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 POLAND

1.1. Unfair commercial practices and marketing

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

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

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

In Poland, the Act on prevention of unfair commercial practices (Ustawa o przeciwdziałaniu nieuczciwym praktykom rynkowym, 23 August 2007, Dz.U. 2007 Nr 171 poz. 1206) implemented the UCPD. Article 4 of this Act contains a general clause that is based on the general clause prohibiting unfair competition in Polish law, as adopted in Article 3 para 1 of the Act on combating unfair competition (Ustawa o zwalczaniu nieuczciwej konkurencji, 16 April 1993, Dz.U. 1993 Nr 47 poz. 211). The principle-based approach is expressed through a requirement for the test of unfairness of a commercial practice to check whether the practice is ‘contrary to the principle of good practices’ (‘zasada sprzeczności z dobrymi obyczajami’). On the face of it, there is thus a contradiction between the requirements for unfairness in Polish and EU law, but the courts could interpret Polish provisions pursuant to the UCPD, thus using the unfairness test of a general clause (Article 5 UCPD).

The compliance test of a given commercial practice to the principle of good practices is easier to conduct for Polish courts than the test of professional diligence from the UCPD. Polish courts are very familiar with the standards of ‘good practices’, as this test is long present in Polish law. The old Polish law regulating unfair competition (as old as of 1926) used this term as meaning the trader’s honesty and fairness, and generally it refers to ethical and moral standards of behaviour that could be expected from traders, and does not require the trader’s fault to establish breach (fault could be required if the test of professional diligence was applied instead) (this interpretation has been upheld in the above-mentioned Act of 1993). The Polish Supreme Court applies this test, considering also the professional diligence standard as adopted in the UCPD, ensuring that the scope of the general clause of good practices is not broader.

From this perspective, the introduction thereof by the Polish legislator could be seen as an effective consumer protection tool.

It should, however, be mentioned that the scope of the application of the general clause has only recently been clarified in Polish law, following the CJEU’s judgment in the case C-388/13 UPC Magyarország, with the change to the Act on prevention of unfair commercial practices applicable as of December 25, 2014 (Dz. U. 2014 poz. 827), establishing that it did not need to be conducted when the commercial practice also fell under the misleading or aggressive commercial practice test or was contrary to codes of conduct.

Generally, stakeholders agree that the principle-based approach provides for an effective approach to consumer protection. It allows for courts and other national enforcement authorities to be flexible when deciding whether a given commercial practice could be perceived as unfair under the provisions of the Directive. This also

1 See e.g. Stefanicki 2010; Strzelecki.
2 See e.g.: III SK 47/14 of 9 April 2015; III SK 24/14 of 16 April 2015; III SK 80/13 of 27 August 2014; III SK 45/13 of 8 May 2014.
3 See e.g. Namysłowska & Piszcz (eds.), Strzelecki.
4 See e.g.: III SK 47/14 of 9 April 2015; III SK 24/14 of 16 April 2015; III SK 80/13 of 27 August 2014; III SK 45/13 of 8 May 2014.
5 See e.g. Polish Supreme Court case III SK 34/13 of 4 March 2014.
means that the protection against unfair commercial practices is capable of applying whenever modern technology is employed or whenever a new, unfair commercial practice appears on the market.

However, the consumer organisation sees principle-based approach as problematic before the dispute goes to court. They perceive consumers and traders as unaware of what this test could cover within its scope. Consumers are helpless to realize whether their rights have been infringed and even if they are aware thereof, they usually would not know what measures and remedies were available to them and had no resources to file a claim or a complaint. Consumer organisations are also often helpless since they have limited resources (both financially and with regard to staff).

In some sectors, e.g. energy, stakeholders underlined the fact that the amount of unfair commercial practices has risen in the past few years (since 2010), mainly, in their opinion, due to the change of market players on the market (third party access policy). New market players, who needed to win over clients when entering the market, have at times even adopted an unfair practices model as their business model. However, simultaneously, almost all stakeholders mentioned during the interviews that the enforcement of consumer protection against unfair commercial practices is strong and only getting better.

Another, briefly signalised problem by the consumer organisation, stems from the principle-based approach and flexibility, as well. Namely, the general notions used in the UCPD often provide opportunities for traders to claim that they may not be accused of an unfair commercial practice. For instance, they would claim that in the relation to the client their practice has been a ‘one time’ occurrence, and, therefore, it may not be called a ‘practice’, not to mention an unfair practice. Despite the recent judgment of the CJEU (C-388/13 UPC Magyarország) clarifying this issue to the benefit of consumers, it is unlikely that Polish consumers and their lawyers would know to invoke it any time soon, according to the consumer organisation. In this respect, the consumer organisation would appreciate more clarity and guidance from the legislators rather than the CJEU, as that would be easier to invoke and had a potential to reach more parties.

The consumer authority UOKiK (Polish Office of Competition and Consumer Protection – Urząd Ochrony Konkurencji i Konsumentów) mentioned here that they tend to base their cases, protecting collective interests of consumers, on the general clause of unfairness rather than on the black lists (please see the answer below on the two black lists binding currently in Poland). The reasons for it are uncertain (some practices might have been popular at the moment of writing the black lists, but then disappeared from the market, replaced by new modern practices; the lists are so clear that traders know not to use these practices anymore; etc.), but it seems that there are almost no practices on the Polish market that fall under the ones written on the black lists. The flexibility of the general clause allows, however, to protect consumers interests well in this area.

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

The Polish legislator introduced a black list of misleading commercial practices in Article 7 of the Act on prevention of unfair commercial practices and a black list of aggressive commercial practices in Article 9 of this Act. The black lists became thus an integral part of the system of consumer protection in Poland.

Just like the European legislator’s, the Polish legislator’s intention was to allow the black lists to alleviate the burden of proof on consumers claiming that a given trader’s commercial practice is unfair, and to ensure that at least the 31 defined commercial practices are always perceived as unfair and prohibited. Although in Polish law there is also a reversal of the burden of proof when the consumer claims that the practice is a misleading one – it is for the trader to prove then that the practice was not misleading (Article 13 of the Act on prevention of unfair commercial practices). Still, due to the black lists the national court should start the unfairness’ assessment by comparing the
practice to the black lists of unfair commercial practices, prior to asking traders to justify the fairness of their practices. This last step will not be necessary, if the practice is indeed on one of the black lists.\(^6\) The presence of the black lists may thus avoid costly and timely litigation and facilitates court’s assessment of unfairness.

The introduction of two black lists of unfair commercial practices contributed to the significant diminishment of the presence of such practices on the market, pursuant to the stakeholders representing traders. They also claim that it increases the awareness of traders of prohibited practices, which they are helped in due to information campaigns organized by the UOKiK and by the business associations.

The consumer organisation sees the black lists as also helpful in the enforcement, since it enables them to easier assess whether a particular case has more chances to be resolved to the consumer’s benefit.

The UOKiK mentions indeed that the black-listed practices are rarely noticed on the Polish market, but is unsure as to the reasons for it. It could be that the black lists have had a deferring effect on Polish traders, but possibly these practices might also have become outdated and have been replaced by more modern ones.

- The practical benefits for consumers arising from the Member States’ use of the minimum harmonisation clauses for financial services and immovable property; N/A as Poland did not extend consumer protection in these areas.

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

The UCPD as implemented by the above-mentioned Act on prevention of unfair commercial practices may be applied to protect consumers against misleading environmental claims and in addressing misleading practices in the energy market.\(^7\)

The UCPD may be applied in the energy market and in tackling misleading environmental claims by the President of the UOKiK, but only to protect collective consumer interests against unfair commercial practices, based on Article 24 of the Act on protection of competition and consumers, last modified in August 2015 (Ustawa o ochronie konkurencji i konsumentów, 16 luty 2007, Dz. U. 2015 poz. 184). Stakeholders are of the opinion that the UOKiK is quite effective and active in its enforcement procedures. The UOKiK mentioned that a big problem in this area is the infamous Volkswagen case, where the authority is still working on the case against Volkswagen, but is likely to base it on the infringement of a prohibition of misleading commercial practices. The ‘green claims’ as part of the ‘environmental claims’ would likely be controlled for their fairness and non-misleading character by sector regulators, e.g. Agricultural and Food Quality Inspection (Inspekcja Jakości Handlowej Artykułów Rolno-Spożywczych) or State Sanitary Inspection (Państwowa Inspekcja Sanitarna). The President of the UOKiK has a horizontal competence to enforce UCPD also in case of such claims, but, due to limits in its capacity and resources, trusts that such agencies are performing their tasks on the market. These agencies are unlikely to use UCPD provisions, but would rather base their own cases on sector rules and regulations, e.g. on how information on dietary supplements is to be provided on a label.

Pursuant to ECC Poland the regulators of market sectors in Poland enforce legal provisions of a given sector and are less familiar with, and less interested in, general consumer protection rules, e.g. protection against unfair commercial practices.

\(^6\) See e.g. Namysłowska 2014.

\(^7\) Nestoruk.
Therefore, consumers are less protected in certain specific areas (health, transport, energy, etc.), since the UOKiK is more focused on general consumer protection and it may escape its attention that certain sectors’ specific conditions may create new consumer issues. Consumers themselves are not unaware of the level of protection due to them, so they cannot enforce themselves their rights.

The regulator of the energy market URE (Polish Energy Regulatory Office – Urząd Regulacji Energetyki) may not start proceedings against traders in the energy market on the basis of Polish provisions implementing the UCPD and in the interview expressed the wish their competences were extended to this area.

Even if the enforcement by the President of the UOKiK of the UCPD in these matters may be effective, stakeholders complained that it will rarely provide practical benefits to consumers. However, before the President of the UOKiK issues an administrative decision, it enables traders to negotiate a settlement, combined with the trader ceasing to continue with the unfair commercial practice. This settlement involves a trader suggesting a satisfying solution to the problem of the unfair commercial practice, e.g. introduction of a change in a consumer contract; lowering the price; repayment of undue collected fees; fulfilment of untrue promises; enabling consumers to terminate the contract or to file a complaint; providing required information. This solution presents thus a practical benefit for consumers (so-called in Polish 'przysporzenie konsumenckie').

Still, stakeholders identified as one of the problems in this area the lack of any (contractual) effects for individual consumers that could follow from the enforcement by the regulators/authorities of the UCPD in this sector. In their opinion, consumers, who are victims of misleading or aggressive commercial practices in the energy sector or with regard to misleading environmental claims, rarely will enforce any consumer protection in courts.

However, again, at least in theory consumers have such options, granted to them by Article 12 of the above-mentioned Act on prevention of unfair commercial practices to claim in court that an unfair commercial practice infringed their interests. They may claim from the trader: (1) cessation to continue with the unfair commercial practice; (2) removal of the consequences of this practice; (3) making a public statement; (4) compensating caused damage, especially by terminating the concluded contract with an obligation of mutual restitution and repayment of purchase-related costs; (5) awarding an appropriate sum of money for a social cause specified by the consumer, which may encompass financing further protection of consumers. If consumers are inactive, they may be represented by the Citizens Ombudsman, Financial Ombudsman, consumer associations or local consumer ombudsmen, however, only in raising above-listed claims (1), (3) and (5).

Stakeholders representing traders claim that most environmental and energy claims on the Polish market are verified prior to their publication. Consumer organisations mention that most unfair commercial practices in this area are a clear deceit, e.g. presenting a new contract with a new energy provider as an adjustment of an old contract, with consumers signing it unaware of the fact that they are concluding a new contract, until it is 14 days later and first bills from the new provider are arriving; often these contracts would also have a penalty in standard contract terms for annulling this contract. While there are provisions theoretically protecting consumers in such situations against unfair contract terms (against penalty clauses) and unfair commercial practices (against concluding a contract without realizing it), if a consumer organisation would like to protect consumers against such practices, they would get involved in a prolonged legal procedure (a couple of years duration) and that would tie up its resources.

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8 E.g. by fining energy providers for limiting consumer options to report faulty energy meters, which decision the trader appealed from in Polish courts, and which decision was finally upheld by the Polish Supreme Court, III SK 24/14 of 16 April 2015.
The practical benefits for consumers of the "average consumer" as the reference point for assessing whether a commercial practice is likely to materially distort economic behaviour; [Key aspects to consider are: How does the concept of "average consumer" work in practice? Is the concept applied rigidly?]

The average consumer notion as a person who is reasonably knowledgeable, observant and circumspect has developed gradually in Poland, also as a result of the influence of EU law and of the CJEU's case law. Prior to the implementation of the UCPD in Poland there were some judgments, especially in the area of misleading effect of trademarks on consumers, in which consumers have been perceived as knowledgeable and capable of protecting their interests on the market.9 However, traditionally in Polish law average consumers were often seen as not careful and forgetful.10 The average consumer notion has been correctly implemented in Article 2 para 8 of the Act on prevention of unfair commercial practices. Therefore, Polish courts are applying nowadays uniformly the model of an average consumer as defined in EU consumer law.11 In another Polish Supreme Court judgment12 it was also added that an average consumer should be a person acting rationally. He or she should also have certain knowledge of current economic market and its conditions.13

However, interestingly, an average Polish consumer can still be perceived by Polish courts as less knowledgeable and careful than other European average consumers, with Polish courts taking into account the possibility to account for social, cultural and linguistic factors as per Recital 18 of the UCPD and Art. 2 Para. 8 of the above-mentioned Act. In a case of the Court of Appeals in Warsaw14 it was stated that average Polish consumers, due to cultural and social factors, have a low awareness of law; as well as, that Polish average consumers are not comparable with regard to their knowledge, carefulness and awareness to Western European average consumers, who for decades have been exposed to consumer education, pursuant to the Polish court.

With regard to how an average consumer is being defined, the Polish Supreme Court refers to the need to look first to the type of consumer product or service being advertised, and second to the type of medium used for this advertisement. Together, these criteria will allow defining the intended and actual recipients of the advertisement. The model of an average consumer will then be created based on the qualities that a consumer to whom the advertisement is directed, and whom it reaches, should have.15 Polish courts stress the need to apply these two criteria in the above-mentioned order.16 When applying the benchmark of an average consumer, Polish judges evaluate reasonable expectations as to consumer behaviour based on logic and their life experience, refusing to allow parties to provide empirical evidence as to consumer behaviour.17

In the judgment of the Polish Supreme Court,18 an average consumer in a car market had an ability to read and understand advertising materials, is reasonably critical, mature, knowledgeable and careful, and thus could not be seen as not paying attention and likely to be confused as to who will take care for his or her car.

In the judgment of the Polish Supreme Court19 an average consumer in the insurance market has been seen as one that would verify insurance agents’ claims about future

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9 See Polish Supreme Court e.g. I CKN 1319/2000 of 11 July 2002.
10 See on this Polish Supreme Court e.g. III CSK 377/07 of 23 April 2008.
11 See Polish Supreme Court e.g. III CSK 377/07 of 23 April 2008.
12 See Polish Supreme Court I CSK 87/13 of 29 November 2013.
13 See e.g. Polish Supreme Court III SK 34/13 of 4 March 2014.
14 VI ACa 1069/12 of 17 January 2013,
15 See Polish Supreme Court e.g. I CKN 1319/00 of 11 July 2002; I CK 358/02 of 2 October 2007; III CSK 377/07 of 23 April 2008.
16 See e.g. Court of Appeal in Warsaw, VI ACa 1685/14 of 30 November 2015.
17 See e.g. Court of Appeal in Warsaw, VI ACa 116/14 of 18 June 2015; Court of Appeal in Warsaw, VI ACa 1685/14 of 30 November 2015.
18 I CK 358/02 of 2 October 2007.
19 I CSK 43/15 of 14 January 2016.
profits and insurance conditions. However, even a reasonable average consumer would not be expected to check whether the insurance agent, remaining under the supervision of the insurance company, has indeed transferred consumer's money to that company.

In a case concerning advertising in online banking, the Court of Appeal in Warsaw decided that the average consumer would be an Internet user and a user of banking services, who is knowledgeable about banking services and banking products, as well as familiar with the online environment. Since online banking is not considered by the Polish court as an everyday transaction, potential consumers of such services should be perceived as being more circumspect than usual, and, therefore, more difficult to mislead. This led the court to conclude that it could not have been misleading to the consumer that there were payments related to the use of an online banking account, when the advertisement promoted free online banking, since an average consumer is aware that there are many banking services that could not have been enumerated in the advertisement and that most banking services need to be paid for.

Consumer association claims that the ‘average consumer’ concept may be harmful since most consumers who fall victim to unfair commercial practices are often unaware, older, ill, etc.; these ‘average’ consumers should, therefore, more often qualify as vulnerable consumers, but this is not really acknowledged by courts, which continue to apply the ‘average consumer’ standard in such cases. This, among other things, also leads to a crisis of confidence of consumers towards traders that were traditionally perceived as trustworthy, e.g. banks. ECC Poland also mentions that the ‘average consumer’ notion as a norm is being invoked as a standard nowadays by Polish courts, while vulnerable consumers are still a relatively unknown and unused category (see also below).

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

Vulnerable consumers are rarely referred to in case law and taken as a standard of consumer protection. There is, however, a judgment of the Polish Supreme Court, in which a member of a specific group of consumers has been identified as an average consumer – a consumer of a medicine. Ill consumers have been perceived as having less awareness, less capability for rational and critical decision-making; when they are additionally elderly, this further weakens their transactional position, as they are more prone to suggestion. Often, Polish courts would reject the arguments of the President of the UOKiK that e.g. a given advertisement is directed at young or old, and, therefore, vulnerable, consumers, and instead would apply the average consumer benchmark.

Pursuant to some stakeholders, the concept of the vulnerable consumer is not working well in practice. For example, in the energy sector it is often older, illiterate or handicapped consumers that have concluded contracts due to unfair commercial practices directed at them. Stakeholders believe that it is not sufficient to take the standard of the vulnerable consumer as a yardstick for the assessment of whether an unfair commercial practice took place, but rather that such consumers should be granted additional remedies; easier procedural options; etc. Consumer associations mention here that consumers would not be aware that they could ask for a different standard of protection by claiming that they belong to this vulnerable consumer category – they would not be aware that there is a difference in assessment there. Polish courts would not be likely to inform consumers of such an option or apply the vulnerability of a consumer as a standard of their own motion, as the contradictory

20 Court of Appeal in Warsaw, VI ACa 1685/14 of 30 November 2015.
21 II CSK 289/07 of 2 October 2007.
22 See e.g. Court of Appeal in Warsaw, VI ACa 1685/14 of 30 November 2015.
process in Polish law is seen as prohibiting judges’ intervention in such cases (see further on ex officio issues).

ECC Poland draws attention to the fact that Polish courts presiding over consumer claims are general district courts, not specialising in consumer protection and, due to their lack of experience with consumer cases and consumer protection, they will not provide additional protection to these consumers who should be classified as ‘vulnerable’. This, while there is direct marketing targeted at vulnerable (especially old) consumers, which is commonly reported in the media, indicated by consumer organisations and ECC Poland, but this does not seem to influence courts. Again, likely due to the decentralisation of resolution of consumer law cases (they do not go to one, specialised court).

There is a difference in the administrative procedures, where the collective consumer interest is at stake. The UOKiK states that if during the procedure the President of the UOKiK manages to show that a given commercial practice was directed at a particular consumer group, a member of that group is then used as a representative ‘average’ consumer for this group. The main vulnerable consumers in Poland are old or young consumers – age remains the main vulnerability criteria. Based on the vulnerability, the level of knowledge and experience with contracting expected of the consumer would be lowered, e.g. old Polish consumers are still used to the concept of monopoly on the energy market and may not expect other companies to be active on that market. Therefore, a higher standard of carefulness would be expected from traders when providing consumers with information in such situations.

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

Stakeholders representing traders believe that self-regulation, especially adoption of codes of conduct by business organisations, is crucial for the proper functioning of consumer protection against unfair commercial practices in Poland. First, they believe self-regulation adds another level of flexibility to the existing consumer law regulations, which allows individual sectors to promptly reply to current needs of the market, reacting to newly reported unfair commercial practices. Second, it seems that compliance with codes of conduct can be strictly monitored, on more than one level, as well. That is to say, when traders applies to join a business organisation they need to comply with their code of conduct, but also annually there are compliance audits taking place in some business organisations. Such compliance audits have proven to be a good incentive to follow the code of conduct. However, not all traders’ associations implement such thorough compliance checks, as the interviews showed. Third, despite being competitors traders learn from one another through adopting and following self-regulation together, meeting together, discussing particular case scenarios. Sectoral regulators may also advise informally through the business organisations as to how practices of a particular trader should be adjusted. Finally, business organisations may also design education campaigns for their consumers.

In the energy sector, there are two main business organisations – one for more established, traditional energy and telecommunication companies; the other – newer, for more alternative, smaller energy providers. In the second case, self-regulation was more problematic at the beginning of the functioning of this organisation, pursuant to the stakeholders.

Aside from codes of conduct adopted by traders’ associations, there are also many ethical pledge schemes available for traders to join (e.g. Przedsiębiorstwo Fair Play (Business Fair Play), Teraz Polska (Now Poland), Rada Reklamy (Union of Associations Advertising Council) with its Kodeks Etyki Reklamy (Code of Ethical

23 See http://przedsiebiorstwo.fairplay.pl/
24 See http://www.terazpolska.pl/
Advertising)\(^{25}\) that have their own codes of conduct, regulations and organize competitions of best practices for their associated traders. Traders’ incentive to join such schemes is to obtain a certificate that they can attach to their marketing materials (e.g. website) but also place on the packaging of their products. Traders’ associations encourage such participation and claim that consumer awareness of many of these certificates and what they represent is good, as these have been used for many years now in practice. The last of the above-mentioned codes of self-regulation schemes – Code of Ethical Advertising – focuses specifically on ensuring fair advertising practices and has been adopted by, a very active in its enforcement, association of advertisers: Union of Associations Advertising Council. ECC Poland also mentions the importance of this last, specific self-regulation in the area of advertising practices, even though their activity is not seen as fully preventing advertisers from using misleading advertising. Their influence on the traders and advertisers is limited.

Moreover, ECC Poland and the UOKiK mention that there are still significant market sectors, e.g. air passenger transport, telecommunication, that are not regulated by a trader’s association, which do not organize themselves.

Consumer association considers soft law as not effective for providing consumer protection in Poland. In many cases, pursuant to them, traders’ codes of conduct would copy provisions of law and reaffirm the rights that consumers already have, instead of protecting them additionally. The UOKiK is of the same opinion about most codes of conduct in Poland. As an example of a good code of conduct and its enforcement, the UOKiK also mentioned the Code of Ethical Advertising. Moreover, they mentioned a new initiative on the financial market in Poland pertaining to the regulation of good practices in advertising consumer credits, which seems to provide more guidance to credit lenders in Poland than the current regulations, e.g. as to in what font size provide a consumer credit. Since, together with the UOKiK, it was the Association of Polish Banks (Związek Banków Polskich) that drafted this regulation, Polish banks will need to apply this guidance, but not all credit lenders. The adoption of these rules is new, thus it is yet not possible to assess their enforcement and compliance with them.

\(^{25}\) See https://www.radareklamy.pl/kodeks-etyki-reklamy

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

Stakeholders did not express a wish for such an extension. Generally, current Polish law implementing the UCPD is perceived as satisfactory and in no need of additional changes. However, pursuant to the research of the European Commission Poland has not yet fully complied even with the existing black list, which suggests that there may be a general reluctance from prohibiting more commercial practices as unfair.\(^{26}\)

ECC Poland and the consumer association see the two Polish black lists as well construed, but would like to see them better enforced in practice.

ECC Poland mentions that many of the blacklisted practices are focused on the pre-contractual relations with the consumer, as well as the moment of conclusion of a contract, while their concept should be applicable also to the performance of the contract. Even if the UCPD provisions should apply and regulate also this performance of the contract, the black lists are less helpful here.

Both the UOKiK and the regulators on the energy market draw attention to a recent problem in Poland with unfair door-to-door sale of energy and gas (targeting vulnerable, older consumers; not providing truthful, full information; clearly misleading consumers). They would see some general rules being adopted to remedy this situation, possibly a provision on one of the black lists prohibiting or at least
limiting such commercial practices. However, they also acknowledge that the interests of traders who have their business model set up on door-to-door practices and conduct fair commercial practices would need to be considered. It is expected that well-established traders in this sector would welcome such proposals, as well, since the bad reputation of such door-to-door unfair commercial practices also tarnishes the trust consumers have in them.

The mechanism of subsequent inclusion should be adopted to easier adjust to modern technologies and new practices appearing on the market, pursuant to the UOKiK.

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

Obtaining more financial resources for educational campaigns could contribute to raising consumer awareness, the lack of which is a major concern and a significant contributor to the rising number of unfair commercial practices. Sector regulators warn, however, that some educational campaigns may have backfired in the past and became a source of new unfair commercial practices on the market. E.g. when a brochure on consumer rights was sent out, some traders might have carried it around as ‘proof’ that they observe rules mentioned in this brochure; additionally, since the brochure mentioned that consumers should be active in comparing contract terms and not be afraid of switching service providers, traders were using this argument as a reason that consumers need to switch to their services. Stakeholders representing traders agree that additional educational campaigns tend to improve the effectiveness of consumer protection.

Sector regulators mention also the following: providing consumers with additional contractual remedies (despite Polish law already providing quite a few of these). Stakeholders representing traders favour more attention being placed on certificates confirming that a given trader follows codes of conduct.

Both sector regulators and the UOKiK also mention the need to further limit the option for concluding door-to-door contracts, especially since traders often target vulnerable consumers. Since this would limit trade options for some market players (some of them focus only on door-to-door sales), the consequences of such limitations should be considered (cost-benefit analysis, as well as the effect on the freedom of provision of services), but some further limitations, if not full prohibition, are definitely necessary. This view has also been supported by the consumer organisation, which stressed that they often encounter problems with consumer protection in door-to-door situations, especially with regards to unfair commercial practices being sold by door-to-door salesmen.

Consumer organisation focuses on the need to improve enforcement of consumer protection rather than to change the substance of these provisions. Pursuant to them, in Poland, attorneys rarely take on consumer cases, consumer organisations have resources to only take a few cases a year. Since consumers are unable to enforce their rights, they do not realize how Polish law works, and the legal system of consumer protection is also complex, consumers are usually unable to successfully represent themselves and have trouble finding representation. From a substantive point of view, further clarification of a few concepts could help, e.g., that an unfair commercial practice does not need to be repetitive, which means that a trader could not use a defence that this was not a ‘practice’ but rather an incident (there was a CJEU judgment in this area, but Polish judges would be more inclined to follow a legal provision that clarifies this).

Further education of judges on rules of consumer protection is also seen as desirable by consumer organisations. Especially with regards to rulings of the CJEU, which seem to be applied by Polish courts with quite a delay.
Furthermore, Polish law provides for a specific remedy in individual consumer cases; namely, it gives consumers an opportunity to demand that a trader who harmed their interests, aside individual damages for consumers, also pays a certain amount for a social cause,\(^{27}\) which concept includes a possibility to finance activities of consumer associations (it is the consumer’s choice what social cause will be financed). Consumers could, therefore, act socially and not only claim their own damages, but also improve the general consumer protection by contributing to consumer association’s financing. However, Polish law seems to discourage them from doing so by estimating the value of the dispute, on the basis of which the procedural costs are calculated, as not only covering the damages claimed by the consumer but also these additional payments for a chosen by consumer social cause. Therefore, if consumers lose the case, they have to pay more for the procedure, if they asked not only for their individual damages to be compensated, but also for the trader to contribute to a social cause. Consumer organisations would be happy to see this provision changed.

ECC Poland mentions that it could be useful to have a ‘name and shame’ practice established, where decisions recognizing certain commercial practices as unfair or standard contract terms as abusive would be published and could be consulted easily by consumers, media etc. This could prove to be an effective consumer protection measure. Especially, since Polish court’s judgments (especially of district courts, which preside over consumer cases in the first instance) are rarely made public, which means that courts in different towns may issue different decisions in similar cases; consumers are unaware of what they may expect, etc.

Moreover, ECC Poland mentions that it would be good to further finance activities of consumer organisations, e.g. to conduct more educational activities like having a radio or a TV show dedicated to consumer issues, writing regular columns for newspapers and blogs etc. Currently there are no resources for this in Poland. They compare Polish situation to the UK’s, where “Which?” has such resources and consumers know to get in touch with them when they have issues, to consult their magazine and use their practical tips and guidance.

None of the stakeholders have mentioned the possibility to add consumer education to the school curriculum, but the introduction of such a measure could also increase the effectiveness of consumer protection.

1.1.2. Effectiveness of the PID in establishing a high level of consumer protection

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

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

A new law was adopted by the Act of 9 May 2014 on informing about prices of products and services (Ustawa z dnia 9 maja 2014 r. o informowaniu o cenach towarów i usług, Dz. U. 2014 poz. 915). The definition of the unit selling price (Art. 3 Para. 1 No. 2 and Art. 3 Para. 2 of this Act) does not deviate from the PID. The transparency requirements comply with the PID, as well. Polish legislator requires traders to inform consumers about the reason for a discount in price, when it applies (Article 4 of this Act). If there is a difference or confusion as to prices, consumers may demand that a product or a service is sold to them at the most favourable price (Article 5 of this Act).

This Act also gave the authority to the Minister of Commerce to issue a regulation on publishing prices of products and services, which was published on December 9, 2015 and started applying as of January 1, 2016 (with traders being given time till September 30, 2016, to adjust their practices to new rules). Pursuant to Article 4 of this Regulation the unit selling price refers to litres, cubic meters, kilograms, tonnes, meters, square meters or pieces, depending on what is being sold (e.g. by length or

\(^{27}\) See e.g. Court of Appeal in Katowice, I ACa 648/15 of 22 January 2016.
surface). The unit selling price does not need to be disclosed (Article 7 of this Regulation) when: it is identical to the product’s price; products are sold in sets due to their purpose; selling non-foodstuffs exclusively in pairs due to their purpose or characteristics; selling medicines.

Stakeholders representing traders are of the opinion that consumers are effectively informed about the unit selling price. There is no evidence of lack of compliance, pursuant to them, in this area, and consumers are paying more attention to this disclosed information. Consumer association mentions here that generally there are not so many consumer complaints about how consumers are informed about prices. Polish enforcement authority in this respect – Inspection of Commerce (Inspekcja Handlowa) – has had, however, a number of cases on misleading prices in 2015 – 625. The Administrative Court in Warsaw has also adjudicated that there is a difference between indicating the goods’ price and their unit selling price and that traders are obliged to indicate the unit selling price when the goods’ packaging determines the content in grams or litres.

A Consumer association has noticed, additionally, that consumers complain about the new change in Polish law that took away the obligation of big supermarkets to provide consumers with a price reader. A price reader in a big supermarket was seen by consumers as enabling them to verify displayed prices easily and prevented disputes at the cash register.

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

As mentioned in the previous answer, Polish law defines specifically what measurement units may be referred to in a unit selling price (Article 4 of the Regulation).

Stakeholders representing traders do not see the need for a change of a designated unit price. Currently, traders may place information on performance measurement units on the product packaging, but they do not relate it to the price. Relating it to the price could potentially lead to a misleading commercial practice, pursuant to the stakeholders, as such performance measurement units are always estimates (e.g. number of washloads for detergents will depend also on consumer’s water supply, hard vs. soft water causing a difference). Moreover, stakeholders do not believe that consumers would pay attention to this unit price or that it would influence their decision-making. The UOKiK is of a similar opinion, also fearing increased opportunities for a misleading commercial practice, increased confusion of a consumer and definitely would not advise introduction of such new measurement units instead of traditional ones, if anything, alongside them.

A consumer association mentions that due to the change in Polish law, e.g. gas provided to consumer homes stopped being calculated in cubic meters and the measurement started to be provided to consumers in kWh. This change has been criticised by consumers, who claim not to be mathematically capable to assess the value/quality/etc. of such gas units. Also, providing consumers with many different units adjusted per product category would add another complication, make the assessment less transparent. They also indicate as an example of such a complexity the change in the evaluation of the energy efficiency – where the introduction of more categories (from maximum A category to A+++ category) have proved to be less transparent for consumers, and might have contributed to more misleading practices.

29 Administrative Court in Warsaw, VI SA/Wa 1406/15 of 19 November 2015.
The effects of the regulatory choices/derogations allowed by the Directive and applied by Member States. [Key aspects to consider are: Is the derogation relevant? Do companies make use of it? Are there consumer complaints because of this? If so, approximately how many per year?]

1.1.3. Effectiveness of the MCAD in providing protection for businesses

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

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

Advertising that is prohibited by the provision of Art.16 Para. 1 of the Act of 16 April 1993 on combating unfair competition (Ustawa z dnia 16 kwietnia 1993 r. o zwalczaniu nieuczciwej konkurencji, Dz. U. 2003 Nr 153 poz. 1503 ze zm.) falls under the following (exemplary) categories: advertising that is illegal, contrary to the principle of good practices or infringing human dignity; misleading advertising that may influence transactional decision-making; advertising referring to emotions by instigating fear, praying on superstitions or children’s gullibility; advertising that is framed as a provision of objective information; advertising that significantly infringes privacy, especially by bothersome approaching clients in public places, inertia selling or spamming. The Act implemented the MCAD and contains the same rules concerning unfair advertising as MCAD, including separate requirements for misleading advertising (Art. 16 Para. 2 of this Act) and comparative advertising (Art. 16 Para. 3 of this Act). The Act itself does not define the notion of ‘advertising’. It has been, however, defined in another Act of 29 December 1992 on radio and television (Ustawa z dnia 29 grudnia 1992 r. o radiofonii i telewizji, Dz. U. 2004 Nr 253 poz. 2531 ze zm.), its Art. 4 Para. 6 defining it as any transmission not coming from the sender that aims at promotion of sale or other forms of benefitting from products or services, supporting specific issues, ideas or achieving other desired by an advertiser effects, that has been sent for any sort of payment. This definition applies to any advertising on radio or TV. Two elements are perceived by the scholars as necessary to recognize advertising in general: (1) information about the product or service and (2) encouragement to either purchase the product or service or use it otherwise (without purchasing it), but still in exchange for payment.30

Polish stakeholders do not see a reason to change the notion of ‘advertising’ applied in this law nor to extend protection granted to businesses, alike the model of consumer protection against unfair commercial practices. Their resistance in this area comes either from the conviction that current rules are sufficiently efficient (business associations) or that they do not feel competent to discuss these issues (e.g. the UOKiK).

The UOKiK mentions that traders are generally protected through private law measures, with traders able to go to court and enforce their protection on the basis of provisions of the Act on combating unfair competition. The President of the UOKiK could have some competence here if an unfair competition act would simultaneously infringe/harm collective consumer interests, which is feasible and the Act on combating unfair competition deliberately, through the use of general clauses, allows for such a situation to occur.

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

30 See e.g. Jaworska-Dębska; Skubisz.
Misleading advertising test is defined in Art. 16 Para. 2 of the Act on combating unfair competition as requiring assessment of all elements of the advertising, especially concerning quantity, quality, ingredients, performance, suitability, applicability, repair options of the advertised goods or services, as well as the client's behaviour.

Stakeholders consider the flexibility granted by the principle-based approach as contributing to the increased effectiveness of these provisions, as well. Again, there is not much they could say about issues in this area in practice. The lack of administrative enforcement in this area has also not been seen as a problem for the protection of traders’ interests.

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

There is no additional protection granted to traders in this area in Poland and stakeholders continue to see it as unnecessary to introduce additional protection.

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

Comparative advertising is seen as unfair competition, if it is contrary to the principle of good practices and Art. 16 Para. 3 of the Act on combating unfair competition lists requirements for this assessment. The full harmonisation in this area is seen as providing more legal certainty, especially for cross-border advertising. However, the use of a general clause, principle-based approach provides certain flexibility and may still lead to divergent evaluation of whether a given comparative advertising is unfair. Again, the interviews did not point out any specific issues in this area.

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

Generally, stakeholders perceive this as an effective legal framework, but this is mainly the result of them not being able to name any issues in this area. Most interviews have been, however, conducted with experts on consumer protection and they have, therefore, less practical experience with enforcement of provisions protecting traders.

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

In case of unfair competition acts, traders, whose interests might have been harmed or infringed, may file a claim on the basis of Article 18 of the Act on combating unfair competition and demand from a trader: (1) cessation to continue with the unfair competition act; (2) removal of the consequences of this act; (3) making a public statement; (4) compensating caused damage; (5) returning unjustified enrichment; (6) awarding an appropriate sum of money for a cultural cause, but only if the unfair competition act was deliberate. The rights of traders in case of an unfair competition act and of consumers in case of an unfair commercial practice are, therefore, very similar.

Pursuant to Art. 25 Para. 2 of the Act on combating unfair competition, unfair competition acts in the sphere of advertising can also be penalized. At the moment, there is a case pending at the Polish Constitutional Court submitted by the Polish Citizens’ Rights Ombudsman that this provision of law is not in compliance with the Polish constitution.
• Are there measures that could improve the effectiveness of the MCAD in providing protection for businesses (see also 1.1.6 below)? Are there best practices or lessons learnt in your country that could be relevant for other EU countries?
Stakeholders did not identify any such measures or best practices.

1.1.4. Effectiveness of current rules in eliminating obstacles to the Internal Market

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

• Whether the application of the principle-based approach under this Directive in different Member States shows disparities in the understanding of its principles and, if so, whether these disparities have an impact on cross-border trade;
The representatives of business associations in the financial sector in Poland did not feel like there is much cross-border trade in their market and, thus, could not address these questions. Other stakeholders representing traders consider the maximum harmonisation in the area of UCPD as effective and are not aware that any disparities between national laws of different Member States have caused problems for Polish traders.

• The effects of the uniform black list of unfair commercial practices annexed to this directive on the free movement of goods and services;
The representatives of business associations in the financial sector in Poland did not feel like there is much cross-border trade in their market and, thus, could not address these questions. Other stakeholders representing traders consider the maximum harmonisation in the area of UCPD as effective and are not aware that any disparities between national laws of different Member States have caused problems for Polish traders.

• Whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade. [Do the national differences play a role in a business perspective? Have they caused problems?]
N/A as Poland did not extend consumer protection in these areas.

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

• Whether the application of the principle-based approach under this Directive in different Member States shows disparities in the understanding of its principles and, if so, whether these disparities have an impact on cross-border trade;
The representatives of business associations in the financial sector in Poland did not feel like there is much cross-border trade in their market and, thus, could not address these questions. Other stakeholders representing traders also had no opinion on these issues.

• Whether the minimum harmonisation character of provisions on misleading advertising represents a barrier to cross-border trade;
The representatives of business associations in the financial sector in Poland did not feel like there is much cross-border trade in their market and, thus, could not address these questions. Other stakeholders representing traders also had no opinion on these issues.
Whether the fully harmonised provisions on comparative advertising provide an appropriate legal framework in cross-border trade for advertising where a competitor or a product offered by a competitor can be identified;

The representatives of business associations in the financial sector in Poland did not feel like there is much cross-border trade in their market and, thus, could not address these questions. Other stakeholders representing traders also had no opinion on these issues.

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

The representatives of business associations in the financial sector in Poland did not feel like there is much cross-border trade in their market and, thus, could not address these questions. Other stakeholders representing traders also had no opinion on these issues.

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

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

The level of awareness of traders as regards information requirements at the advertising stage, as in particular demonstrated by their practical application; [Key aspects to consider are: How are these rules applied in practice? To what extent do traders implement these rules? Are these information requirements under the UCPD useful in view of the more comprehensive pre-contractual information requirements of the CRD?]

Art. 6 Para. 4 of the Act on prevention of unfair commercial practices transposes Art. 7 Para. 4 UCPD into Polish law. It has not been changed by the transposition of the Consumer Rights Directive in Poland. There is, thus, a certain overlap of information requirements at the moment. It is unlikely that this overlap would constitute a burden for traders or consumers, considering that traders by providing e.g. once information on their geographical address comply with both sets of rules at the same time. It may be easier for courts and enforcement authorities to have separate lists of information requirements, to better know what to enforce, in which situation and under which law. However, considering that, pursuant to the Directive, Art. 6 Para. 2 of the Act on prevention of unfair commercial practices defines as material information any mandatory information requirement under other regulations, the list of Art. 6 Para. 4 of the Act will only be relevant for such practices that fall outside the scope of the CRD.

Stakeholders representing traders consider traders to be aware of these information requirements, especially since the UOKiK and traders’ associations conduct educational campaigns any time there is a new provision introduced, placing additional information requirements on traders. In their opinion, the overlap between information requirements in UCPD and CRD is not problematic, as traders knowing what information to provide will provide it just once and fulfil both requirements at once. They do not see the need to change the law. The UOKiK confirms that many efforts have been made to educate traders and make them aware of information obligations upon the introduction of the CRD. Therefore, traders not complying with information duties would rather not do it due to awareness but rather wilfully. Perhaps with an exception of some incidental online traders, e.g. using online marketplaces like Allegro (Polish eBay) who may indeed still be unaware that these rules also may apply to them. Also, if traders had doubts as to how to provide particular information and whether they were compliant, they could have asked for explanation and guidance from the UOKiK, which was then provided. The UOKiK also does not think that much has changed with regard to information obligations of traders or that any changes
have caused them many problems (aside the cost to hire lawyers to adjust their standard terms and conditions, regulations).

If information from Art. 6 Para. 4 of the Act on prevention of unfair commercial practices is not provided to consumers in an online trader’s regulation, in a way that would allow consumers to easily reach this information, and that regulation sets terms and conditions for provision of services by the trader, the trader is in breach of this provision.  

A consumer association pays most attention to whether consumers were provided with pre-contractual information, the lack of which could lead to the annulment of the contract. Inspection of Commerce (Inspekcja Handlowa) is the authority controlling the compliance of traders with information duties, but they are often more focused on other compliance issues than proper performance of duties to inform, pursuant to consumer associations.

Traders in Poland are mostly focused on conducting their business in the most cost-efficient way and less on the quality of provided services, which may lead them to either be unaware of information duties they are to provide consumers with or ignore these provisions, pursuant to the ECC Poland. As an example of improper provision of information, that is occurring regularly, ECC Poland mentions that Polish traders selling to foreign consumers often provide only the basic information in the language of the consumer (or English or German), and all the detailed standard terms and conditions would still be written in Polish, thus mostly illegible to foreign consumers.

The UOKiK mentions that the main problem in this area remains in the contracts concluded at a distance, e.g. via phone, where it is also more difficult to check for compliance and enforce it.

- Is there any overlap with the provisions of the Services Directive and the E-commerce Directive that apply to advertising? If so, are there any costs arising for public authorities and/or businesses due to this multiplicity of information obligations?

The Services Directive has been transposed in Poland by the Act of March 4, 2010 on provision of services at the territory of Poland (Ustawa z dnia 4 marca 2010 r. o świadczeniu usług na terytorium Rzeczypospolitej Polskiej, Dz. U. 2010 Nr 47 poz. 278). Pursuant to its Article 10 the service provider has some information requirements that also overlap with the ones mentioned in the UCPD, with regard to: service description and price; trader’s name and address.

The E-commerce Directive has been transposed in Poland by the Act of July 18, 2002 on electronic provision of services (Ustawa z dnia 18 lipca 2002 r. o świadczeniu usług drogą elektroniczną, Dz. U. 2002 Nr 144 poz. 1204). Pursuant to its Art. 5 Para. 1 the e-commerce service providers also needs to inform consumers about their name and address; Article 8 sets the need for the service provider to publish a Regulation that would define the services provided, as well as conditions of contract termination and complaint procedures. Again, thus, there is a certain overlap.

Stakeholders representing traders do not perceive any additional costs for businesses due to this overlap, since traders knowing what information to provide will provide it just once and fulfil both requirements at once. Stakeholders do not see the need to change the law.

ECC Poland states that all the information duties for traders towards consumers create a puzzle and take away clarity from traders as to their obligations. Especially considering that aside all EU consumer law-based information obligations, traders also have to comply with many national duties when setting-up a business.

The UOKiK mentions that there are some issues in the telecommunication sector due to divergent rules on information obligations between the telecommunication

31 See e.g. Polish Supreme Court III SK 4/14 of 15 October 2014.
regulations and general consumer law provisions, especially after the adoption of the CRD. The UOKiK has prepared a common statement together with the regulator of the telecommunication sector UKE (Office of Electronic Communication – Urząd Komunikacji Elektronicznej) on information duties as to what provisions should be applicable and what traders' obligations in this area are, to avoid different assessment and simplify enforcement. They, otherwise, do not perceive the costs of enforcement to be higher due to different provisions providing information duties to traders in various regulations and acts. They do, however, state that if an information duty is unclear, they are less hesitant to enforce its compliance with traders.

1.1.6. Relevance for business-to-business transactions

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

• Whether an extension of the Unfair Commercial Practices Directive to B2B transactions or a revision/extension of the Misleading and Comparative Advertising Directive would bring benefits for cross-border trade;

Currently, Polish law has two separate Acts in this area. While the Act on prevention of unfair commercial practices implements UCPD, it provides for remedies only for consumers as a result of an unfair commercial practice, as mentioned above. If traders want to invoke an unfair commercial practice, they should prove that it involves unfair competition acts, as well, pursuant to the Act on combating unfair competition (which might be the same material test, with just a different procedure). The second Act implements MCAD, but is still considered by scholars and courts as indirectly applicable also to relations B2C, as it was prior to the adoption of the UCPD. Consequently, currently, the legislative framework in Poland does not clearly distinguish between the two regimes of liability, from UCPD and MCAD. An unfair competition act may also be perceived as harming collective consumer interests, enabling the UOKiK to start an administrative procedure. Even though the protection of traders in the Act on combating unfair competition provides generally only for a civil procedure. The revision of the MCAD regime could be beneficial to the clarity of the Polish legal system. This does, however, not necessarily need to imply granting more rights to traders in B2B situations and the effect of such a change on cross-border trade remains uncertain.

Business associations do not believe that the protection of B2C should be extended to B2B. They mention the problem of a ‘slippery slope’ – how could it be assessed to which trader this protection should be granted? They believe that consumer protection is a special regime, the justification for introducing it lies in the special needs of natural persons and their weak contractual position, and this justification does not apply, pursuant to them, even to micro-businesses, who have more resources than consumers. No signals have been received by stakeholders representing traders from traders engaging in cross-border trade on the need to extend this protection to B2B.

• Whether it is appropriate to keep separate legal regimes for B2B and B2C transactions in the area of commercial practices and to what extent both regimes could be aligned;

In Poland the definition of the consumer was originally not limited to natural persons since the old Art. 384 Para. 3 of the Polish Civil Code identified a ‘person’ as a consumer, without excluding legal persons from this definition. On the basis of this provision consumer protection could, potentially, be extended to legal persons, even though some scholars questioned this interpretation. In 2003 this provision has been adjusted, as was claimed – to better follow EU law, and now consumer notion refers only to natural persons. One of the justifications given was that a broader notion of a

32 See e.g. Namysłowska 2015.
33 See e.g. Gnela.
consumer led to the worsening of the legal position of Polish traders in comparison to foreign traders. Therefore, if the change came from the European level and required adjusting all national laws in the EU, this objection could be removed.

Moreover, if the definition of a consumer is not extended to cover legal persons, the separate legal regimes established by the UCPD and the MCAD could be abolished and be replaced by one common regime. This has been previously suggested in the scholarship as a solution that would introduce more legal certainty. This certainty would be achieved by removing materially similar, but procedurally different regimes of liability for unfair commercial practices in B2C relations and misleading/comparative advertising in B2B relations.

In the opinion of some sector regulators the protection of weaker parties should be extended at least to some, smaller businesses since they are transactionally as weak as natural persons.

Business associations do not believe that the protection of B2C should be extended to B2B. They mention the problem of a ‘slippery slope’ – how could it be assessed to which trader this protection should be granted? They believe that consumer protection is a special regime, the justification for introducing it lies in the special needs of natural persons and their weak contractual position, and this justification does not apply, pursuant to them, even to micro-businesses, who have more resources than consumers.

The UOKiK mentions also that currently there is a draft law being discussed in Polish Parliament about unfair commercial practices between suppliers, distributors and traders in the sector of trade of food and agriculture products. This suggests that current law does not provide sufficient clarity as to protection of traders’ interests in such relations, even though the Act on combating unfair competition could cover these scenarios. For clarity sake, protection against unfair commercial practices in such relations would then be placed in this separate act and would be enforced by the UOKiK, provided that this law is adopted.

- The appropriate scope of the protection in B2B transactions – whether the protection should cover only the pre-contractual stage (i.e. misleading or aggressive marketing) or should also cover unfair commercial practices during and after the transaction;

See previous answers – no stakeholder has expressed a need for such an additional protection in B2B transactions. Stakeholders representing traders are of an opinion that general contract law rules applicable in Poland are at the moment of a satisfactory quality and no additional protection should be introduced.

The UOKiK mentions the current works in the Polish Parliament on a new law that would regulate performance of contracts between traders and their suppliers and distributors, to prohibit more clearly unfair commercial practices in such vertical relations, specifically in the sector of food and agriculture products. This suggests that eventually the adoption of new rules is more required at the transactional and post-transactional stage than pre-contractually.

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

See previous answers – no stakeholder has expressed a need for such an additional protection in B2B transactions. Stakeholders representing traders are of an opinion that general contract law rules applicable in Poland are at the moment of a satisfactory quality and no additional protection should be introduced. The current Act

34 See e.g. Namysłowska 2015.
on combating unfair competition does contain specific provisions in its Chapter 2 on what constitutes an unfair competition act.

It remains to be seen whether the new law, if it is adopted, regulating the performance of B2B contracts between traders and suppliers/distributors would contain any black list.

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

See previous answers – no stakeholder has expressed a need for such an additional protection in B2B transactions. Stakeholders representing traders are of an opinion that general contract law rules applicable in Poland are at the moment of a satisfactory quality and no additional protection should be introduced.

However, the new rules that might be adopted in Poland would introduce a possibility of administrative enforcement of traders’ interest, by giving the UOKiK authority to enforce its provisions.

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

Also with respect to this question stakeholders representing traders do not see the need for an additional protection regime being introduced. Currently, Article 18 of the Act on combating unfair competition, as mentioned above, provides traders with remedies in case misleading or comparative advertising is found, as an example of an unfair competition act (see above for the list thereof).

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

Also with respect to this question stakeholders representing traders do not see the need for an additional protection regime being introduced. There is a general feeling of satisfaction with how the national law functions at the moment. No complaints from the traders suggest such a need for a change either.

1.1.7. Relevance of contractual consequences of unfair commercial practices

Please analyse whether there are in your country:

- Any national law provisions providing contractual consequences in case of breaches to the Unfair Commercial Practices Directive or national provisions on the avoidance of the contract e.g. in cases of usury or other immoral behaviour;

Consumers may claim avoidance of the contract concluded as a result of an unfair commercial practice, with an obligation of mutual restitution and the trader’s obligation to pay back consumer’s costs related to the purchase of the product, pursuant to Art. 12 Para. 1 of the Act on prevention of unfair commercial practices. This was a novel remedy introduced for consumers in Polish law, not quite compatible with other forms of avoiding the contract from the Polish Civil Code and could be compared to putting consumers in the same position as if they were withdrawing from a contract.

Before the President of the UOKiK issues an administrative decision while protecting the collective interests of consumers, it enables traders to negotiate a settlement, combined with the trader ceasing to continue with the unfair commercial practice. This

37 See also e.g. Sieradzka 2008b; Nestoruk 2015.
38 See e.g. Nestoruk 2015.
settlement involves a trader suggesting a satisfying solution to the problem of the unfair commercial practice, e.g. introduction of a change in a consumer contract; lowering the price; repayment of undue collected fees; fulfilment of untrue promises; enabling consumers to terminate the contract or to file a complaint; providing required information. This solution presents thus a practical benefit for consumers (so-called in Polish 'przysporzenie konsumenckie'). It has yet not gone as far as to allow consumers to withdraw from a contract or to nullify the contract. This is seen by the UOKiK, as potentially beneficial for consumers in some cases, but also dangerous, as consumers might not want their contracts, even if concluded on the basis of an unfair commercial practice, annulled. Therefore, taking such a decision would require a careful balance of all the consequences of such an annulment, which would prolong the procedure, require individual consumers to become part of it and would defy the purpose of protecting collective consumer interests.

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

The consequences have been specified by the legislator for consumers claiming their rights in individual cases in front of district courts in Article 12 of the Act on prevention of unfair commercial practices, thus there is no need for additional protection being granted by the courts. Courts should apply the above-mentioned provision. However, this protection would only be applied when consumers claim it, and this does not happen often, as also mentioned by consumer organisations, mainly due to consumers’ lack of awareness of their rights.

The President of the UOKiK’s decisions do not have a direct effect on individual consumer contracts, but consumers could invoke decisions of the President of the UOKiK in front of district courts in their individual cases, the President of the UOKiK could then also provide explanations to the court. There is no data, how often consumers actually use decisions of the President of the UOKiK in their individual cases.

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

Potentially, there is such a need with respect to the enforcement of sector specific rules protecting consumers, which e.g. in the energy sector does not provide sector regulators with an opportunity to intervene on behalf of individual consumers. Such individual consumer complaints would be re-directed to the UOKiK, which can then collect such complaints and its President may then act to protect collective consumer interests against a given trader on the basis of Article 24 of the Act on protection of competition and consumers. Individual consumers thus usually do not directly benefit from the proceedings conducted by the regulators that may fine (President of the UOKiK) or try to take away trader’s concession or conduct mediation with traders (sector regulators).

However, individual consumers may either go to court or approach regional/local consumer ombudsmen, filing for individual consumer remedies, as described above, encompassed in Article 12 of the Act on prevention of unfair commercial practices. These individual remedies award consumers also with an option to annul the concluded contract, thus they are quite far-reaching. Plus, as described above there is an option for some interventions of the UOKiK to provide for contractual consequences to individual consumers, with traders voluntarily taking on an obligation to adjust consumer contract terms.

Stakeholders representing traders do not see the need to further develop these consequences. Consumer associations claim that these contractual consequences should go further, ensuring that traders do not benefit at all from breaking the law and disposing consumers of their rights and their protection. The general idea would be to ensure that traders are concerned about whether they are conducting an unfair
commercial practice, since currently they are not worried that much about the consequences. For example, a telecommunication provider would likely act differently knowing that if they provide misleading advertisement or coerce a consumer’s signature on a contract, they would lose the mobile phone that was issued to the consumer with a contract, and not only have to admit their wrongdoing, cease the practice and potentially compensate some damages (if these can be proven).

1.2. Contract conclusion and performance

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

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

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

UCTD has been transposed to Polish law by the Polish Civil Code and the Act on protection of competition and consumers, last modified in August 2015 (Ustawa o ochronie konkurencji i konsumentów, 16 luty 2007, Dz. U. 2015 poz. 184). Article 385 of the Polish Civil Code introduces the general test of unfairness, using the principle-based approach, that is prohibiting a standard term and condition that is contrary to the principle of good practices. In the individual consumer claims against unfairness of standard contract terms, this test replaces the ‘good faith’ requirement from the UCTD, but in practice there is not much deviation in understanding of these two principles. Accordingly, the Polish Supreme Court perceives a standard term and condition as contrary to the principle of good practices when it undermines the contractual balance of parties’ rights and obligations. The significant imbalance to the detriment of the consumer is a separate requirement that in the same judgment was interpreted as unjustified disproportion in the parties’ rights and obligations to the detriment of the consumer.

The Act on protection of competition and consumers also uses a principle-based approach when regulating a possibility of in abstracto control of standard contract terms, unrelated thus to an individual consumer claim. Pursuant to a new Article 99a of the Act on protection of competition and consumers it will be the President of the UOKiK who in an administrative procedure will decide on the abusive character of a standard term in abstracto. Consumers, consumer ombudsmen, ombudsmen of the insured, consumer associations and foreign organisations entitled to start injunction proceedings, may notify the President of the UOKiK about an infringement regarding a trader using an abusive clause, contrary to the prohibition in Article 23a of this Act. This last provision prohibits traders from conducting practices that harm collective consumer interests, meaning practices that are unlawful or contrary to the principle of good practices (Article 24 of the Act on protection of competition and consumers). In particular, this provision defines as a practice that harms collective consumer interests: the use of unfair commercial practices; the breach of the information duties, i.e. providing consumers with comprehensive, truthful and accurate information; as well as, offering consumers financial services that do not meet their needs, which were assessed pursuant to the information available to the traders. This provision used to refer also to a catalogue of unfair standard contract terms that was published by the District Court in Warsaw XVII Division of Consumer and Competition Protection (SOKiK – Sąd Ochrony Konkurencji i Konsumentów) (see below further on the change as to this catalogue that function as a sort of ‘black list’ in Polish law).

Again, stakeholders representing traders find that a certain level of flexibility, for which the principle-based approach allows, is a good addition to the unfairness test.

39 See e.g. I CK 832/04 of 13 July 2005.
40 See also e.g. I CSK 125/15 of 15 January 2016.
The UOKiK mentions that they are likely to base most of their cases on the grey list rather than on the general clause, as traders continue to make the same mistakes in practice and fall under one of the categories placed on the grey list. However, the general test of unfairness provides additional options for enforcement and is useful in practice.

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

The indicative list is not being used in practice by Polish courts during the individual control of unfairness, since the general clause described above is supplemented by the grey list of potentially unfair clauses in Article 385\(^3\) of the Polish Civil Code. This provision transposed the indicative list from the Annex to the UCTD into Polish law. Stakeholders did not identify any Polish judgments where the indicative list of the Annex would be referred to rather than the grey list from the Polish Civil Code. A consumer association stressed that Polish judges would be more inclined to put more emphasis on Polish rather than European law. As a result, European law would be applied more indirectly.

The UOKiK mentions that in their administrative procedures they also tend to use the grey list from the Polish Civil Code rather than the indicative list of the Annex and they do not see the need to just repeat the same point from the indicative list in the Annex. They could not recall a case, when the indicative list would have been used. However, they did not exclude a possibility to invoke the Annex, if its interpretation in European law could guide Polish law in the future, e.g. if the Directive is more clear on a certain issue, especially as there are slight differences between the list in the Annex and the list from the Polish Civil Code.

Stakeholders did not have an opinion on this matter.

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

Aside the grey list adopted in Polish Civil Code (as mentioned above), the UOKiK published decisions of the SOKiK that found certain standard terms unfair in in abstracto control of unfairness. The registry, in which these decisions were published, was perceived as a factual black list, prohibiting the use of certain standard terms against all consumers of a particular trader, but not against all traders (even though some scholars argued for giving it such an erga omnes effect). The rules on the control in abstracto have recently been changed and any cases started after April 17, 2016 will not have their decisions added to the registry (further explained later in this report). The registry consists of almost 2000 pages and 6597 entries. Instead of classifying a type of a contract term that has been considered unfair and organizing decisions pursuant thereto, it just lists specific clauses found unfair in particular cases. For example: ‘Under circumstances not accounted for in a given Contract, decisions will be taken by MeCom in the form of a decree.’\(^41\) or ‘in case of the loss or damage to the client’s wardrobe, damages will be limited to the amount representing its value, not exceeding, however, the 10-times worth of the price of the performed service’.\(^42\)

Some of the contract terms that have been mentioned by stakeholders as often found in consumer contracts and leading to unfairness were e.g. penalty clauses;\(^43\) exclusion

\(^41\) Decision XVII Amc 27/01 of 27 February 2002.
\(^42\) Decision XVII Amc 7/00 of 16 January 2002.
\(^43\) See e.g. Court of Appeal in Warsaw, I ACa 125/13 of 17 July 2013.
of jurisdiction of courts (of consumer residence). Both of these type of contract terms could fall under the scope of Article 385 of the Polish Civil Code, respectively its Paragraph 17 or 23. Scholarship mentions also: allowing businesses to adjust the price without notifying the consumer; providing improper notification of a change to standard terms and conditions to the consumer (e.g. announcing it on a poster in the business’ offices); allowing business’ to keep consumer money if the consumer overpaid (up to a certain amount); or placing a condition on providing a service to a consumer, from the consumer concluding more than one contract with the same provider. The last condition could fall under Art. 385 Para. 6 or 7 of the Polish Civil Code, but other of the above-mentioned type of terms are not directly prohibited. For example, Art. 385 Para. 20 of the Polish Civil Code prohibits contract terms that allow the trader to determine or raise the price or compensation after the conclusion of the contract without granting a consumer a right to terminate this contract. This provision does not specifically provide a duty to notify the consumer.

Stakeholders consider lists of unfair contract terms as helpful for increasing awareness of unfair contract terms among both businesses and consumers and consider it rather comprehensive and broad in protecting consumer interests.

The UOKiK considers the grey list as very effective, but would be concerned if a black list was introduced to the Polish Civil Code. It considers Polish traders as creative and adjusting their provisions only slightly when these are assessed as unfair, e.g. if a penalty clause of 15% would be assessed as abusive, traders would adjust it to 14.9%, which would require new evaluation as a new provision. Since a black list would need to be very precise, it would be difficult to place on it certain terms that are most problematic in practice.

- The effects of limiting a court decision establishing the unfairness of an unfair term to the individual relationship between the specific trader and the consumer, rather than, for example, extending the effect of such court decision to all contracts concluded with a given trader, even outside injunctions under Article 7(2) of the Directive, or to all contracts containing the same contract term; [Key aspects to consider are: Have the effects of court decisions establishing the unfairness of an unfair term been extended to all contracts of the trader concerned or to the contracts of any other trader containing such a term? If so, how does this work in practice? What are the impacts on businesses? If there are no such effects of court decisions on unfair terms: what are the effects of this situation?]

In Poland there has been some extension of the effects of the court’s assessment of an unfair character of a contractual term. Pursuant to Articles 479 – 479 of the Polish Civil Procedure Code, standard terms and conditions have been controlled for unfairness in abstracto. This means that a consumer, a consumer ombudsman or the President of the UOKiK could have claimed at the SOKiK that a certain clause in the standard terms and conditions was unfair in all circumstances, regardless of the individual situation of a given consumer. If a clause used by a particular trader has been assessed as unfair in all circumstances, it was published as such in the registry of the SOKiK and it may not have further been applied by the trader. Consequently, also in already concluded contracts, with other consumers, this clause should automatically be not binding. This last effect has recently been codified by the new Article 23d in the Act on protection of competition and consumers. This extended effect is not applicable to cases when consumers raised individual complaints at their district courts due to traders using unfair standard terms and conditions in light of performing specific contracts. While not all traders would automatically adjust contracts with all their consumers upon the issue of the decision on unfairness, this could lead to administrative penalties, as well as individual consumer claims, in which the administrative decision could be invoked.

44 See e.g. Court of Appeal in Warsaw, VI ACa 1571/12 of 26 April 2013.
45 See e.g. Court of Appeal in Warsaw, I ACa 125/13 of 17 July 2013.
However, this effect did and does not stretch to other traders who may be using identical or similar clauses, despite some claims having previously been made in the scholarship and in some judgments of the Polish Supreme Court about such a possibility. Ultimately, the view that has prevailed is that the unfairness control in abstracto analyses unfairness of a clause in view of the whole contract, which may lead to different results for other traders. The above-mentioned Supreme Court’s judgment prohibits also that a claim is raised against a trader on the basis of the same standard term for a second time. This seems to suggest that even if the trader changed the set of standard terms and conditions, but placed the same perceived as unfair term in them, it would automatically be recognized as unfair.

The recent modernisation of the Act on protection of competition and consumers has given the authority to the President of the UOKiK to conduct unfairness control in abstracto and taken it away from the SOKiK. As it has previously been mentioned, the procedure is now administrative rather than judicial, more alike the protection of collective consumer interests against the use of unfair commercial practices. Since it is only very recently introduced in Poland, it is impossible to evaluate at this point its effectiveness and consequences.

Stakeholders representing traders mention that despite the lack of extended effect of decisions on unfairness of standard contract terms, traders who use clauses similar or identical to the ones that have been declared unfair, often in practice decide to change their standard terms and conditions.

Consumer association mentions that the previous system, of registering and publishing standard terms which have been assessed as unfair might have been abused, but was effective for consumer protection. The abuse could consist of some organisations approaching traders who apply similar or same provisions to the ones already assessed as unfair, and threatening them with starting procedures against them, while the unfairness assessment could be different in individual cases, when all circumstances of the case would be considered. Still, according to the consumer association some standard terms are so evidently and grossly unfair that there should be a possibility to use a decision in a particular case towards other traders using the same term. Currently, this option does not exist in Polish law, since there is no black list of unfair contract terms and courts, including the Supreme Court, are not allowed to extend the unfairness assessment to the whole sector.

The UOKiK also mentions that it would wish more consumers invoked the administrative decisions issued in their individual cases to support their individual claims and encourage them to do so. They also mention that if another trader just copies a standard term that has already been assessed as unfair in another administrative procedure, consumers should have an easier option to prove unfairness of such a term than just by following the whole procedure from the start. This would also take away some of the burden of the consumer authority, limiting the number of procedures that would need to occur. Although, if such an easier unfairness procedure were adopted, the trader should still be given an option to prove that a term is not unfair considering the contract as a whole.

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

In Polish law if a standard term and condition is not transparent, it may be seen as being contrary to the principle of good practices, which would make it unfair pursuant to Art. 385 Para.1 of the Polish Civil Code. However, the consumer association mentions that they rarely see it that Polish courts would take into account the lack of

46 See e.g. the Polish Supreme Court III CZP 17/15 of 20 November 2015.
47 See e.g. III CZP 80/08 of 7 October 2008.
48 See e.g. the Polish Supreme Court III CZP 17/15 of 20 November 2015. See also e.g. Namysłowska & Piszcz (eds.) 2016.
49 See e.g. Polish Supreme Court I CSK 313/12 of 15 February 2013.
transparency as a reason to allow consumers to avoid a contract in practice. The UOKiK assesses the lack of precision of T&Cs as an indication of unfairness and potential non-binding character of a non-transparent term; but e.g. a term written in overly small font would be less likely to automatically lead to such a consequence, but would rather lead to the assessment that the information was not provided in a full form, thereby leading to the infringement of collective interests of consumers, or as a misleading commercial practice.

Transparency is perceived as providing consumers with understandable information (both as to content and as to the form, in which it is provided), as well as lack of ambiguity (referred only to the content). Both these conditions need to be simultaneously fulfilled to consider a term transparent. Generally, and also in this judgment, a benchmark of an average consumer is used to assess the term’s transparency. Interestingly, in this case the term was considered transparent, despite it using a notion that has been included in the Polish Civil Code in a different meaning than in this legal provision. The Polish Supreme Court did not think that average consumers would have legal knowledge that would lead to them being confused by this term and, thus, decided that the term was unambiguous. However, the Polish Supreme Court’s assessment that average consumers lack legal knowledge may also lead to the finding of non-transparency of standard contract terms that may confuse consumers as to their legal rights.

In another judgment the Polish Supreme Court decided that if the consumer correctly understands a standard term, it is irrelevant for the assessment of transparency, whether he or she also agrees with what the term states. Specifically, Art. 24 Para. 1 of the Act on protection of competition and consumers mentions as a practice harming collective consumer interests a trader’s breach of providing consumers with reliable, truthful and full information. This means that a non-transparent (if considered: not reliable, not truthful or not full information) standard term may be controlled in abstracto for unfairness, which administrative procedure excludes the possibility to apply other individual sanctions from the UCTD, such as the use of the rule contra proferentem.

In general, stakeholders perceive transparency requirements as having been given a proper sanction in Polish law.

Generally, sector regulators stated that in their own sectors the transparency of contractual terms and conditions has improved in recent years. They perceived unfair commercial practice to be more problematic in the market than unfair contract terms, at the moment.

Also stakeholders representing traders are confident that Polish traders provide all the required information and that the form, in which the information is provided, is satisfactory. They also mention that transparency requirements may have little practical relevance, considering that consumers do not usually read information that is provided to them. They did not, at the same time, consider it a priority to invest time and money in order to increase consumer’s readership of standard terms and conditions.

A consumer association and the UOKiK consider lack of transparency to be a huge problem, especially in the financial system. Consumer contracts are too long, with many annexes, written in small print, too, and in a complex language. Often also the most important terms for consumers would be hidden somewhere in the text and written in smaller, less visible print. Traders may express here the willingness to provide transparent contract terms, but they lack more specific direction what would be perceived and assessed as transparent, e.g. how many pages a contract would

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50 See also Polish Supreme Court e.g. I CSK 72/15 of 4 March 2016.
51 See e.g. I CSK 125/15 of 15 January 2016.
52 See e.g. I CSK 531/13 of 10 July 2014.
53 See also Polish Supreme Court e.g. I CSK 72/15 of 4 March 2016.
have, what size font is seen as transparent. No authority or legislator provides for specific information on what is perceived as transparent pursuant to the consumer organisation. The UOKiK gives an example here of the new code of conduct for credit lenders in Poland, that does provide such further guidance on transparency, including e.g. the use of what size font could be perceived as transparent. However, this code of conduct is quite novel and it is not yet certain how effective it will be. Moreover, it is exceptional in the level of details it provides to traders on how to provide (transparency) information to consumers.

The UOKiK mentions that it is difficult to combat too long T&Cs (since there is no standard on what is too long and there are many information obligations that need to be fulfilled) or T&Cs written in a complex language (since lawyers draft them and it can be expected they would use legalise). However, they often combat the use of imprecise language (the use of 'in particular' etc.) as well as the visibility of T&Cs (paying attention the font size and graphic display). The assessment of lack of transparency would rather be conducted ad hoc, there are no general indications of what is non-transparent. Different methods of display of information are accounted for to assess transparency, as well as the consumers themselves – e.g. for vulnerable consumers different font size may be required to make a term transparent.

- Whether the extensions of the application of this Directive (to individually negotiated terms or to terms on the adequacy of the price and the main subject-matter) put in place in certain Member States represent an advantage for consumer protection. [Note: Question only relevant for MS that have put in place extensions of application of UCTD]

N/A as Poland did not extend consumer protection to such terms.

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

Stakeholders representing traders think that the decision on unfairness forces traders to remove unfair clauses from their contracts, which is a satisfactory and appropriate sanction and should discourage traders from using abusive clauses. Stakeholders were, however, not convinced of the active role of Polish courts in enforcing consumer protection ex officio. On the contrary, they believe that if a consumer will not raise the possibility of unfairness of a contract term, the court will not look for it – due to the procedural rule of courts investigating only upon parties’ complaints. Consumer organisations also see the conflict between the CJEU’s rulings on ex officio taking into consideration of consumer interests and Polish procedural legal system that requires courts to remain neutral and only engage in arguments presented by both parties. Polish courts, generally, would only then provide procedural guidance to parties. Additional complication in taking into account consumer rights is that in Poland there are no courts that specialise in consumer protection. Consumer law cases go to all district courts’ judges, who then have little experience in consumer law, as only a small percentage of their cases would pertain to consumer protection.

The administrative remedy for consumers is to notify the President of the UOKiK about an unfair contract term pursuant to the new Article 99a of the Act on protection of competition and consumers. The President of the UOKiK may protect collective consumer interests by instigating an in abstracto control of standard contract terms (see more in other paragraphs). The ECC Poland considers this administrative protection of consumer interests as the main advantage of the current system of

54 See also e.g. Namysłowska & Skoczny 2015 at: http://www.cars.wz.uw.edu.pl/tresc/badania/07/Ekspertyza_naukowa_dla_ZBP.pdf
consumer protection, since the UOKiK is active in enforcing protection of collective consumer interests and in abstracto control of standard terms and conditions. The judicial enforcement of individual consumer rights is perceived as less effective.

The new administrative procedure that started as of April 2016, has not yet been applied in practice and, therefore, it is impossible to assess its effectiveness. Previously, the enforcement of collective interests of consumers has been a judicial procedure, but as of April 2016 it became an administrative procedure, alike to the ones allowing the President of the UOKiK to protect collective interests of consumers against the use of unfair commercial practices. For now, only first explanatory proceedings have started. The UOKiK states that they will need time to assess the effectiveness of the new procedure. Especially with regard to the consumer benefits (przysporzenie konsumenckie), they would need to act carefully, e.g. with regard how to annex consumer contracts when a certain provision would need to be removed or adjusted.

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

Consumer association considers that, generally, it would be useful to adopt some general rules on unfairness, e.g. either adoption of a black list of unfair contract terms or providing courts (Supreme Court) with a possibility to ban the use of grossly and evidently unfair contract terms from the whole market and not just by a specific trader. There should be an easier possibility to prohibit the use of certain categories of contract terms, without the need to adjust legislation. The UOKiK agrees here that consumers should be able to more easily claim unfairness of a contract term that has already previously been assessed as unfair towards another trader, even if the whole T&Cs differ from each other.

The last modification to the Act, established a new enforcement procedure for the President of the UOKiK. Namely, identified in Article 99a of the Act on protection of competition and consumers entities (see above) may notify the President of the UOKiK on the existence of potential unfair standard terms and conditions. The President of the UOKiK has discretion whether to start a formalized unfairness control in abstracto as a result of such a notification.

Another new enforcement tool enables consumers who started an individual case at their district courts against a trader for the use of an unfair standard term, to ask the President of the UOKiK to intervene in their case. Pursuant to the new Article 31d of the Act on protection of competition and consumers, the President of the UOKiK will do so, if the public interest demands this. This new possibility allows the President of the UOKiK to share his experience with the court. The UOKiK mentioned that it would wish individual consumers paying more attention to the decisions of the President of the UOKiK, invoking more often its decisions in individual cases. This would, however, be likely to require the use of legal aid by consumers.

ECC Poland mentions that it could be useful to have a ‘name and shame’ practice established, where decisions recognizing certain commercial practices as unfair, or standard contract terms as abusive, would be published and could be consulted easily by consumers, media etc. This could prove to be an effective consumer protection measure. Especially, since Polish court’s judgments (especially district courts which preside over consumer cases) are rarely made public, which means that courts in different towns may issue different decisions; consumers are unaware of what they may expect, etc.

Moreover, ECC Poland mentions that it would be good to further finance activities of consumer organisations, e.g. to conduct more educational activities like having a radio or TV show dedicated to consumer issues, writing regular columns for newspapers and blogs etc. Currently there are no resources for this in Poland. They compare Polish
situation to the UK’s, where ‘Which?’ has such resources and consumers know to get in touch with them when they have issues, to consult their magazine and use their practical tips and guidance.

Another point raised by ECC Poland is that there should be more attention given to the fact that unfair contract terms could be found in other traders’ communication to consumers than just their regulations, codes of conducting business. Most complaints submitted to national courts and the UOKiK, pertain to unfairness of terms in these regulations and the public opinion would, thus, be likely to ignore the fact that also other terms could be unfair.

One possibility is to establish a black list with a provision, pursuant to which consumers may terminate a contract concluded for a definite period of time, but only if they pay a penalty fee (any penalty fee). Currently, consumers are often dissuaded from terminating contracts by such penalty clauses finding their way into standard terms and conditions and being invoked by the trader. Polish law prohibits at the moment through the grey list in the Polish Civil Code such penalty clauses as unfair, but only if they are one-sided or if they are exorbitant, which estimation depends on the enforcement authorities. On the one hand, instead of introducing a blacklisted prohibition of the use of penalty fees, the enforcement authorities could interpret the notion ‘exorbitant’ broadly and factually prohibit the use of most penalty clauses. On the other hand, since any such fee may, however, discourage consumers from terminating the contract, a complete prohibition was argued for by the stakeholders.

1.2.2. Effectiveness of the current rules in eliminating obstacles to the Internal Market

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

- Whether the application of the general fairness clause in different Member States shows disparities in the understanding of this principle and, if so, whether disparities have an impact on cross-border trade;  
  
  [Key aspects to consider are: Do national differences in the application/implementation of the Directive play a role for businesses? Have these differences led to changes in their business strategy? Have these differences caused problems?]

  None such disparities have either been reported to or noted by the stakeholders representing traders.

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

  None such barriers have either been reported to or noted by the stakeholders representing traders.

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

  None such barriers have either been reported to or noted by the stakeholders representing traders.

1.2.3. Relevance for business-to-business transactions

Regarding the area of contractual fairness and in relation to the Unfair Contract Terms Directive, please analyse:
• Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;

Also with respect to this question stakeholders representing traders do not see the need for an additional protection regime being introduced.

Polish law provides partially an extended protection against unfair contract terms, e.g. Article 805 of the Polish Civil Code in its paragraph 4 allows for such a control in case of insurance contracts concluded by any natural persons acting for purposes related to their trade or profession.

• Whether the system of protection established by the Directive, based on the concept of good faith and the significant imbalance in the parties' rights and obligations, would be appropriate for B2B transactions;

Stakeholders representing traders generally believe that the general contract law rules are sufficiently protecting traders at the moment. They consider consumer law to specifically be designed to protect weaker transactional parties, consumers, which system would then, according to them, not suit protection of traders and their interests. They would not welcome the same standards being applied to B2B relations as to B2C.

• The appropriate scope of B2B protection against unfair contract terms – should the protection, if at all needed, extend to individually negotiated terms, the main subject-matter of the contract and the adequacy of the price;

Also with respect to this question stakeholders representing traders do not see the need for an additional protection regime being introduced. Based on the available evidence and the interviews, it is concluded that such an extension is not needed.

• Whether there are specific contractual terms often used in B2B transactions which could be regarded as unfair in all circumstances or presumed to be unfair;

None such terms have been reported to stakeholders representing traders.

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

Also with respect to this question stakeholders representing traders do not see the need for an additional protection regime being introduced. Based on the available evidence and the interviews, it is concluded that an introduction of this principle in B2B transactions is not needed.

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

No such benefits have been observed by the stakeholders.

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

Stakeholders perceive any such extension to be problematic for businesses, as consumer regime has not been drafted with them in mind. They have not, however, mentioned any specifics.

• Whether the benefits of extending the scope to business-to-business transactions would exceed the negative consequences of such an extension.
Based on the available evidence and the interviews, it is concluded that such an extension is not desired.

1.3. Injunctions

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

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

- To what extent is the use of the injunction procedure in your country contributing to the reduction in the number of infringements to consumer protection rules and reduction in consumers’ detriment?

ECC Poland does not perceive the injunction procedure as particularly beneficial to consumers in cross-border disputes. This lack of effectiveness is related to the fact that often, even if an action is taken, the trader may be difficult to find in another country, thus a decision rarely leads to practical benefits for consumers. ECC Poland has also limited resources to act on a particular case – only a few cases a year are being picked up. On national level, the injunction procedures are perceived as more beneficial, even if they may take too long, and even if the President of the UOKiK has discretion as to when to act (which means that not all infringements of consumer rights are being picked up).

The UOKiK does not have an opinion on whether there is a reduction in the number of infringements as a result of them applying the injunction procedure. They state that they are active in this field; they have also sufficient work in this area. There is definitely some positive effect of the injunction procedure - discouraging traders from infringing consumer interests, but new infringements continue to occur.

- What measures in your national legislation on injunction procedure are considered to be particularly effective, if any: measures regarding the cost of the procedure, the summary procedure, the publication of the decision and/or the publication of a corrective statement, the sanctions for non-compliance with the injunction order (Art. 2(1) of the Injunctions Directive), the prior consultation (Article 5 of the Injunctions Directive), and the effects of the injunction order?

The UOKiK mentions here the financial penalties as sanctions for non-compliance with the injunction that discourage traders from further infringing consumer interests, as one of the effective elements of the procedure. Moreover, the possibility to publish the decision or have the trader issue a public corrective statement acts in a discouraging way, as traders fear the effect this may have on their reputation on the market and consumer trust. Of course, the sole possibility to issue an injunction is already an effective enforcement measure.

There are three phases of the administrative procedure. The first one is not formalized, where the UOKiK issue a light statement to the trader notifying him, when the infringement is slight and could easily be remedied, that certain incorrectness has been found and should be remedied. The notification contains a list of sanctions that may be applied if the infringement is not corrected. Usually traders act upon these notifications, as they are often directed at traders who were not aware of their obligations, rather than those who have acted wilfully. The second phase is the explanatory procedure, started when the case is bigger and when the UOKiK needs more information to proceed with the case. The UOKiK demands then information from traders and the traders are obliged to provide it. This second phase also often leads to traders receiving an incentive to change their practices and results in traders ceasing with the infringement. This means that statistics on issued decisions do not reflect the actions of the UOKiK. Most procedures would end on the second, explanatory stage.
The third, actual injunction procedure would then only occur when the trader really ‘insists’ on it, pursuant to the UOKiK.

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

Yes, the President of the UOKiK has authority to act on any infringement of collective consumer interests, not only pertaining to the infringement in the areas listed in the Annex I to the Injunction Directive. E.g. there are proceedings protecting collective consumer interests in the consumer construction area, pertaining to contracts concluded with developers.

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

A consumer association mentions that the injunction procedure may take too long and could, therefore, due to this lengthy process be ineffective, since often when the decision is published, it is too late to fully reverse the negative effect of a concluded contract for consumers. The new change in the provisions of the Act on the protection of competition and consumers is yet too recent to evaluate its effectiveness in correcting this obstacle.

The UOKiK mentions that the biggest obstacle to the effectiveness of the injunction procedure is that the traders may be registered nowadays anywhere and it is difficult to ‘catch’ them. Even if the UOKiK knows that certain Polish traders conduct e.g. unfair commercial practices, if these traders have their commercial online activity registered outside Poland it is more difficult to start effective injunction proceedings against them (even though theoretically in the EU it should not matter where the registered seat is). In cross-border cases, the President of the UOKiK’s decisions may be effective towards foreign traders, but only if these traders take their business and the regulators seriously. If they do not, they may just not pick up the decision of the President of the UOKiK and act as if they are unaware thereof.

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

Stakeholders representing traders do not report any need for the protection of collective business’ interests to be introduced.

ECC Poland mentions that it would be useful to look more closely into which parties have a right to notify the President of the UOKiK that there was an infringement and that there is a need for the injunction procedure to be started by the President of the UOKiK. While it is reasonable to grant this right to consumers, consumer organisations’ motions should be treated differently than these of consumers. That is to say, consumer organisations’ motions should be seen less like an indication of an infringement that could or could not be acted upon by the President of the UOKiK, and more as a direction to do so.

The UOKiK mentions that in Poland e.g. there are many regulations, regulating different sectors and protection of consumers in these different sectors, that would not directly indicate the applicability of the procedure of injunction in this area. This means that sector regulators enforcing consumer protection in this area may not know
that there could also be an option of the President of the UOKiK starting an injunction procedure on the basis of Polish law in this area – to protect collective consumer interests there. This does not flow from the EU law, this is the extension applied in Polish law, so the UOKiK does not quite see how the EU legislator could help here.

1.3.2. Effectiveness of the current rules in eliminating obstacles to the Internal Market

What is the effectiveness of the ID in eliminating obstacles to the Internal Market in terms of:

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

ECC Poland does not perceive the injunction procedure as particularly beneficial to consumers in cross-border disputes. This lack of effectiveness is related to the fact that often, even if an action is taken, the trader may be difficult to find in another country, thus a decision rarely leads to practical benefits for consumers. ECC Poland has also limited resources to act on a particular case – only a few cases a year are being picked up. On average, each year ECC Poland notifies the President of the UOKiK of about five to six practices, as potentially infringing consumer protection in cross-border transactions. The President of the UOKiK may decide to act upon such a notification and instigate protection of collective consumer interests. The President of the UOKiK has discretion in this.

The UOKiK again mentions here the problem with the enforcement of such injunction proceedings against foreign traders, if these are not well-known traders or traders who take their business and compliance obligations seriously. However, the UOKiK considers that in most injunction cases against foreign traders, these cease with the infringements upon notification.

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

ECC Poland does not perceive the injunction procedure as particularly beneficial to consumers in cross-border disputes. This lack of effectiveness is related to the fact that often, even if an action is taken, the trader may be difficult to find in another country, thus a decision rarely leads to practical benefits for consumers. ECC Poland has also limited resources to act on a particular case – only a few cases a year are being picked up. On average, each year ECC Poland notifies the President of the UOKiK of about five to six practices, as potentially infringing consumer protection in cross-border transactions. The President of the UOKiK may decide to act upon such a notification and instigate protection of collective consumer interests. The President of the UOKiK has discretion in this.

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

Currently, mostly due to the increased relevance of e-commerce, it is easy for traders to disguise where they are located. This hinders enforcement process of injunction proceedings, pursuant to the UOKiK.
1.3.3. Interplay between the Injunctions Directive and other enforcement instruments of consumer law

Please analyse:

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

The injunction procedure as regulated by the Injunctions Directive is split between the provisions on the injunction procedure in cases falling under the UCTD and all other consumer protection issues. Article 99a (and further) of the Act on protection of competition and consumers regulates injunction proceedings against traders using unfair contract terms. Article 100 (and further) of this Act regulates injunction proceedings when traders harm other collective consumer interests.

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

One of the main differences in the procedures is that in case of injunctions related to the use of unfair contract terms only certain, specified categories of entities are entitled to notify the President of the UOKiK about this (Article 99a of the Act). In case of infringements of provisions on unfair commercial practices or implementing CRD – anyone may serve this notification (Article 100 of the Act). In case of procedure against infringement of UCPD- or CRD-based rules, the President of the UOKiK may also issue a temporary injunction for the trader to cease with such a practice, when continuation of this practice, until a decision is issued, could severely harm consumer interests (Article 101a of the Act).

Previously, collective consumer interests in UCTD cases have been protected through judicial procedures. The recent change in Polish law, adding an administrative procedure for protecting collective consumer interests against abusive standard terms and conditions, brought thus these two injunction procedures together, establishing an administrative mode for both of them. Generally, the explanatory procedure will be likely to look the same way now in Polish law (although the change is recent and it remains to be seen how the new provisions will be applied in practice).

The protection of collective consumer interests is very broad in Polish law and goes in its scope beyond the list of the Injunctions Directive.

1.4. Cross-cutting issues

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

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

Consumer association perceives as a definite benefit for consumers that the whole consumer protection system has been improved in past years, thanks to the Europeanization of consumer law. This system is imperfect, but it is still an improvement. The cost thereof is that the legal system became more complex and that the consumer has to now have more extensive knowledge thereof than in the
1990s in Poland. However, this cost pursuant to the consumer association is difficult to avoid. One tip could be to look more into effectiveness of consumer protection and whether consumers make use of the highly complicated provisions. It is highly unlikely that it would be possible to make these procedures so transparent that all consumers would benefit from them and understand them; but it could be feasible to educate at least some consumers better, and to improve at least some enforcement procedures. This would lower the cost of consumer protection while keeping its benefits.

The UOKiK’s opinion is that the consumers’ costs of enforcement of consumer rights are not high, thus consumers should be benefitting significantly from the established consumer protection. However, the question remains whether consumers actually enforce their rights.

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

Stakeholders representing traders find the harmonized rules beneficial. They assess Polish traders to be more aware and better informed about consumer needs and their rights, since the introduction of the legislation based on EU law to Poland. Moreover, they think that cross-border trade became easier due to consumer protection measures becoming increasingly more subject to full harmonisation.

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

Stakeholders representing traders do not perceive these costs (legal advice mostly in order to assure compliance) to be substantial.

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

Sector regulators mention that they have few means given to them to publicly enforce consumer protection. They could potentially take away concession of a particular trader, for non-compliance with consumer rights, the few that there are, expressed in the sector legislation. This court procedure is, however, perceived as a last resort measure, that, in practice, is rarely taken, since it also harms consumers if their service provider disappears from the market. Moreover, Polish courts require strong evidence of continuous breaches of legislation, before they would issue an order to take away the concession.

The UOKiK cannot estimate the costs involved in the public enforcement of consumer protection, but it establishes that there are more cases submitted to it with every year; these cases are more and more complex; and the cases are more and more relevant, where the intervention of the President of the UOKiK is indeed then actually necessary.

• Are there indications that the directives covered by the study are not implemented in your country in a cost-effective manner?

Not one stakeholder has mentioned this. Based on the available evidence and the interviews, it is concluded that there is no indication of the implementation being not cost-effective.
Could the costs for implementing and enforcing the rules of the directives covered by the study be reduced without lowering the level of protection for consumers? If so, how?

See above. The UOKiK mentions that one of the measures that could improve cost-effectiveness of their work would be to allow for decisions on abusive clauses to have an effect erga omnes or at least to allow such a decision to simplify following procedures against other traders that are using the same standard terms.

1.4.2. Interplay with EU sector-specific consumer protection legislation

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

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

In the energy sector, pursuant to the stakeholders, traders are quite aware of consumer rights, aside the new players on the market, who sometimes learn as they go. The business organisations also provide information to traders on what rules they should be compliant with, audit their members. Consumer awareness is really low – regulators constantly receive individual complaints, without specific rights being mentioned in them, and then need to direct consumers either to starting a legal action in court (rarely occurs) or to the UOKiK. Unfair commercial practices are often based on consumer unawareness, especially with regard to traders targeting in door-to-door sales vulnerable consumers, e.g. older consumers.

Pursuant to ECC Poland the regulators of market sectors in Poland enforce legal provisions of a given sector and are less familiar with, and less interested in, general consumer protection rules, e.g. protection against unfair commercial practices. Therefore, consumers are less protected in certain specific areas (health, transport, energy, etc.), since the UOKiK is more focused on general consumer protection and it may escape its attention that certain sectors’ specific conditions may create new consumer issues. Consumers themselves are not aware of the level of protection due to them, so they cannot enforce themselves their rights. The UOKiK to an extent agrees that sector regulators would be more likely to apply sector rules to protect consumers and could be less active in invoking general consumer protection rules (also often would not have a competence to do so), but they are cooperating with the UOKiK, may refer consumers to the UOKiK and often attend trainings etc. organized by the UOKiK on general consumer law-related issues.

The UOKiK generally would not welcome being more involved in consumer protection in particular sectors as that would likely increase the financial and resources’ burden for it. However, it does mention that currently it cooperates with sector regulators and that some more visibility of general consumer rights could be useful there.
Specify whether in your country the same authority is responsible for the enforcement of the horizontal EU consumer law and the sector specific rules, or whether there are different authorities responsible for these two sets of rules; [If different entities are responsible, key aspects are: Is there an institutionalised cooperation between them? Does the institutional arrangement for enforcement affect the use of UCPD/UCTD in the regulated sectors, as specified in the previous bullet?]

Only the President of the UOKiK is competent to enforce horizontal EU consumer law with regard to protection of collective interests of consumers. Enforcement of sector specific rules lies in the competence of sector regulators, thus whenever consumer complaint is based on horizontal EU consumer law, sector regulators refer consumers to the UOKiK, which then accumulates consumer complaints and its President may act in protecting their collective interests.

The cooperation between sector regulators and the UOKiK is very good, pursuant to stakeholders. They often informally cooperate in motivating traders to observe consumer rights. For example, sector regulators may collect consumer complaints and publish a list of service providers that consumers report as using unfair commercial practices. Upon publication of such a ‘blacklist’, talks are holding place with traders to convince them to change their practices. UOKiK takes part in these meetings and if traders will not adjust their practices may act instead of sector regulators against them. Moreover, when there is an overlap of information obligations in sector regulations and in the general consumer protection provisions, the UOKiK would agree with sector regulators on the interpretation thereof. The UOKiK mentions, however, that all this cooperation is incidental and not institutionalized. Sometimes this cooperation is friendly and on equal footing, sometimes the UOKiK subtly indicates that certain consumer protection measures are not sufficiently protected in a given sector and they inquire then why this is so. The last situation is very delicate and all regulators and authorities attempt then not to close the open door of cooperation between them due to an overlap in their competences.

Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning contractual fairness, unfair commercial practices, and information obligations regarding advertising; [Key aspects to consider are: How do they work together with the sectoral legislation? Are there issues/overlaps/conflicts etc.?]

As mentioned in the answer to question 1.1.5 there is some overlap between consumer provisions in horizontal and sector-specific rules, but this follows from the overlap between European provisions that had to be transposed to the Polish legal system. The Polish legislator did not significantly extend further information requirements or provide for more consumer protection rules in sector-specific legislations.

Stakeholders mention that while currently there may not be much overlap or problems with the existing overlapping provisions, which suggests that the system is coherent, it could be desirable to provide for more consumer protection in sector-specific rules. Especially sector-specific regulators would appreciate receiving more enforcement tools.

What are the benefits of the complementary application of the UCPD and UCTD in the regulated sectors? What are the costs due to the complementary application with the sectoral EU consumer protection legislation?

The benefit thereof is that sector-specific regulators may direct and instruct consumers who come to complain about unfair commercial practices or unfair contract terms about remedies they could use, authorities (the UOKiK) they could approach. Pursuant to the stakeholders, there are costs related to the fact that consumers tend to think that in sector-specific issues, it is the sector-specific regulator that they should approach first. This means that manpower, time and money are devoted to re-
directing consumers to the UOKiK or informing them that their only option is to start a judicial procedure. Stakeholders suggest thus that these costs could be avoided in the future, if consumers were better educated on their rights and better knew which authorities could help them.

The UOKiK appreciates the possibility to protect collective consumer interests on the basis of general consumer protection provisions allowing for the protection of consumer collective interest, also in cases, where there are sector-specific rules applicable. This supplements the activity of sector-specific regulators that often may be focused on other matters than consumer protection. However, simultaneously the UOKiK does not express a wish to be further involved in the enforcement of consumer protection in sector-specific matters (see above).

- Assess any need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law.

This hasn’t been brought up by the stakeholders. Based on the available evidence and the interviews, it is concluded that such a clarification is not needed.

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

- Please analyse the need and potential for the application of the consumer law directives (mainly UCPD and UCTD) to consumer-to-business (C2B) relations. This concerns situations where the consumer sells goods or provides services to a trader (e.g. where the consumer sells gold jewellery to a trader or supplies digital content to business against remuneration).

Stakeholders representing traders have not encountered this as an issue in Polish law. General contractual rules should be applicable in such situations and are perceived as sufficiently protective of parties’ interests.

Consumer associations perceive any extension of B2C protection – whether to C2B or B2B relations – as impractical, since consumer associations already do not have enough resources to protect consumers and this extension would only provide more subjects that would need to be protected. Moreover, this could further complicate the understanding of traditional legal definitions (such as ‘consumer’), introduce distinction between distributors that could even be perceived as discrimination between traders (depending on the type of conducted commercial activity) or as an unfair competition act (since it could distort market conditions, providing more incentives to only trade with bigger companies).

1.4.4. Specific protection for vulnerable consumers

Please analyse:

- Whether the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined in the consumer law directives and relevant jurisprudence, and as applied by national authorities and courts in your country, continue to be valid and fit for purpose.

Most stakeholders perceive the notion of a consumer and of an average consumer as working well and having been fully adopted in Polish law. The notion of a vulnerable consumer provides some difficulties in practice, as in individual cases Polish courts seem not likely to change the level of consumer protection, if the issue is that of a vulnerable consumer. The President of the UOKiK tries to take the special position of vulnerable consumers into account during collective consumer protection proceedings.

Sector regulators are helpless in protecting small businesses, since consumer protection is not extended to them. They would like to see the definition of consumer
being widened. Stakeholders representing traders, however, consider the currently binding definitions satisfactory and would not want them changed.

- To what extent the existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers and whether, based on the experiences in your country, specific provisions should be introduced in other directives concerned, in particular the Unfair Contract Terms Directive.

Sector regulators do not consider the level of protection of vulnerable consumers as adequate, since they are more prone to be victims of unfair commercial practices, some market players specifically take as their clients only such consumers. Still, they have the same remedies as other consumers and often are helpless in enforcing their individual rights. Consumer association, the ECC Poland and the UOKiK – all mention the problem of Polish traders often targeting vulnerable consumers, especially older consumers in door-to-door sales and targeting young consumers through advertisement. It seems, however, that the level of protection would not increase just by changing legal provisions and, e.g., introducing a concept of vulnerable consumers to the UCTD. Rather, it would be more necessary to improve enforcement of the application of a different standard for assessment of commercial practices, if a vulnerable consumer is a target thereof.

1.4.5. EU added value

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

All stakeholders think that consumer protection has improved due to Europeanisation of consumer law. Sector regulators believe, however, and are adamant about it, that there are still too few individual remedies available to consumers. Moreover, consumer organisation claims that consumers could easier claim remedies on the basis of general contract and consumer law rather than provisions about protection against unfair commercial practices, e.g. they would rather try to terminate a contract as concluded under mistake, than invoke unfair commercial practices. The latter is due to the complex system of unfair commercial practices and its enforcement.

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

Stakeholders representing traders and consumers both believe this is so. Generally, not many issues have been noticed with regard to the proper provision of a price per unit to consumers.

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

Stakeholders did not have an opinion on this topic.

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

Stakeholders representing traders believe it is easier to trade cross-border nowadays and for consumers to purchase from foreign traders. There is even special advice given online by these stakeholders to traders inquiring about how to set up cross-border trade. Any problems that traders or consumers may encounter during their
cross-border experience are not, however, being reported back to traders’ associations.

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

All stakeholders think that consumer protection has improved due to Europeanisation of consumer law.
## A. Transposition fact sheet

### Table 1: Fact sheet on transposition of directives in Member States' law – Poland

<table>
<thead>
<tr>
<th>Directive</th>
<th>Transposition legislation (National law, Article)</th>
<th>Comments</th>
<th>Specific provisions going beyond minimum harmonisation requirements/use of exemptions</th>
<th>Included in national legislation</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Directive 93/13/EEC on unfair terms in consumer contracts</td>
<td>Act on protection of competition and consumers, last modified in August 2015 (Ustawa o ochronie konkurencji i konsumentów, 16 luty 2007, Dz. U. 2015 poz. 184)</td>
<td>'Grey list' of terms which may be considered unfair</td>
<td>Yes</td>
<td>Polish Civil Code, Article 385³</td>
<td>Extending the application of Directive to individually negotiated terms</td>
</tr>
<tr>
<td>Directive 93/13/EEC on unfair terms in consumer contracts</td>
<td>Article 385¹ (and further) Polish Civil Code</td>
<td>'Black list' of terms considered unfair in all circumstances</td>
<td>No</td>
<td></td>
<td>On the basis of old provisions of the Act on protection of competition and consumers (prior to April 2016), the UOKiK published a registry of decisions of the Court Protecting Competition and Consumers (SOKiK) on these standard terms and conditions that have been assessed as unfair in abstracto; this worked a de facto black list – even though only a given trader was prohibited from applying this term</td>
</tr>
<tr>
<td>Extension</td>
<td>Description</td>
<td>Law/Mandate</td>
<td>Description</td>
<td></td>
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<tr>
<td>No</td>
<td>Extensions of the application of Directive terms on the adequacy of the price and the main subject-matter</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>Assessment of unfair contract terms <em>in abstracto</em></td>
<td>Act on protection of competition and consumers, Article 23a, 24 &amp; 99a</td>
<td>Consumers, consumer ombudsmen, ombudsmen of the insured, consumer associations and foreign organisations entitled to start injunction proceedings, may notify the President of the UOKiK about an infringement regarding a trader using an abusive clause.</td>
<td></td>
<td></td>
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<tr>
<td>Yes</td>
<td>Contractual consequences of lack of transparency</td>
<td>Polish Civil Code, Article 385¹</td>
<td>Non-transparent standard terms and conditions perceived as contrary to the principle of good practices and thus unfair</td>
<td></td>
<td></td>
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</table>

### Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market

<table>
<thead>
<tr>
<th>Description</th>
<th>Law/Mandate</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Act on prevention of unfair commercial practices (<em>Ustawa o przeciwdziałaniu nieuczciwym praktykom rynkowym</em>, 23 August 2007, Dz.U. 2007 Nr 171 poz. 1206)</td>
<td>Provisions regarding financial services going beyond minimum harmonisation requirements</td>
<td>No</td>
</tr>
<tr>
<td>Provisions regarding immovable going beyond minimum harmonisation requirements</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Act on protection of competition and consumers, last modified in August 2015 (<em>Ustawa o ochronie konkurencji i konsumentów</em>, 16 luty 2007, Dz. U. 2015 poz. 184)</td>
<td>Application of UCPD to B2B transactions</td>
<td>No</td>
</tr>
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<td></td>
<td></td>
<td>Act on combating unfair competition (<em>Ustawa o zwalczaniu nieuczciwej konkurencji</em>, 16 April 1993, Dz.U. 1993 Nr 47 poz. 211) applies a similar test for recognizing misleading and comparative advertising in B2B claims as for unfair commercial practices, though.</td>
</tr>
</tbody>
</table>

¹ Non-transparent standard terms and conditions perceived as contrary to the principle of good practices and thus unfair.
<table>
<thead>
<tr>
<th>Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers</th>
<th>Enforcement of protection of collective consumer interests</th>
<th>Act on protection of competition and consumers, Article 24</th>
<th>Generally, unfair commercial practices harming collective interests of consumers are prohibited by this provision and the President of the UOKiK is entitled to protect these collective interests (also implementation of the Injunctions Directive).</th>
</tr>
</thead>
<tbody>
<tr>
<td>Act of 9 May 2014 on informing about prices of products and services (Ustawa z dnia 9 maja 2014 r. o informowaniu o cenach towarów i usług, Dz. U. 2014 poz. 915)</td>
<td>Extension of the application to other sectors (e.g. for immovable property)</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Directive 2006/114/EC concerning misleading and comparative advertising</td>
<td>Use of specific regulatory choices/derogations</td>
<td>Yes</td>
<td>Act of 9 May 2014 on informing about prices of products and services, Article 4</td>
</tr>
<tr>
<td>Act on combating unfair competition (Ustawa o zwalczaniu nieuczciwej konkurencji, 16 April 1993, Dz.U. 1993 Nr 47 poz. 211)</td>
<td>Penalization of unfair competition acts, including misleading and comparative advertising</td>
<td>Yes</td>
<td>Act on combating unfair competition, Article 25</td>
</tr>
<tr>
<td>Pursuant to Article 25 para 2 of the Act on combating unfair competition, unfair competition acts in the sphere of advertising can also be penalized. At the moment, there is a case pending at the Polish Constitutional Court submitted by the Polish Citizens’ Rights Ombudsman that this provision of law is not in compliance with the Polish constitution.</td>
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<tr>
<td>Directive 2009/22/EC on injunctions for the protection of consumers' interests</td>
<td>Act on protection of competition and consumers, last modified in August 2015 (Ustawa o ochronie konkurencji i konsumentów, 16 luty 2007, Dz. U. 2015 poz. 184)</td>
<td></td>
<td></td>
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</tbody>
</table>
### Table 2: Fact sheet on Injunctions Directive – Poland

<table>
<thead>
<tr>
<th>Issue</th>
<th>Answer</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Is the injunction procedure as foreseen by the Injunctions Directive regulated in your country separately (as a separate procedure or 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)?</td>
<td>- Yes, separate procedures in a single legal act</td>
<td>Act on protection of competition and consumers provides the President of the UOKiK with an authority to protect collective consumer interests. The President may thus start injunctions proceedings, negotiate with traders cessation of unfair practices etc. Article 99a (and further) of this Act regulate injunction proceedings against traders using unfair contract terms (see described in the text of the study). Art 100 (and further) of this Act regulate injunction proceedings when traders harm other collective consumer interests. One of the main differences in the procedures is that in case of injunctions related to the use of unfair contract terms only certain, specified categories of entities are entitled to notify the President of the UOKiK about this (Article 99a of the Act). In case of infringements of provisions on unfair commercial practices or implementing CRD – anyone may serve this notification (Article 100 of the Act). In case of procedure against infringement of UCPD- or CRD-based rules, the President of the UOKiK may also issue a temporary injunction for the trader to cease with such a practice, when continuation of this practice until a decision is issued could severely harm consumer interests (Article 101a of the Act).</td>
</tr>
<tr>
<td>Who is entitled to bring an action seeking an injunction?</td>
<td>- Designated public bodies&lt;br&gt;- Specified consumer associations&lt;br&gt;- Individual consumers&lt;br&gt;- Other</td>
<td>Under Article 100 of the above-mentioned Act – anyone may notify the President of the UOKiK, who then may seek an injunction. Under Article 99a of the above-mentioned Act – individual consumers, consumer ombudsmen, ombudsmen of the insured, consumer associations and foreign organisations entitled to start injunction proceedings may notify the President of the UOKiK, who then may seek an injunction.</td>
</tr>
<tr>
<td>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</td>
<td>- Administrative procedure</td>
<td>It is an administrative procedure, however, the appeal from the administrative decision is to be submitted to the District Court in Warsaw – Court Protecting Competition and Consumers (SOKiK) pursuant to Article 81 of the above-mentioned Act.</td>
</tr>
</tbody>
</table>
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.

| Who bears the costs of an injunction procedure? | - The costs are as a rule borne by the losing party -The qualified entities are exempted from costs | Pursuant to Article 77 of the above-mentioned Act trader who was found infringing the provision of the Act is bound to pay the costs of an injunction procedure. Para 2 of this provision specified that in justified circumstances traders may be obliged to pay the costs only partially or not at all. Article 78 specifies that regardless of the outcome of the procedure, traders may be obliged to pay costs resulting from their obviously wrongful behaviour (e.g. hiding information). Pursuant to Article 58 para 2 of the above-mentioned Act, if one of the parties asks of an expert’s opinion they may be obliged to pay a deposit to cover some of the expert’s costs. If no practice harming collective consumer interests is found, these expert’s costs are covered by the State Treasury, Article 58 para 3. |

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?

| 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 | Pursuant to Article 21 para 1 and 2 of the above-mentioned Act, any practice harming collective consumer interests is prohibited and examples from Annex I are only listed as indication of possible infringements of such collective interests |

Is protection of business’ interests covered by the injunctions procedure?  
If scope of application extended to the protection of business’ interests, please provide details in the comments column regarding type of business’ interests covered by the injunctions procedure

| Is protection of business’ interests covered by the injunctions procedure? | - No | |

Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations

| Is it possible to bring an injunction action jointly against several traders from the same economic sector or their associations | - No | |

Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID)

<p>| Is there an out-of-court preliminary stage in the injunction procedures? (not including the consultation stage under Art. 5 of the ID) | - Yes | Prior to the injunction procedure, pursuant to Article 47 para 2 of the above-mentioned Act the President of the UOKiK may conduct an explanatory procedure to e.g. establish whether there is an infringement justifying beginning of injunction procedures (Article 48). Additionally, pursuant to Article 49a of this Act, the President of the UOKiK does not need to start an injunction procedure but instead may address the trader and the trader may provide a statement on the matter |</p>
<table>
<thead>
<tr>
<th>Question</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Has your Member State taken specific measures regarding the prior consultation (Article 5 of the Injunctions Directive)?</td>
<td>Yes, requirement for party seeking injunction to consult with the defendant and a qualified entity</td>
</tr>
<tr>
<td>Does the national legislation provide for measures ensuring summary procedure? Please specify main characteristics of the procedure (subject matter/time limits) in the comments column.</td>
<td>Yes, before the UOKiK issues an administrative decision, it enables traders to negotiate a sort of settlement combined with the trader ceasing to continue with the unfair commercial practice. This settlement involves a trader suggesting a satisfying solution to the problem of the unfair commercial practice, e.g. introduction of a change in a consumer contract; lowering the price; repayment of undue collected fees; fulfilment of untrue promises; enabling consumers to terminate the contract or to file a complaint; providing required information. This solution presents thus a practical benefit for consumers (so-called in Polish “przysporzenie konsumenckie”).</td>
</tr>
<tr>
<td>Are there sanctions for non-compliance with the injunction order (Article 2(1) of the Injunctions Directive)? If sanctions in form of penalty or fine foreseen please specify in the comments column to who exactly should they be paid?</td>
<td>Yes, penalty of a fine for each day of non-compliance</td>
</tr>
<tr>
<td>Has your Member State taken specific measures regarding the publication of the decision and/or the publication of a corrective statement?</td>
<td>Yes, Pursuant to Article 107 of the Act, for every day of non-compliance the President of the UOKiK may fine a trader with a monetary fine of an equivalent of up to EUR 10 000</td>
</tr>
<tr>
<td>Is it possible to claim within the injunction procedure for sanctions for the infringement?</td>
<td>Yes, Pursuant to Article 23b of the Act if the President of the UOKiK assesses a standard contract term as unfair, the President may oblige the trader to issue a corrective statement in a form and with content as stated in the decision. The President of the UOKiK may also decide to publish the decision, partially or in full, at the trader’s expense. Article 26 of the Act states the same for other injunction procedures.</td>
</tr>
<tr>
<td></td>
<td>In its decision the President of the UOKiK may state what measures should be taken by the trader to remove consequences of the infringement of collective consumer interests (also Article 23b and 26 of the Act).</td>
</tr>
<tr>
<td>Question</td>
<td>Answer</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>--------</td>
</tr>
<tr>
<td>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?</td>
<td>No</td>
</tr>
<tr>
<td>Can an action for damages to be paid to the qualified entity or the public purse be brought within the injunction procedure?</td>
<td>No</td>
</tr>
<tr>
<td>Can an action for damages or redress to be paid to the consumers concerned be brought within the injunction procedure?</td>
<td>No</td>
</tr>
<tr>
<td>Can individual consumers base their individual claims for damages/remedies on the injunctions order?</td>
<td>Yes</td>
</tr>
<tr>
<td>Can the qualified entity claim other measures beyond the injunction, e.g. evidence of compliance with the judgment?</td>
<td>No</td>
</tr>
<tr>
<td>Are the effects of individual injunctions orders extended to the future infringements and/or same or similar illegal practices (of other traders)?</td>
<td>Yes - No</td>
</tr>
</tbody>
</table>
## Number of B2C disputes

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

<table>
<thead>
<tr>
<th>Year</th>
<th>Type of data</th>
<th>Total number of B2C disputes (number of cases)</th>
<th>Share of B2C disputes decided on basis of ...</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>UCPD</td>
<td>UCTD</td>
</tr>
<tr>
<td>2015</td>
<td>Inspection of Commerce (Inspekcja Handlowa) statistics</td>
<td></td>
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</table>

Note: There is no statistical data on this available. The UOKiK does not gather such data; Polish district courts pertinent to adjudicate in individual consumer cases do not generally publish their judgments; etc. there is little transparency of the individual consumer law enforcement in Poland. *Decisions regarding improper information about prices.

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

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

---

55 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)

<table>
<thead>
<tr>
<th>Redress mechanism</th>
<th>Estimated court fees (national currency)</th>
<th>Estimated lawyer’s fees (national currency)</th>
<th>Other costs, if any (national currency)</th>
<th>Estimated time involved for consumer (hours)</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lower court procedure</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ADR or other relevant procedure</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Notes: There is no statistical data on this available. Consumer cases are not standard and may take from months to (more likely) years, at different courts, with different representation fees being applicable.

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

A consumer went on a package holiday with a friend to Kenya for which they paid €2000 per person. The holiday was a disaster. The flight was delayed by 12 hours. The air conditioning in the hotel was not working at all. The safari trip took place but not in the park they had been promised; on top of that, they were transported there by bus instead of by plane. They complained to the tour operator and asked for compensation amounting to a total of €5,000 (€4,000 for the cost of the package and €1,000 for lost time and enjoyment). The tour operator agreed to compensate them €1,000 only, pointing to a provision in the contract limiting the organiser’s liability to 25% of the total cost of the holiday. When the consumer asked, her local consumer association told her that terms which inappropriately limit the trader’s liability in case of inadequate contractual performance are most probably unfair. The consumer decided to take the tour operator to court to enforce her rights.


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

There is no statistical data on this available.
C. Interviews conducted and literature reviewed

Table 5: Interviews conducted for this study

<table>
<thead>
<tr>
<th>Organisation</th>
<th>Stakeholder type</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>KPF (Conference of Polish Financial Businesses)</td>
<td>Business association</td>
<td>05-07-2016</td>
</tr>
<tr>
<td>KIG (Polish Chamber of Commerce)</td>
<td>Business association</td>
<td>12-07-2016</td>
</tr>
<tr>
<td>UOKiK (Office of Competition and Consumer Protection)</td>
<td>National consumer enforcement authority</td>
<td>27-07-2016</td>
</tr>
<tr>
<td>UKE (Office of Electronic Communication)</td>
<td>National regulatory authority</td>
<td>27-06-2016</td>
</tr>
<tr>
<td>URE (Office of Energy Regulation)</td>
<td>National regulatory authority</td>
<td>06-07-2016</td>
</tr>
<tr>
<td>European Consumer Centre</td>
<td>European Consumer Centre</td>
<td>19-07-2016</td>
</tr>
<tr>
<td>Federacja Konsumentów (Consumer Federation)</td>
<td>Consumer organisation</td>
<td>18-07-2016</td>
</tr>
</tbody>
</table>
Table 6: Literature reviewed for country report

<table>
<thead>
<tr>
<th>Author/Source</th>
<th>Year</th>
<th>Title of publication</th>
</tr>
</thead>
<tbody>
<tr>
<td>M. Namysłowska &amp; A. Piszcz (eds.)</td>
<td>2016</td>
<td>Ustawa o zmianie ustawy o ochronie konkurencji i konsumentow z 5.8.2015 r. Komentarz. C.H. Beck</td>
</tr>
<tr>
<td>M. Namysłowska</td>
<td>2014</td>
<td>‘Stosowanie dyrektywy 2005/29/WE o nieuczciwych praktykach handlowych w swietle pierwszego sprawozdania Komisji’ in: Europejski Przegląd Sadowy vol. 2</td>
</tr>
<tr>
<td>K. Horubski</td>
<td>2014</td>
<td>‘Nieuczciwosc praktyki rynkowej w swietle ustawy o przeciwdzialaniu nieuczciwym praktykom rynkowym’ in: Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu vol. 372</td>
</tr>
<tr>
<td>K. Kopaczyńska-Piecznia</td>
<td>2012</td>
<td>‘Czyn nieuczciwej konkurencji a nieuczciwa praktyka rynkowa’ in: Monitor Prawa Handlowego vol. 3</td>
</tr>
<tr>
<td>I.B. Nestoruk</td>
<td>2011</td>
<td>‘Marketing ekologiczny w prawie polskim – przegląd regulacji’ in: Prace z Prawa Własności Intelektualnej vol. 113</td>
</tr>
<tr>
<td>R. Stefanicki</td>
<td>2010</td>
<td>‘Wymogi staranności zawodowej przedsiębiorcy (w swiecie dyrektywy o nieuczciwych praktykach handlowych)’ in: Panstwo i Prawo vol. 3</td>
</tr>
<tr>
<td>M. Namysłowska</td>
<td>2010</td>
<td>‘Znaczenie czarnej listy nieuczciwych praktyk handlowych – uwagi na tle orzecznictwa TS’ in: Europejski Przegląd Sadowy vol. 8</td>
</tr>
<tr>
<td>G. Rączka</td>
<td>2010</td>
<td>‘Niedozwolone postanowienia umowne w umowach rachunku bankowego’ in: Przegląd Prawa Handlowego vol. 4</td>
</tr>
<tr>
<td>M. Grochowski</td>
<td>2009</td>
<td>‘Wadlność umów konsumenckich (w swiecie przepisów o nieuczciwych praktykach rynkowych) in: Panstwo i Prawo issue 7</td>
</tr>
<tr>
<td>D. du Cane</td>
<td>2009</td>
<td>‘Nieuczciwa konkurencja a dobre obyczaje oraz class action po polsku’ in: Przegląd Prawa Handlowego vol. 3</td>
</tr>
<tr>
<td>R. Stefanicki</td>
<td>2009</td>
<td>‘Dyrektwy 2005/29/WE o nieuczciwych praktykach handlowych i jej implementacja do krajowego systemu’ in: Przegląd Prawa Handlowego vol. 1</td>
</tr>
<tr>
<td>M. Namysłowska</td>
<td>2008</td>
<td>‘Reklama porównawcza w orzecznictwie ETS’ in: Europejski Przegląd Sadowy vol. 1</td>
</tr>
<tr>
<td>M. Namysłowska &amp; K. SztorbYN</td>
<td>2008</td>
<td>‘Ukryta reklama po implementacji dyrektywy on nieuczciwych praktykach handlowych’ in: Panstwo i Prawo vol. 11</td>
</tr>
<tr>
<td>M. Sieradzka</td>
<td>2008</td>
<td>‘Prawonarzne aspekty stosowania nieuczciwych praktyk rynkowych’ in: Nowa Kodyfikacja Prawa Karnego vol. XXIII; Wrocław (2008a)</td>
</tr>
<tr>
<td>M. Sieradzka</td>
<td>2008</td>
<td>‘Actio popularis jako instrument ochrony interesów konsumentów przed nieuczciwymi praktykami rynkowymi’ in: Przegląd Prawa Handlowego vol. 3 (2008b)</td>
</tr>
<tr>
<td>Autor</td>
<td>Rok</td>
<td>Tytuł i Źródło</td>
</tr>
<tr>
<td>-------</td>
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</tr>
<tr>
<td>M. Strzelecki</td>
<td>2008</td>
<td>‘Klauzula generalna nieuczciwej praktyki rynkowej’ in: <em>Przeglad Prawa Handlowego</em> vol. 11</td>
</tr>
<tr>
<td>B. Gliniecki</td>
<td>2008</td>
<td>‘Ustawa o przeciwdziałaniu nieuczciwym praktykom rynkowym’ in: <em>Monitor Prawniczy</em> vol. 1</td>
</tr>
<tr>
<td>M. Jagielska</td>
<td>2007</td>
<td>‘Skutki wpisu postanowienia wzorca umownego do rejestru niedozwolonych postanowień’ in: <em>Europejski Przegląd Sadowy</em> vol. 5</td>
</tr>
<tr>
<td>M. Namysłowska</td>
<td>2007</td>
<td>‘Nowa ustawa o przeciwdziałaniu nieuczciwym praktykom rynkowym’ in: <em>Monitor Prawniczy</em> vol. 23</td>
</tr>
<tr>
<td>A. Kunkiel-Krynska</td>
<td>2007</td>
<td>‘Nowe rozwiązania prawa ochrony konsumenta w dyrektywie o nieuczciwych praktykach rynkowych’ in: <em>Europejski Przegląd Sadowy</em> vol. 8</td>
</tr>
<tr>
<td>Ł. Wściubiak</td>
<td>2007</td>
<td>‘Dobre obyczaje w ustawie o przeciwdziałaniu nieuczciwym praktykom rynkowym’ in: <em>Przeglad Prawa Handlowego</em> vol. 11</td>
</tr>
<tr>
<td>J. Pisuliński</td>
<td>2005</td>
<td>‘Niedozwolone klauzule umowne w obrocie bankowym na wybranych przykładach’ in: <em>Prawo Pankowe</em> vol. 6</td>
</tr>
<tr>
<td>K. Kruszewska-Sobczyk &amp; M. Sobczyk</td>
<td>2004</td>
<td>‘Niedozwolone klauzule w umowach zawieranych przez konsumenta’ in: <em>Radca Prawny</em> vol. 4</td>
</tr>
<tr>
<td>M. Jagielska</td>
<td>2000</td>
<td>‘Niedozwolone klauzule umowne: nowelizacja kodeksu cywilnego’ in: <em>Monitor Prawniczy</em> vol. 11</td>
</tr>
<tr>
<td>F. Zoll</td>
<td>1993</td>
<td>‘Niedozwolone klauzule w umowach konsumenckich’ in: <em>Kwartalnik Prawa Prywatnego</em> vol. 2</td>
</tr>
</tbody>
</table>