

REFIT FITNESS CHECK OF EU CONSUMER & MARKETING LAW

Unfair Commercial
Practices Directive



2005

Misleading and Comparative
Advertising Directive



2006

Unfair Contract Terms
Directive



1993

Price Indication
Directive



1998

Sales and Guarantee
Directive



1999


Injunctions Directive



2009

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Progress and Timeline

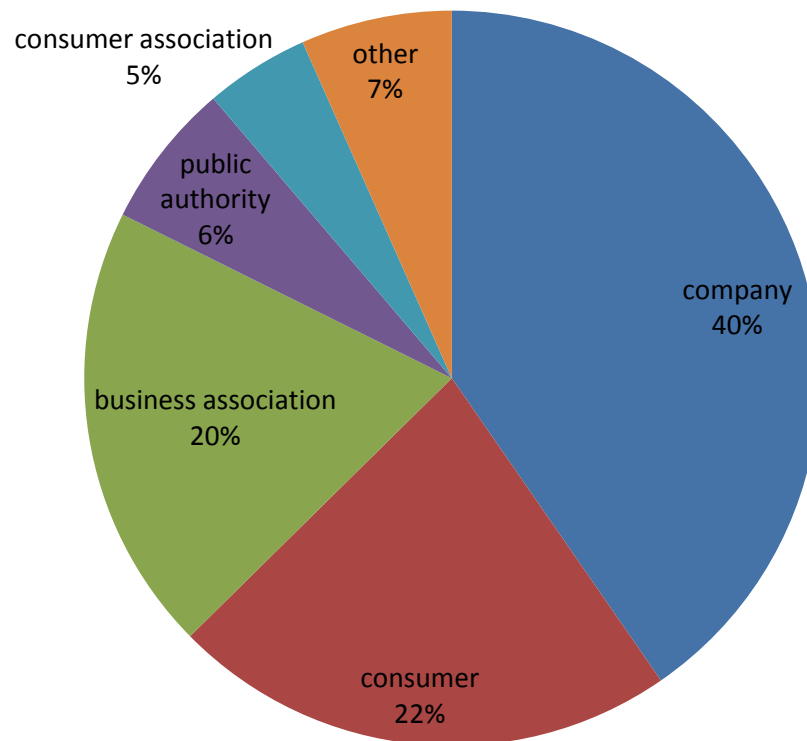
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- "Roadmap" published on 8 January 2016.
 - Process led by DG Justice and Consumers; intra-Commission coordination through an Inter-Services Steering Group.
 - Several supporting studies underway to collect data.
- Online public consultation (12 May – 12 September 2016).
 - Stakeholder consultative group established – 1st meeting on 21 September; 2nd – 25 November + further meetings in 2017.
 - "Consumer Summit" 2016 dedicated to the Fitness Check (17 October 2016).
- First priority in light of the Digital Contracts Proposals – provision of data on the Sales Directive 1999/44/EC to substantiate the case for alignment of rules for all sales channels (August - September 2016).
 - Finalisation of the external studies by February 2017
 - Adoption and publication of the Fitness Check Report in Spring 2017 with the announcement of follow-up actions.

Information sources

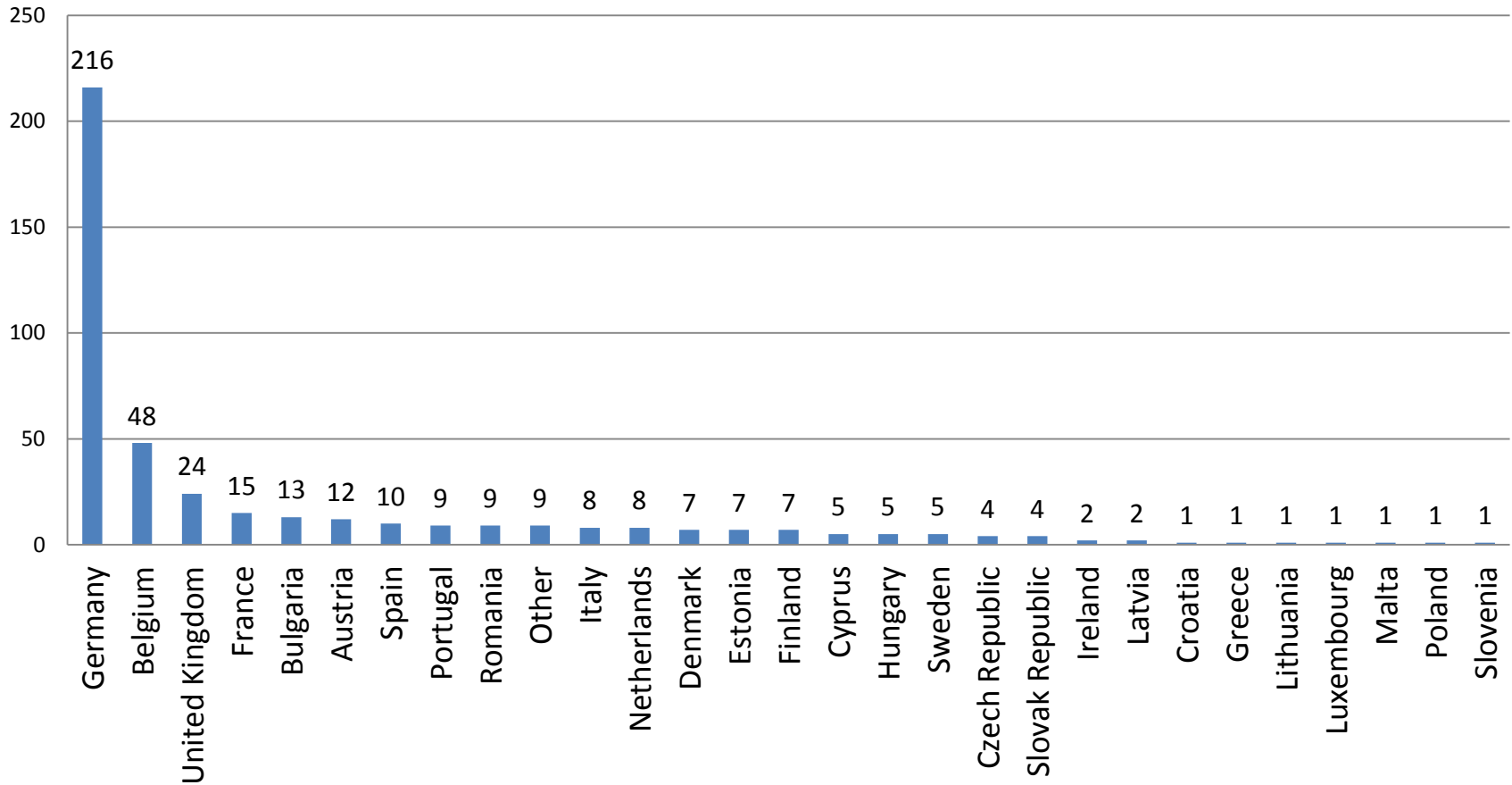
- Online public consultation;
- External studies, including:
 - Consumer survey
 - Stakeholder interviews
 - Business interviews
 - Behavioural experiments & mystery shopping
 - Literature review
- Consumer Summit conclusions;
- Proceedings of the Stakeholder expert group.

Online public consultation

In total: 436 replies



Replies by Country



Public consultation - Consumer survey

- Nearly half (47%) of respondents indicated having experienced a **problem with a trader** in the last 12 months.
- Amongst them, more than half (58%) said that their most serious problem was not solved at all.
- The **most frequently reported problems** were:
 - Trader did not provide the key information before concluding a contract (23%);
 - Consumers were misled by marketing statements and concluded a transaction they later regretted (20%).
- Around 40% of respondents felt being well-protected by **national public authorities and national courts**, but similar numbers thought that these authorities are not effective in implementing consumer law.

(external) Consumer Survey

- 23'500 respondents in EU 28 (+ NO, IS).
- Representative sample (in terms of gender, age group, education, location (urban v. rural), economic situation).
- Majority of respondents thought that traders are 'compliant' with consumer rules (between 44% and 64%) rather than not compliant (between 9% and 11%).
- One quarter (26%) of respondents had experienced **at least one problem** related to their consumer rights in the past year.
- Of all consumer rights problems, **misleading or aggressive commercial practices were the ones experienced most often** (15% stated that these occurred 'Very often' or 'Often'). This is followed by the lack of indication of the unit price (11%), defective goods (10%) and unfair standard contract terms (9%).

Public consultation - Business survey

- Around 80% of respondents found complying with consumer protection rules **beneficial** because:
 - consumers whose rights are respected come back,
 - consumers whose rights are respected bring/attract other consumers (by word of mouth, online endorsements),
 - on the contrary, consumers whose rights are not respected discourage other consumers (damage to reputation).
- Only around 30% agreed that businesses can **trade across the EU more easily** thanks to the EU consumer and marketing rules.
- Over 60% of companies agreed that **businesses are well protected** against unfair comparative advertising and misleading marketing practices of other businesses.

External studies – current findings on UCPD

- The **principle-based approach** of the UCPD is generally considered effective:
 - Future-proof
 - Yet some concerns about legal uncertainty for consumers and businesses, as well as need for enforcement authorities and courts to 'circumstantiate' the principle-based rules
- Regarding the UCPD **black list**:
 - Authorities: alleviates burden of proof. No need for the *transactional decision* test.
 - Traders: Increased legal certainty, easier compliance check. Consumers: (Some) increased clarity on banned practices.
 - But: Limitations in its applications (e.g. some practices deemed less relevant, others still require substantive assessment).

External studies – current findings on UCTD

- The UCTD is generally considered to be **effective** in establishing a high level of consumer protection. In particular:
 - The principle-based approach allows for flexibility and adaptation to new market situations
 - The recent CJEU case-law on the unfairness test and the price/main subject-matter exclusions as well as on the active role of national judges has contributed to its effectiveness
- **Implementation problems** are mainly attributed to national factors, such as:
 - Lack of resources available to (some) national enforcement authorities
 - Lack of awareness by (some) national courts

Public consultation – full survey

Forward-looking questions/1

- **Need for simplification/ streamlining:**

- Majority of companies, consumer associations and public authorities and relative majority of consumers agree that EU consumer and marketing rules should be simplified by bringing them into a single horizontal EU instrument; relative majority of business associations disagreed.

- **Better enforcement:**

- Majority of consumer associations, consumers and public authorities call for more **dissuasive sanctions** against non-compliant businesses

Level of penalties – example of the CRD

Art. 24 CRD – *"Member States shall lay down the rules on penalties applicable to the infringements of the national provisions and take all measures necessary to ensure that they are implemented.*

*The penalties provided must be **effective, proportionate** and **dissuasive**. (...)"*

- **Cyprus** – 5% of the annual turnover or up to 200.000 EUR
- **Latvia** – 10% of the annual turnover or up to 100.000 EUR
- **Netherlands** – 1% of the annual turnover or up to 900.000 EUR

- **Bulgaria** – min. 100 - max. 3000 BGN (approx. 51-1530 EUR)
- **Lithuania** – min. 500 - max. 5000 LTL (approx. 154-1540 EUR)
- **Romania** – min. 1000 – max. 5000 RON (approx. 222-1110 EUR)

Public consultation – full survey

Forward-looking questions /2

▪ **Better protection against unfair contract terms**

- Majority of consumer associations, consumers and public authorities agree with the introducing of an EU wide black-list of terms that are always prohibited
- Majority of consumer associations and public authorities and more than half of consumers agree with the idea of incorporating key Court of Justice case law on the *ex officio* duties of judges to assess the presence of unfair terms. Relative majority of companies and business associations are against it.

▪ **Better protection against unfair practices:**

- Majority of consumer associations, consumers and public authorities, as well as relative majority of companies support introducing right to individual remedies (e.g. compensation and/or invalidity of the contract when the consumer has been misled into signing a disadvantageous contract)

UCPD - individual remedies

Current UCPD:

- "Cease and desist" orders & penalties
- In addition, MS have the option to order publication of cessation decision/corrective statement

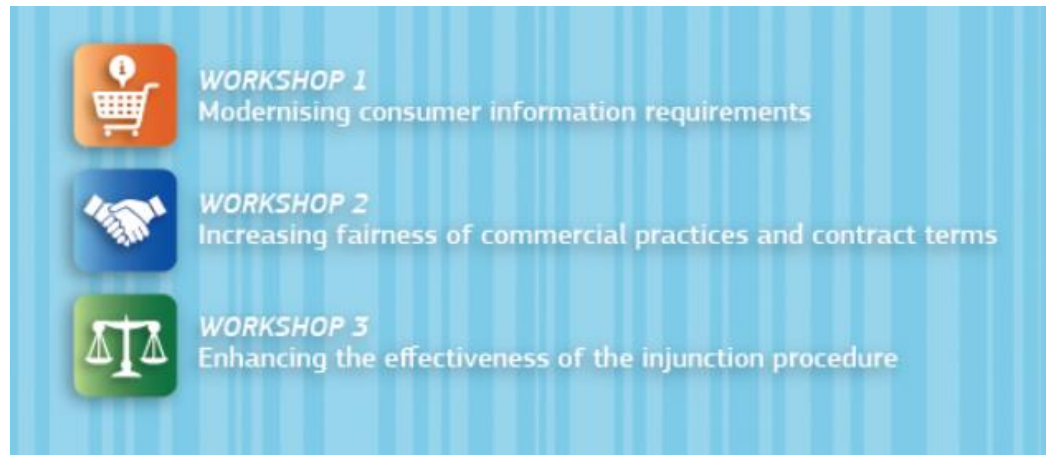
Contractual consequences under national law:

- Civil law – general rules on validity of contract and on damages
- Additional UCP-specific provisions e.g. in FR (nullity), PL (compensation and cancellation), PT (annulment, amendment), etc.
- But e.g. EE: "UCP does not in itself result in nullity"




Consumer Summit 2016:

- 520 registered participants from 31 countries
- 24 speakers
- Interactive thematic workshops
- Large coverage on social media



European Consumer Summit 2016 / 1

- Main conclusion: current EU consumer and marketing law is largely fit for purpose 
- Key messages identified:
 - Step up enforcement;
 - Increase consumers' and traders' awareness about their rights and duties;
 - Introduce targeted amendments to the existing directives;
 - Possibly bring the current Directives into a single regulatory instrument, provided the level of consumer protection is not reduced & the necessary margin of manoeuvre is left to MS to tackle national specificities.

European Consumer Summit 2016 /2

■ Consumer information



- **Simplification** of the information requirements currently provided in several directives;
- Strengthening the **transparency requirements** for online intermediaries (platforms);
- Improving **how information is displayed** to consumers.

■ Fairness



- Clearer **individual remedies** for victims of unfair commercial practices
- Introduction of a '**black list**' of unfair contract terms
- Codification of the **CJEU case-law** on the ex officio application of the UCTD by national courts

European Consumer Summit 2016 /3

- Effectiveness of the **injunctions** procedure



- Reducing costs for consumer organisations;
- Ensuring that the affected **consumers get redress** as a result of the injunctions decision;
- Divided views on whether also the **role of business organisations** in seeking injunctions should be enhanced.

- B2B



- Divided views on the need **to extend B2C rules** to protect SMEs from unfair practices and unfair contract terms.

Thank you for your attention!