CONSUMER JUSTICE ENFORCEMENT FORUM II

MAY 2016

ENFORCEMENT OF CONSUMER RIGHTS: STRATEGIES AND RECOMMENDATIONS

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Enforcement of consumer rights: Strategies and recommendations

May 2016

The final project guidelines were prepared with the support of Professor Evelyne Terryn (University of Leuven), Professor Geraint Howells (on leave from University of Manchester at City University of Hong Kong) and Professor Hans Micklitz (European University Institute).

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SUMMARY OF PROJECT FINDINGS – KEY MESSAGES

- **Public and private together:** Consumer organisations have been and will remain the front-runners in relation to consumer law enforcement, particularly in the digital marketplace. They are the watchdogs of the market. Public and private enforcement are not mutually exclusive: to the contrary, they strengthen each other provided an appropriate framework for co-operation exists.

- **Need for structural rules on national and transborder co-operation in consumer law enforcement:** Structural co-operation between consumer organisations and public authorities may take different forms: from regular information exchanges and consultations to joint media campaigns and so forth. This co-operation should be reinforced through the possibility of enforcement requests that the authority must act upon and investigate.

- **Need for complaints collection:** The early detection of market failure and consumer problems in quickly-evolving markets remains crucial. This requires a developed and widely standardised system for the electronic collection and evaluation of consumer complaints across the EU. The barriers of fragmented and dispersed collection systems urgently need to be overcome through the development of appropriate common schemes across Europe to guarantee the effective exchange of information, both between consumer organisations and between consumer organisations and public authorities.

- **Need for collective action beyond injunctions:** Being able to rely on an effective procedure for collective redress is paramount if consumers are to directly benefit from successful enforcement and the work of consumer organisations. The EU recommendation on collective redress, which still awaits implementation in many Member States, provides for a minimum standard.

- **Need for consumer law enforcement through information technology:** The emerging debate on using information technology in particular through the development of self-learning algorithms should be forcefully promoted and made available to consumer law enforcement through consumer associations and public bodies.

- **Need for new approach towards Europe-wide effect of administrative action and judgments:** Competition law is ahead of consumer law. Experience with co-ordinated enforcement action shows that an injunction in one country does not guarantee that a transnationally operating company will change its practices in other EU countries. Whilst information exchange as well as co-operation with national enforcement authorities and the use of social media remain crucial, European standards on the transborder effect of enforcement actions are needed.

1. Introduction

1.1. Background

This project builds on the conclusions of the Consumer Justice Enforcement Forum (CoJEF) project (2011-2013) which received 'Civil Justice' programme funding, 2007-2013 (JUST/2013/JCIV/AG)".
CoJEF II started on 1 of March 2014 and ran for two years.

1.2. Partners, secretariat, participants, advisers

BEUC, The European Consumer Organisation, managed the project with a secretariat comprising Ursula Pachl, Deputy Director General who was the project co-ordinator, Augusta Maciuleviciute (Senior legal officer); Agustin Reyna (Senior Legal Officer); Christoph Schmon (Legal Officer); Patrycja Gautier (Enforcement Officer); Rosa Santa Barbara (Project Secretary); Philippe Dellis (Web-site Manager) and Axel Jansen (Finance Manager).

The project partners are ten consumer organisations from different Member States. This broad geographical coverage ensures that all different European enforcement cultures are represented and discussed within the Forum.

The Forum is supported by three academic experts on European consumer law, Professor Geraint Howells (on leave from University of Manchester at City University of Hong Kong), Professor Hans Micklitz (European University Institute) and Professor Evelyne Terryn (University of Leuven).

The project partners are ten independent national consumer associations:

- **Austria:** Verein für Konsumenten-information – www.verbraucherrecht.at
- **Belgium:** Association Belge des Consommateurs – www.test-achats.be
- **France:** UFC - Que Choisir - www.quechoisir.org
- **Germany:** Verbraucherzentrale Bundesverband - www.vzbv.de
- **Italy:** Altroconsumo - www.altroconsumo.it
- **Poland:** Federacja Konsumentow - www.federacja-konsumentow.org.pl
- **Portugal:** Associaçao Portuguesa para a Defensa do Consumidor - www.deco.proteste.pt
- **Slovenia:** Zveza Potrošnikov Slovenije - www.zps.si
- **The Netherlands:** Consumentenbond - www.consumentenbond.nl
- **United Kingdom:** Which? - www.which.co.uk

1.3. Objectives

Strengthening the enforcement of EU and national consumer laws by enhancing networking and training among consumer organisations. This was be achieved by exchanging best practices, sharing experience and training consumer organisations' lawyers to develop enforcement strategies which include problem analysis and solution mechanisms in both a national and European perspective while exploring and better exploiting cooperation between consumer organisations, public authorities and other actors.

1.4. Activities

1.4.1. Forum meetings

Aim: Discussion of cases, exchanged of information, exploring of enforcement strategies and various synergies, training and coaching.

Themes: online services, unfair commercial practices, telecommunications, geoblocking, consumer guarantees, car emission scandal, online platforms.

Academic research before the forum meetings: report on online services.

Brussels 3-4 July 2014	Online services
Milan 11-12 December 2014	Unfair commercial practices
Riga 18-19 April 2015	Telecommunications
Brussels 3-4 December 2015	Geoblocking / consumer guarantees
Florence 21-22 March 2015	Car emission scandal – liability of online platforms in B2C transactions

1.4.2. Policy debate on enforcement of consumer rights

Brussels 21 April 2015
Theme: Consumer rights enforcement in digital markets /Pan-European enforcement in related areas

1.4.3. Coaching exercise

- Unfair credit agreements: DECO – Associação Portuguesa para a Defesa do Consumidor -Latvian National Association for Consumer Protection (LNACP)
- Additional costs in the telecom sector: Which? UK - Zveza potrošnikov Slovenije (ZPS) - Ziva Drol Novak (ZPS), Slovenia
- Billing for mobile telephony - Verbraucherzentrale Bundesverband e.V. (vzbv) e.a. - Helke Heidemann-Peuser - Zveza potrošnikov Slovenije (ZPS) - Ziva Drol Novak (ZPS)

1.4.4. Dissemination

Dissemination of the information exchanged is not only important for the partners involved, but also for other consumer organisations, other stakeholders and regulators and legislators.

For this reason, a website has been maintained with important cases, as well as the presentations of the seminars and meetings of the past events.

The final report with the conclusions and guidelines of the CoJEF II will also be published on the website and widely disseminated both electronically and on paper.

This information enables consumer organisations to learn about and compare enforcement results/solutions of various countries for similar problems.

2. Enforcement cases

2.1. Introduction

The cases mentioned below are a selection of the cases discussed during the CoJEF II project. This exchange of information concerned both strategic, legal and practical aspects of enforcement and enforcement cooperation, both between consumer organisations and with public authorities and other actors.

Notwithstanding the differences in legal systems and in the resources available to consumer organisations, the problems confronted with are often similar. Precedents, experience and best practices in one Member State are therefore not only a fruitful ground for action across the borders, but the exchanged of information also ensures a more efficient and effective enforcement, building on accumulated experience.

2.2. Unfair commercial practices – car sector

CASE 1

Title of the case:	Misleading fuel consumption
Consumer organisation, country:	Altroconsumo, Italy v Volkswagen, Fiat
Business sector concerned:	car industry

Facts

Car manufacturers measure the fuel consumption of their cars using an outdated test called the New European Driving Cycle (NEDC). This test allows for manipulation leading to unrealistically low fuel consumption results. Consumers are thus misled about the real fuel consumption of the car and can end up paying more on fuel costs than expected.

A new and more appropriate test procedure, the Worldwide harmonized Light vehicles Test Procedure (WLTP) has been developed and is expected to be introduced under EU law.

BEUC is campaigning (http://beuc.eu/great-fuel-consumption-scam) in order to obtain the adoption by the EU of the WLTP from 2017 onwards. The WLTP is expected to close many of the loopholes currently exploited by car manufacturers and better simulate real driving conditions, with more modern and realistic driving scenarios.

Altroconsumo tested in a certified laboratory, on the basis of the requirements prescribed by the law, the fuel consumption of a Fiat Panda and a Volkswagen Golf. The results revealed a significant misalignment with respect to consumption data publicized by the two producers/retailers: Volkswagen Golf 1.6 TDI 7 + 50%; Fiat Panda 1.2 + 18%.

On the basis of these findings, Altroconsumo announced two Class Actions for unfair commercial practices against Fiat and Volkswagen asking for compensation for damage suffered by consumers. The class of possible adherents are the consumers that have purchased the two car models tested. The damages requested are the increased consumption of the vehicles from those stated by the manufacturer.

A calculator on the Altroconsumo website, allows consumers to calculate what they can recover by joining the class action.

Legal background

Directive 2005/29/EC on unfair commercial practices prohibits misleading practices.

This among others includes misleading information concerning the main characteristics of the product, such as the results to be expected from its use, or the results and material features of tests or checks carried out on the product (article 6).

Article 7 of the Directive also prohibits misleading omissions, i.e. omitting material information the average material information that the average consumer needs, to take an informed transactional decision.

The directive itself does not provide for private law sanctions (such as damages) in case of infringement; however, national laws may well provide for such sanctions. This is the case in Italy.

The relevant Italian provisions were: Art 20 ff Italian Consumer Code - Article 140 bis Italian Consumer Code (class action).

Follow – up and outcome

Two class actions were introduced before the court of Torino (FIAT) and Venezia (Volkswagen) in February 2015 on the basis of unfair commercial practices and misleading advertisement.

The first step in the process is a decision on the on the admissibility of the class actions.

In the Fiat case, the action was admitted (on appeal). A 4 months period to compose the class was given (ending in April 2016). More than 200.000 consumers were contacted through the list of Panda owners obtained from the public register.

In the VW case, the class action was refused at first instance, the appeal is now pending. More than 10.000 consumers are engaged thus far.

The action taken in this case was however not limited to the mere court action. The momentum created by the action was also used in order to reinforce the mentioned BEUC lobbying campaign on emission standards.

The tests were copied in other countries (eg Belgium) where similar results were communicated to consumers. No court actions have been started yet as the outcome of the Italian case is awaited. A website with a similar calculator was launched in Belgium.

Consumers were strongly involved in this case and a broad audience could be reached through the use of several innovative means of communication:

- Altroconsumo announced the plan to test at least one other car. Consumers could vote for specific cars. Altroconsumo announced its intention lodge a further class action for the most “voted” additional car. This allowed to expand the audience of interested consumers and to experience a “participated class action”.
- New tools of communication were used (including video, social media seeding (twitter, facebook, lobbypro), a call center for non members interested in the action and in calculating the refund etc) in order to reach as many consumers as possible.

Further attention and media coverage was guaranteed through the later Dieselgate scandal that also involved Volkswagen. Altroconsumo was the first to have introduced an action against VW for misleading practices (for fuel consumption). This information was stressed and made public again during the Dieselgate scandal and ensured extra media attention, again allowing Altroconsumo to reach a wider audience.

Recommendations

This case illustrates the benefits of a comprehensive approach towards enforcement.

The investment in information and communication about court case can also be used to reinforce a parallel lobbying campaign for better legislation. The use of novel ways of communication, including social media and internet, and a participative class action, allowing consumers to be involved in certain choices in the enforcement process allows to reach a broader audience and thus to increase the impact of a class action. Online visibility and playing a forefront role in a consumer scandal ensures widespread and attention and leads to a larger audience being reached.

The implication of global players and standards that are used European wide, in combination with a European prohibition of misleading practices allows to replicate the action in other countries where similar misleading practices are involved. This however, requires the necessary funding for court actions. In the absence of sufficient funding for court actions, a first step is already informing the consumer of the misleading character of the fuel consumption communicated.

A decision on the merits confirming the misleading character of the practice will be helpful to duplicate this action in other Member States.

2.3. Unfair commercial practices – advertising directed at children

CASE 2

Title of the case: Advertising in schools
Consumer organisation, country: VKI, Verein für Konsumenteninformation, Austria v Raiffeisenlandesbank
Business sector: financial services / education
Handelsgericht Wien 17 October 2014 - settlement

Facts of the case

The bank visited several schools during school hours and distributed commercial material to children in schools, inciting children to open a bank account, more specifically a pocket money account. Slogans were used as: 'Visit us with your parents in the nearest Raiffeisenbank and collect your personal Burton rucksack and Junior Card". The bank also offered a gift in return for personal data for marketing purposes.

Legal basis

Not mentioned in the settlement.

Directive 2005/209/EC prohibits unfair commercial practices; including aggressive practices.

Annex I, nr. 28 of the directive prohibits as unfair in all circumstances: 'Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them.'

The data protection directive and the ePrivacy Directive (Directive 2002/58/EC on privacy and electronic communications – prohibits the use of automated calling systems without human intervention (automatic calling machines), fax or e-mail for the purposes of direct marketing in respect of subscribers who have not given their prior consent). It is questionable that a 'free' consent to use personal data for direct marketing is given if the gift is made dependent upon such consent.

Outcome

The case was settled and the settlement was approved by the commercial court of Vienna.
The bank agreed to stop the mentioned practice and also to abstain from directly addressing children in schools, to avoid offering an account by means of an attractive gift that could only be obtained if they provided their personal data for marketing purposes. In addition, the bank agreed to abstain from offering an attractive gift to children on condition that they would convince friends to open an account. The bank finally agreed to abstain from collecting personal data of the children during commercial sessions during school hours.

Recommendations

The case illustrates that settlements are possible and can provide a swift solution in case where the infringements are clear cut.

The case also illustrates a disadvantage of settlements, there is no court decision prohibiting the practice on a legal basis that can be used as a precedent for other consumer organisations.

CASE 3

Title of the case: Gameforge
Consumer organisation, country: Bundesverband der Verbraucherzentralen & Verbraucherverbände, Germany
Business sector: online services – games
Bundesgerichtshof 18 September 2014, Az.: I ZR 34/12[1]

Facts of the case

The case concerned in-app purchases and advertising directed at children.

The company concerned offered on online game under the name ‚Runes of Magic' – a fantasy role playing game. The programme could be downloaded for free. However, the opportunity was given to buy additional armor and weapons and equipment for the characters in the game. Payment was inter alia possible by SMS. The following slogan was used: 'This week you are having another chance to pimp your character. Snap the opportunity to give the certain „something" to your armor and weapons!'.[2]

Clicking on a link in the slogan then allowed players to see the prices and gadgets and accessories and to purchase them.

Legal background

Directive 2005/209/EC prohibits unfair commercial practices; including aggressive practices.

Annex I, nr. 28 of the directive prohibits as unfair in all circumstances: 'Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them.'

Outcome

The practice was prohibited by the BGH. The Court decided that - for a direct exhortation to children (nr. 28 of the Annex to the Unfair Commercial Practices Directive), it is not compulsory that the exhortation to buy products exclusively addresses children. For the applicability of Number 28 of the Annex it is necessary but also sufficient that the advertisement is *also* directed to children. This is also the case if the group targeted mainly consists of adults.[3] The argument of the company that 85 percent of the gamers were adults and that the average age was 32 was therefore dismissed.

The answer to the question whether or not a *direct* exhortation is given to children to buy advertised products depends on the overall context of the advertising. The Court concluded that in the case at hand there was a direct exhortation. Relevant factors were the language used (the familiar form was use as well as child friendly, simple language and terms that are typical for children). The fact the consumers had to click on a link to see and buy the advertised products did not stand in the way of the qualification as a 'direct exhortation' – it was sufficient that consumers considered the site as a whole.

[1] Full text available at : http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=69114&pos=0&anz=1.
[2] Translation of 'Diese Woche hast Du erneut die Chance Deinen Charakter aufzumotzen!
Schnapp Dir die günstige Gelegenheit und verpasse Deiner Rüstung & Waffen das gewisse 'Etwas'!'.
[3] Bundesgerichtshof 18 September 2014, Az.: I ZR 34/12.

CASE 4

Title of the case: Disney Universe
Consumer organisation, country: VKI Verein für Konsumenteninformation, Austria
Supreme Court OGH 09.07.2013 4 Ob 95/13v[4]
Business sector: online services – games

Facts of the case

The Austrian 'Disney Universe' concerned similar facts as the German Gameforge case. On the website concerned videos and DVD's were marketed, as well as online games and music of inter alia 'Hannah Montanah' with slogans as *'See your series on DVD', 'Get your cool soundtrack'*, with a link to an Amazon internet site where the DVD's and CD's could be bought.

Legal background

Directive 2005/209/EC prohibits unfair commercial practices; including aggressive practices.
Annex I, nr. 28 of the directive prohibits as unfair in all circumstances: 'Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them.'

Outcome

The OGH did not find an infringement of nr. 28 of the Annex. There was no 'direct exhortation'. The Court induced this inter alia from the fact that an extra step was necessary between the invitation to purchase and the actual decision to buy. In case only the addressee of the commercial communication can take that step and not the advertiser, there is no 'direct exhortation'.

The mere pointing out of the possibility to buy is therefore not contrary to Annex I, nr. 28 according to the OGH. The advertising was considered to be a mere invitation to use the product, in order to decide whether or not to buy the product an additional step was necessary, a step that had to be taken by the children themselves.

Recommendations and findings

Both the German and the Austrian case law make clear that very direct messages directed at children as 'buy now' or 'upgrade now' are contrary to Annex I, nr. 28 Unfair Commercial Practices Directive.[5]

There seems however to be a discrepancy in the decisions of the BGH and the OGH concerning messages that are less direct.

Whereas for the BGH, a direct exhortation is also possible even if further steps (like clicking on a link) are necessary actually to see and buy the products offered, as long as users consider the pages to constitute one whole.

[4] Full text of the decision available at:
https://www.ris.bka.gv.at/JustizEntscheidung.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20130709_OGH0002_0040OB00095_13V0000_000&IncludeSelf=True.

[5] See eg OGH 18.09.2012 4 Ob 110/12y = wbl 2012, 655. The following advertising was considered a direct exhortation: *'Stickersammelbuch mwN: „Hol' dir hier das Buch dazu. Stickersammelbuch zum Sensationspreis EUR 1,99"*. In the same sense; OGH 19.03.2013 4 Ob 244/12d: „Stickerbuch holen und Sticker sammeln. Hol dir jetzt dein Stickerbuch. EUR 1,99.").

For the OGH on the other hand, the fact that further steps were necessary to take a decision (in the form of clicking on a link) was considered material to reject the qualification as a direct exhortation.

It is regrettable that neither court considered it necessary to refer the issue to the CJEU. This practice is a blacklisted practice and that list is exactly supposed to provide legal certainty. Different interpretations by the highest national courts are definitely not helpful to come to the uniform interpretation of a full harmonisation directive. One way out would be to encourage the highest courts in the country to investigate ex officio whether there is a deviating Supreme court judgment in another member state.

2.4. Telecom sector

CASE 5

Title of the case: Unlock mobile phones campaign (unfair commercial practices and unfair contract terms
Consumer organisation, country: Which?, UK

Facts

Nearly half of mobile phone owners do not switch immediately when their contract ends. Which? calculated that mobile users are collectively losing out on £5.4bn a year by being on the wrong contract. Which? therefore wants providers to make switching easier by telling consumers when their contract is ending as well as providing details of the best deals and unlocking handsets for free.

A specific problem is that most providers do not separate the costs of the handset from calls, texts and data. Consumers often continue to pay for a phone they have already paid off. In addition, consumers were being charged to unlock their phone at the end of their contract.

A campaign was launched, that was signed by more than 75,000 consumers.

Legal basis

No court actions were considered but a lobbying and media campaign for stricter regulation was launched.

Directive 2005/29/EC on unfair (including misleading) commercial practices might have been helpful for intransparent advertising.

Directive 93/13/EEC on unfair contract terms might have been relied on for unclear pricing clauses.

Consumer credit directive 2008/48/EC may be applicable to contracts that offer 'free' phones that are paid through a subscription (see below for Dutch case law in this regard).

Outcome

In March 2016 the mobile operator EE announced ending the practice of locking phones upon termination of the contract to match similar policies from O2 and Three.

In addition, the regulator Ofcom announced proposals for quicker and easier switching by launching a public consultation in March 2016.[6] Its preferred option is the 'gaining provider-led' process for switching. This would place responsibility for the switch, including the transfer of a customer's mobile phone number, entirely in the hands of their new provider.

The UK Government, in its Budget 2016, stated that all consumers should be free to have their handset unlocked at the end of a contract without paying.

Which? continues to campaign for providers to show the monthly cost of the handset separately from the service charge, to automatically stop charging for the handset when the minimum contract period ends and for 'gainer led' switching to be implemented quickly.

[6] http://consumers.ofcom.org.uk/news/simpler-mobile-switching/.

Recommendations and findings

Although the mentioned directives can provide a legal basis for action, stricter legislation on switching and termination of telephone contracts provides better protection.

The Belgian Telecom legislation can be a source of inspiration. The Telecom Act was changed in 2012.[7] It now allows consumers to terminate their phone contracts without charge. This applies both to contracts of unlimited duration and to contracts for a limited duration, once a six month period has elapsed.

Even for contracts with a limited duration it is possible to terminate the contract within the first six months, but charges may than be incurred (with as a maximum the subscription fee due for the remaining period of the six months).

In case the subscription for a limited period was linked to a 'free' phone, the consumer may be charged the residual value of the device. An amortization table must be added to the contract, indicating the residual value of the device of the remainder of the contract of limited duration. The maximum period of amortization of the device is 24 months.

[7] For the full text of the Telecom Act: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2012071004&table_name=loi.

CASE 6

Title of the case: Mobile phone pricing campaign
Consumer organisation, country: Which?, UK

Facts

Following complaints on unclear pricing strategies and price rises by mobile phone operators, Which? started a campaign: 'Fixed Means Fixed'. The aim of the campaign was to ensure that consumers were not subject to price rises during the minimum term of the contract.

Which? carried out research that demonstrated that nearly 50 percent of consumers do not know what the RPI (the Retail Prices Index that was referred to in the price variation clauses) means, and eight in 10 consumers do not know what the current rate of RPI is. Which? found that even reading through the small print was not sufficient to be fully informed of the consequences of entering into a contract.

Legal basis

Directive 2005/29/EC on unfair commercial practices

Article 6 prohibits misleading practices; the use of an unfair contract term may also constitute an unfair commercial practice (C-453/10 - Pereničová en Perenič - ECLI:EU:C:2012:144)

Directive 93/13/EEC on unfair contract terms. Although this directive does not rule out price variation clauses, strict requirements concerning the transparency of such clauses follow from the directive (See in particular cases Invitel C-472/10 - ECLI:EU:C:2012:242 and RWE C-92/11 - ECLI:EU:C:2013:180)

Outcome

More than 60.000 consumers supported the campaign. This campaign also allowed consumers to vote between four potential options for action for Ofcom. 90% voted for the possibility to leave the contract without penalty if the price goes up.

As a consequence of the campaign the regulator Ofcom launched a public consultation. This eventually led to new rules issued by Ofcom allowing consumer to leave a contract without penalty in case of mid-contract price rises.[8]

Recommendations

The campaign illustrates the strength of participative actions and of cooperation with regulators.

Consumer organisations can collect relevant information on market failure, consumer participation increases the pressure on the regulator and also provides possibilities for consumer education, empowerment and information. An internet tool was created to sign an online petition and to vote between different options. Consumers were called upon to use social media to contribute to better information on the new rules.

These successful campaigns were later on copied during the coaching exercise described below. It is thus possible to use the expertise gained and the result obtained in one country to create changes also in other countries.

[8] For more information see http://www.which.co.uk/campaigns/mobile-phone-price-rises/track-our-progress/.

CASE 7

Title of the case: Telefonica (O2) – Misleading pricing
Consumer organisation, country: Which?, UK
ASA adjudication 3 February 2016[9]

Facts

The case concerned price indication of mobile phone contracts provided by O2 in a press advertisement and on their website. The provider did not mention the fact that the price would increase (linked to inflation) in the headline price, but buried this in the small print at the bottom of the ad.

Linked to its Fixed Means Fixed campaign (see Case 6 above), Which complained to the Advertising Standards Authority.

Legal basis

The ASA decided on the basis of the CAP Code (that inter alia prohibits misleading practices).

The principles on misleading advertising in the CAP code are based on in the following legal standard:

Directive 2005/29/EC on unfair commercial practices

Article 6 prohibits misleading practices, including practices that mislead about the price or the manner in which the price is calculated, or the existence of a specific price advantage (article 6 (d)).

Outcome

The ASA upheld Which's complaint. It considered that, because the monthly price of the contract was likely to be of significant importance to consumers when deciding on a mobile phone contract, the monthly tariff increase within the term of the contract amounted to a significant term, which should be made clear to a consumer. Given the significance of the information, the ASA considered it should have been clearly and prominently presented within the ad. The ad failed to make clear the retail price index price rise to the airtime plans and was misleading.

Recommendations and findings

The Which? complaint that was eventually upheld by the ASA followed action by Ofcom (the telecoms regulator) to stop phone providers giving themselves a contractual discretion to increase prices during the contract term. To circumvent Ofcom's guidance on this point, companies began to use contract terms that mandated an inflation-linked price rise - i.e. the price rise was no longer discretionary but was linked to inflation.

Which? argued that, if the price of a phone package was set to rise during the contract term, this must be made clear in any advertising. The ASA agreed. The complaint and Ofcom decision was part of the wider campaign on transparency in mobile phone pricing that was described above.

Having recourse to self-regulatory bodies in those countries where they exist is definitely an option to consider for a consumer organisation when confronted with misleading advertising practices.

[9] Full text of the adjudication: https://www.asa.org.uk/Rulings/Adjudications/2016/2/Telef%C3%B3nica-UK-Ltd/SHP_ADJ_258322.aspx

CASE 8

Title of the case: A1 Mobilkom Austria– Misleading pricing
Consumer organisation, country: VKI, Austria
Supreme Court Austria (OGH) 22 May 2007, 4 Ob 93/07

Facts

A1 Mobilkom Austria listed every detail of its pricing strategy in its marketing, except for the „activation fee", although it amounted to 49,90 Euro. In the contract form there was a reference to an „activation fee according to our terms" – directly under the signature field.

Legal basis

Directive 2005/29/EC that prohibits misleading practices
Directive 93/13/EEC that prohibits unfair contract terms and requires contracts terms to be transparent.

Outcome

The Court upheld VKI's claim. The reference to an activation fee should also be mentioned in the tariff plan, that is so detailed that it appears to be comprehensive.

The clause concerning the activation fee was considered intransparent by the court.

A mere reference to the cost in the application form to the ‚activitation fee according to our terms' was not sufficient.

The argument of the Operator that it was commonly known that such fee was due and that its practice was therefore not misleading was dismissed.

Recommendations and findings

The VKI action for injunction was succesful and the specific practice had to be stopped.

However, the case also illustrates that limitations of an action for injunction. The action did not lead to the reimbursement of the consumer that was misled. Individual redress is still not possible in injunctive proceedings for unfair commercial practices.

The practice of charging activitation fees was not completely abandoned. Even higher activitation fees are now sometimes charged, which is legal, provided they are clearly indicated.

CASE 9

Title of the case: Free mobile phones – Misleading pricing
Consumer organisation, country: VKI, Austria
Settlement 12 December 2014

Facts

A mobile phone provider advertised phones for free when concluding a certain tariff plan with a minimum duration of 24 months.

The same tariff plan without the phone was, however, cheaper.

In addition, in order to qualify for a certain tariff plan the consumer had to agree to an optional package. This implied an obligation to pay 10 Euro/month extra (for services already included in the basic tariff plan), in order to get the phone for free.

Legal basis

Directive 2005/29/EC prohibits misleading practices. The Annex contains a list of practices that are considered unfair in all circumstances. Nr. 20 of that Annex provides that is prohibited as misleading in all circumstances: „N. 20 - Describing a product as 'gratis', 'free', 'without charge' or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item."

The Commission Guidance on the UCPD furthermore makes clear that traders must be able to show, for an item genuinely to be supplied for free, conditional on the purchase of another item, that the price of the item they are paying for (in this case the tariff plan) is the same with or without the free item.[10]

Consumer rights directive 2011/83/EU provides for clear information obligations inter alia on price

E-commerce directive 2000/31/EC provides for additional information obligations inter alia on price

Outcome

An action for injunction was introduced, which led to a settlement at firstinstance. The trader agreed to amend its pricing practices.

Recommendations and findings

These actions require substantial resources in terms of monitoring. Consumers are not always aware of hidden costs, so that complaints may be limited, notwithstanding the important losses incurred by consumers. Actions for injunction do not always have sufficient deterrent effect.

Contracts whereby the ‚free' phone is paid for through a subscription may be qualified as credit contracts (as a deferred payment is granted) – this implies that the obligations imposed by the Consumer credit directive and national consumer credit law (information obligations, creditworthiness check etc) must be complied with.

The Supreme Court in the Netherlands decided in this sense.[11] Also in Belgium, telecom operators are adapting their advertising to comply with consumer credit legislation.

[10] SEC(2009) 1666, Guidance on the implementation/application of directive 2005/29/ec on unfair commercial practices, p. 58.

CASE 10

Title of the case: Opt out for extra payments
Consumer organisation, country: VKI, Austria
OGH 23.9.2013, 4 Ob 27/13v - T-Mobile SMS-Änderung[12]

Facts

T-Mobile sent the following SMS to customers: *„Since 1.7. you have been calling for free and unlimited to banks, public authorities and companies, due to T-Mobile´s optional package „special rate numbers". Valid for special rate numbers (0720xx, 50xx, 57xx, 59xx, 05xx) nationwide.*

From 1.8. we charge EUR 2,-/month for this service. If you do not need it, reply with „NO" until 25.7."

This essentially meant that consumer had to opt out to avoid extra charges.

Legal basis

Directive 2005/29/EC prohibits aggressive commercial practices, both in a general clause and in addition, a number of practices are blacklisted and thus prohibited in all circumstances.

According to art. 8, a practice is aggressive if: *"in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise."*

Nr. 29 of the Annex prohibits as aggressive in all circumstances:

"Demanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer except where the product is a substitute supplied in conformity with Article 7(3) of Directive 97/7/EC (inertia selling)."

Outcome

The Supreme Court (OGH) accepted that the conclusion of optional packages per SMS with the information that the consumer has to opt out if he does not agree, is an aggressive commercial practice.

The practice was prohibited as an aggressive practice on the basis of the general norm. A change of contract was enforced upon the consumer, that leads to an additional fee for a service he did not order. This nuisance or rather undue influence is an aggressive practice that is able to influence the economic behaviour of the average consumer.

The Supreme Court, however, refused to apply the Annex, nr. 29. It held that this did not concern an unsollicited new service, but rather a modification of existing service, and therefore Nr 29 was not applicable.

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[11] Hoge Raad 13 juni 2014, ECLI:NL:HR:2014:1385, full text: http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2014:1385.

[12] Full text of the OGH decision: https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20130923_OGH0002_0040OB00027_13V0000_000; for more details and the original decision *see verbraucherrecht.at:* http://tinyurl.com/nzct6qa.

2.5. Online services (iTunes, Facebook, Google...) – unfair terms, data protection

Facts

Several online services (social network sites; cloud-based storage services; e-mail services and cloud computing services) use potentially unfair contract terms in their general terms and conditions. In addition, there are privacy issues and problems of misleading practices.

Such services are often marketed in ways that do not correspond with reality; the information provided in the 'marketing' pages does not correspond with the legal terms and conditions.

In addition, there is a problem of transparency. There are often different versions of terms and conditions, consumers must click through several lengthy web pages with sometimes conflicting terms and conditions. This makes it extremely difficult to get a correct view of the terms one is agreeing to.

The problematic character of the terms of many online services providers was confirmed in the legal literature and in studies carried out by consumer organisations.

Several consumer organisations have taken action in parallel against different service providers.

The most problematic clauses concern:

- Exoneration clauses (services are often provided 'as is')
- Choice of law and choice of jurisdictions clauses (often California law; court of California)
- Unilateral change of contract terms
- Unilateral change of service terms
- Termination clauses (often termination at will by the trader; termination possible for minor infringements by the consumer; no similar right at unilateral termination by the consumer ...)
- Disclaimers limiting the invalidity of unfair terms ('To the extent permitted by law, we exclude all warranties')
- Unlimited, free license on all IP content uploaded (*'you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post'*)

Legal background

The clauses and practices concerned can be challenged on several legal grounds:

Directive 2005/29/EC on unfair commercial practices;

Directive 1993/13/EEC on unfair contract terms. It is important to note that this directive has a very broad scope of application. It applies to all 'consumer contracts'. The directive has a very broad scope of application and it applies to 'all contracts' between traders and consumers.[13] The question of whether the consumer pays a price (in the case of online services – there is often no monetary consideration, but 'only' personal data in return for a service) is therefore irrelevant for the application of this directive;[14]

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

[14] In the same sense, E. TERRYN, "'Consumers, by Definition, Include Us All' ... But Not for Every Transaction", ERPL 2016, n 2, 271; M. LOOS & J. LUZAK, 'Wanted: A Bigger Stick. On Unfair Terms in Consumer Contracts', *Journal of Consumer Policy* 2015; several national courts already applied national provisions implementing the Unfair Contract Terms Directive to 'free' internet services (e.g., Landgericht Berlin 6 Mar. 2012, Az 16 O 551/10; Kammergericht Berlin 24 Jan. 2014, 5 U 42/12).

Directive 2000/31/EC on electronic commerce – the directive interalia provides for information requirements meant to ensure the transparency of the e-commerce process;

Data Protection and ePrivacy Directives;

Brussels I-, Rome I- and Rome II-Regulations;

Directive 2002/58/EC on privacy and electronic communications – prohibits the use of automated calling systems without human intervention (automatic calling machines), fax or e-mail for the purposes of direct marketing in respect of subscribers who have not given their prior consent (specifically for practices such as the 'friends finder' – cf below).

A detailed analysis of the possible legal grounds to challenge the unfair terms and practices is provided in the study of Loos and Luzak.

A further detailed legal analysis can be found in the study commissioned by the Belgian privacy authority.[15]

Outcome

a. France - UFC-Que Choisir

In France, UFC-Que Choisir analysed the contract terms and conditions of Facebook, Twitter and Google.

A formal notice was sent to Facebook (Ireland), Twitter and Google and other social networks with a critical review of 180 contractual terms. There was no willingness to negotiate. According to Facebook, Twitter and Google, their Terms and Conditions are fully compliant with the applicable legislation.

In March 2014, UFC-Que Choisir summoned Facebook, Twitter and Google before the «Tribunal de grande instance » de Paris. The deletion of the unfair and illegal terms and conditions was requested, inter alia on the basis of provisions on unfair terms (directive 93/13/EC and L.132-1, R.132-1, R.132-2 Consumer Code); the French Data Protection act (1978) and the French Code of Intellectual Property.

There is no court decision as of today, the cases are still in the pre-hearing stage.

The lengthiness of the contract terms involved (and of the writ of summons) complicates the procedure. Several legislative changes obliged UFC-Que Choisir to update the summons to include new legal dispositions. Changes by Facebook to its terms after the 2nd prehearing court session, once more obliged UFC-Que Choisir to review the new contract terms.

b. Germany

vzbv introduced several actions against social media and online services providers, for unfair contract terms, unfair commercial practices and infringements of data protection legislation. Several cases were successful, however, sometimes only after long proceedings up to the highest courts.

Facebook - Berlin *Kammergericht* (Court of Appeal) 24 January 2014 - 5 U 42/12[16]

vzbz has also challenged several clauses in the Facebook general terms and conditions as well as the practice of Facebook to import address data via the Facebook 'Friends Finder' tool, introduced by Facebook in 2010.

[15] Available at *ICRI/CIR and iMinds-SMIT advise Belgian Privacy Commission in Facebook investigation*: https://www.law.kuleuven.be/icri/en/news/item/icri-cir-advises-belgian-privacy-commission-in-facebook-investigation

[16] Case available at: http://www.vzbv.de/sites/default/files/downloads/Facebook_II__Instanz_AU14227-2.pdf.

Users can import their address books and find friends on Facebook with a single click. That sounds easy but may have unwanted consequences: Facebook sends email invitations in the name of the user to people who are not registered with Facebook – and who perhaps do not want to be. Many consumers have taken a conscious decision not to use Facebook.

The Berlin *Kammergericht* (Court of Appeal) declared the practices illegal. It also found the IP licensing clause to be invalid, as it contravened the principle of transparency.

The main contents and key statements of this judgment concern:[17]

1. Application of German privacy laws

By placing cookies on users' computers in Germany, Facebook's parent company uses "means" for data processing and therefore "collects" and "processes" data as defined in the German Federal Data Protection Act (BDSG). Hence, German data protection legislation becomes applicable and is not excluded by Irish data protection laws (due to Facebook's subsidiary in Ireland).

2. Invitation emails and Friend Finder

Facebook invitation emails are harassing, and therefore illicit advertising as defined by the German Law against Unfair Competition (UWG).

It is decisive that sending the recommendation emails goes back to the Recommendations feature Facebook provided for this purpose. This is not changed by the fact that it is not Facebook, but a respective third party using Facebook, who is displayed to the recipient as the sender of the invitation email. This practice misleads the consumer (at least in the disputed Friend Finder from 2010) into believing that this feature limits its search for friends on Facebook, whereas in fact it also addresses such relatives, friends, and acquaintances who are outside of Facebook and have not agreed to receive advertising emails.

The invitation email in dispute is disguised as a private message. It therefore qualifies as a misrepresentation under unfair trade practices law because it actually is advertising for which Facebook is responsible.

The Find Friends feature violates German privacy laws. After the user clicks the Find Friends button, Facebook processes and uses personal data for advertising purposes without informing the user or obtaining the user's consent as required by law. This is a violation of the requirement to obtain consent.

3. General terms and conditions

IP license clause – "The exchange of your contents and information"

This clause grants Facebook the general authority to use all copyright-protected works posted by Facebook members (especially photos and videos) worldwide and free of charge. This does not comply with the principle of appropriate remuneration of the author. In the most customer-unfriendly interpretation, this clause leads to the conclusion that Facebook may grant sub-licenses to other companies for their commercial use of copyright-protected contents posted by Facebook members and even charge them a fee, while the user cannot make a claim for remuneration and gets no share in the revenue.

Furthermore, the restriction to "use on, or in connection with, Facebook" is unclear because any type of "connection to Facebook" may be sufficient and cannot be sufficiently monitored by the user.

The license clause is also not clear and straightforward. This follows from the fact alone that the purpose of granting a license is not defined in detail. But also the passage saying that the use of Facebook members' contents is limited to "the use on, or in connection with, Facebook" does not clearly detail the rights to use

[17] Summary of the document by Vzbv, for the full document with the key contents and arguments (in English), see http://www.vzbv.de/sites/default/files/downloads/key-statements-vzbv-facebook-2014-01-24.pdf.

granted. For example, third-party companies as licensees could use the contents without limitation, at least "on" Facebook.

Advertising clause – „Advertising on Facebook"

Facebook wants to use the names and profile pictures of its Facebook members for advertising purposes. Despite the reference to the privacy settings, the context in which his or her name or profile picture may be used does not become clear to the user. It is not apparent if the advertising is limited to the Facebook member's profile pages or if the name and profile picture will also appear on other pages of Facebook next to advertising and/or if Facebook provides advertising spots on the Facebook website to advertisers.

The ineffectiveness of this clause also results from data protection provisions of the German Federal Data Protection Act (BDSG). For the reasons mentioned above, it is not ensured that a Facebook user gives his or her informed consent in conformity with the law when it comes to the use of his or her data (name and profile picture) for specific advertising purposes.

Amendment clause

Facebook wishes to reserve the right to make any changes to its terms of use. Among other scenarios, it would be conceivable that the use of the Facebook platform will in the future depend on paying a fee and that Facebook then will include provisions on users participating in the costs or on a fee-based service in its terms of use. Such a comprehensive amendment clause is ineffective in its specific unrestricted formulation.

Termination clause

Facebook grants itself the right to terminate its service for users who violate "the letter or the spirit" of its terms of use. This clause is ineffective because it grants Facebook an extraordinary right to terminate without requiring good cause or having given the user unsuccessful prior written warnings.

Amendment clause

The amendment clause of the Facebook Data Use Policy is ineffective because the mere announcement of changes does not meet the legal requirements. Publication on websites with mere general administrative contents does not comply with the requirement of a "special notice" in the meaning of an individual message, such as by email.

The part of the judgment concerning the Friends finder was appealed.[18] The Bundesgerichtshof (German Federal Court of Justice) confirmed the illegality of the Friends Finder in its judgment of 14 January 2016.[19] The BGH confirmed that this constituted an unfair advertising practice.

vzbv also requested that Facebook be fined since the IP licensing clause in its General Terms & Conditions has not been modified sufficiently to comply with the decision of the Berlin Kammergericht that was already final with regard to this clause.

The Berlin Landgericht confirmed vzbv's request for a fine. Facebook was fined 100,000 euros.[20]

WhatsApp

vzbv has criticised the use of English terms and conditions in contracts with German consumers by WhatsApp.[21] It also criticised the incompleteness of the information concerning the company and the absence of contact data.

[18] The remainder of the judgment (declaring part of their terms and conditions invalid) was already final as Facebook's appeal against their denial of leave to appeal was rejected.
[19] http://www.vzbv.de/pressemitteilung/wegweisendes-bgh-urteil-facebooks-einladungs-e-mails-waren-unlautere-werbung; press release BGH: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2016&Sort=3&nr=73328&pos=0&anz=7 (full judgment not yet available).
[20] Case number 16 O 551/10.

The case is important as it also concerns the rules to be complied with by a US-based supplier of digital services.

The case mainly concerns the German Telemediengesetz (TMG) that implements the E-Commerce Directive 2000/31. The country of origin principle of this directive implies that information society services providers including those addressing consumers must respect (only) the trader's home (country-of-origin) law except for « contractual obligations concerning consumer contracts » governed by Art.6 Regulation N° 593/2008 (Rome I).

Whatsapp was first condemned in absentia, but it objected to the decision. The Regional Court of Berlin then only partly upheld the claim of Vzbv in its decision of 24 November 2014. It agreed that the information given by WhatsApp was not sufficient (lack of geographical address; lack of information on company registration), it did not uphold the claim that the terms and conditions had to be provided in German.

vzbv appealed to the Berlin Kammergericht. The case was decided on 8 April 2016 predominantly in favor of vzbv. The decision is not final. Although an appeal to Bundesgerichtshof was not admitted, Whatsapp can still appeal against their denial of leave to appeal.

The decision of Kammergericht is also relevant, inter alia because of the following issues that were decided:

- **Activities directed to the consumers' country of residence:** the Court accepted that the following criteria suffice to conclude that WhatsApp targets the German market: users who access WhatsApp under www.whatsapp.de are re-routed to www.whatsapp.com and receive then main information in German. WhatsApp gives a German telephone number and uses the term « AGB » which is common in Germany for terms & conditions.

- **Terms of Service in English**: The Court decided that the mere provision of terms and conditions in English was not sufficient for the requirement of transparency to be infringed.
  The court pointed out that such a practice puts an unreasonable burden on consumers. It found that everyday English is widespread in Germany but not the type of English used in legal texts, contracts and commercial documents. The court noted that no customer should have to face "an extensive, complex set of rules with a very large number of clauses" in a foreign language. It found that, in the absence of a German translation, all the clauses lack transparency and are therefore legally void. When the judgment becomes applicable WhatsApp will have to make its terms of use and privacy policy available in German.

- **Failure to provide a second means to contact WhatsApp**
  The judges also found that the company was in violation of the German Telemedia Act according to which providers must provide a second means of fast and direct contact in addition to an email address, such as a contact form or a telephone number where the company can be reached. WhatsApp had failed to provide such a second means of contact. Instead, the company had linked to its Facebook and Twitter pages. However, users cannot send messages to the company via Twitter and WhatsApp had set up its Facebook profile in such a way that messages could not be sent either.
  The court however did not agree with vzbv's view that an authorised representative of the company should be named in WhatsApp's legal notice. The court ruled that, in accordance with European law, only the name and address of the service provider need to be provided.

[21] See http://www.vzbv.de/sites/default/files/downloads/WhatsApp-LG-Berlin-2014-11-25.pdf; and http://www.vzbv.de/sites/default/files/downloads/WhatsApp-LG-Berlin-15_0_44_13.pdf.

c. Norwegian Consumer Council Forbrukerrådet

The Norwegian Consumer Council conducted a study on standard terms used by seven cloud service providers ('Hazy terms in the cloud' - Standard terms used by Dropbox, Google Drive, Apple iCloud, Microsoft SkyDrive (now OneDrive), Jottacloud, SugarSync, and SpiderOak).[22]

The study gave consumers a clear and comparative overview of the terms the providers used for the following main aspects: content ownership and protection against data loss; amendment of terms and account termination; privacy.

This eventually led to a complaint by the Norwegian Consumer Council to the Norwegian Consumer Ombudsman about Apple's terms with the Norwegian Consumer Ombudsman for violating several articles of Norwegian and European Consumer law.[23] The most serious issue was considered to be Apple's unilateral right to change the Agreement at any time, at their own discretion and without giving users notice.

The complaint received major media attention.

In its response to the Norwegian Consumer Ombudsman, Apple quickly agreed to amend the Agreement so that the consumer would only be bound by new terms and conditions once they have been put on notice and accepted.

A review by the Norwegian Consumer Council in 2015 of the privacy policy of the analyzed cloud services showed an improvement of the terms; although the situation is still not optimal:

2014 Privacy Review

	Dropbox	OneDrive	iCloud	Google Drive	Jottacloud	SpiderOak	SugarSync
You can delete your account	✓	✓	✓	✓	✓	✓	✓
Stored data is deleted after termination	?*	?*	?*	?*	✓	✓	✓
Informs you about law enforcement requests	✓	✗	✗	?**	✗	✓	✗
Will not look at the content of your files	✓	✗	✗	✗	✓	✓	?***

2015 Privacy Review

	Dropbox	OneDrive	iCloud	Google Drive	Jottacloud	SpiderOak	SugarSync
You can delete your account	✓	✓	✓	✓	✓	✓	✓
Stored data is deleted after termination	?*	?*	?*	?*	✓	✓	✓
Informs you about law enforcement requests	✓	✓	✓	?**	✓	✓	✗
Will not look at the content of your files	✓	✓	✗	✗	✓	✓	?***

[22] For the full report see: http://fbrno.climg.no/wp-content/uploads/2014/02/2014-05-14-Unfair-cloud-storage-terms_report.pdf (January 2014).
[23] Press release: http://www.forbrukerradet.no/pressemelding/apple-icloud-violates-norwegian-and-european-law/.

d. Belgium

Although the Belgian case was an own initiative case by the Belgian Privacy Commission case with no direct involvement of a consumer organisation, we nevertheless mention it as the outcome was discussed during the CoJEF II meetings and as the outcome is relevant for the pending procedures in other Member States.

In a judgement of 9 November 2015, the President of the Court of First Instance in Brussels, Belgium, ordered Facebook Inc., Facebook Ireland Limited and Facebook Belgium SPRL in summary proceedings to cease registering via cookies and social plug-ins which websites internet users from Belgium who do not have a Facebook account visit. Non-compliance with the order was sanctioned by a penalty of 250,000 EUR per day.

The main findings of the Court were:[24]

a. **Belgian data protection law applies and Belgian courts have jurisdiction**
The Court rejected Facebook's argument argued that it has to comply only with Irish data protection law and that only Irish courts have jurisdiction, referring to the Google Spain case of the CJEU of 13 May 2014. In that case, the CJEU decided the national data protection law of an EU Member State applies if the activities of a local establishment in that Member State are inextricably linked to the activities of the data controller.

b. **It concerns the processing of "personal data"**
The Court found that the IP address and a "unique identifier" contained in Facebook's data cookie are "personal data". The collection by Facebook of these data is therefore a "processing" of personal data.

c. **Violation of Belgian data protection law**
The Court held that collecting data on the web surfing behaviour of people who have decided not to become a Facebook member is a "*manifest*" violation of Belgian data protection law.

There was no legal justification for processing personal data of people who do not have a Facebook account via cookies and social plug-ins. Facebook did not obtain their consent; it cannot invoke an agreement; there is no legal obligation and the security interest pursued by Facebook is overridden by the fundamental right to privacy of people who do not have a Facebook account.

e. Recommendations and findings

The problems with these service providers are common and international, the solutions, however, remain national.

There are clear precedents in specific Member States condemning specific practices and contract terms, on the basis of national law that is however, an implementation of European directives. There are also several relevant precedents applying the data protection law of the country of the consumers.

The outcome of the WhatsApp case on appeal will also be important in terms of applicable law and scope of application of the country of origin principle. In addition, the outcome of the request for a preliminary ruling by the OGH in the Amazon case (described below) will be crucial to determine the applicable law in case of an action for injunction against a company established in another Member State.[25]

A court victory in one Member State unfortunately does not lead to automatic changes for consumers in other Member States. Thus, it is rather striking that Facebook e.g. has changed some terms and conditions but only in the German language. The changes therefore stay limited to the country where the practice was prohibited.

[24] Summary of the press release by the Belgian privacy commission, see for a more elaborate account of the judgment: https://www.privacycommission.be/en/news/judgment-facebook-case.

[25] Oberster Gerichtshof (Austria) lodged on 27 April 2015 — Verein für Konsumenteninformation v Amazon EU Sàrl (Case C-191/15, ECLI:AT:OGH0002:2015:0020OB00204.14K.0409.000.

The precedents can nevertheless be used by other organisations to obtain similar court decisions. Information exchange is crucial in this regard.

The experience built up by consumer organisations in this sector teaches that without external pressure (in the form of a court decision or at least starting proceedings in court), it is difficult to convince multinational players to settle and abide by the applicable European legislation.

It may, however, not always be necessary for the consumer organisation itself to start court procedures. Cooperation with national enforcement authorities (both consumer / competition authorities) but also data protection authorities can be envisaged.

Media attention has also proved to be an important tool in creating willingness to settle / change behaviour.

2.6. Apple - Consumer guarantees – unfair commercial practices /unfair terms

Facts and background

The Apple case was initiated under CoJEF I and followed-up under CoJEF II. We briefly recall the history of the case and then focus on the follow-up.

The Italian Competition Authority (*Autorità garante della concorrenza e del mercato)* fined the US based company Apple for misleading practices and information as to the guarantee on its hardware products. This case was initiated by the Italian consumer association *Altroconsumo* who had received complaints from consumers that Apple was in breach of consumer protection rules.

The matter relates to the advertised 1-year limited 'manufacturer's warranty', which was found to mislead consumers about their benefits from the EU-wide minimum 2-year legal guarantee established by Directive 99/44/EC on consumer sales.

Another element of the case concerns the promotion of the extension of this 1-year limited 'manufacturer's warranty' through the sale of the *Apple Care Protection Plan* for which consumers pay a considerable amount of money for a protection that they would have anyhow under the law (e.g. right to the repair or the replacement in case the product is defective during the two-year guarantee period).

Altroconsumo performed investigations (including video recording of the behaviour of shop assistants in Apple stores throughout Italy) and discovered that Apple pursued a commercial strategy aiming at misleading consumers on their legal guarantee rights in order to promote and sell the Apple Care Protection Plan leading to an infringement of the existing legislation on unfair commercial practices.

Altroconsumo filed a complaint against Apple before the AGCM (Italian Competition Authority), as the first instance authority in Italy in charge of enforcement of the rules on unfair commercial practices. The national authority confirmed the misleading nature of the company's commercial strategy and fined the three incumbents: Apple Retail Italy, Apple Italy and Apple Sales International.

Apple appealed the decision of the competition authority before the Regional Administrative Court of Lazio (Il Tribunale Amministrativo Regionale per il Lazio). The Regional Administrative Court of Lazio confirmed, in the prevailing part, the decision of the AGCM and the imposed fine of 900 000 EUR.

Apple subsequently appealed the decision of Regional Administrative Court of Lazio before the Council of the State (Consiglio di Stato – the highest administrative court), that also completely confirmed the judgment under appeal and the fine.[26]

[26] Decision of 17 november 2015, see for the full text: https://www.giustizia-amministrativa.it/cdsintra/cdsintra/AmministrazionePortale/DocumentViewer/index.html?ddocname=CUQXZN4L2NU4USFL7NB2H6DZ6M&q=.

Altroconsumo brought the case to the attention of the CoJEF I project. Other national consumer associations found that Apple applied the same unfair practices in their countries and, thus, was not in accordance with their national consumer laws.

Under the co-ordination of BEUC, eleven consumer associations decided to join in a co-ordinated action to call on the company to cease and desist these unlawful practices and the marketing of their *AppleCare Protection Plan* or, alternatively, called on their respective national authority to investigate Apple's practices.

Legal basis

Apple's behaviour falls within several provisions of Directive 2005/29/EC on unfair commercial practices, namely:

- Article 6 on misleading actions by false information on the guarantee as required by article 6(1)(g) in connection with Directive 1999/44/EC.
- Article 7 on misleading omissions by omitting all material information or their provision in unclear and unintelligible manner as requested by article 7 (1) and (2) of Directive 2005/29/EC.
- Article 8 on aggressive commercial practices in relation to the behavior of Apple staff as verified by the Italian competition authority, and,
- Misleading commercial practice n°10 of Annex I of the Directive (Presenting rights given to consumers in law as a distinctive feature of the trader's offer) regarding the promotion of the Apple Care Protection Plan.
- In addition to the infringement of the unfair commercial practices legislation, Apple was also found in breach of other relevant areas of EU consumer law, such as:
- Article 6 of Directive 1999/44/EC, as transposed by the Member States and which establishes the obligation to state that the consumer has certain legal guarantee rights which are not affected by the commercial guarantee.
- Article 5 of Directive 1993/13/EEC and the provisions on clarity of contract terms.

Outcome under CoJEF I

Since in most countries the company did not change in a satisfactory manner the unfair behaviour - as described in the cease and desist letters and / or the complaints submitted to the national authorities, further appropriate enforcement means available in each concerned jurisdiction (e.g. public or private enforcement) were taken by the consumer associations.

As a result of the cease and desist letters, Apple modified partially its web-pages. However, most of the consumer organisations considered these changes not sufficient in order to comply with national laws and stop misleading consumers.

Four consumer organisations (Test-Achats/Test-Aankoop, Belgium; DECO, Portugal; vzbv, Germany and ULC, Luxembourg) filed injunction actions in court. The Danish Spanish and Slovenian consumer organisations filed complaints with their public enforcement authorities.

The European Commission (Vice-President Reding) also supported the efforts of consumer organisations by addressing a letter on 21 September 2012 to all EU Ministers in charge of consumer affairs and by raising this case with national enforcement bodies.

Further developments under CoJEF II

The action for injunction eventually led to settlements in several countries, including Portugal, Belgium and Luxembourg and to clearer information and a 'warranty notice' on the website, also on the homepage. The Notice described their statutory warranty right and it was easily accessible and visible to consumers.

That link however disappeared on the Luxembourg website, as well as on several other national websites and the information was only available after several clicks or, for certain specific products, in a promotion concerning the guarantee against payment. After further correspondence with the Union Luxembourgeoise des Consommateurs, Apple reintroduced the link in some of the countries that had started proceedings (Belgium and Luxembourg).

In Germany, the case was not settled, but further pursued in Court. Apple had changed the clauses concerned, but it refused to sign the cease and desist declaration Vzbv asked for, so that the court action was continued.

In September 2015, the Berlin Kammergericht decided that 16 terms and conditions in a product guarantee by Apple were impermissible, because they caused a significant imbalance to consumers. This decision is now binding. It confirmed the earlier decisions of the district court of Berlin of November 2014.[27]

It concerned 11 clauses in the producer`s guarantee and 5 clauses in the Care Protection Plan The one-year Hardware guarantee provided by Apple for material and product defects covered less than the legal warranty according to which the seller is liable for defects for a period of two years. According to their terms and conditions product defects were only covered if the devices were used normally and in accordance with their published guidelines. These, however, were not explained in detail. Even dents and scratches were excluded as far as they would not impair the function of the product. The Berlin Kammergericht criticized the lack of transparency as a guarantee needs to be easily understandable and must describe the rights of the consumers precisely. It must clearly be stated that the legal rights are not restricted in any way. Otherwise customers could be restrained from enforcing their rights.[28]

Recommendations and findings

The Apple case illustrates that national enforcement actions in some member states do not automatically lead to Pan-European changes. Some kind of Pan-European enforcement tool would be needed so as to avoid the scattering of the resources and inconsistent national approaches.

Constant monitoring also proved necessary to ensure compliance with the settlements reached.

Public enforcement proved helpful to put pressure to settle, not only in the country where the fine was imposed, but also in other countries. Court actions also proved necessary to put pressure to settle.

The Apple case also illustrates that the current legislation on commercial guarantees (Directive 99/44/EC) is not sufficient to ensure transparency with regard to the consumer's legal rights. The Unfair Commercial Practices Directive and the Unfair Contract Terms Directive proved to be helpful tools to complement the consumer sales directive, but stricter legislation on the information that needs to be provided on the legal rights in case of a commercial guarantee is required.

The decision in the German Apple case is an important precedent that can be useful in further negotiations in other countries. The court clearly confirmed that the control of unfair contract terms also applies to commercial guarantees and that the requirement of transparency is definitely applicable.

[27] Press release with reference to the full text of the judgments: http://www.vzbv.de/urteil/apple-garantiebedingungen-waren-unzulaessig.
[28] *Beschluss des KG Berlin vom 11.09.2015, Az. 23 U 15/15, rechtskräftig.*

3. Coaching exercise

3.1. Unfair credit agreements

PROJECT – BIG BANK CASE

Coach - DECO – Associação Portuguesa para a Defesa do Consumidor
Coached partner -Latvian National Association for Consumer Protection (LNACP)
Training: Exchange of information, advice in setting up enforcement strategy

Facts

BigBank used two different borrowing rates per agreement in their credit agreements with consumers. The practice started from the end of 2008 at least. The first of these borrowing rates was explicitly specified in a credit agreement itself. The second one, used for calculating monthly payments, was hidden and was not specified in an agreement at all.

Consumers were not informed about the existence of the second (hidden) borrowing rate, and, the hidden borrowing rate was significantly higher than the one explicitly specified in a contract. In other words, consumers presumed, that the borrowing rate, used to calculate their payments according to the schedule was the same as specified in the contract, while in reality BigBank used higher borrowing rate, without informing consumers about it.

The partners exchanged information during two CoJEF II Meetings, skype calls and by e-mail. The enforcement strategy of LNACP was defined taking into account DECO's experience on court actions. DECO's experience was useful in better analysing and approaching the problem, in the dissemination of information to the consumers concerned and in determining the court strategy.

Outcome & recommendations

Although the project confirmed the usefulness of a coaching exercise, it also illustrated that practical problems and in particular language barriers may slow down the process and complicate cooperation. As all information and legislation was in Latvian there was the need to translate every document. Given the scarce resources of consumer organisations, coaching between partners with at least a passive knowledge of each other's language is recommended.

3.2. Additional costs in the telecom sector

Coach: Which? UK
Coached partner: Zveza potrošnikov Slovenije (ZPS), Slovenia
Training: Exchange of information and campaigning advice

Facts

Telecom operators in Slovenia charge consumers relatively high fees- in addition to the monthly subscription fee – such as a connection fee, for changing subscription plans with the same operator and also a cost for terminating the contract.

Which? ran a successful campaign in the UK that led to changes in the practices of the telecom operators in the UK (see above). The campaign was set up so that consumers were involved (in the form of a petition) and informed and at the same time the regulator was approached as well as the telecom operators. This campaign and action was presented by Which? at the third CoJEF II seminar in Riga in May 2015.

ZPS decided to run its own campaign against additional costs that consumers had to pay to telecom operators. In June 2015, ZPS prepared an action plan based on the presentation of Which? campaign. During this campaign, both partners involved in the coaching exercise exchanged information and advice by phone and at CoJEF meetings.

Outcome and recommendations

ZPS published an article in its magazine ZPStest and highlighted the problems. It also sent letters to the telecom operators and the telecom regulator and it invited consumers to sign a petition (almost 7.000 reacted).

ZPS also organised individual meetings with operators and a joint meeting with the regulator and market inspection body. The Telecom regulator subsequently organized 2 meetings with all parties. The operators promised to change their practice, to lower the prices of some other additional costs and to present all the additional costs in their contract terms more clearly for consumers.

Early 2016 operator Simobil had to lower the price for changing the subscription plan from 20 EUR to 9,99 EUR after the intervention of the market inspection body. The operator now says that it will not charge any additional cost to the subscriber which changes the plan in the first 30 days after signing the contract.

ZPS is continuing in 2016 with its campaign to stop charging costs (connecting fee, termination fee, fee for changing plan) and plan to check the contract terms and to carry out field research on how the operators conclude the contracts with consumers.

The experience of Which? was very helpful in setting up the campaign. Their experience helped to obtain maximal outcome in a cost efficient way. The exercise was not only helpful for the problems in the telecom sector. ZPS now also uses the experience and know-how of planning and running the campaign for campaigning in other sectors.

- ⇨ Exchange of information on campaigning and lobbying proved easier to reproduce in other legal systems than experience with court action. This is due to differences in legal systems, and available remedies.
- ⇨ Coaching exercises between partners that have passive knowledge of each other's language facilitates cooperation and reduces costs.

3.3. Billing for mobile telephony

Coach: Verbraucherzentrale Bundesverband e.V. (vzbv) e.a.
Coached partner: Zveza potrošnikov Slovenije (ZPS)
Training: Exchange of information and legal precedents

Facts

After Zveza potrošnikov Slovenije had reported about their findings in billing practices of mobile phone companies at the Brussels conference in December 2015 vzbv sent to the Slovenian colleagues a collection of press releases and judgments on this issue which were issuedin Germany during the last couple of years. The decisions show that also in Germany there have been the attempts to bill extra fees to clients for self-evident services like sending paper invoices or to create fees for not using the phone or not sending back the SIM card. These clauses have been forbidden in the meantime. All the cases were injunction cases taken to court by vzbv. Particularly the following cases have been communicated to the Slovenian colleagues:

Bundesgerichtshof 29 October 2014 - SIM card, paper invoice; Drillisch: A 14399-3 und -4[29]

Main points decided:

- A clause determining that a paper invoice costs 1.5 € is subject to judicial control. Such clause does not concern the main subject matter of the contract, nor the adequacy of the price. It concerns an additional agreement, for a service that is considered to be an exception by the contract (electronic invoices being considered the standard)
- Such clause causes a significant imbalance as each party has to perform its obligations under the contract (and has to bear the costs involved), without being able to charge a separate fee.
- Such clause is only possible for an offer that is exclusively done online and that only allows the contract to be concluded online.

Landgericht Kiel, 05 September 2015, Az. 8 O 128/1330

Main points decided: A mobile phone company, may not make it unnecessarily difficult to obtain a refund for the unspent balance upon termination of a contract with a customer who has a pre-paid contract. The mobilcom-Debitel GmbH, asked for superfluous data that were not known to the customer in order to be able to ask for a refund. Also, making the refund dependent on the return of the SIM card and of a copy of identity card was considered illegal.

Oberlandesgericht Düsseldorf 29 January 2015, Simyo: A 13646-631

Main points decided:

- A fee for a paper invoice (in the case concerned 5.11€) is an unfair contract term;

[29] http://www.vzbv.de/pressemitteilung/gebuehren-fuer-die-erstellung-von-papierrechnungen-unzulaessig; full text BGH decision: http://www.vzbv.de/sites/default/files/downloads/Drillisch-Telecom-BGH-III-ZR-32-14-SIM-Card-Papierrechnung.pdf
[30] http://www.vzbv.de/meldung/mobilfunkvertraege-restguthaben-muss-ohne-hindernisse-erstattet-werden , full text of the decision:

http://www.vzbv.de/sites/default/files/downloads/mobilcom_debitel-Erstattung-Restguthaben-LG_Kiel-2015-05-19.pdf

[31] http://www.vzbv.de/pressemitteilung/gebuehren-fuer-die-erstellung-von-papierrechnungen-unzulaessig; full tekst of the decision: http://www.vzbv.de/sites/default/files/downloads/Simyo-GmbH-Papierrechnung-OLG-Duesseldorf-2015-01-29.pdf.

- A clause determining that 'In case of an electronic invoice, this invoice is considered to be received when it is accessible in the personal service area of the consumer' was likewise considered to be an unfair contract term as it created a fiction that was not linked to any actual possibility of acknowledgement.

- The communication of these cases aimed at illustrating the legal remedies in Germany in cases of unfair contract terms which have an impact on pricing.

Outcome and recommendations

The participants shared their experiences and agreed to keep each other informed about the further practical and juridical developments in their countries on this issue.

As similar problems arise in other countries (inter alia imposing charges for paper invoices), the outcome of the German cases is extremely important and also relevant for other countries as the legal basis (unfair contract terms) is the Unfair Contract Terms Directive 93/13/EEC so that the German precedents can also be relied on in other jurisdictions.

4. Update - General guidelines and recommendations

4.1. Introduction

The CLEF and CoJEF I projects culminated in a set of policy recommendations and recommendations for action. These recommendations still stand in 2016. Nevertheless, the vast amount of material collected via CoJEF II, as well as some important new trends and developments, requires an update of the previous conclusions. This is due in particular to the ever-increasing internationalisation of the main issues at the forefront of consumer organisations' activities. The preceding documentation highlights the role of social media and the key function of telecom and e-commerce regulation.

4.2. Identifying the need for action – the importance of information collection

Identifying the need for action continues to be the first step to be taken before embarking on any initiative.

The early detection of market failure and consumer problems in rapidly evolving markets remains crucial. Consumer organisations have a pivotal role in this regard and should continue to invest in the collection of information, ideally through a consumer complaint system that could be standardised and jointly accessible.

The objective documentation outlining the problem plays an important role in achieving changes and successes: not only when contacting the media and public authorities, but also during enforcement proceedings and when lobbying for better regulation. The number of consumers involved can help to raise the profile of the issue. Solid facts and in-depth investigation are becoming ever more important in a world that requires evidence before political action.

The collection of information on market failures makes consumer organisations important partners for better public enforcement, both on the national and international levels, inter alia in the CPC network. This is the starting point for being taken seriously as a partner. However, consumer organisations need resources to function as watchdogs and early warning systems.[32]

The collection of individual complaints highlights the role and function of consumer organisations to the public, and may help to inform consumers about the actions taken. It provides the basis for involving consumers via social media into the compilation and selection of relevant consumer actions.

The importance of market failures and consumer problems cannot, however, always be measured by the number of consumer complaints. Consumers may not be aware of hidden costs or additional charges, as became apparent in the previously described telecom cases and in the Apple case on commercial guarantees. Other forms of information collection (mystery shopping, analysis of contract terms, and so forth) may therefore be necessary in order to substantiate a problem.

Additionally, and mainly in relation to the digital economy, consumers are inadequately informed about and thus unaware of unfair or illegal commercial practices and infringements of personal data protection rules, which stem for example from hidden technical features in online services and social media platforms. As the Facebook cases described in the preceding sections show,[33] consumers are either not informed or informed in a way that makes it challenging for them to understand the implications of certain terms.

As a consequence, enforcement in this sector will increasingly require the ability to trace and analyse the technological features of services and tools, such as for example cookies. The analysis of contract terms is no longer sufficient. Consumer organisations and enforcers need to reach out to experts including 'hackers' and IT specialists in order to identify and establish illegal behaviour.

[32] Germany has provided resources for this specific purpose. See for example http://www.marktwaechter.de/. Unfortunately the website is only available in German.

[33] Judgment of the Court of Justice of the EU in Case C-362/14, Maximillian Schrems v Data Protection Commissioner, 6 October 2015.

Best practices: Which? campaign on nuisance calls and texts

Which? ran a successful campaign against nuisance calling (details below). The initiative involved a petition for consumers to sign (369,000 signatures were collected by May 2016); and a tool to help consumers in issuing complaints (more than 11,000 complaints were issued by May 2016).[34]

Once a problem has been detected, several factors must be taken into account when deciding whether or not to take action, including but not limited to:

- Consumer harm: financial loss, frequency, effect on consumer trust
- Strategic importance: public, political
- Chances of success (requires a legal and factual analysis), possible outcome
- Efficiency: costs and outcome, funding, financial risks

4.3. Choosing the appropriate action / remedy / forum

4.3.1. Importance of information exchange

Consumer problems very often have an international dimension. Companies operate internationally, and they adopt international marketing strategies. Legally speaking, it is often hard to distinguish between marketing practices and standard terms. One of the most striking changes that has occurred between COJEF I and COJEF II is the speed of internationalisation and globalisation via the digitalisation of the economy.

Consumer organisations, on the other hand, still operate largely on the national level and use national enforcement tools. This is due to the national character of legal systems, despite the extent to which substantive law has been harmonised, and more fundamentally to the cultural, linguistic and emotional ties within societies to national legal systems. Precedents, experiences and best practices in one Member State may nevertheless be crucial for actions in other Member States. They may also inspire exchange and provide fruitful ground for cross-border action.

Court cases may be relied upon as precedents in the case that identical (full) harmonisation directives are involved: specifically, solutions that have proven practicable in one Member State might help to convince another government to adapt legislation. One of the major difficulties in practice is that national judgments – even from the highest courts in the Member States – may differ with regard to an identical legal issue. In theory this is a matter for the European Court of Justice. One wonders, however, whether a 'comply or explain' mechanism should be introduced in all national legal systems.

The CoJEF website and database provide an important platform for information exchange. The BEUC newsletter can also play a critical role in this regard, as it provides members with information about each others' campaigns.

[34] http://www.which.co.uk/campaigns/nuisance-calls-and-texts/track-our-progress/

4.3.2. National / international

Private international law aspects

Internationalisation and globalisation complicate enforcement in several ways.

When consumer issues with international aspects are concerned, the relevant forum or jurisdiction, and whether to take coordinated or cross-border action (using for example the CLEF guidelines), must be determined. Private international law will play an important part in this decision.

Initiating court proceedings against a foreign, and even a non-EU-based company does not, however, necessarily mean that cross-border action will always be required.

Most multinational companies also have EU branches, and there is often a connection with an EU country that may be sufficient for a national court to have jurisdiction or for national law to apply. There are already a number of previously mentioned precedents inter alia that can be drawn upon with regard to data protection (such as the Spanish Google case and the German and Belgian Facebook cases).

In any event, careful consideration must be given to private international law issues.

The answer of the CJEU to the preliminary ruling below will have an important impact on consumer protection levels and on opportunities and hurdles in the enforcement of consumer (contract) law by consumer organisations. If the CJEU confirms that it is within EU law for Amazon to impose Luxembourg as its place of jurisdiction in its standard terms, all consumer organisations would have to file an action of injunction in Luxembourg. Luxembourg courts would then need to play a key role in the future development of consumer law.

At the same time, consumer organisations may have increased interest in co-operating and distributing enforcement actions depending on the simplest and most practical option in a specific jurisdiction. For example, the Luxembourgish consumer organisation would be best placed to act against companies headquartered in Luxembourg.

The following questions concern the applicable law in the case of an action for an injunction.

Cases

Request for a preliminary ruling from the Oberster Gerichtshof (Austria) lodged on 27 April 2015 - Verein für Konsumenteninformation v Amazon EU Sàrl (Case C-191/15)[35]

VKI filed an action for an injunction against Amazon EU (established in Luxembourg). Amazon engaged in e-commerce and contracted with Austrian consumers. VKI challenged several clauses in Amazon's terms and conditions. One of these clauses determined that Luxembourg law was the applicable law.

The Austrian Supreme Court has referred several questions concerning the applicable law to the CJEU, in essence:

- Whether the applicable law in an action for an injunction is to be determined in accordance with Article 4 of the Rome II Regulation.
- If so, whether the country in which the damage occurs (Article 4(1) of the Rome II Regulation) be understood as each country towards which the commercial activities of the defendant

[35] ECLI:AT:OGH0002:2015:0020OB00204.14K.0409.000

undertaking are directed, in which case the clauses challenged must be assessed according to the law of the court seized.

- Whether a choice of law clause, providing that the law of the country of establishment of the undertaking applies, has an effect on the applicable law.

- If Rome II does not apply, how then should the law applicable to the action for an injunction be determined?

Mapping the possibilities in the MS

Apart from private international law, the available remedies and procedures will also play a role in deciding the forum or jurisdiction in which action should be taken. This is particularly true for the available remedies beyond the action for injunction, as the harmonised European minimum standards differ considerably.

Although enforcement mechanisms are still mainly national tools, they may be useful in obtaining results for a group of consumers that is not limited to residents. Although there are still some legal uncertainties involved, this possibility merits further exploration and testing. At any rate, the systems listed below seem to provide opportunities for a potentially useful application beyond national boundaries, e.g. in cases like the VW emissions scandal.

Opportunity? The Dutch Collective Settlements Act (WCAM – Wet collectieve afwikkeling massaschade) provides possibilities for use in an international context.[36]

The WCAM allows a collective settlement to be submitted to the Amsterdam Court, which can in turn declare the settlement binding to all members of the group who have not opted out. The procedure has been used successfully several times.

Advantages:

- The Amsterdam Court has already accepted jurisdiction, also in cases concerning non-Dutch victims.
- Unless they opt out, non-Dutch victims can be bound to the settlement.
- Foreign (consumer) organisations can fulfil the representation requirements under the WCAM.

Disadvantages:

- The procedure can only be used when the defending company is willing to settle.
- In the absence of (foreign) court decisions recognising the homologation by the Court of Amsterdam, it is not 100 per cent certain that courts in other jurisdictions will recognise and enforce the binding effect of the settlement. Proper notification, also of foreign class members, will therefore be crucial (in order to respect fair trial requirements Articles 6 ECHR and 47(2) of the EU Charter of Fundamental Rights (Strasbourg Court case law) and the corresponding defence that recognition of the judgment would be contrary to public policy).

[36] For an overview of the case law in the Netherlands to date, see: http://www.collectiveredress.org/collectiveredress/reports/thenetherlands/caselaw

Recommendations:

- The inclusion of a forum choice clause in the collective settlement.
- The inclusion of a 'damage scheduling clause', which takes into account the different applicable laws in order to convince the Court of the reasonableness of the awarded compensation.

Opportunity? The Belgian Collective Action Bill may also provide opportunities in an international context.

Advantages:

- Not only is there a settlement procedure similar to the Dutch one, but it is also possible under Belgian law to use collective action if the company is not willing to settle.

Disadvantages:

- At the moment there is no standing for foreign consumer organisations. This however has been declared unconstitutional (Belgian Constitutional Court, 17 March 2016).[37] Nonetheless, claims must have a strong legal link to Belgium.
- The action can only be used for damages caused after 1 September 2014.
- There is an opt-in system for victims residing abroad.

Opportunity? The Portuguese collective action mechanism may also provide opportunities to be used in a cross-border case.

Advantages:

- This is a long-standing group action procedure that can be filed on an opt-out basis.
- The Portuguese consumer association DECO has the standing to file the case.
- There is a facilitated costs regime even if the case is lost.

[37] Belgian Constitutional Court, 17 March 2016, case nr. 41/2016

4.3.3. Public / private enforcement – the role of public authorities – enforcers and regulators

Co-operation with public enforcers

Whenever litigation is contemplated, it is important to consider co-operation with public authorities. Under the CPC Regulation (Regulation (EC) No 2006/2004 on consumer protection cooperation), all Member States must designate a public authority in charge of EU law. This public authority must ultimately be able to take action within these legal boundaries that could culminate in the launching of an action for injunction. As far as purely national conflicts are concerned, not all Member States have established full-fledged public authorities in charge of consumer law enforcement.

However, the tools available to public authorities (including fines, the possibility to take regulatory action, and even funding) may increase the effectiveness of an action. A strong public authority is not incompatible with a strong consumer organisation. An action taken by a public authority does not exclude actions by consumer organisations, e.g. in the form of follow-on actions for compensation; information campaigns; or negotiations with the involved companies with the goal of changing the problematic behaviour. What is needed, however, is an institutionalised form of co-operation between public authorities and private organisations. Evidence shows that consumer organisations must have legal tools at their disposal in order to push consumer authorities into action.

In cases with international aspects, an action by a public authority in one Member State may have positive effects even in other Member States. Thus, the action against Apple by the Italian Antitrust Authority seems to have contributed to the willingness of Apple to settle with consumer organisations in other countries.

Institutionalised co-operation may take different forms. In the Netherlands, the co-operation between the Authority for Consumers and Markets (ACM) and the Consumentenbond includes informal monthly exchanges about important signals, consultations on external communication, a confidentiality agreement, and the provision of regular feedback. In addition, the Consumentenbond has the status of an 'interested party', which allows it to object to or agree with decisions of the ACM in court. It can also send a formal enforcement request to the ACM, which has a legal obligation to respond. This co-operation has been formalised in a protocol.[38] Even greater powers are granted in the UK to 'designated consumer bodies' (including Which?) that can make super-complaints to regulators when a market problem is identified that significantly harms consumers' interests. The regulator is then obliged to investigate the complaint and respond within 90 days.[39]

Case – Super-complaint Which? Pricing practices in the groceries market

In 2015, Which? filed a super-complaint about pricing practices in the groceries market. The complaint included a number of misleading practices alleged to infringe upon the Unfair Commercial Practices Directive.[40]

The complaint led to an in-depth investigation by the Competition and Markets Authority (CMA).[41]

The CMA confirmed the existence of specific problematic pricing and promotional practices, and agreed to undertake further action (including enforcement if necessary) with the businesses concerned.

[38] https://zoek.officielebekendmakingen.nl/stcrt-2015-44660.html
[39] The following guidelines provide more detailed information: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284441/oft514.pdf
[40] http://www.staticwhich.co.uk/documents/pdf/misleading-pricing-practices---which-super-complaint-401125.pdf, and for a summary see: https://assets.digital.cabinet-office.gov.uk/media/554b81d0e5274a157200007c/Summary_of_super-complaint.pdf
[41] See for the full report: https://assets.digital.cabinet-office.gov.uk/media/55a6c83540f0b61562000005/Groceries_Pricing_Super-Complaint_response.pdf

The CMA also found that there was more that could be done to further increase levels of compliance. It therefore issued concrete recommendations to the competent authorities to clarify the guidance applicable to pricing practices, in particular in relation to unit pricing where a lack of legibility and consistency are causing unnecessary confusion for consumers.[42]

Further co-operation with Which? to inform and educate consumers about the effective use of unit prices is planned.

Case – Italian Competition Authority fines Apple for misleading and aggressive practices following complaint by Altroconsumo

The complaint against Apple filed by Altroconsumo before the AGCM (Italian Competition Authority) led to the eventual conviction of Apple for unfair commercial practices and the imposition of a fine. The conviction was useful not only in obtaining changes in Italy, but also in the actions and settlement negotiations undertaken by consumer organisations in other Member States.

Such – institutionalised – co-operation is of course not only of benefit to consumer organisations, but is first and foremost in the general interest of more effective enforcement and consumer protection. The early detection of market failures and emerging consumer problems is crucial for effective enforcement. Public enforcers often depend on formal complaints for information about market failures. However, this is no longer the only way that consumers ventilate problems: they may choose to express their dissatisfaction via social media and online forums.[43]

Consumer organisations can play an important role in setting up tools whereby consumers can support campaigns and file (online) complaints. The Which? campaign on nuisance calls and texts described below is a good example in this regard.[44]

The need for early and accurate detection of consumer problems and market failures, and the related need for adequate prioritisation, were also stressed during the review process of the CPC Regulation. The evaluation of the CPC Regulation identified a need for more intense co-operation between consumer organisations and the CPC network, in particular regarding the exchange of information about emerging practices that could be in breach of EU consumer law.[45] The evaluation report confirms that *"The stakeholders in the public consultation also highlighted that regular co-operation between the CPC authorities and consumer organisations is essential for early detection and effective handling of infringements."*[46] The possibility for consumer organisations to use the alert system as well would be another option for more extensive co-operation and more effective information exchange.[47] The more structural involvement of consumer organisations within the CPC network would also lead to more efficient prioritisation within the network.[48]

[42] https://assets.digital.cabinet-office.gov.uk/media/55a6c83540f0b61562000005/Groceries_Pricing_Super-Complaint_response.pdf

[43] See CMA Report 'Pricing practices in the groceries market', July 2015: https://assets.digital.cabinet-office.gov.uk/media/55a6c83540f0b61562000005/Groceries_Pricing_Super-Complaint_response.pdf, p. 55.

[44] http://www.which.co.uk/campaigns/nuisance-calls-and-texts/

[45] See COM (2014) 439 final, p. 7.

[46] See COM(2014) 439 final, p. 12.

[47] See COM(2014) 439 final, p. 9.

[48] See COM(2014) 439 final, p. 12.

Cooperation with regulators / legislators

Addressing consumer problems can take the form of enforcement action, but it may also involve improving legislation and regulation. Experiences exchanged during the CoJEF II project (inter alia regarding the co-operation with the Council of European Energy Regulators, or CEER) demonstrate that there can be major advantages for all parties involved with a more structural involvement of consumer organisations in the regulatory process.

Consumer organisations are crucial partners in the regulatory process. They have the ability and the competence to: Pass on signals about market functioning (and market failure). Consumer organisations are well placed to detect consumer problems and issues with market functioning at an early stage; Provide guidance and empowerment to customers, inter alia about prices and rights; Handle complaints and (in some cases) be involved in alternative dispute resolution; Disseminate information from national regulatory agencies. Through a more structural involvement in the regulatory process, consumer organisations can bring about positive effects by for example:

- Facilitating an understanding of markets and consumer concerns, and thus improving the performance of regulators and consumer organisations alike.
- Helping to encourage the increased understanding and acceptance of regulatory decisions; andBringing about greater transparency, to the benefit of all market participants.

Some 'best practices' are listed below, but there is definitely room for improvement at both the national and European levels. At the European level, for example, a more structural involvement in the development of the European Commission's guidelines on certain consumer protection directives would be welcome; as would the systematic involvement in information campaigns set up by the European Commission. The CEER Recommendations could and should serve as a blueprint for activities within other regulated markets, such as telecoms or financial services.

Best practices: CEER (Council of Europe Energy Regulators) – BEUC Co-operation

CEER Advice on How to Involve and Engage Consumer Organisations in the Regulatory Process, C14-CEM-74-07, 12 March 2015.[49]

CEER is the Council of European Energy Regulators. Its members and observers are the statutory bodies responsible for energy regulation at the national level.

In 2015, based on extensive consultation, CEER issued advice and 16 concrete recommendations for improved co-operation with consumer organisations. The recommendations, which focus on the four key themes of Information Exchange, Capacity Building, Policy Development & Design, and Improving Compliance, are detailed below. These recommendations are useful not only for National Regulatory Authorities (NRAs) in the energy sector, but can also be a source of inspiration for other sectors in furthering co-operation between regulatory agencies and consumer organisations.

CEER Recommendation 1 – Simplicity of information (Information Exchange)

Information shared between NRAs and consumer organisations, as well as with other markets participants, should be clear, simple and easy to understand. Technical data from NRAs should

[49] http://www.ceer.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_PAPERS/Customers/Tab5/C14-CEM-74-07_ConsOrg%20Involvement_Advice_March%202015_0.pdf

therefore be brought to an understandable level. NRAs should encourage consumer organisations to transform their broad knowledge base into concise and focused messages.

CEER Recommendation 2 – Visibility of information (Information Exchange)

NRAs should ensure a high level of visibility in relation to their activities. This could be achieved by proactively delivering timely notifications about major decisions/publications and by supporting relevant documents with summary notes explaining core elements and effects on consumers. NRAs should encourage consumer organisations to act likewise in relation to NRAs.

CEER Recommendation 3 – Improved communication channels (Information Exchange)

NRAs should identify contact persons in relevant fields of interest in order to allow relevant information to flow more rapidly and directly on the basis of mutual trust. NRAs should encourage consumer organisations to act likewise in relation to NRAs.

CEER Recommendation 4 – Clear framework for information sharing (Information Exchange)

In order to establish a clear co-operation framework recognised by the relevant parties, and to the extent that no legal framework/obligation is already in place, NRAs should encourage consumer organisations to establish such a framework with them. The parties could in this way determine the basic principles in relation to how and which information should be shared. Such an agreement should not be too restrictive and may be reviewed/updated regularly to take changing circumstances into account over time.

CEER Recommendation 5 – Synergies (Capacity Building)

NRAs should strengthen their performance in relation to consumer organisations and aim for joint capacity building measures given that they possess expertise of significant mutual value. Given the possible ultimate benefit for the final customer, these synergies should not be left unexploited.

CEER Recommendation 6 – Extent of capacity building (Capacity Building)

Capacity building should be proportionate both in terms of content and resources. It should allow NRAs and consumer organisations as well as other market participants to enhance their level of knowledge with a view to allowing an informed dialogue.

CEER Recommendation 7 – Priority subject areas (Capacity Building)

Capacity building should be performed in clearly defined priority areas which may vary from country to country and from one institution to another. Priority areas should be selected carefully, on the basis of circumstances in individual national markets (different customer needs and priorities) and other relevant considerations.

CEER Recommendation 8 – Resource management (Capacity Building)

NRAs should commit to a general principle of providing capacity building to consumer organisations free of charge (i.e. without any extra cost such as tuition or service fees) and should encourage consumer organisations to do the same. If extra costs cannot be avoided, additional incentives should be provided (e.g. course certificates, possibility to network, etc.) in order to optimise value for money. Public funding could be called upon if the intended activities qualify.

CEER Recommendation 9 – Forms of capacity building (Capacity Building)

Capacity building should be realised through appropriate channels jointly agreed by NRAs and consumer organisations. Different groups may use different types of measures to share information and knowledge depending on individual needs.

CEER Recommendation 10 – Best practice from other sectors (Capacity Building)

NRAs should make an effort to find out whether any best practice examples on capacity building programmes exist in other (regulated) sectors that can be applied to the energy sector as well. At the same time, NRAs should encourage consumer organisations to report on any best practice examples they are aware of.

CEER Recommendation 11 – Overview of future developments of the regulatory framework (Regulatory Policy Development and Design)

As a prerequisite for an increased dialogue on strategic and policy related issues, NRAs should provide an overview of future developments regarding the regulatory framework and encourage consumer organisations, alongside other market participants, to participate in this process.

CEER Recommendation 13 – Public consultations (Regulatory Policy Development and Design)

Public consultations at national level should play a central role in the policy development process with a view to allowing interested stakeholders to take part in this process. Where appropriate, relevant input from consumer organisations may be called upon in the early preparation phases of such consultation processes.

CEER Recommendation 14 – Transparency (Regulatory Policy Development and Design)

NRAs should provide maximum transparency whenever possible and should ensure clarity on how input from consumer organisations as well as from other stakeholders is taken into consideration during the regulatory policy development process in order to increase accountability.

CEER Recommendation 15 – Evidence-based regulation (Improving Compliance)

Regulatory compliance processes should be evidence-based and could include exchanges of information between NRAs and consumer organisations as well as with other market participants to detect potential non-compliant behaviour in the market. This would also result in a higher degree of acceptance and legitimacy of decisions. However, the NRA is not obliged to act upon all the information it may receive, as ultimately the NRA is responsible for deciding when and how to ensure compliance.

CEER Recommendation 16 – Accountability (Improving Compliance)

In order to enhance the accountability of NRAs, regulators should develop appropriate means of communication with consumer organisations, as well as with other market participants, to create effective transparency of regulatory actions and decisions.

Best practice – Which? – Nuisance calls and texts campaign

Which? is running a campaign against nuisance calling. It involves a petition for consumers to sign (369,000 signatures as of May 2016) and a tool that helps consumer to issue complaints (more than 11,000 registered complaints as of May 2016).

The campaign also involves informing consumers about their rights. It calls on the UK Government to make senior executives accountable by law for their company's nuisance calls, and to require businesses to show their number when they call.

The campaign convinced the Government to launch a Nuisance Calls Action Plan, which includes:

- Lowering the threshold for the Information Commissioner's Office (ICO) to take action against nuisance calling firms: calls now only have to cause 'annoyance' rather than 'substantial distress' before enforcement measures can be implemented.
- New regulations to let Ofcom (the UK communications regulator) and the ICO share information on rogue companies.
- A task force, led at the Government's request by Which?, to review how people consent to receiving marketing calls.

Another successful outcome of the campaign is that as of 16 May 2016 it will be illegal for direct marking companies to hide or disguise their phone number: all marketing callers will be forced by law to display their phone numbers when calling.[50]

Enforcement and lobbying for better regulation may also go hand in hand. Investing in media contacts that in turn inform the public about ongoing litigation and public involvement may also be used to put pressure on regulators.

The various Which? campaigns, which were successfully duplicated in Slovenia under the framework of the CoJEF II coaching exercise, are good examples to this end. The Altroconsumo 'misleading fuel' case is another positive example. This action ran in parallel with the BEUC campaign on the introduction of the Worldwide harmonised Light vehicles Test Procedure (WLTP).

4.3.4. The role of the media / social media

The media plays a crucial role in informing consumers about potential litigation. It allows consumer organisations to reach beyond existing members to a wider audience, and can help raise public awareness about the problem. More importantly, the media enables consumers to participate actively via the internet in enforcement campaigns, whether by contributing information or by joining collective actions.

The media can also help to inform consumers about achievements such as newly adopted measures and regulations, thus increasing consumer empowerment. Strong media links therefore remain a crucial part of an overall enforcement strategy for consumer organisations. Media strategies can no longer be limited to the traditional channels (TV, radio, press), but must also involve social media and the internet. This

[50] http://www.which.co.uk/campaigns/nuisance-calls-and-texts/track-our-progress/

creates new opportunities, such as a more interactive way of informing consumers and participative enforcement. Various options are possible: consumers may be asked to vote on their preferred option for better regulation (as in the Which? mobile phone pricing campaign), or even about the litigation to be initiated (as in the Altroconsumo 'misleading fuel' consumption case).

The use of social media may also be crucial in reaching a younger public that would otherwise not easily find their way to consumer organisations. Social media enables spontaneous activities focused on concrete consumer problems. Social media should thus be viewed as a means to reach consumers who are not yet actively involved in the work of consumer organisations.

Best practice – Altroconsumo – misleading fuel consumption

This previously outlined case concerns two class action suits that were initiated against VW and Fiat for their misleading indication of fuel consumption. Consumer involvement in this case was strong, and a broad audience was reached through the use of several innovative means of communication:

- Altroconsumo announced that it would lodge an additional class action suit against another car, and asked consumers to vote for specific companies. This increase the audience of interested consumers and allowed them to experience a 'participatory class action'.
- New communication tools were used in order to reach as many consumers as possible. These included video and social media seeding via Twitter, Facebook, and a call centre for non-members interested for example in calculating refunds.

Further media coverage and attention was gained through the ensuing Dieselgate scandal, which also involved Volkswagen. Altroconsumo was the first to introduce an action against VW for misleading practices (for fuel consumption). This information was brought back to the public's attention during the Dieselgate scandal, which resulted in extra media attention and allowed Altroconsumo to reach a still wider audience.

5. CoJEF II - Challenges and opportunities for consumer enforcement

Globalisation, internationalisation and digitalisation of consumer problemsThe globalisation of consumer problems is definitely not new: the boost of e-commerce, digitalisation, and the success of multinational companies in consumer goods and services all mean that many consumer problems have an international character. What is new is the speed of these developments: the hearsay evidence is that what would have taken five years a decade ago takes five months today. Web 3.0 and 4.0 and the Internet of Things represent the challenges to come for consumer law enforcement.

During CoJEF II, cases involving internationally active IT companies like Facebook, Apple and Dropbox confirmed this trend. Increased internationalisation can also be witnessed in marketing campaigns, and is even apparent in the more 'traditional' consumer goods sectors. The fuel and emissions scandals in the car industry provide clear examples. At the national level, similar problems often arise in sectors with different players that are not necessarily multinationals. The problems connected with unclear pricing in the mobile phone industry, which are not limited to a specific country although the operators differ, are illustrative.

5.1. The key role of facts and language

Enforcement activities in the field of social media demonstrate the role and importance of facts and language. For example, US companies operating in English are key players in Europe. These companies may have subsidiaries in the EU, and can adapt their marketing strategies and business practices to specific circumstances in 28 Member States. Consumers in these counties could thus be confronted with 28 variations of the same marketing strategy, or the same standard terms in 28 languages.

Neither consumer organisations nor consumer authorities have a full overview of the strategies of Facebook, Apple or Google. The Apple case, as well as more recent consumer organisation activities against Google and Facebook, provide ample evidence of these 'messy' situations. To put it bluntly, nobody knows whether companies use the same or different marketing strategies and standard terms in different countries. It would be a Herculean task to compare 28 variations in all of the languages of the EU. And the situation is even worse when it comes to enforcement. Even if one Member State takes action and forces a company to change its practices or terms, it is by no means clear whether all European consumers will benefit.

This situation has both legal and factual dimensions. The legal side is that a judgment or regulatory action in one country does not bind courts and agencies in other countries. Differing interpretations should in theory be decided by the ECJ. Yet such a clarification might take years, if it ever happens. The factual problem is that although a judgment in one Member State might be favourable for all EU consumers, people are not necessarily aware of the judgement and it may not be accessible due to language barriers.

What is required is a more innovative use of digital and software techniques for collecting data on marketing practices and standard terms, for comparing this information in various languages, and for evaluation in order to eliminate at minimum the most egregious infringements. The use of software in consumer law enforcement should therefore be promoted, and investments should be made to adapt existing laws to the age of digitalisation. Herein lies one of the most important challenges in the development of consumer law enforcement.

5.2. National character of enforcement tools

Rules for tackling consumer problems are increasingly harmonised: that is to say that material rules are converging. (Substantive) consumer law is to a large extent based on European directives that are implemented in national law. Divergences in application nevertheless continue to exist, also in areas where full harmonisation directives have been adopted.

Notwithstanding the increased activity of the EU in the areas of procedural law and enforcement tools, enforcement still remains a predominantly national matter. Enforcement bodies (whether private or

public) are national, and the European Commission has no enforcement power. Sanctions in the relevant directives are very often not explicitly provided for and remain a national issue (subject to the minimum standards of effectiveness and equivalence).

The tools available to consumer organisations continue to vary widely. Collective action is just one example where important differences continue to exist. Such procedures may not be available for consumer organisations, or there may not be adequate funding. Furthermore, procedures may be open only to consumer organisations with standing, and standing may be restricted to the consumer ombudsman of a public authority, e.g. in Poland.

Although the Alternative Dispute Resolution (ADR) Directive[51] has brought about important changes, at least in some countries, important differences continue to exist. For example, companies may not be willing to submit disputes to an ADR body, nor may they be willing to comply with the (non-binding) decisions of ADR bodies.

Apart from the problem of the absence of an effective (collective) redress mechanism in certain Member States, traditional (individual) enforcement in the courts also shows important differences. The costs of legal procedures differ widely, and the 'loser pays' principle works as an significant obstacle in certain Member States. In the UK, for example, the risk of having to pay the defending party's legal costs may be a deterrent to launching court actions, and this has an important influence on the cases actually brought to court.

This issue clearly has significant repercussions for the enforcement strategies chosen by different consumer organisations. As described, Which? has mainly undertaken campaign activities around cases and 'best practices', resulting in settlements and actions taken by UK regulators. On the other hand, the German Vzbv has been involved in a far greater number of court proceedings. Although the different costs involved in proceedings are not the only explanation, they do play an important role.

The international cases analysed under CoJEF II and the coordinated actions initiated under CoJEF I moreover illustrate that a success in one country does not automatically lead to changes in the behaviour of the company concerned in other countries – even if the infringed rules were European ones. Strict monitoring and actions by national consumer organisations are necessary to ensure the required changes in all countries concerned.

5.3. Opportunities to use national enforcement tools in a more innovative way

These national enforcement tools do not however rule out enforcement on an international scale.

Initiatives such as the CoJEF II project and BEUC's coordination of consumer initiatives are crucial in order to avoid consumer organisations from working exclusively in a national context, disconnected from the wider international context in which companies are operating.

It is essential that consumer organisations across Europe exchange information and learn from each other's experiences on best practices, consumer issues and cases. Further investment in the CoJEF website and database is therefore crucial. The BEUC newsletter can also play an important role in the dissemination of news about progress on national enforcement, and in informing BEUC member organisations about each other's campaigns.

Co-operation and information exchange in the form of coaching between consumer organisations can also be very effective, as illustrated in the CoJEF II coaching exercises. Language barriers, however, also play a role. The coaching experiment demonstrated that partners should be carefully chosen: coaching exercises between partners that have a passive knowledge of each other's language facilitates co-operation and reduces costs. In addition, the exchange of information about campaigning and lobbying

[51] Directive 2013/11/EU on alternative dispute resolution for consumer disputes

proved easier to reproduce in some legal systems than experiences with court action, due to differences in legal systems and available remedies.

Finally, national tools must be carefully mapped when deciding where to take action. The use of certain national tools (such as the Dutch or the Belgian collective procedures) on an international scale is definitely an option to be further explored. Both national systems allow the courts to declare a settlement binding, not only for the defendant and national victims but also for foreign victims. Such a tool may be an efficient option in dealing with a Pan-European consumer problem. A substantive investment in the proper notification of foreign consumers will in any event be necessary in order to ensure that their fundamental rights are respected (inter alia the right of access to justice).

5.4. Funding, economies at different speed, consumer organisations with varying means and tools

Another recurring challenge is of course funding. Funding is also the first and last issue when it comes to enforcement. The means available to consumer organisations in terms of staff and other resources vary widely amongst the CoJEF II members and amongst consumer organisations in general. Some depend totally on volunteers; others are dependent on membership fees; and some receive governmental subsidies specifically for enforcement purposes.

A common challenge for all organisations is the continuity of funding. Government subsidies are sometimes limited, and income from membership fees is not guaranteed. Digitalisation presents challenges not only in terms of enforcement: it also influences customer behaviour. Younger generations search the internet for answers to their questions rather than subscribing to the newsletters of consumer organisations.

The attitude of younger generations towards consumer organisations also appears to have changed. Young consumers tend to expect concrete solutions for their specific cases rather than general information or actions in the public interest. This is also a factor to be taken into account when deciding upon concrete strategies and considering whether or not to engage in enforcement action. However, these shifting consumer attitudes may make it even more important for consumer organisations to focus on enforcement, including enforcement that leads to individual redress.

A related problem in terms of co-operation on enforcement amongst consumer organisations is the different speeds at which the European economies operate. This discrepancy is also reflected in consumer issues and problems. The absence of a homogeneous (consumer) market leads to different priorities for consumer organisations in different countries. Co-operation between consumer organisations will therefore be led not only by similarities in language and legal systems, but also by the commonality of consumer issues and priorities.

5.5. Comprehensive approach towards enforcement: redress not the only outcome, but also better regulation and consumer empowerment

Digitalisation and fast-changing markets also provide opportunities for consumer organisations. The internet and social media allow wider audiences to be reached, and more consumers are thus informed and empowered.

Consumer organisations are and will remain crucial in the early detection of market failures and consumer problems, and they have an important role to play in alerting other consumer organisations, the public, and public authorities. An efficient complaint registration system is an important tool for investment.

A more structural co-operation with public enforcers – in terms of regular exchange of information and joint capacity building – is an asset, at least in those countries with efficient public enforcement structures. A more structural co-operation would be welcome both at the national and EU levels (inter alia in the CPC network). This would include legal means granting consumer organisations the power to push enforcement authorities into action.

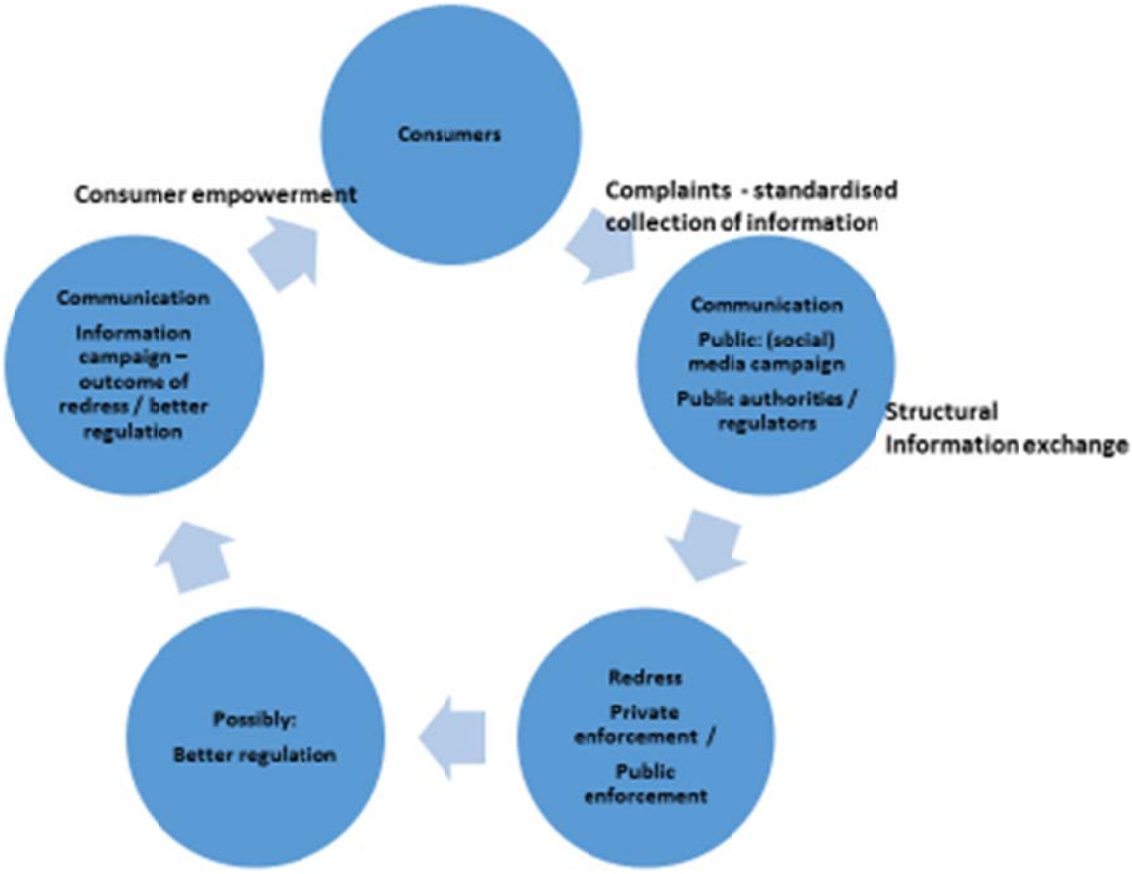
Once consumer organisations have decided that an issue deserves further action, the options include both private and public enforcement as well as individual and collective enforcement. The path chosen will depend on the different enforcement tools available to the organisations, as well as the tools available to public enforcers. Co-operation with public enforcers and even regulators and legislators may ensure that not only the individual consumer obtains redress, but that the problem is solved in the general interest of all consumers suffering from the same problem.

Information campaigns and consumer involvement and participation, for example through social media, may help to put pressure on public enforcers and regulators and to create wider support for change.

Consumer organisations play an important role in signalling consumer problems and consumer law infringements, and in taking action to stop them either through their own actions or with the help of public authorities. In addition, they also fulfil a key function by informing consumers of the outcome of their actions and of changes in regulation or legislation. They can and must provide guidance on consumer rights, and can create greater transparency in the market, thus empowering consumers. This is only possible with the introduction of collective redress that reaches beyond the action for injunction and allows consumers to recover ill-gotten gains and be compensated for harm. In its recommendation, the European Commission has set the benchmark against which the national tool box should be measured.

Even if collective redress exists, what is needed most of all is the ever-closer co-operation between national consumer organisations and national enforcement authorities to enforce the law against companies operating worldwide. Otherwise the enforcement gap will remain, as consumers from member states with more established enforcement systems will benefit from higher protection standards than those with underdeveloped enforcement structures. In this respect, the coaching exercise is paradigmatic of the situation of consumer law enforcement in the EU.

Consumer organisations thus play a pivotal role in a comprehensive approach that starts from a consumer problem and ideally ends with consumer empowerment:



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Ms Pachl is the Deputy Director General at BEUC. Lawyer by background, she has gained considerable expertise in various regulatory policies and on the application of a vast range of EU legislation which have direct impact on consumers. In her function at BEUC, she supervises inter alia work on all aspects of the consumer law acquis, consumer law enforcement and redress and the European Commission's Digital Single Market Strategy. Since 2010, she has been co-ordinating BEUC's projects in relation to co-ordinated enforcement action. Ms Pachl is also responsible for BEUC's work on EU governance and horizontal policies (e.g. European Commission's impact assessments and Better Regulation Agenda) and is a member of the European Commission's REFIT platform.

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Ms Augusta Maciuleviciute is a Senior Legal Officer at BEUC. She leads BEUC team on enforcement and redress, covering collective redress, alternative dispute resolution, competition and other private and public enforcement issues. She has also been working on the previous Consumer Justice Enforcement Forum project (CoJEF I project).

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BEUC The European Consumer Organisation

The Consumer Justice Enforcement Forum (CoJEF II) project is concerned with the role consumer organisations can play in making the consumer protection rules developed by the EU fully and equally effective throughout the Community.

CoJEF II project partners are ten independent national consumer associations:

Austria: Verein für Konsumenten-information

Belgium: Association Belge des Consommateurs

France: UFC - Que Choisir

Germany: Verbraucherzentrale Bundesverband

Italy: Altroconsumo

Poland: Federacja Konsumentow

Portugal: Associaçao Portuguesa para a Defensa do Consumidor

Slovenia: Zveza Potrošnikov Slovenije

The Netherlands: Consumentenbond

United Kingdom: Which?

Visit our website www.cojef-project.eu

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