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

Final report Part 3 – Country reporting

Prepared by Civic Consulting  
May 2017

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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 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 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 provides 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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<p><b>Directive 2006/114/EC concerning misleading and comparative advertising</b></p>	<p><i>Burgerlijk Wetboek (DCC)</i></p>			<p>Art. 6:194-196 DCC</p>	
<p><b>Directive 2009/22/EC on injunctions for the protection of consumers' interests</b></p>	<p><i>Burgerlijk Wetboek (DCC), as enacted in 1992</i></p>				
	<p><i>Wet Handhaving Consumentenbescherming (Consumer Protection Enforcement Act 2006)</i></p>				

**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?</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	<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?</p> <p>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)?</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>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