmonisation and its Discontents: A Transaction Costs Critique of a European Contract Law' in J. Devenney and M. Kenny (eds), *The Transformation of Private Law*, (Cambridge University Press 2013).



- 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.

Again by way of background, it should be noted that the impact of non-harmonised law on cross-border trade is keenly contested.

### 1.2.3. Relevance for business-to-business transactions

Regarding the area of contractual fairness and in relation to the Unfair Contract Terms Directive, please analyse:

- Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;

A case can be made for strengthening the position of SMEs in relation to unfair contract terms. Thus the Federation of Small Businesses reported:

- 'Half (52%) of small firms have been stung by unfair contract terms with suppliers, costing nearly £4 billion in the last three years.
- Suppliers are failing to make auto-rollover clauses clear up front (24%), tying businesses into lengthy notice periods (22%), charging high early termination fees (20%) and concealing details in small print (20%).
- Two in five (40%) respondents said they felt powerless to do anything about unfair contract terms because the supplier was too important or powerful to challenge.
- 42 per cent said that the contract terms that most negatively affected their business came from a contract with a supplier of energy, communications or financial services.'

However, the Federation of Small Businesses does not necessarily endorse strengthening the position of SMEs in relation to unfair terms in this context: 'FSB considers this to be a complicated area. Considerable nuance is needed re any policy action. FSB don't think the policy response should be crudely extending consumer protections to small businesses for example. FSB previously expressed a high degree of scepticism about extending aspects of consumer rights to small businesses and B2B transactions when this possibility was raised recently by the Commission in relation to digital consumer rights and the purchase of goods online. There are potentially big downsides to blunt measures, which will damage the flexibility and other benefits that small businesses enjoy under current English and Welsh contract law and we have argued in previous consultation responses that any measures along these lines are for Member States to decide.'

In 2005<sup>246</sup> the Law Commission recommended<sup>246</sup>, in broad terms, to extend the scope of the (then) UTCCR 1999 to small businesses:

'...subject to one proviso, there is wide support for protecting small businesses, particularly those that can be considered quasi-consumers because of their vulnerability in the market. The support came from many sectors of industry, law firms, the Financial Markets Law Committee and others. The proviso was that the regime should not apply to small businesses operating in the financial

<sup>246</sup> See Law Commission, *Unfair Terms in Contracts*, (Law Com. No 292 (2005)).

sector, since these are often highly sophisticated, or to businesses closely associated with larger firms or companies.<sup>247</sup>

It is more difficult to make the case, in the UK, in relation to business contracts generally.<sup>248</sup> One difficulty is, of course, how to appropriately and workably define a small business.<sup>249</sup> The provisions providing protection against 'unfair' terms in the CRA 2015 do not<sup>250</sup> apply to any businesses and, in contrast with the previous position under UCTA 1977,<sup>251</sup> a company is not capable of being a consumer under the CRA 2015.<sup>252</sup>

- 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;

Although it is possible to argue that a different system of protection might be appropriate for B2B transactions,<sup>253</sup> it may be more straightforward, particularly if the protection is only extended to small businesses, to use the same system of protection with the rider that the fact that the B2B, or more accurately business to small business (B2SB), context of the transaction is to be taken into account.<sup>254</sup> The 2005 recommendations of the Law Commission also supported the extension of public enforcement to this context<sup>255</sup> although it noted difficulties with funding for such an extension.<sup>256</sup>

<sup>247</sup> *Ibid* at 2.32. The support was not, however, universal: 'The CBI maintained that giving additional protection to small businesses would make it riskier to contract with them and consequently would work against their interests. This is an important point. However, it was the firm view of the representatives of small businesses who responded – and in particular the Federation of Small Businesses – that greater protection is very much needed. It appears that small businesses may prefer a reduction in the risks they face even at the possible cost of some loss of business' (*ibid* at 2.33). Cf. BIS, 'Protection of Small Businesses when Purchasing Goods and Services: Call for Evidence', (BIS/15/209 (2005)).

<sup>248</sup> See Law Commission, *Unfair Terms in Contracts*, (Law Com. No 292 (2005)) at 2.24ff. Cf. also Law Commission, 'An Optional Common European Sales Law: Advantages and Problems Advice to the UK Government' (November 2012).

<sup>249</sup> See Law Commission, *Unfair Terms in Contracts*, (Law Com. No 292 (2005)) at 5.33ff.

<sup>250</sup> Although cf. Arbitration Act 1996, s.90.

<sup>251</sup> See *R & B Customs Brokers v. United Dominions Trust* [1988] 1 WLR 321.

<sup>252</sup> See s.2(3): 'Consumer' means an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession'.

<sup>253</sup> Cf., for example, C. von Bar and E. Clive, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Sellier, Munich, 2009) and the discussion in P. Hellwege & L. Miller, 'Control of Standard Contract Terms', in G. Dannemann & S. Vogenauer, *The Common Frame of Reference for European Contract Law and its Interaction with English and German Law* (Oxford University Press, 2013).

<sup>254</sup> Note Article 4(1) of the UCTD: '1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent'.

<sup>255</sup> See Law Commission, *Unfair Terms in Contracts*, (Law Com. No 292 (2005)) at 5.94.

<sup>256</sup> 'We accept these submissions and we would like to recommend this extension. However, our enquiries into the practical implementation of such a scheme have led to doubts over whether there are suitable enforcement bodies capable of meeting the cost and willing to do so. In particular, the Office of Fair Trading has indicated that it would not be willing to take on the role of policing small business contracts. In short, there appear to be no bodies which currently have the resources effectively to carry out this role. We have not, therefore, made provision in the Draft Bill for a preventive powers regime in respect of terms in small business contracts': Law Commission, *Unfair Terms in Contracts*, (Law Com. No 292 (2005)) at 5.95.

- 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;

The 2005 recommendation of the Law Commission to, in broad terms, extend the (then) UTCCR 1999 protection to small businesses also included a recommendation not to extend the protection afforded to small businesses in respect of unfair terms to negotiated terms,<sup>257</sup> not least as it seemed there was little appetite for such an extension.<sup>258</sup> On the other hand, it can be argued, given some of the vulnerabilities potentially faced by small businesses and by analogy with the position with consumers following the CRA 2015, that such an extension, at least from a consumer protection perspective, is desirable.<sup>259</sup>

- 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;

From a UK perspective there are some terms which, even between large businesses, would be regarded as 'unfair'.<sup>260</sup> A more difficult question is whether terms which exclude liability for breach of statutory implied terms (e.g. ss13-15 of the Sale of Goods Act 1979) should be prohibited by analogy to the provisions preventing exclusion of analogous terms in consumer contracts under the CRA 2015.<sup>261</sup> On balance, in the light of the many different types of small businesses, it can be argued that such terms should not be 'unfair' *per se* but should be subject to an unfairness test.

- Whether there is a need for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive;

From a UK perspective, this may not be too controversial given, for example, approaches to interpretation,<sup>262</sup> the *Interfoto* line of authority<sup>263</sup> etc. However, much would depend, for example, on the standard to be applied in assessing those concepts and the consequences of non-compliance.<sup>264</sup>

- Whether an extension of the Unfair Contract Terms Directive to B2B transactions can bring benefits for cross-border trade;

As noted above,<sup>265</sup> the impact of harmonised law on cross-border trade is keenly contested. Much will, of course, depend on the merits of the relevant rules selected.<sup>266</sup> However, as hinted at above, there seems to be more of a case in relation to small businesses given that such business may not have access to appropriate legal advice etc.<sup>267</sup>

<sup>257</sup> See Law Commission, *Unfair Terms in Contracts*, (Law Com. No 292 (2005)) at 5.68.

<sup>258</sup> See Law Commission, *Unfair Terms in Contracts*, (Law Com. No 292 (2005)) at 1.13.

<sup>259</sup> A slightly different question is whether public enforcement, given the potential cost, should be extended to non-negotiated terms in this context.

<sup>260</sup> See, for example, UCTA 1977, s.2(1): "A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence."

<sup>261</sup> See above at 1.2.1.

<sup>262</sup> Cf., for example, *Houghton v. Trafalgar Insurance Co* [1954] 1 QB 247.

<sup>263</sup> *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] Q.B. 433.

<sup>264</sup> See above at 1.2.1.

<sup>265</sup> See 1.1.4.

<sup>266</sup> Cf. J. Devenney, M. Kenny & L. Gillies, 'The EU Optional Instrument: Absorbing the Private International Law Implications of a Common European Sales Law', (2012) *Yearbook of Private International Law* 315 at 329.

<sup>267</sup> See Law Commission, 'Unfair Terms in Contracts', (Law Com 292, (2005)) at para. 5.15.

- Whether the consequences of such an extension would have an effect on innovation by or market opportunities for SME providers/suppliers;

As noted above, there seems to be a case that small businesses are prevented from making full use of the internal market by the absence of such rules, given that such businesses may not have access to appropriate legal advice etc.<sup>268</sup>

- Whether the benefits of extending the scope to business-to-business transactions would exceed the negative consequences of such an extension.

As noted above,<sup>269</sup> the impact of harmonised law on cross-border trade is keenly contested.

### 1.3. Injunctions

#### 1.3.1. Effectiveness of the current rules in establishing a high level of consumer protection

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

- To what extent is the use of the injunction procedure in your country contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment?<sup>270</sup>

The ID has been transposed in the UK, in fairly complex terms, by Part 8 of the Enterprise Act 2002. Part 8 distinguishes between 'domestic infringements'<sup>271</sup> and 'community infringements'.<sup>272</sup> It also distinguishes between general enforcers,<sup>273</sup>

<sup>268</sup> See Law Commission, 'Unfair Terms in Contracts', (Law Com 292, (2005)) at para. 5.15.

<sup>269</sup> See 1.1.4.

<sup>270</sup> 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.

<sup>271</sup> See s.211: '(1) In this Part a domestic infringement is an act or omission which—(a) is done or made by a person in the course of a business, (b) falls within subsection (2), and (c) harms the collective interests of consumers. (1A) But an act or omission which satisfies the conditions in subsection (1) is a domestic infringement only if at least one of the following is satisfied— (a) the person supplying (or seeking to supply) goods or services has a place of business in the United Kingdom, or (b) the goods or services are supplied (or sought to be supplied) to or for a person in the United Kingdom (see section 232). (2) An act or omission falls within this subsection if it is of a description specified by the Secretary of State by order and consists of any of the following— (a) a contravention of an enactment which imposes a duty, prohibition or restriction enforceable by criminal proceedings; (b) an act done or omission made in breach of contract; (c) an act done or omission made in breach of a non-contractual duty owed to a person by virtue of an enactment or rule of law and enforceable by civil proceedings; (d) an act or omission in respect of which an enactment provides for a remedy or sanction enforceable by civil proceedings; (e) an act done or omission made by a person supplying or seeking to supply goods or services as a result of which an agreement or security relating to the supply is void or unenforceable to any extent; (f) an act or omission by which a person supplying or seeking to supply goods or services purports or attempts to exercise a right or remedy relating to the supply in circumstances where the exercise of the right or remedy is restricted or excluded under or by virtue of an enactment; (g) an act or omission by which a person supplying or seeking to supply goods or services purports or attempts to avoid (to any extent) liability relating to the supply in circumstances where such avoidance is restricted or prevented under an enactment.'

<sup>272</sup> See s.212: '(1) In this Part a Community infringement is an act or omission which harms the collective interests of consumers and which—(a) contravenes a listed Directive as given effect by the laws, regulations or administrative provisions of an EEA State, (b) contravenes such laws, regulations or administrative provisions which provide additional permitted protections, 2(c) contravenes a listed Regulation, or (d) contravenes any laws, regulations or administrative provisions of an EEA State which give effect to a listed Regulation. (2) The laws, regulations or administrative provisions of an EEA State which give effect to a listed Directive provide additional permitted protections if—(a) they provide protection for consumers which is in addition to the minimum protection required by the Directive concerned, and (b) such additional protection is permitted by that Directive'.

<sup>273</sup> S.213(1).

designated enforcers,<sup>274</sup> community enforcers<sup>275</sup> and CPC enforcers.<sup>276</sup> Enforcement procedures are set out in ss.214-223, with s.217 making provision in respect of enforcement orders.<sup>277</sup> S.221 provides:

‘(1) Subsection (2) applies to—

- (a) every general enforcer;
- (b) every designated enforcer which is a public body.

(2) An enforcer to which this subsection applies has power to take proceedings in EEA States other than the United Kingdom for the cessation or prohibition of a Community infringement.

(3) Subsection (4) applies to—

- (a) every general enforcer;
- (b) every designated enforcer;
- (c) every CPC enforcer.

(4) An enforcer to which this subsection applies may co-operate with a Community enforcer—

- (a) for the purpose of bringing proceedings mentioned in subsection (2);
- (b) in connection with the exercise by the Community enforcer of its functions under this Part.’

The CMA regard these powers as an important part of its consumer protection armoury.<sup>278</sup> However Which? has identified cost risk as limiting the effectiveness of this procedure:

‘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. 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

<sup>274</sup> S.213(2).

<sup>275</sup> S.213(5): ‘A Community enforcer is a qualified entity for the purposes of the Injunctions Directive—(a) which is for the time being specified in the list published in the Official Journal of the European Union in pursuance of Article 4.3 of that Directive, but (b) which is not a general enforcer, a designated enforcer or a CPC enforcer.’ CPC enforcers may make applications for enforcement orders: see s.215(4A).

<sup>276</sup> S.213(5A). This relates to Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer laws (OJ No L364/1, 9.12.2004) as amended.

<sup>277</sup> ‘(3) If this section applies the court may make an enforcement order against the person. (4) In considering whether to make an enforcement order the court must have regard to whether the person named in the application— (a) has given an undertaking under section 219 in respect of conduct such as is mentioned in subsection (3) of that section; (b) has failed to comply with the undertaking. (5) An enforcement order must— (a) indicate the nature of the conduct to which the finding under subsection (1) or (2) relates, and (b) direct the person to comply with subsection (6).’

<sup>278</sup> See OFT, *Enforcement of consumer protection legislation*, (OFT512 (2008)) which has now been adopted by the CMA. See also ‘Benchmarking the performance of the UK framework supporting consumer empowerment through comparison against relevant international comparator countries: A report prepared for BERR by the ESRC Centre for Competition Policy University of East Anglia Norwich’ (2008) at p.21: ‘Overall, we conclude that the UK is on a par with the best in respect of the legislative framework (with the caveat that the volume and complexity of the legislation could be simplified). The UK is on a par with the best in terms of its provision of consumer information and advice, and consumer advocacy. In respect of redress mechanisms, the UK’s position on ADR could be further improved and likewise the small claims procedure (which currently takes a year on average) could be enhanced. The UK’s system is underpinned by a strong public enforcement regime. In the light of forthcoming legislative changes, the key enforcement agencies will have a number of different types of enforcement powers which will enable them to regulate business in a responsive way. There is also evidence that the UK does focus its enforcement resources to deal with systemic market problems, and has challenging targets against which performance is measured.’

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.'

- What measures in your national legislation on injunction procedure are considered to be particularly effective, if any: measures regarding the cost of the procedure, the 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?

S.214 makes provision in respect of prior consultation with the person against whom an enforcement order might be sought and s.219 makes provision in respect of undertakings from such person that they will not, for example, continue or repeat certain conduct.<sup>279</sup> There is evidence, albeit in the context of the UCTD, of the effectiveness of this preliminary type of enforcement practice.<sup>280</sup>

- Has your country extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunction Directive? If yes, what are the additional consumer rights covered?

Above 'domestic infringements'<sup>281</sup> and the application of Part 8 to situations where the UK has gone beyond the minimum harmonisation requirements in particular directives have been discussed.

- Analysis of the obstacles to the effective use of the injunction procedure, in particular by analysing which progress in removing obstacles has been made and/or new difficulties that have emerged in your country since 2012.

The Consumer Rights Act 2015 added new ss.219A-219C into the Enterprise Act 2002.<sup>282</sup> This provides for 'enhanced consumer measures':

'The aim of Schedule 7 is to provide greater flexibility for public enforcers and the civil courts in relation to the contents of enforcement orders and undertakings made under Part 8 of the EA. 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 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

<sup>279</sup> S.219(4).

<sup>280</sup> See S. Bright, 'Winning the Battle against Unfair Contract Terms' (2000) 20 *Legal Studies* 331. Although the UK European Consumer Centre did not: 'It needs to be appreciated that in most cases it is needed to go to court to get this kind of decision.'

<sup>281</sup> Note also D. Parry, R. Rowell, B.W. Harvey and C. Ervine, *Butterworths Trading and Consumer Law* (Lexis, 1996-) at 1.64: 'The areas covered are mainly those civil and criminal measures which do not fall or only partially fall under the definition of a Community infringement under s212.'"

<sup>282</sup> See s.79 and Schedule 7 of the Consumer Rights Act 2015.



relevant market information to enable them to make better purchasing decisions.<sup>283,284</sup>

In terms of the cost risk identified above, Which? has proposed:

'We suggest that the Directive incorporates a principle that enforcers should not be required to pay the trader's costs where an action is unsuccessful - in recognition of the public interest function of the proceedings - so long as the enforcer does not act unreasonably...Any argument that this would lead to more unmeritorious or spurious enforcement cases is unfounded. There are (and there will inevitably remain) significant pressures on enforcers - such as budgetary constraints and reputational considerations - which incentivise them to prioritise those cases that will have the greatest public benefit for the resources deployed. However, if Member States felt that a financial incentive was also needed, then in unsuccessful cases an enforcer could be required to pay a fixed fee of (say) several thousand Euro toward the trader's costs. This model has proved successful in other Member States, such as Belgium.'

- In a forward looking perspective: Should the coverage of the Injunctions Directive be extended (by including additional legislation into Annex I to the Directive)? If so, which EU legislation should be included? Are there other measures that could improve the effectiveness of the ID in establishing a high level of consumer protection? Should the scope of the Injunctions Directive be extended to the protection of collective business' interests? Are there best practices in your country that could be relevant for other countries and considered as model for the injunction procedure at EU level?

Subject to the comments above<sup>285</sup> about the MCAD, there is a case for extending the protection in the ID to business interests, at least where there is a clear internal market need.

### 1.3.2. 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:

- How effective is the injunction procedure in addressing infringements originating in another EU country?

The procedures outlined above<sup>286</sup> seem to represent a fairly comprehensive package<sup>287</sup> although it will, for example, depend on the level of effectiveness of cross-border co-

<sup>283</sup> See *Consumer Rights Act 2015: Explanatory Notes* at [383]. For further guidance see BIS, *Enhanced Consumer Measures: Guidance for Enforcers of Consumer Law*, (BIS/15/292 (2015)).

<sup>284</sup> Which? noted: 'ECMs represent a welcome addition to the domestic enforcement toolkit in the UK. We would encourage the Commission to consider introducing similar measures at an EU level.' Which? also noted: 'In the UK, enforcers do not currently have the power to impose fines or monetary penalties for breaches of consumer protection law. This is in stark contrast to the position around breaches of competition law, for which the European Commission (and domestically the CMA) can impose significant fines. It is also inconsistent with the position in relation to (i) consumer law enforcement in other jurisdictions, both in other Member States and outside the EU; and (ii) the powers of other sector regulators in the UK, such as the Financial Conduct Authority and the Claims Management Regulator, which have fining powers... We believe that the introduction of fining powers would strengthen compliance incentives for business and operate as a significant deterrent against breaches. It would also ensure a greater degree of consistency across the enforcement landscape...The level of any fines should be calculated to ensure a real deterrent effect, as opposed to token amounts which are likely to be considered simply as 'the cost of doing business'. Fines should therefore be set in a proportionate and meaningful way whilst ensuring flexibility. Linking fines to turnover may be appropriate, as the Commission does in relation to competition law fines.'

<sup>285</sup> See 1.1.3.

<sup>286</sup> See 1.3.1.

<sup>287</sup> See, in particular, s.215(4).



operation.<sup>288</sup> The Department for Business, Energy and Industrial Strategy commented as part of the interview process that:

'Injunctions are an effective part of the enforcement toolkit, but need to be accompanied by other tools such as cross border enforcement. Some clarification of the interplay and coherence between the Injunctions Directive and other provisions on the enforcement of consumer rights would help strengthen the consumer protection regime.'<sup>289</sup>

- How effective is it to address infringements originating in another EU country that qualified entities in your country are enabled to seek injunctions in the other Member State (Article 4 of the Injunctions Directive)?

This framework has already been outlined above,<sup>290</sup> and no particular issues were identified by the CMA in its publication Enforcement of consumer protection legislation.<sup>291</sup>

- In a forward looking perspective: Are there non-legislative or/and legislative measures that could improve the effectiveness of the injunction procedure in addressing infringements originating in another EU country? Are there best practices in your country that could be relevant for other EU countries and could be considered as a model for the injunction procedure at EU level?

It can be argued<sup>292</sup> that non-legislative harmonisation is a key ingredient in the effectiveness of EU consumer legislation, particularly in terms of regulators and enforcers from different EU Member States developing a shared understanding of, for example, unfairness under the UCTD.

### 1.3.3. Interplay between the Injunctions Directive and other enforcement instruments of consumer law

Please analyse:

- Is the injunction procedure as designed by the Injunctions Directive regulated separately in your country (in a separate legal act or as a separate procedure regulated within the same legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (UCPD, UCTD and by the Consumer Rights Directive)?

There is some scope for the streamlining of the relevant provisions in the UK. For example, under the Consumer Rights Act 2015, the CMA (and other Regulators) are able to enforce Part 2 of the Act.<sup>293</sup> Schedule 3 provides a framework for this type of enforcement action and applies to:

- '(a) a term of a consumer contract,
- (b) a term proposed for use in a consumer contract,
- (c) a term which a third party recommends for use in a consumer contract, or

<sup>288</sup> Cf. 'Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen' [2015] EU Focus 1.

<sup>289</sup> Interview feedback, 11 August 2016.

<sup>290</sup> See 1.3.1.

<sup>291</sup> (CMA7, (2014)).

<sup>292</sup> J. Devenney and M. Kenny, 'Unfair Terms and the Draft Common Frame of Reference: The Role of Non-Legislative Harmonisation and Administrative Co-Operation?' in J. Devenney and M. Kenny, *European Consumer Protection: Theory and Practice* (Cambridge University Press, 2012).

<sup>293</sup> See s.70. In relation to investigatory powers see Schedule 5 which enhances the powers under the UTCCR 1999.

(d) a consumer notice.<sup>294</sup>

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'<sup>295</sup> of a relevant term or notice.<sup>296</sup> Significantly, however, this power extends to terms or notices which are prohibited without the need to assess fairness (which relate, in particular, to sections of the Act which broadly replicate some of the more protective consumer provisions formerly found in UCTA 1977):

'A term or notice falls within this sub-paragraph if it purports to exclude or restrict liability of the kind mentioned in—

- (a) section 31 (exclusion of liability: goods contracts),
- (b) section 47 (exclusion of liability: digital content contracts),
- (c) section 57 (exclusion of liability: services contracts), or
- (d) section 65(1) (business liability for death or personal injury resulting from negligence).<sup>297</sup>

This power also now extends to individually negotiated terms<sup>298</sup> and to consumer notices,<sup>299</sup> neither of which was, at least clearly in relation to the latter, required by the UCTD.

The public enforcement provisions in the Act are, in fact, part of the tapestry of public enforcement provisions relevant to the regulation of unfair terms. In addition to the provisions under the Act, it is possible to take public enforcement action under Part 8 of the Enterprise Act 2002 (which relates, in particular, to infringements of Community legislation) and under the Consumer Protection from Unfair Trading Regulations 2008.

- If these procedures are regulated separately: What are the main differences between them? How is the coherence between these procedures ensured? If these procedures are regulated in a single legal act (possibly as a single procedure): In what way do these procedures (or this procedure) go beyond measures foreseen by the Injunctions Directive?

This has been covered under the last item.

## 1.4. Cross-cutting issues

### 1.4.1. Cost and benefits of the directives covered by the study

- To what extent is there evidence for benefits for consumers stemming from the protection provided by both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of benefits for consumers from the protection against unfair commercial practices and unfair standard terms in contracts; [*Note: a relevant aspect in this context is whether the costs for consumers in exercising their rights under these directives are limiting these benefits or not.*]

It can be argued that consumers benefit, in general, from the regime established by the minimum and fully harmonised EU consumer rules aimed at unfair commercial practices and unfair standard terms in contracts; and that, moreover, consumers

<sup>294</sup> Schedule 3, para 1.

<sup>295</sup> Schedule 3, para 3.

<sup>296</sup> This power is significant in terms of the CMA or other Regulator obtaining 'undertakings' instead of seeking an injunction etc. - see Schedule 3, para 6.

<sup>297</sup> Schedule 3, para 3(2).

<sup>298</sup> See 1.2.1.

<sup>299</sup> Cf. H. Beale (ed.), Chitty on Contracts, (32nd Edn., Sweet & Maxwell, London, 2015) para. 38-392.

benefit from the interplay of different public, private and criminal law regimes. In addition, the case can be made that the effective enforcement of consumer protection is enhanced through a diverse regime of collective redress<sup>300,301</sup> and methods of alternative and online dispute resolution (ADR and ODR).<sup>302</sup> Many argue that this diverse regime is required given the potential for consumer disputes, the relative low value of individual cases and the imbalance of bargaining power. The OECD has recommended that all states should adopt mechanisms enabling consumers to be able to resolve disputes whether individually, collectively or through public authorities, stressing a need for a combination of mechanisms, and for direct negotiation as the first option.<sup>303</sup>

That this diversity is required *inter alia* because many consumer losses are so small as to be not worth pursuing through private litigation clearly raises the issue of the relative efficiency of consumer protection under the consumer protection rules. One consistent concern which is expressed relates to the costs for consumers of exercising their rights under the directives. The UK European Consumer Centre noted: 'In the UK, most of consumer disputes are within the upper limit of small claims value wise. This can sometimes be more problematic with cross border disputes, where there is the need to take legal action in another country. This is due to the requirement to be represented by a lawyer, which can be cost prohibitive for consumers sometimes.' Beyond the issue of litigation costs, some have argued (as noted above) that it is not clear that the main focus, for example, of the UCTD is on establishing a high level of protection; nor that the nexus between a high level of consumer protection and increased participation in the internal market is proven.<sup>304</sup> Moreover, given the contested prevalence of information requirements in the relevant directives, the precise extent of consumer protection will vary on the context of the transaction; there are, additionally, now a plethora of cross-cutting national and EU information duties which further complicate the consumer's position.

Litigation therefore needs to be placed in a matrix of collective redress, ADR and ODR. ADR, furthermore, is encouraged in sector specific secondary legislation (seen in Telecoms, Energy, Consumer Credit, Payment Services and Universal Services

<sup>300</sup> Encouraged by the European Parliament (EP). See EP Report 'Towards a Coherent European Approach to Collective Redress' (A7-0012-2012, 12 January 2012): para 25: '...the availability of an effective judicial redress system would act as a strong incentive for parties to agree an out-of-court settlement, which is likely to avoid a considerable amount of litigation; encourages the setting-up of ADR schemes at European level so as to allow fast and cheap settlement of disputes as a more attractive option than court proceedings, and suggests that judges performing the preliminary admissibility check for a collective action should also have the power to order the parties involved to first seek a collective consensual resolution of the claim before launching collective court proceedings; believes that the criteria developed by the Court should be the starting point for the establishment of this power; stresses, however, that these mechanisms should remain, as the name indicates, merely an alternative to judicial redress, not a precondition therefore...'

<sup>301</sup> Which? noted: 'Currently, individualised private enforcement of consumer rights through the courts is largely untenable. Despite the European Commission's Recommendation on collective redress being published in 2013, the UK is yet to introduce a viable collective mechanism by which UK consumers can enforce their consumer rights. We understand that the position is similar in many other Member States. In addition, while the ADR Directive has led to the availability of ADR in all sectors, the use of ADR by traders is not mandatory and take-up outside of the regulated sectors has been minimal [...] In our view, EU legislation is now required to set a minimum standard for the availability of collective redress mechanism for breaches of consumer law, based on an opt-out model. This issue should be addressed as part of the REFIT programme, given the pivotal role of private enforcement in the wider compliance landscape.'

<sup>302</sup> See, for example, Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for consumer disputes and amending Regulation 2006/2004 and Directive 2009/22 (OJ L165, 18.6.2013, p.63), Regulation 524/2013/EU of the European Parliament and of the Council of 21 May 2013 on Online Dispute Resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) (OJ L165, 18.6.2013, p.1) pursuant to: 2011 Commission Proposal for a Directive on Alternative Dispute Resolution for Consumer Disputes, COM(2011) 793/2. Commission Proposal for a Regulation on Online Dispute Resolution (ODR) for Consumer Disputes, COM(2011) 794/2.

<sup>303</sup> OECD, *Recommendation on Consumer Dispute Resolution and Redress* (Paris: OECD, 2007) at <http://www.oecd.org/dataoecd/43/50/38960101.pdf>.

<sup>304</sup> See above.

Directives)<sup>305</sup> and in the elaborations of end-user and EU citizenship rights (see below). Notwithstanding criticism of ADR,<sup>306</sup> it is still too early to assess the success of EU initiatives aimed at introducing/improving methods of collective redress and ADR and ODR. Similarly, it is too early to judge the impact of the introduction of new remedies.<sup>307</sup>

- To what extent is there evidence for benefits for traders stemming from both the minimum harmonised and the fully harmonised consumer rules, e.g. in terms of creating a level playing field for honest traders by providing a legal basis to eliminate or at least constrain dishonest market practices, such as the use of unfair standard terms in contracts or unfair commercial practices, including through the application of the Injunctions Directive;

Traders, too, can benefit, in general, from the consumer rights' floor and the level playing field provided through the EU regime of consumer protection. However countervailing concerns can be expressed as regards the regulatory burden placed, in particular, on small traders (see below). More subtly, traders may be lulled into a false sense of security by 'misapplications' of EU directives (see *Abbey National* and 2012 OFT Issues Paper).

- What are costs for traders due to the need to respect the requirements under the directives covered by the study? [*Note: Such as costs of research, legal advice and compliance as well as the amount of time necessary to comply with the directives*]

Traders may express a concern that the rules lead to excessive regulatory burden, especially on small traders. However, as noted above, in the UK national flanking measures have been taken which aim to address the regulatory burden.<sup>308</sup> Similarly, some traders may argue that traders are adversely affected by rules directed, in particular, at the protection of vulnerable consumers.

Meanwhile, the case could be made, seen above, that the minimum harmonisation derogation under the UCPD has a negative impact and dampening effect on cross-border trade; this means that minimum harmonisation derogations do not necessarily improve or promote the internal market and reduce the benefits traders had expected.<sup>309</sup> Furthermore, the application of the UCPD through the 'blacklist' of unfair commercial practices attracting criminal sanctions may create additional burdens on business, and especially small businesses, as previously analysed. Although, as observed above, a virtual blacklist appeared to have been already operating in this area.

Similarly, on the implementation of the MCAD there may be concerns, despite the general view that the principle-based approach was appropriate, with the use of

<sup>305</sup> Seen, *inter alia*, in E-commerce, Postal Services and MiFID Directives.

<sup>306</sup> P. H. Lindblom, 'ADR - The Opiate of the Legal System? Perspectives on Alternative Dispute Resolution Generally and in Sweden' (2008) 1 ERPL 63-93 at 89. 'In the worst case, ADR may function as an opiate to the legal system. The legislature and the courts are made passive. Citizens are lulled into a false sense of readily available and qualitative access to justice in society. The judiciary functions of behaviour modification, judicial lawmaking, judicial and administrative review - as well as the court's communicative functions - are weakened and impeded. The pros of ADR are few compared to the cons.' Similarly, J. Davies & E. Szyszczak 'ADR: effective protection of consumer rights?' (2010) E.L.Rev. 695 at 707: 'Allowing and encouraging a significant number of consumer-supplier disputes to be settled by ADR processes as a general principle denies the role of law to move beyond the contractual content of USO settlement of the individual dispute to the creation of stronger qualitative concepts of USOs which are at the heart of new consumer citizenship objectives in the EU.'

<sup>307</sup> BIS, Misleading and aggressive practices – Guidance on new rights for consumers: BIS Guidance on the Consumer Protection (Amendment) Regulations, 2014.

<sup>308</sup> For example: BIS Press Release 16 October 2014: <https://www.gov.uk/government/news/street-trading-and-pedlary-laws-to-be-modernised>. The UK European Consumer Centre noted: 'These rules are fairly clear and concise and in most cases it is possible to seek business advice from Trading Standards departments at no cost.'

<sup>309</sup> See above at 1.1.4.

criminal sanctions for misleading advertising; especially where, particularly in the absence of fraud, such sanctions have a dampening effect on cross-border trade.

- What are the costs involved in the public enforcement of these rules?

On paper Regulators have an impressive array of powers. For example, in the area of financial services, the Financial Conduct Authority (FCA) may take a wide variety of measures.<sup>310</sup> Impressive though these powers are, there have been concerns that the regulatory authorities do not have the resources to expedite their tasks.<sup>311</sup> To an extent the *inefficiency* of public enforcement may therefore be attributed to underfunding and this position has worsened in the wake of the financial crisis. According to Garside levels of funding for consumer protection are no longer relevant to optimal levels of protection: amounting to £1.99 [approx. EUR 2.30] per citizen per year.<sup>312</sup> Moreover, the case for a mix of enforcement tools only works if public enforcement is adequately funded. Given the poor funding of the regulatory authorities, implementation of consumer protection may not be as effective as it could be.

Yet there are important counter arguments relating to the place of public enforcement and one-dimensional models of public enforcement. First, what appears to be influential, beyond the level of funding, for public enforcement is its interplay with other forms of self- and co-regulation.<sup>313</sup> Similarly, the reliance on one-dimensional models of public enforcement, such as the criminal and administrative sanctions originally introduced under the CPUTR, have proven to be inefficient.<sup>314</sup>

- Are there indications that the directives covered by the study are not implemented in your country in a cost-effective manner?

Again in the area of unfair contract terms there is concern in the UK, highlighted in the non-referral to the CJEU of the interpretation of Reg. 6(2) of the UTCCR, in *OFT v Abbey National* (see discussion above).<sup>315</sup> *Abbey National* presents the issue of improperly implemented and applied directives. This was addressed by the 2012 Law Commissions' Issues Paper on Unfair Terms in Consumer Contracts,<sup>316</sup> which concluded that the case lulls traders into a false sense of security.<sup>317</sup> The question of the fairness review was subsequently 'resolved' on the basis of transparency of the relevant terms and changes brought about in the Consumer Rights Act 2015. It has, however, been disputed whether this reliance on the transparency of information works to improve consumer protection, especially in the area of financial services.<sup>318</sup> Moreover, if a question arises on the correct interpretation of a transposed directive, there is the further issue of ensuring the referral to the CJEU; referral is not the claimant's right but is in the gift of the national court.<sup>319</sup>

Finally, finding the right balance between public and private enforcement is important in ensuring efficient implementation of consumer protection directives. As seen above, the original enforcement model for the CPUTR foresaw reliance on a regime of criminal/administrative sanctions; a model which simply did not work effectively. This,

<sup>310</sup> <https://www.the-fca.org.uk/about/enforcement> .

<sup>311</sup> See generally above in 1.1.1.

<sup>312</sup> See generally above in 1.1.1.

<sup>313</sup> See above at 1.1.1.

<sup>314</sup> See above at 1.1.1.

<sup>315</sup> *OFT v Abbey National* (2009) UKSC 6.

<sup>316</sup> Law Commission, 'Issues Paper, Unfair Terms in Consumer Contracts: a new approach?' 25 July 2012.

<sup>317</sup> *Ibid* para 8.1.2.

<sup>318</sup> Adequacy of the information paradigm in consumer protection. See generally: A. Colombi-Ciacchi & S. Weatherill *Regulating Unfair Banking Practices in Europe* (OUP, 2010).

<sup>319</sup> Famously the CILFIT doctrine (Case 283/81 *CILFIT* [1982] ECR 3415, paras.14 & 16) addresses the limited cases in which the national court need not refer questions of interpretation to the CJEU.

in turn, established the case for the introduction of private redress rights under the CPUR 2008.<sup>320</sup>

- Could the costs for implementing and enforcing the rules of the directives covered by the study be reduced without lowering the level of protection for consumers? If so, how?

The majority view seems to be that funding for implementation and enforcement is already at dangerously low levels. Any further reduction in expenditure is likely to be counter-productive; even modest increases in funding would help optimise the level of consumer protection. However, one suggestion which might partially counter this view is the proposition that broadening the circle of super-complainants might raise the overall efficiency of consumer protection.

#### 1.4.2. Interplay with EU sector-specific consumer protection legislation

Regarding the interplay of the horizontal EU consumer legislation [mainly UCPD and UCTD] with EU sector-specific consumer protection legislation in the areas of electronic communications, passenger transport, energy and consumer financial services, please:

- Analyse the levels of awareness of the requirements of the horizontal EU consumer legislation (mainly UCPD and UCTD) of businesses and consumers and the specific public enforcement bodies in the relevant sectors, as in particular demonstrated by their practical application; [*Key question here is: Are UCPD and UCTD applied in practice by national authorities and courts as a legal basis to combat unfair commercial practices and unfair standard terms in contracts in the regulated sectors?*]

**Consumer Financial Services:** As discussed above there has been a significant issue on the applicability of the fairness review under the UCTD in the area of consumer financial services in the wake of *Abbey National*. This debate on the correct application of the UTCCR, is ongoing even after the introduction of the Consumer Rights Act 2015. It can therefore be argued that awareness of the horizontal requirements of the UCTD is distinct from the correct interpretation and application of the relevant horizontal provision.

**Passenger Transport:** the horizontal EU regime is overshadowed by national legislation on exclusion clauses.<sup>321</sup> For example, the Road Traffic Act 1988 and the Public Passenger Vehicles Act 1981 provide, respectively, that any antecedent agreement or understanding between the user of a motor vehicle and his passenger(s) which purports to restrict the driver's liability to that passenger in respect of risks for which compulsory insurance cover is required<sup>322</sup> is void under s.149(2) of the Road Traffic Act 1988. Meanwhile the Public Passenger Vehicles Act 1981, section 29,<sup>323</sup> invalidates a provision contained in a contract for the carriage of a passenger in a public service vehicle where that provision purports to restrict the liability of a person in respect of a claim which may be made against that person in respect of the death or personal injury to a passenger while being carried in, or who is entering or is alighting from the vehicle, or which purports to impose any conditions as to the enforcement of such liability.

**Air transport:** Meanwhile, in Air Transport national and EU sectoral measures intervene in the treatment of unfair terms and unfair commercial practices. In this context The Carriage by Air Acts (Implementation of the Montreal Convention 1999)

<sup>320</sup> See above, 1.1.1.

<sup>321</sup> R. Lawson, *Exclusion Clauses and Unfair Contract Terms*, (11<sup>th</sup> Ed., Sweet & Maxwell, 2014) at 6-004.

<sup>322</sup> See s.143 of the Road Traffic Act 1988.

<sup>323</sup> Cf. Rights of Passengers in Bus and Coach Transport (Exemptions and Enforcement) Regulations 2013/1865.



Order 2002,<sup>324</sup> under the heading 'Liability of the Carrier and Extent of Compensation for Damage', provides that any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in the Convention shall be null and void. An identical provision also applies in relation to combined carriage.<sup>325</sup> The limit is currently approximately EUR 1134.71.<sup>326</sup> A passenger can increase this by making an advance declaration and paying a supplementary fee.<sup>327</sup>

**Electronic communications:** Finally, in Electronic Communications, The Privacy and Electronic Communications (EC Directive) Regulations 2003 impose certain obligations in relation to electronic communications. Regulation 27 provides that any contract term between subscriber and the provider of a public electronic communications service or, between the provider of such a service and the product of an electronic communications network, inconsistent with any such right, shall be void.<sup>328</sup>

- Specify whether in your country the same authority is responsible for the enforcement of the horizontal EU consumer law 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 UCPD/UCTD in the regulated sectors, as specified in the previous bullet?*]

There are frequently overlaps between the enforcement powers of regulators which may be seen as inefficient and requires coordination.

- Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning contractual fairness, 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.?*]

In theory, the variety of public, private, criminal, regulatory and co- and self-regulatory regimes form a sophisticated regime with a number of control mechanisms. In practice, the system of public enforcement appears underfunded, while private litigation is subject to limits to redress and a welter of cross-cutting sectoral regimes. Moreover, there appear to be important issues/overlaps and conflicts between the horizontal and the sector-specific rules, for example, on the treatment of vulnerable consumers (see below).

It can be argued that neither domestically (CRA 2015) nor at EU level (Consumer Rights Directive 2011) has legislation gone far enough to consolidate the complexity of the law in consumer protection; consumers seem either reluctant or less than willing to engage with the full suite of remedies.<sup>329</sup>

- What are the benefits of the complementary application of the UCPD and UCTD in the regulated sectors? What are the costs due to the complementary application with the sectoral EU consumer protection legislation?

See above.

<sup>324</sup> SI 2002/263. The Order amends the Carriage by Air Act 1961, and disapplies s.1 of that Act in relation to Community carriers to the extent that Council Regulation 2027/97 has the force of law in the UK. The Convention entered into force in the EU on June 28, 2004. The Convention itself came into force on November 3, 2003.

<sup>325</sup> Combined carriage: Carriage partly by air and partly by some other mode.

<sup>326</sup> R. Lawson, *Exclusion Clauses and Unfair Contract Terms*, (11<sup>th</sup> Ed., Sweet & Maxwell, 2014).

<sup>327</sup> R. Lawson, *Exclusion Clauses and Unfair Contract Terms*, (11<sup>th</sup> Ed., Sweet & Maxwell, 2014).

<sup>328</sup> R. Lawson, *Exclusion Clauses and Unfair Contract Terms*, (11<sup>th</sup> Ed., Sweet & Maxwell, 2014).

<sup>329</sup> Report p.21.



- Assess any need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law.

The full complexity of provision (as seen above), in particular the interplay of EU sector specific rules, horizontal rules and non-consumer law provisions, is seen most tangibly in the treatment of vulnerable consumers (see below, 1.4.4.). Furthermore, the interplay of different models of self- and co- regulation may be seen as making this area ripe for clarification, especially in the light of what some regard as the failures of the CRA 2015 and 2011 Consumer Rights Directive to consolidate the law.

#### 1.4.3. Relevance of consumer law directives for consumer-to-business transactions

- Please analyse the need and potential for the application of the consumer law directives (mainly UCPD and UCTD) to 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).

See above. In relation to C2B contracts, the UK European Consumer Centre noted: 'This is still most likely to be considered a B2C agreement, where the existing rules apply.'

#### 1.4.4. Specific protection for vulnerable consumers

Please analyse:

- Whether the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined in the consumer law directives and relevant jurisprudence, and as applied by national authorities and courts in your country, continue to be valid and fit for purpose.

Traditionally English law has not specified a consistent and unambiguous definition of a 'consumer'.<sup>330</sup> A consumer transaction in English law generally involved three elements:

- the 'consumer' must be a person/organisation not acting in a business capacity';
- the seller or supplier must act in 'in the course of business' and;
- the goods/services must be intended for private and not business use.

The traditional English definition was thus quite narrow and did not admit a particular category of 'vulnerable' consumers.<sup>331</sup> To Reich the advent of the consumer-citizen, through a broad reading of Articles 20 and 169 TFEU, broadened the definition of the European consumer.<sup>332</sup> The notion of the vulnerable consumer has been with us,

<sup>330</sup> The most common domestic definition of a consumer was that of an individual who purchases goods or acquires services from a commercial organisation. In some contexts, however, a commercial organisation acquiring goods or services from another may be deemed a 'consumer'. More widely, consumers can be equated with 'citizens', to the extent that the enforcement of rights are concerned, so that potential recipients of social security benefits could be seen as consumers as would the recipients of other services provided in the 'public' sphere. Cf. now the CRA 2015, s.2.

<sup>331</sup> *R & B Customs Brokers v United Dominions Trust* [1988] 1 WLR 321. *Ashington Piggeries v Christopher Hill Ltd* [1972] AC 441.

<sup>332</sup> N. Reich, H. Micklitz & P. Rott, *Understanding EU Consumer Law* (Intersentia, 2009) at 48: 'The term 'consumer' in Article 169 TFEU and 'citizen of the Union' in Article 20 TFEU are substantially concurrent: each describes a subject with a certain EU legal status, a definition which goes beyond the scope of the classical fundamental EU freedoms. With regard to the EU citizen the freedom of movement and the rights based on information and protection of legitimate interests constitute the central reference points for the granting of subjective rights which can be further developed by a network of secondary law.'

arguably, since the landmark case of *Buet*.<sup>333</sup> The importance of a high level of consumer protection reaffirmed in *Mostaza Claro*.<sup>334</sup> Waddington, meanwhile, observes that whereas EU consumer protection law has, in general, not sufficiently protected the vulnerable,<sup>335</sup> vulnerable consumers are protected, to an extent, in a variety of sectoral measures, *inter alia*:

- Services of General Economic Interest.<sup>336</sup>
- Electricity Market Directive<sup>337</sup> vulnerability in the context of 'household customer'.
- Gas Market Directive<sup>338</sup> 'household customer'.
- Universal services.<sup>339</sup>
- Services Directive<sup>340</sup> Article 4 (3) providing that the 'recipient' of services means any natural person who is a national of a Member State or who benefits from rights conferred upon him by Community acts, or any legal person as referred to in Article 48 of the Treaty and established in a Member State, who, for professional or non-professional purposes, uses, or wishes to use, a service.
- Payment Services Directive<sup>341</sup> Article 4 (10): the 'payment service user' means a natural or legal person making use of a payment service in the capacity of either payer or payee, or both'.
- Air Passenger Rights Regulation<sup>342</sup> 'passenger rights'.

However, though the Commission has mapped out some sectoral contours of vulnerability, for example, in the energy sector,<sup>343</sup> Bartl observes that great differences emerge between the Member States on the concept of vulnerability and

<sup>333</sup> Case 382/87 *Buet and Educational Business Services v Ministère Public* [1989] E.C.R. 1235; [1993] 3 C.M.L.R. 659. para. 13 '...there is greater risk of an ill-considered purchase when the canvassing is for enrolment for a course of instruction or the sale of educational material. The potential purchaser often belongs to a category of people who... are behind with their education and are seeking to catch up. That makes them particularly vulnerable when faced with salesmen of educational material who attempt to persuade them that if they use that material they will have better employment prospects...' See: J. Stuyck, 'The Notion of the Empowered and Informed Consumer in Consumer Policy and How to Protect the Vulnerable Under Such a Regime'; *The Yearbook of Consumer Law* (2007), p.167.

<sup>334</sup> Case C-168/05 *Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-10421, para.38: 'The nature and importance of the public interest underlying the protection which the Directive confers on consumers justify, moreover, the national court being required to assess of its own motion whether a contractual term is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier.'

<sup>335</sup> L. Waddington, 'Vulnerable and Confused: the protection of 'vulnerable' consumers in EU law' (2013) 38(6) *ELRev* 757 at 781: 'EU law both fails to adopt such an approach, and, to the extent that EU instruments provide for full harmonisation, also hampers any efforts of Member States to take such action. However, examples of such targeted measures from areas outside "classic" consumer protection law can be found in EU legal instruments. Measures relating to Services of General Economic Interest, such as the supply of energy, do provide additional protection for consumers who are regarded as "vulnerable" in specific ways, for example because of fuel poverty. In addition to universal service obligations, such instruments can also contain particular duties owed to specific groups of vulnerable consumers. Elsewhere, some EU instruments establish an obligation to provide information in non-standard and accessible formats and, more generally, to take measures to avoid indirect discrimination. However, in spite of the emphasis placed on providing consumers with information... no equivalent obligations can be found in EU consumer protection law.'

<sup>336</sup> Directive on Services of General Economic Interest.

<sup>337</sup> Directive 2009/72 concerning common rules for the internal market in electricity and repealing Directive 2003/54 [2009] OJ L211/55 (Electricity Market Directive).

<sup>338</sup> Directive 2009/73 concerning common rules for the internal market in natural gas and repealing Directive 2003/55 (Gas Market Directive) [2009] OJ L211/94.

<sup>339</sup> Directive 2002/22 on universal service and users' rights relating to electronic communications networks and services (Universal Services Directive) [2002] OJ L108/51.

<sup>340</sup> Services Directive 2006/123/EC.

<sup>341</sup> Payment Services Directive 2007/64.

<sup>342</sup> Air Passenger Rights Regulation 261/2004.

<sup>343</sup> *European Commission Staff Working Paper, "An Energy Policy for Consumers"* SEC(2010)1407 final, fn.17 at p.11 [http://ec.europa.eu/energy/gas\\_electricity/doc/forum\\_citizen\\_energy/sec\(2010\)1407.pdf](http://ec.europa.eu/energy/gas_electricity/doc/forum_citizen_energy/sec(2010)1407.pdf)

the degree of protection actually provided (if at all).<sup>344</sup> Moreover, Waddington observes that the failure to protect vulnerable consumers may, in light of the United Nations Convention on the Rights of Persons with Disabilities, itself potentially amount to a breach of the European Union's obligations under international human rights law.<sup>345</sup> As Waddington concludes, much more needs to be done to protect the vulnerable consumer.<sup>346</sup> Vanessa Mak, meanwhile, has explored the difficulties in defining the European consumer; arguing that a 'pluriform' concept of the consumer has emerged; with a variation of treatment depending on whether consumer protection is being relied upon in justifying national measures in a free movement context, or when invoking the average consumer in the context of measures of positive integration.<sup>347</sup>

The Department of Business, Energy and Industrial Strategy commented to us: 'We recognise that difficulties exist over a rigid definition of vulnerable consumer. Consumers will find themselves in vulnerable positions according to circumstances not just physical characteristics. Any changes in the definition of vulnerable consumers should take into account the resulting impact on existing case law and consider any unintended consequences. Similarly, changes to 'average consumer' would need to take account of behavioural evidence. If small business owners were to be considered 'consumers' then the overall 'average' might be complicated and the threshold for effectively consumers increased because in general small business owners can be expected to be better informed and perhaps more circumspect in their purchasing decisions. There is some advantage in definitions that remain flexible and adaptable to the circumstances.'<sup>348</sup>

In conclusion, this survey has underscored that the 'average' consumer definition may have important implications for internal market purposes, but it is, on its own, unlikely to achieve a high level of consumer protection.<sup>349</sup> The introduction of the notion of the 'vulnerable' consumer has, in general, been seen as a positive move towards a higher level of consumer protection, with the caveats that the definition is limited to situations where traders have particular degrees of knowledge<sup>350</sup> and that some traders fear the wider application of the concept from a transaction cost perspective. Given the plurality of sectoral definitions it is difficult to avoid the conclusion that a further measure of consolidation is needed in this area.

<sup>344</sup> M. Bartl, 'The Affordability of Energy: How Much Protection for the Vulnerable Consumers' (2010) 33 *Journal of Consumer Policy* 225.

<sup>345</sup> Decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (2010/48) [2010] OJ L303/16. For a broader discussion of the implications of the conclusion of the Convention for the EU: L. Waddington, 'The European Union and the United Nations Convention on the Rights of Persons with Disabilities: A Story of Exclusive and Shared Competences' (2011) *Maastricht Journal of European and Comparative Law* 431.

<sup>346</sup> Waddington, above. 'It is not difficult to conclude that, under the Convention, the [EU] should be taking specific steps to protect consumers with disabilities where necessary. Of course, disability or impairment is only one of many potential causes of consumer 'vulnerability', and not all persons with disabilities will be 'vulnerable'. The [EU] must therefore not only pay greater attention to the need to protect 'vulnerable' consumers who are disabled, but all consumers who find themselves in a situation which renders them vulnerable. Greater recognition of the diversity of all consumers could create a framework within which to do this.'

<sup>347</sup> 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](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1626115).

<sup>348</sup> 11 August 2016. Cf. UK European Consumer Centre: 'We believe these to be valid and fit for purpose. The current arrangements offer appropriate balance between the rights of parties, which does not impede trade, at the same time offering significant degree of protection.'

<sup>349</sup> Devenney cited above.

<sup>350</sup> Report p.5.

- To what extent the existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers and whether, based on the experiences in your country, specific provisions should be introduced in other directives concerned, in particular the Unfair Contract Terms Directive.

Waddington argues that the coverage of vulnerability in the horizontal directives is inadequate; and this would seem to be underscored in the elaborations of vulnerability in the fragmented patchwork *inter alia* of the services and utility market directives (see above). As for the UCTD, the UK has, as analysed above, had a possibly unique testing of the directive as it applies to vulnerable consumers in *Abbey National* in which the Supreme Court came to the controversial conclusion that the UCTD had intended to advance contractual freedom rather than fairness.<sup>351</sup> More could possibly be done in that sector-specific 'services' and utilities legislation and in the UCTD to ensure the protection of vulnerable consumers. However the case can be made, given the fragmentation of the law on vulnerable consumers, that (a) broader consolidation measure(s) need to be adopted.

Moreover, it is worth noting that the CMA, with the objective *inter alia* of addressing the fall-out from *Abbey National*, launched a market investigation into retail banking.<sup>352</sup> The CMA report on retail banking, issued on 9 August 2016, specified measures to ensure greater transparency and the voluntary capping of bank charges especially for (vulnerable?) consumers without arranged overdrafts. The consumer organisation Which? has subsequently challenged whether such voluntary schemes can work, especially in the light of recent research into behavioural economics;<sup>353</sup> arguing that more stringent standards need to be laid down in legislation. As Alex Niell, Director of Policy and Campaigns at the consumer organisation Which? commented on the CMA proposals:

'The steps outlined today, to provide customers with better information and an improved switching experience, are welcome. However it is questionable whether these measures will be enough, not only to increase competition but also to ensure banks deliver a better service for their customers....' 'It is disappointing that the monthly charge cap is not actually a cap and banks will be allowed to continue to charge exorbitant fees for so called unauthorised overdrafts, rather than protect those customers that have been identified as among the most vulnerable.'<sup>354</sup>

#### 1.4.5. EU added value

- Overall, would you consider that protection of consumers against unfair commercial practices and unfair standard terms in contracts has improved in your country since the implementation of the UCPD and the UCTD in national legislation?

Generally a positive balance, yet still some concerns remain as to how the regime could be optimised and as to how, on particular interpretations of EU law, the correct application of consumer protection can be ensured in the absence of referral of the relevant case to the CJEU under Article 267 TFEU (see above). The Consumer Council for Northern Ireland also noted:

'It is the Consumer Council's view that the effectiveness of EU legislation, and the domestic laws that implement them, largely depends on levels of

<sup>351</sup> *Abbey National*, above, fn.168; H. Collins, 'Good Faith in European Contract Law' (1994) *OJLS* 229.

<sup>352</sup> <https://www.gov.uk/government/news/cma-paves-the-way-for-open-banking-revolution>.

<sup>353</sup> Commission Guidance on the Implementation/Application of the Directive on Unfair Commercial Practices SEC(2009) 1666, pp32-33: 'It is then for the national courts and administrative authorities to assess the misleading character of commercial practices by reference, among other considerations, to the current state of scientific knowledge, including the most recent findings of behavioural economics. Thus, for example, the use of defaults (...) or the provision of unnecessarily complex information may, according to the circumstances of the case, prove misleading.'

<sup>354</sup> Which on CMA report into retail banking: <http://www.which.co.uk/campaigns/better-banks/CMA-banking-inquiry-FCA-better-banks/>.

awareness that exist amongst consumers and businesses. Without sufficient awareness, businesses may deliberately or inadvertently fail to comply with legal requirements and consumers will not utilise the laws that have been put in place to protect them.

The Consumer Council conducts research every four years which assesses consumers' proficiency, including awareness of their rights. Since the research began in 1998, the proportion of NI consumers who feel well informed about their rights has increased, with awareness in 2015 returning to levels last seen in 2007...

In our latest research study, three fifths of NI consumers felt they were well informed about their rights. However, when survey participants were tested against true/false statements relating to everyday applications of consumer law, it was evident that many, including those who felt well informed, were not as proficient as they thought.'

- Overall, would you consider that the information of consumers regarding unit prices has improved since the implementation of the PID in national legislation?

Some would say that there is much greater transparency on price in the wake of the Price Information Directive; others, however, point to discounting, particularly prevalent on the UK retail market, which can sometimes confuse consumers as to the correct price indications. As noted above, there has been a super-complaint raised by Which? on the implementation of the PID and pricing practices in the groceries sector. While the CMA did not consider that pricing practices were systemically abusive, they nevertheless made a number of recommendations to improve practice.<sup>355</sup>

- Overall, would you consider that the protection of businesses against unfair marketing in your country has improved since the implementation of the MCAD in national legislation?

The overall protection of business has been improved since the implementation of the MCAD, and the introduction of a more level playing field. Perhaps inevitably, however, some small businesses may continue to be concerned at the regulatory burden.

- Overall, would you consider that it has become easier for businesses in your country to directly trade cross-border to final consumers located in other EU countries in recent years? Has it become easier for consumers in your country to directly purchase cross-border from traders located in other EU countries?

It seems that businesses, generally, have found it easier to trade cross-border in recent years and certainly consumers appear to be more willing to trade across borders. But further vigilance is needed to monitor up-take and further statistics are required. The UK European Consumer Centre noted: 'It is easier thanks to the rules being more uniform across the community. This, however, is mostly thanks to other laws concerning sale of goods, distance sales, etc.'

- To what extent are these improvements, if any, due to the mentioned directives?

The directives have certainly helped in creating a more level playing field and increasing consumer confidence. Yet other factors have also played a role: modern technology makes cross-border transactions far easier to engage in than was once the case; moreover, consumers have adapted to a more inter-connected Europe: borders have become more porous and consumers have more confidence in cross-border transactions.

<sup>355</sup> Report p.8.

## Annex

## A. Transposition fact sheet

**Table 1: Fact sheet on transposition of directives in Member States' law – United Kingdom**

Directive	Transposition legislation (National law, Article)	Comments	Specific provisions going beyond minimum harmonisation requirements/use of exemptions	Included in national legislation		Comments
<b>Directive 93/13/EEC on unfair terms in consumer contracts</b>	Consumer Rights Act 2015.		'Black list' of terms considered unfair in all circumstances	Yes	See, in particular, ss. 31, 47, 57 and 65	
			'Grey list' of terms which may be considered unfair	Yes	See Schedule 2, discussed above at P.28.	
			Extensions of the application of Directive to individually negotiated terms	Yes	See s.2.	
			Extensions of the application of Directive terms on the adequacy of the price and the main subject-matter	No	See s.64.	<i>It is debatable whether s.64 properly transposes the UCTD.</i>

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<b>Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market</b>	Consumer Protection from Unfair Trading Regulations 2008		Provisions regarding financial services going beyond minimum harmonisation requirements	Yes	Various: See C. Willett & Peter Sparkes' Country Report for Civic Consulting: 'Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU part - Final report and country reports' (2011) - <a href="http://ec.europa.eu/justice/consumer-marketing/files/ucpd_study_country_reports.pdf">http://ec.europa.eu/justice/consumer-marketing/files/ucpd_study_country_reports.pdf</a>	
			Provisions regarding immovable going beyond minimum harmonisation requirements	Yes	Various (Accommodation Agencies Act 1953): See C. Willett & Peter Sparkes' Country Report for Civic Consulting: 'Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU part - Final report and country reports' (2011) - <a href="http://ec.europa.eu/justice/consumer-marketing/files/ucpd_study_country_reports.pdf">http://ec.europa.eu/justice/consumer-marketing/files/ucpd_study_country_reports.pdf</a>	
			Application of UCPD to B2B transactions	No	See, in particular, Regulation 2.	



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<b>Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers</b>	Price Marking Order 2004		Extension of the application to other sectors (e.g. for immovable property)	The UK has taken advantage of various exclusions.	The relevant provisions only apply to 'products'. However, the relevant provisions are 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)); not applicable in relation to small businesses (Schedule 2).	
			Use of specific regulatory choices/derogations	See above.	See above.	
<b>Directive 2006/114/EC concerning misleading and comparative advertising</b>	Business Protection from Misleading Marketing Regulations 2008					
<b>Directive 2009/22/EC on injunctions for the protection of consumers' interests</b>	Enterprise Act 2002, Part 8 (as amended)					

**Table 2: Fact sheet on Injunctions Directive – United Kingdom**

Issue	Answer	Comments
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)?	- Yes, separate procedures in separate legal acts	<i>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).</i>
Who is entitled to bring an action seeking an injunction?	- Designated public bodies - Specified consumer associations	<i>See, in particular, ss.213 and 219C. See also Enterprise Act 2002 (Part 8) (Designation of the Consumers' Association) Order 2005/917.</i>
Is the injunction procedure a court or an administrative procedure? If your country legislation foresees both forms of the procedure, please explain in the comments column for which infringements the court or administrative procedure is foreseen	- Court procedure	<i>See s.217.</i>

<p>Who bears the costs of an injunction procedure?</p> <p>If qualified entities (or some of their categories e.g. consumer organisations) are entitled to an exemption of some/all cost related to the procedure please explain the characteristic of such exemption in the comments column.</p>	<p>- <i>Which?</i> 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 <i>Which?</i>, 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.’</p>	
<p>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?</p>	<p>- Yes, scope of application extended to cover areas of consumer law that are not part of Annex I of the Directive</p>	<p><i>See s.211 (‘domestic infringements’).</i></p>
<p>Is protection of business' interests covered by the injunctions procedure?</p> <p>If scope of application extended to the protection of business' interests, please provide details in the comments column regarding type of business' interests covered by the injunctions procedure</p>	<p>No</p>	<p><i>Although note that under s.210 that a ‘consumer’ can include situations where ‘the individual receives or seeks to receive the goods or services with a view to carrying on a business but not in the course of a business carried on by him.’</i></p>
<p>Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations</p>	<p>- Yes</p>	<p><i>S.217 applies to a ‘person’ and, under the Interpretation Act 1978, s.6, that would include ‘persons’.</i></p>

Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID)	- Yes - No	<i>This is central to, for example, the CMA's enforcement strategy.</i>
Has your Member State taken specific measures regarding the prior consultation (Article 5 of the Injunctions Directive)?	- Yes, requirement for party seeking injunction to consult with the defendant	<i>See s.214 (and s.216 on coordination).</i>
Does the national legislation provide for measures ensuring summary procedure? Please specify main characteristics of the procedure (subject matter/time limits) in the comments column.	- Yes	
Are there sanctions for non-compliance with the injunction order (Article 2(1) of the Injunctions Directive)? If sanctions in form of penalty or fine foreseen please specify in the comments column to who exactly should they be paid	- Yes, other sanction (please specify)	<i>A fine and potentially imprisonment (see s.220 and Phillimore v. Surrey County Council [2010] EWCA Civ 61).</i>
Has your Member State taken specific measures regarding the publication of the decision and/or the publication of a corrective statement?	- Yes	<i>See, for example, s.217(8).</i>
Is it possible to claim within the injunction procedure for sanctions for the infringement?	See comments.	<i>S.215 deals with jurisdiction. Criminal proceedings are in addition to this enforcement route.</i>
Can an action for the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to other beneficiary be brought within the injunction procedure?	- No	<i>Not specifically mentioned in the new 'enhanced consumer measures' but might have some form of restitution, in the widest sense, under the general law (e.g. Powers of Criminal Courts (Sentencing) Act 2000, s.130(4)).</i>
Can an action for damages to be paid to the qualified entity or the public purse be brought within the injunction procedure?	- No	<i>S.219A(2) states, in relation to the redress category, 'where such consumers cannot be identified, or cannot be identified without disproportionate cost to the subject of the enforcement order or undertaking, measures intended to be in the collective interests of consumers.' In the relevant guidance (Enhanced Consumer Measures: Guidance for Enforcers of Consumer Law (BIS/15/292, (2015)) BIS noted that this money could not be paid to the Treasury (see p.13) but could, for example, be paid to a charity (see[63]-[64]).</i>

Can an action for damages or redress to be paid to the consumers concerned be brought within the injunction procedure?	- Yes	<i>Under s.219A(2).</i>
Can individual consumers base their individual claims for damages/remedies on the injunctions order?	- Yes	<i>To some extent: cf. OFT v. Foxtons Ltd.</i>
Can the qualified entity claim other measures beyond the injunction, e.g. evidence of compliance with the judgment?	- Yes	<i>S.217(8) provides: 'An enforcement order may require a person against whom the order is made to publish in such form and manner and to such extent as the court thinks appropriate for the purpose of eliminating any continuing effects of the infringement— (a) the order; (b) a corrective statement.' Note also the enhanced consumer measures in ss.219A-C.</i>
Are the effects of individual injunctions orders extended to the future infringements and/or same or similar illegal practices (of other traders)?	- Yes	<i>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)).'</i>

## B. Data tables

*Number of B2C disputes*

Please indicate how many B2C disputes have been decided in your country on the basis of consumer law directives covered by this study (UCPD, UCTD, PID) as a proportion of the total number of B2C disputes decided on the basis of other national consumer legislation (based on statistics, or based on estimates by enforcement authorities and other stakeholders, where this is not the available).

**Table 3: B2C disputes decided on the basis of consumer law directives covered by this study in comparison with total B2C disputes decided on the basis of other legislation (most recent year for which data is available)**

Year	Type of data	Total number of B2C disputes (number of cases)	Share of B2C disputes decided on basis of ...					Comments
			UCPD	UCTD	PID	other EU consumer protection legislation (e.g. CRD, Sales Directive, sectoral legislation)	national consumer legislation not based on EU directives	
N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	See comments below.

Given, for example, the way in which B2C disputes are often addressed through discussion between the trader and a relevant authority, it is impossible to accurately estimate how many B2C disputes have been decided in the UK on the basis of the consumer law directives covered by this study (UCPD, UCTD, PID) as a proportion of the total number of B2C disputes decided on the basis of other national consumer legislation. However, note that: (i) the low number of proposed prosecutions under the CPUTR 2008 was a key driver in the UK introducing a specific private right of redress in respect of unfair commercial practices; (ii) there is very little case law specifically on the PMO 2004;<sup>356</sup> and (iii) particularly in connection with unfair terms, there is evidence of the effectiveness of negotiation by relevant bodies prior to formal enforcement action being sought.<sup>357</sup>

<sup>356</sup> Cf. also D. Parry, R. Rowell, B.W. Harvey and C. Ervine, *Butterworths Trading and Consumer Law* (Lexis, 1996- ) at 2.43ff.

<sup>357</sup> See S. Bright, 'Winning the Battle against Unfair Contract Terms' (2000) 20 *Legal Studies* 331. Although the UK European Consumer Centre did not: 'It needs to be appreciated that in most cases it is needed to go to court to get this kind of decision.'

*Costs of obtaining redress for a hypothetical case of invoking unfairness of a standard contract term*

- Please estimate the costs, including time, for consumers in obtaining redress when invoking the unfairness, and thereby the non-binding character of standard contract terms in a contract they concluded. Please provide the estimate for the hypothetical example below, focusing on costs (and needed time) of a lower court procedure and the use of ADR or other relevant procedure (if applicable).<sup>358</sup>

**Table 4: Estimate of costs for consumers in obtaining redress when invoking the unfairness of standard contract terms in a contract they concluded (for the hypothetical example provided in the box below)**

Redress mechanism	Estimated court fees (national currency)	Estimated lawyer's fees (national currency)	Other costs, if any (national currency)	Estimated time involved for consumer (hours)	Comments
Lower court procedure					See comments below.
ADR or other relevant procedure					See comments below.

Notes: This is a debated issue<sup>359</sup> in the UK and is, of course, dependent on a number of variables.<sup>360</sup> For example in response to a 2011 call for evidence,<sup>361</sup> BIS noted that ‘...no evidence specific to consumer to business disputes was forthcoming.’<sup>362</sup>

‘ADR can offer a cheaper and quicker alternative to the courts for disputes where a consumer is not able to resolve their complaint directly with the business from whom they made their purchase. It is estimated that ADR costs are between 1/8th and 1/3rd of the cost of going to court and the European Commission have estimated that it only takes up to 90 days for most disputes referred to ADR to be resolved. ADR in the UK tends to be free for the consumer, as it is often funded through businesses paying membership fees, levies or case fees to the ADR provider.’<sup>363</sup>

BIS also noted:

‘Indeed, UK ADR providers report that a significant number of the cases they currently deal with would never have gone to court. Other stakeholders noted that in their view very small value claims may not be suitable for either court action or ADR....A few stakeholders suggested ADR is not always a lower cost or quicker option compared to court action, particularly for complex cases. One stakeholder noted that there would only be cost-savings if the outcome of ADR were followed, as otherwise disputes may still end up in court.’<sup>364</sup>

<sup>358</sup> For the hypothetical example it is assumed that both the provider and the consumer are located in your country.

<sup>359</sup> See BIS, Government Response to Call for Evidence: EU proposals on Alternative (URN 12/674 (2012)).

<sup>360</sup> Cf. BIS, Alternative Dispute Resolution for Consumers: Government response to the consultation on implementing the Alternative Dispute Resolution Directive and the Online Dispute Resolution Regulation (BIS/14/1122 (2014)) p.8: ‘ADR in the UK tends to be free for the consumer, as it is often funded through businesses paying membership fees, levies or case fees to the ADR provider.’

<sup>361</sup> BIS, Call for Evidence on EU proposals on Alternative Dispute Resolution, (URN 11/1372, (2011)).

<sup>362</sup> See BIS, Government Response to Call for Evidence: EU proposals on Alternative (URN 12/674 (2012)).

<sup>363</sup> BIS, Alternative Dispute Resolution for Consumers: Government response to the consultation on implementing the Alternative Dispute Resolution Directive and the Online Dispute Resolution Regulation (BIS/14/1122 (2014)) p.8.

<sup>364</sup> See BIS, Government Response to Call for Evidence: EU proposals on Alternative (URN 12/674 (2012)).



**Hypothetical example: Terms which inappropriately exclude/limit consumers' rights to compensation**

*A consumer went on a package holiday with a friend to Kenya for which they paid € 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 €5,000 (€4,000 for the cost of the package and €1,000 for lost time and enjoyment). The tour operator agreed to compensate them €1,000 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/unfair-contract-terms/index\\_en.htm](http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-contract-terms/index_en.htm)]*

- Please estimate how often court and ADR procedures are used in your country for invoking the unfairness, and thereby the non-binding character of standard contract terms (i.e. the number of cases per year)?

As noted above, public enforcement is the cornerstone of the enforcement of the UCTD in the UK. Moreover, as also noted above, there is evidence of the effectiveness of negotiation by relevant bodies prior to formal enforcement action being sought.<sup>365</sup>

<sup>365</sup> See S. Bright, 'Winning the Battle against Unfair Contract Terms' (2000) 20 Legal Studies 331. Although the UK European Consumer Centre did not: 'It needs to be appreciated that in most cases it is needed to go to court to get this kind of decision.'

C. Interviews conducted and literature reviewed

**Table 5: Interviews conducted for this study**

Organisation	Stakeholder type	Date
Federation of Small Businesses	Business association	30 August 2016
Business, Energy and Industrial Strategy) (formerly BIS)	Ministry	11 August 2016
European Consumer Centre	European Consumer Centre	26 August 2016
Which?	Consumer organisation	28 August 2016
Consumer Council of Northern Ireland	Consumer organisation	31 August 2016

**Table 6: Literature reviewed for country report**

Author/Source	Year	Title of publication
M. Bartl	2010	'The Affordability of Energy: How Much Protection for the Vulnerable Consumers' (2010) 33 <i>Journal of Consumer Policy</i> 225.
H.G. Beale	1995	'Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts' in J Beatson & D Friedmann (eds), <i>Good Faith and Fault in Contract Law</i> , (1995, Clarendon, Oxford).
H.G. Beale (ed.)	2015	<i>Chitty on Contracts</i> (32 <sup>nd</sup> edn., Sweet & Maxwell, London, 2015)
S. Bright	2000	'Winning the Battle against Unfair Contract Terms' (2000) 20 <i>Legal Studies</i> 331.
A. Colombi-Ciacchi & S. Weatherill	2010	<i>Regulating Unfair Banking Practices in Europe</i> (OUP, 2010).
H. Collins	1994	'Good Faith in European Contract Law' (1994) <i>OJLS</i> 229
J. Davies & E. Szyszczak	2010	ADR: effective protection of consumer rights?' (2010) <i>E.L.Rev.</i> 695
J. Devenney & M. Kenny	2012	'Unfair Terms and the Draft Common Frame of Reference: The Role of Non-Legislative Harmonisation and Administrative Co-Operation?' in J. Devenney and M. Kenny, <i>European Consumer Protection: Theory and Practice</i> (Cambridge University Press, 2012).
J. Devenney & M. Kenny	2016	'The Regulation of Unfair Terms in Non-Professional Suretyship Agreements: Lessons for the Wider EU Harmonisation Agenda' in K. Fairweather, P. O'Shea and R. Grantam (eds.), <i>Credit, Consumer and the Law: After the Global Storm</i> (in press, Ashgate 2016)
J. Devenney & M. Kenny	2015	'Omission of Personal Property from the Proposed CESL: The Hamlet Syndrome...Without the Prince?' [2015] <i>The Journal of Business Law</i> 607.
J. Devenney	2016	'Private Redress Mechanisms in England and Wales for Unfair Commercial Practices', (2016) 5 <i>EuCML</i> 100.
J. Devenney	2015	'Conceptualising Consumers in the Law of England and Wales' in K. Riesenhuber and F. Klinck (eds), <i>Verbraucherleitbilder: Interdisziplinäre und Europäische Perspektiven</i> (de Gruyter, 2015)
J. Devenney	2013	'Re-Examining Damages for Fraudulent Misrepresentation: Towards a More Measured Response to Compensation and Deterrence', in L. Di Matteo, K. Rowley, Q. Zhou & S. Santier, <i>Current Issues in Commercial Contracts: Transatlantic Perspectives</i> (Cambridge University Press, 2013).
J. Devenney, M. Kenny & L. Gillies	2012	'The EU Optional Instrument: Absorbing the Private International Law Implications of a Common European Sales Law', (2012) <i>Yearbook of Private International Law</i> 315 at 335-336.
J. Devenney & T. Pfeiffer	2013	'Control of Standard Terms (Collective Proceedings)' in G. Dannemann & S. Vogenauer, <i>The Common Frame of Reference for European Contract Law and its Interaction with English and German Law</i> (Oxford University Press, 2013).
J. Devenney	2011	'Gordian Knots in Europeanised Private Law: Unfair Terms, Bank Charges and Political Compromises' [2011] <i>NILQ</i> 33.
A.M. Dugdale, M. Jones and M. Simpson	2015	<i>Clerk and Lindsell on Torts</i> , (21 <sup>st</sup> edn., Sweet & Maxwell, 2015)
J. Garside	2016	'Trading standards institute: consumers are no longer protected', <i>The Guardian</i> , 7 <sup>th</sup> August 2016.
R. Halson and D. Campbell	2013	'Harmonisation and its Discontents: A Transaction Costs Critique of a European Contract Law' in J. Devenney and M. Kenny (eds), <i>The Transformation of Private Law</i> , (Cambridge University Press 2013).

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P. Hellwege & L. Miller	2013	'Control of Standard Contract Terms', in in G. Dannemann & S. Vogenauer, <i>The Common Frame of Reference for European Contract Law and its Interaction with English and German Law</i> (Oxford University Press, 2013).
M. Himoni	2016	<i>European consumer law: a law for the consumer or the internal market? The case of the consumer right directive and its application to the UK and Cypriot regimes</i> (unpublished Ph.D thesis, University of Leeds, 2016).
G. Howells, H-W. Micklitz and T. Wilhelmsson	2009	'Towards a better understanding of unfair commercial practices', (2009) 51 Int. J.L.M. 69.
F. Kessler M. Koutsias and C. Willett	1943 2012	'Contracts of Adhesion: Some Thoughts about Freedom of Contract' (1943) 43 Columbia L Rev 629. 'The Unfair Commercial Practices Directive in the UK' Erasmus Law Review, 5 (4) 2012
R. Lawson		Exclusion Clauses and Unfair Contract Terms, (11 <sup>th</sup> Ed.)
PH Lindblom	2008	'ADR - The Opiate of the Legal System? Perspectives on Alternative Dispute Resolution Generally and in Sweden' (2008) 1 ERPL 63.
J. Luzak	2015	'Online disclosure rules of the Consumer Rights Directive: Protecting passive or active consumers?' (2015) 3 Journal of European Consumer and Market Law 79.
V. Mak	2010	'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
H. McGregor	2014	<i>McGregor on Damages</i> , (19 <sup>th</sup> edn., Sweet & Maxwell, London, 2014) para. 5-012.
O'Keefe		<i>The Law of Weights and Measures</i> (2 <sup>nd</sup> Edn., Butterworth, London, 1996-)
D. Parry, R. Rowell, B.W. Harvey and C. Ervine		<i>Butterworths Trading and Consumer Law</i> (Lexis, 1996-
J. Poole & J. Devenney	2007	<i>Reforming Damages for Misrepresentation: The Case for Coherent Aims and Principles</i> [2007] Journal of Business Law 269-305.
J. Poole and A. Keyser	2005	<i>Justifying Partial Rescission in English Law</i> [2005] 121 LQR 273.
L. Poro	2014	'Unfair commercial practices in financial services: is the EU legal framework sufficient to protect consumers?' (2014) 29 J.I.B.L.R. 422.
I. Ramsay	2007	<i>Consumer Law and Policy: Text and Materials on Regulating Consumer Market</i> (2 <sup>nd</sup> . Edn., Hart Publishing, 2007) Ch. 4.
N. Reich		Understanding EU Consumer Law
C. Scott & J. Black	2000	<i>Cranston's Consumers and the Law</i> (3 <sup>rd</sup> edn., Butterworths, 2000)
C. von Bar & E. Clive	2009	<i>Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)</i> (Sellier, Munich, 2009)
L. Waddington	2013	'Vulnerable and Confused: the protection of 'vulnerable' consumers in EU law' (2013) 38(6) <i>ELRev</i> 757.
C. Willett	2007	<i>Fairness in Consumer Contracts: The Case of Unfair Terms</i> (Ashgate Publishing, Aldershot, 2007)

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