

CONFERENCE REPORT

Position Paper on the Fitness Check of EU Consumer Law^{*}

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This position paper reflects the discussion and concluding remarks at the second Expert Round Table on impact assessments and EU contract law, held in Oxford in November 2017. The Round Table participants acknowledged the sincere effort of the EU institutions to increase the impact of EU consumer law, in line with principles of better regulation. In this context, the EU's recognition of the value of research, and its efforts to inform itself as to the impact of proposed initiatives and various possible ways to achieve policy aims, look promising.

Improvements in commissioning, carrying out and using research are necessary to prevent the risk that the views of the EU legislator become too narrow or remain too abstract. To this end, the participants at the Round Table found that there is room for improvement on two areas: Firstly, the **quality of research** supporting Fitness Checks and impact assessments should be improved. Secondly, the **conclusions in Fitness Checks** should be critical of policy aims and the potential of contract law to foster cross-border trade. The conclusions should also be better supported by research findings.

1. The Quality of Research Supporting the Fitness Check

As far as the quality of the research supporting the Fitness Check is concerned, the first criticism raised by the Round Table participants pertains to the fact that the text

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of the tender predetermines the research results. The scope of inquiry within which researchers are confined is far too narrow and the instructions are far too directional; the calls too frequently assume that one particular line of enquiry constitutes the only relevant research in relation to a given policy issue, and a wider inquiry is precluded.

The second criticism concerns the time pressure to conduct research: the period allotted is in no way sufficient to meet the ambitious objectives of the tender. The researchers are not given sufficient time to carry out the required research to a level of depth and scientific accuracy that standards of excellence require.

The third criticism has as its object the research methodology on which the Fitness Check is based. The Round Table participants argued that this methodology is unsound and that it is not suitable to determine whether consumer law is effective, efficient, coherent, relevant, and has added value. There is a huge gap between the overambitious language of the tender and the feasibility of the research needed to evaluate all these dimensions of consumer policy in a meaningful manner. Considerable further research, in particular time-consuming empirical and sociological studies, is needed for any substantiated conclusions to be drawn with regard to effectiveness, efficiency, relevance and added value.

The fourth criticism focuses on the interview questions posed to national reporters. Answering the many questions, especially in Fitness Checks, reduces the complex plethora of 28 legal systems to a set of standardized issues which in no way reflect their deeper doctrinal and cultural differences.

The fifth criticism addresses the role of the Court of Justice. The Court plays a dynamic, but not a static role in the development of the legislative *acquis*. It is to some extent unpredictable. So a review of legislative texts must also be fully attentive to the ambitions of the Court of Justice. The material associated with the Fitness Check is not unaware of this - but more emphasis could usefully be placed on the Court's adventurous approach to interpretation. Most of all, the Court's tendency to interpret the EU rules in a broad and expansive manner has the consequence that areas which one might have thought belonged to national law are in fact pulled within the scope of the EU's harmonized regime.

2. Conclusions in the Fitness Check

As far as the substance of the conclusions formulated in the Fitness Check is concerned, the Round Table participants argued that the EU is politicizing research to achieve pre-defined policy goals.

The participants at the Round Table further pointed out that the conclusions of the Fitness Check that better enforcement is necessary are supported by stakeholders and earlier policy documents. However, the conclusion that the main obstacle preventing the achievement of EU policy aims is the insufficient enforcement of consumer law, coupled with consumers' limited awareness of their rights and not enough redress opportunities, overlooks a wide range of current public,

private and other new mechanisms and remedies, such as successful national ADR (especially ombudsman schemes) and coordinated initiatives for enforcement, as well as other possible options. Although better compliance and enforcement are desirable, these conclusions are based on obsolete assumptions about how to ‘enforce’ or support compliance and stand on a very shaky empirical basis. In particular, behavioural science has laid a new foundation for supporting compliance, which contrasts with traditional means of enforcement and should achieve better results.

Considerable innovation is currently taking place in ‘enforcement’ in various Member States and this has not been taken into account in high-level policy-making, and is obscured by analysing enforcement along traditional binary lines of public or private enforcement. The circulation of best practices and opportunities for mutual learning, especially from small and new Member States, should be explored further.

The participants at the Round Table found that the extent to which Fitness Checks can adequately identify inconsistencies, gaps and overlaps, and strengthen the context and baseline scenario in impact assessments depends on the inclusion of all relevant measures in Fitness Checks. The Better Regulation Guidelines should provide clear standards for including or excluding measures from Fitness Checks and should focus on a truly European notion of good governance, whereby the specificity of European capitalism and the specific ethical principles enshrined in the Charter of Fundamental Rights of the EU should play a major role.