An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law

Report prepared by a Consortium of European universities led by the MPI Luxembourg for Procedural Law as commissioned by the European Commission

JUST/2014/RCON/PR/CIVI/0082

Strand 2

Procedural Protection of Consumers

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General Introduction

Methodology, Scope and Aim of the Study

1. Introduction

1. On the 21st of December 2015, the European Union, represented by the European Commission, and Prof. Burkhard Hess, Director of Max Planck Institute for International, European and Regulatory Procedural Law, representing the co-contractors, signed a service contract with the reference JUST/2014/RCON/PR/CIVI/0082. The subject of the contract was the elaboration of an evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law.

2. The contract's starting date was the 21st of December 2015. The period of execution of the tasks was initially established as 12 months and was extended on the 21st of December 2016 from the 21st of December until the 31st January 2017 with the express written agreement of the parties.

3. The present document summarizes the main features of the study, setting out its object, its main actors and the methodology applied. It also includes an assessment of the difficulties encountered in the development of the different tasks that have led to the final outcome.

2. Object of the Study

4. In response to the tender specifications the study consists of two parts. The first strand of the study examines whether obstacles to mutual trust exist and, in the affirmative, identifies the locus and the scale of such obstacles; it thereby facilitates the identification of the areas in which mutual trust needs to be further enhanced in line with the European Council Conclusions of 26/27 June 2014. In addition, the study addresses possible obstacles to legal certainty when businesses and citizens engage in cross-border litigation.

5. The second strand of the study evaluates whether and to what extent national procedural laws and practices ensure the effective procedural protection of EU consumers. Within the realm of consumer law, the study focusses on EU law

governing consumer contracts.[1] It investigates whether national procedural rules and practices satisfy the procedural requirements stemming from the rulings of the Court of Justice of the European Union concerning the principles of effectiveness and equivalence, and the obligation established on the part of the national courts to undertake *ex officio* an assessment of compliance with EU consumer law.

6. Both strands of the study investigate the legal and the practical situations in the civil procedural laws of the 28 EU Member States. The findings derived from, assessments made within, and recommendations based on the study are established on empirical discoveries and are made from a comparative law perspective. The objective of the study is to facilitate and to improve the law-making activities of the European Union and its Member States.

3. Organizational Framework

7. In order to satisfactorily address the two strands of the project, ensuring expertise, completeness and efficiency, a complex organizational framework has been set up; it has the following components:

3.1 The Consortium

3.1.1 Members of the Consortium

8. A Consortium made up of leading European research institutions and the most prestigious European universities was formed at the beginning of the study; it has been led by the Max Planck Institute Luxembourg for Procedural Law. The Consortium incorporated 15 researchers from 12 institutions, including the MPI.[2] The

[1] The study focuses in particular on Directives 93/13/EEC on unfair terms in consumer contracts, Directive 2011/83/EU on consumer rights (including Directives 97/7 and 85/577, (which have been replaced with Directive 2011/83/EU), Directive 99/44/EC on sales and guarantees, Directive 2008/48/EC on consumer credit (previously Directive 87/102/EC), Directive 90/314/EEC on package travel and Directive 2008/122/EC on timeshare.

[2] The members of the Consortium are: Professor Remo Caponi (University of Florence); Professor Gilles Cuniberti (University of Luxembourg); Professor Fernando Gascón Inchausti (Complutense University Madrid); Professor Chris Hodges (University of Oxford, Center for Social and Legal Studies); Professor Emmanuel Jeuland (Université Paris 1 Panthéon-Sorbonne, Institut de droit processuel); Professor Xandra Kramer (Erasmus University Rotterdam); Professor Paul Oberhammer

members of the Consortium elaborated both national reports and (most of them) chapters of the final report. Its main task therefore comprised the undertaking of research and the collection and processing of data from every EU Member State.

9. For the purposes of elaborating the study, two sub-groups were established within the Consortium: sub-group A, dealing with the impact of different national procedures on the free movement of judgments, and sub-group B, addressing the implementation of EU consumer protection instruments in the domestic procedures of the Member States. The Members of the Consortium agreed on the allocation of the different strands of the study among its Members. While each Member was required to monitor a specific part of the study, all worked collegially on the final draft.

3.3.2 Leadership

10. The Max Planck Institute Luxembourg established and ensured the operational efficiency of the Consortium, and coordinated the elaboration of the study thereby safeguarding its consistency and completeness. The MPI contributed to the study with the leadership of its director, Prof. Dr. Dres. h.c. B. Hess, and the collaboration of the Department for Comparative and European Procedural Law. Dr. Pietro Ortolani was the Senior Research Fellow responsible for the mutual trust strand while Dr. Stephanie Law was the Senior Research Fellow responsible for the consumer protection strand. Within the Institute, a core team monitored the progress of the study.[3] Fellows of the MPI from different regions were responsible for the different geographical areas addressed by the study. In this regard, they acted as “Regional Contact Points”; each Contact Point provided guidance and support to the National Reporters and the other Members of the Consortium with respect to a specific jurisdiction or, as the case may be, group of jurisdictions. The Research Fellows

(University of Vienna):Professor Thomas Pfeiffer, Prof. Christoph Kern (Heidelberg University); Professor Marta Requejo Isidro (Max Planck Institute Luxembourg for Procedural Law); Dr. Eva Storskrubb (University of Uppsala); Professor Piet Taelman, Professor Stefaan Voet (University of Gent).

[3] The members of the “core team” were Prof. Burkhard Hess, Prof. Marta Requejo Isidro, Dr. Pietro Ortolani, Dr. Stephanie Law, Vincent Richard, Janek Nowak and Martina Mantovani. Janek Nowak and Martina Mantovani joined the team in the summer of 2016.

supported and monitored the collection of data and interviews, in accordance with the research methodology set out by the Consortium.

3.2 National reporters

11. A network of experienced National Reporters, experts in procedural law and consumer protection law, were entrusted with the task of data collection and the drafting of National Reports. The Members of the Consortium acted as National Reporters for their respective home jurisdictions. An additional 14 National Reporters covered the remaining EU Member States.

3.3 The Advisory Board

12. An Advisory Board, composed of high-ranking stakeholders and experts in procedural and consumer protection law and representing the views of all relevant stakeholders (the judiciary, legal professionals, consumer associations, business associations, debt collection agencies, bailiffs and financial institutions).[4] They assisted the Consortium in contacting practitioners and stakeholders in both procedural and consumer law, and provided feedback as to the accuracy, comprehensiveness and quality of the research carried out. The members of the Advisory Board also reviewed the draft version of the study and made recommendations for further improvement.

4. Methodology

13. The study was carried out by applying a complex, mixed methodology combining qualitative and quantitative paradigms of research: legal desk and archival research, online questionnaires, interviews and national reports were used in a complementary way.

[4] The member of the consortium were Karin Basenach (Head of the Consumer Protection Center Luxembourg); Fabio Guastadisegni (Clifford Chance, head of the Italian litigation practice); Professor Christian Kohler (University of Saarbrücken, former Director-General of the DG Library, Research and Documentation of the CJEU); Professor Hans Micklitz (European University Institute Florence) ; Ignacio Sancho Gargallo (Judge at the Spanish Supreme Court, Madrid); Professor Vassilios Skouris (former President of the CJEU, Luxembourg).

4.1 Legal Desk Research and Archival Research

14. Legal desk research was conducted via a series of comprehensive investigations of the relevant national, European and international legal databases. All accessible and relevant national statutes and case law, as well as the pertinent legal doctrine, was identified by the National Reporters, and assessed by the Consortium.

15. Archival research was conducted by way of obtaining existing secondary quantitative data from the relevant national and international institutions in order to identify and qualify the frequency, geographical occurrence and seriousness of possible problems.

16. In every Member States, efforts were made to collect these statistics via research in all accessible databases, reports and other resources. At the European and international level, statistics were compiled from selected databases and institutional reports. However, it proved difficult to obtain specific data regarding the application of the individual legal instruments. The issue was discussed with the National Reporters and the EU Commission during the first conference of the study, held in June 2016.[5] As a result, the Consortium and the Commission decided to focus primarily on the two other key methods of data collection, namely the online questionnaire and interviews with stakeholders.

4.2 Online Questionnaire

17. Within its first month of activity, the Members of the Consortium drafted a questionnaire composed of both open and closed questions and covering both parts of the study.[6] The broad scope of the study led to a first version of the questionnaire which proved much too complex and long, generating the risk that potential respondents would be deterred from completing the questionnaire, or that they would provide inaccurate responses. Therefore, with a view to facilitating and accelerating

[5] See below, under 5.2.

[6] There were 53 questions in total for the mutual trust version of the online questionnaire and 43 questions in total for the consumer protection version. It should be highlighted that the consumer protection survey was also drafted so as to address a particular set of questions to different stakeholder groups (thus for example, a different set of questions were asked of lawyers than of consumers).

the answering process, the questionnaire was subsequently shortened and split into two parts (one per strand of the study). Accordingly, interviewees could decide whether they wanted to answer the whole questionnaire or only part of it. The questionnaire was translated at the MPI into several EU languages (English, French, German, Italian, Spanish and Polish).

18. The online survey was addressed to and targeted at a wide range of stakeholders (judges, court clerks, lawyers, notaries, bailiffs, national authorities, business organisations, consumer associations, consumer ombudsmen, banks and other financial services providers, and academics) in all 28 Member States. The different number of inhabitants among the Member States was taken into account in order to ensure a balanced distribution of respondents.

19. The questionnaire was uploaded to a SurveyMonkey platform in month two (February) and kept open until month seven (July) of the Study. The platform allowed the respondents to select the questions corresponding to their individual expertise, thus rendering the questionnaire a manageable tool for both the respondents and the Consortium. The processing of the data was also made easier by the platform as it provided for the real-time collection of results, data filtering and the possibility to determine the statistical frequency of each relevant problem as well as its geographical distribution.

20. In total, the online survey received 848 sets of responses.

4.3 Interviews

21. In-depth interviews were conducted by the National Reporters on the basis of a common script drafted by the Members of the Consortium; these interviews were made either in person, by telephone or Skype.[7] Additional interviews were made by the research team of the MPI. When selecting the interviewees, preference was given to individuals with substantial practical experience in the fields of procedural law and consumer protection.[8]

[7] According to the contract, for each strand of the study at least 10 interviews had to be made with stakeholders. For obvious reasons, in small Member States this requirement was very difficult to meet.

[8] Practical problems are described below at para. 6.

22. Interviews followed a template similar to the structure of the online questionnaire, and were therefore based on open and closed questions in order to permit the interviewees to report broadly on their practical experience. In the course of the study, the template was refined and shortened. The results of the interviews were summarized and translated. All interviews are available at the MPI Luxembourg.

23. The total number of interviews is 526. Of this, 279 correspond to the first strand of the study, and 247 to the second.

4.4. National Reports

24. Each National Reporter drafted a detailed report on both parts of the study for their own Member State. For this purpose, the National Reporters gathered data using a uniform template, drafted for each strand by the Consortium, in which all relevant statutes, case law and practices could be reflected. Moreover, thanks to their expertise in the fields under examination, the National Reporters provided indispensable insights as to how the analysed legal institutions operate in practice.

25. The first drafts of the National Reports were collected in May 2016 and distributed to the Consortium for assessment. To facilitate the analysis and comparison of the National Reports the answers given to the questionnaires were compiled in a single master template designed and filled in by the MPI Luxembourg team. The National Reporters were invited to a meeting held in Luxembourg on the 13th of June 2016, where the reports were discussed and decisions made on whether more information or clarification was needed for specific points. After the conference, the National Reporters received specific recommendations on their reports from the MPI team and the Members of the Consortium. The final (improved) versions of the National Reports were delivered in October 2016.

5. The Development of the Study: Meetings and Reporting

5.1 Meetings

26. The Consortium discussed the methodology, the draft online questionnaires, the templates for interviews and for the National Reports, as well as the draft final report, on several occasions. To start with, the tender was circulated and discussed among the group before it was submitted to the EU Commission. In January 2016, the MPI

team elaborated the first drafts of the online questionnaires and circulated them within the Consortium and the Advisory Board for improvement and approval. The Consortium Members started working on the templates for the National Reports in February 2016, always in close contact with the team of the MPI. In June 2016, the MPI organised the first on-site conference on the study, with the participation of the National Reporters (therefore also of the Consortium Members), the members of the Advisory Board and the representatives of the Commission.

27. A second on-site meeting of the Consortium took place in October 2016; at this time, the different chapters of the General Report were discussed. This meeting had been preceded by several skype conferences of the Consortium's Members, in which the structure and the outcomes - in terms of possible policy proposals – of the final report were analysed. The draft chapters were delivered by the Members of the Consortium in December 2016. After a short (mostly linguistic) review the Draft Report was sent to the Commission on the 21st of December, 2016. At that time, the Commission and MPI agreed to extend the contract period until the 31st of January, 2017. Final versions of the chapters (two of them largely reworked in the meantime) were submitted to the EU Commission on the 27th of January, 2017.

5.2 Reporting

28. Due to the reporting obligations, the elaboration of the Study was closely monitored by the EU Commission. In January 2016, a kick-off meeting took place in Brussels, where the team of the MPI met the two units of DG Justice and Consumer Protection and discussed the methodology of the study in detail. The elaboration of the online questionnaire was made in the light of the comments obtained from the Commission after the first meeting. A 1st Report was submitted on the 28th of January 2016. A conference which took place in Rotterdam in February 2016 provided a second opportunity to discuss in detail the draft online questionnaires and the structure of the study with Norel Rosner. Jacek Gartska and Eric Degerbeck attended the June conference and discussed with the national reporters and the Consortium the problems encountered at that stage. The 2nd Report of July/August 2016 summarized the data collection results and the findings of the national reports. It received comprehensive comments from the Commission, which were taken into account in view of the 2nd conference of the project in October 2016. In October 2016, Prof.

Hess and the members of the MPI team working on the consumer strand attended the European Consumer Summit in Brussels and made a presentation on the application of EU consumer law by the domestic courts of the Member States.

6. Difficulties Encountered

6.1 Recollection

29. Studies on the application of EU instruments are usually based on empirical and statistical data. However, until today, specific statistics on civil proceedings are missing in most of the EU Member States. Apart from general information regarding the total number of civil cases, appellate proceedings and enforcement, specific data (i.e. on the number of cases under the specific EU procedural law instruments, precise numbers of cross-border cases etc.) are missing. In this respect it seems advisable that future EU instruments provide for an explicit obligation on the part of the EU Member States to collect and to publish more detailed statistics regarding their application.[9]

30. The collection of statistical data sometimes generated additional difficulties, including the unwillingness of some national ministries of justice or related organisms to permit access to data that was already in existence. Moreover, the collection of data via the European Judicial Network has not proved to be very effective.

31. As expected, the collection of empirical data (especially from the 848 responses to the online questionnaires and via 525 personal interviews) was the most valuable way of getting information. However, conducting interviews is time consuming; the average time of an interview is between 30 and 40 minutes. It was not easy to convince stakeholders to be interviewed; usually, only 1 in 5 persons approached agreed. Against this backdrop, it was not easy to obtain the required number of interviews, especially in small Member States where only a small number of stakeholders is involved in the topics of the study.

[9] This obligation is already found in several EU instruments, see Art.32(2) European Payment Order Regulation; Art.53(2) European Regulation on the Preservation of Bank Accounts.

32. Additional impediments are recurrent. In particular, it must be highlighted that studies on the same or similar subjects are being conducted simultaneously. In this respect, the EU Commission and the EU Parliament should better coordinate their respective research activities. Otherwise, the same stakeholders are asked by different "competing" teams for interviews, a circumstance which necessarily decreases their willingness to cooperate.

6.2 Recommendations for the European Commission in Terms of Project Management

33. A major obstacle for the elaboration of the study was the short timeframe. Assessing the judicial practice in 28 EU Member States for most of the EU instruments in civil and commercial matters within a one-year time period proved to be an almost impossible challenge. Without the infrastructure of the Max Planck Institute, and especially its international team, this task would have been impossible. Indeed, the tight schedule entailed that the team was working under permanent time pressure,[10] even if the number of collaborators dedicated to the project constantly increased. The heavy time constrictions impacted negatively on the review and assessment of interim steps (that is to say, the possibility for a constant refinement of the questionnaires, templates etc.)[11]. With regard to future studies, the provision of more relaxed timeframes, realistically matching the scope of the intended research, is of the essence. In our case, a timeframe of two years would have increased the quality of the study considerably.[12]

34. Content wise, the study addresses two totally different topics. Therefore, it proved to be necessary to split the Consortium and the Advisory Board into two sub-groups which addressed each strand separately. With regard to the National Reporters, it

[10] In order to cope with the timeframe, the MPI team started working at the very moment when it learned that its tender had been selected. Therefore, the team was able to "gain" six additional weeks for the preparation of the project.

[11] Nevertheless, the questionnaires and templates for interviews were refined (and shortened) two times, in order to facilitate the interviewing process and to give National Reporters more flexibility for the interviews.

[12] Interviews were conducted until January 2017 in order to attempt to meet the required figure of 280 for each strand.

was neither possible to split nor to double their number. As a result, while it was possible, it proved to be difficult to retain National Reporters with specific expertise in both strands of the study. In this sense, the working program with regard to the two different strands was immense. The National Reporters were confronted with broad and comprehensive questionnaires and complex templates for their respective reports. In addition, time constraints related to one strand (the Consumer Refit program of the Commission) had an (unnecessary) impact on the other. According to this experience, it seems advisable not to combine two different subjects within one study.

7. Conclusions and Recommendations for the European Commission in Terms of Legislation/policy-making

35. The main results of the study can be found in the conclusions and recommendations. With regard to the first strand, the study did not disclose systemic deficiencies. Therefore, it proposes some targeted measures in order to improve the current situation and to overcome existing obstacles. The most urgent problems relate to the cross-border service of documents.[13]

36. In the second strand the study found considerable inequalities and shortcomings in the application of EU consumer law in the national judicial systems. Therefore, the Study proposes to enact an EU instrument (a directive) on Procedural Consumer Protection in order to improve consumers' access to justice, given that EU consumer protection law is not sufficiently enforced by the courts of the Member States.[14]

37. The elaboration of the study would not have been possible without the support of the core team of the Max Planck Institute Luxembourg which continuously dedicated energy, effort and passion to its elaboration. The team was composed of Dr. Pietro Ortolani and Dr. Stephanie Law acting as the coordinators of the two strands. Apart from acting as a member of the Consortium, Professor Marta Requejo Isidro conceived and reviewed many parts of the study. In the Strand on Mutual Trust, Vincent Richard elaborated on short notice the French national report and assisted the team in preparing the General Report. Martina Mantovani joined in Summer 2016

[13] Executive Summary of Strand 1: Mutual trust (English and French version).

[14] Executive Summary of Strand 2: Procedural Consumer Protection (English and French version).

and helped in ascertaining the national reports and the interviews. Janek Nowak equally joined in Summer 2016 and assisted in the elaboration of the Strand on Consumer Protection.

Therefore, I would like to express my great appreciation and gratitude to the MPI team and to all colleagues and friends who invested much time and effort in the Study.

Luxembourg, 25 January 2017 *Burkhard Hess*

Equivalence and Effectiveness of the Procedural Protection of Consumers under EU Consumer Law

Strand 2

Contents

Executive Summary

1. Unequal Application of EU Consumer Law in the EU Member States

38. This strand of the study comprehensively assesses and evaluates the information obtained through 28 national reports, 848 answers to an online survey, more than 246 interviews with stakeholders in all Member States, and all available statistical data concerning the practical application of EU consumer law by the courts of the Member States of the European Union. Based on these findings, the study found considerable inequalities and shortcomings in the application of EU consumer law in the national judicial systems.

39. Over the last few decades, the EU has enacted an impressive body of consumer protection law, predominantly via directives. Thus far, the legislative activities of the Union have mainly focussed on substantive consumer protection law. With regard to the procedural dimensions and resolution of consumer disputes, the Union recently adopted a Directive on Consumer ADR[15] and a Regulation on ODR[16] mechanisms, while the Directive on Injunctions was first adopted in 1998 and updated in 2009.[17] The EU has not enacted any specific instrument on the protection of consumers in civil proceedings. As a result, EU consumer law is applied and enforced in the context of the national procedural laws of the EU Member States. However, the findings of this strand of the study demonstrate that there is no equal or level playing field across the EU and that national courts are facing difficulties in understanding and implementing the case law the Court of Justice concerning procedural consumer protection.

[15] Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) [2013] OJ L 165.

[16] Regulation (EC) No 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes (Regulation on consumer ODR) [2013] OJ L165/1.

[17] Directive 2009/22/EC of 23 April 2009 on injunctions for the protection of consumers' interests [2009] OJ L 30.

2. Issues to be Addressed by Means of Targeted Intervention

40. It might be advisable to consider providing for minimum standards of consumer protection in civil proceedings in order to improve consumers' access to justice and increase legal certainty and transparency in these proceedings. The intervention should address both individual and collective litigation in a targeted way.

41. With regard to individual litigation, it seems to be necessary to define and clarify the procedural requirements with regard to the obligation on the part of the national court to apply and implement EU consumer law ex officio.

42. In respect of collective redress, it appears advisable to clarify and strengthen the role of consumer protection associations when filing individual or collective claims. The relationship between individual and collective consumer claims should also be clarified.

3. Consumer Law in Civil Proceedings – Major Findings

3.1. Uncertainties Surrounding the Concept of a Consumer

43. EU directives on consumer protection usually define their scope by referring to a contract between an individual and a trader, which refers to the scope of the EU instrument, for example, the sale of goods, unfair terms or consumer credit. One might expect that the application of the European concept by national courts does not entail any problem. However, the empirical research has demonstrated that considerable impediments and inequalities do arise. On the one hand, national laws deviate from the EU concept by enlarging it to include persons like moral persons, ecclesiastical entities, small businesses, etc. On the other hand, courts are not always aware of the existence of a consumer dispute. Especially in cases of default, they are not in a position to investigate the facts of the case, as the burden of proof regarding the existence of a consumer contract lies with the consumer. This means that unless the consumer presents facts regarding his or her status the court will not be able to address this issue.

44. A way out of the present situation would be to provide for a legal presumption that whenever a natural person concludes a contract for sale and/or services with a salesman or a business, he/she is acting as a consumer. It will be up to the other

contractual party (the business) to rebut this presumption in the court proceedings. This entails that the court will obtain the necessary factual information from the business party. As a result, this presumption creates a mechanism whereby consumer protection law will be applied by the court *ex officio*.[18]

3.2. Divergent Approaches to Judicial Activism in the Member States

45. Consumer disputes are heard by civil courts. These courts apply their respective civil procedural laws which are, throughout Europe, mainly dominated by the principle of party disposition. According to this principle, the parties initiate the proceedings, and they provide the court with the facts and legal arguments. Although modern procedural law favours a more active role of the court, the position of a consumer in civil litigation is difficult as he or she is the typical weaker party and, usually, unfamiliar with legal issues. Against this backdrop, the ECJ has developed the obligation of the court to apply consumer law of his own motion in order to protect the weaker party in civil proceedings. However, as the interviews and the national reports demonstrate, the attitude of national laws (and of individual judges) is very diverse. Sometimes, national judges simply disregard the pertinent case law of the ECJ qualifying it as “erroneous”.

46. Generally, civil procedural law should empower the judge to give a “helping hand” to the weaker party (the consumer). In particular, this obligation should apply when the consumer is not represented by a lawyer. However, the representation of the consumer by a lawyer (or by a consumer association) shall not prevent the judge from exercising an active role. Therefore, it is recommended to state this obligation of the judge expressly in the national procedural laws and to set out its requirements in detail.

3.3. Clarifying the Content of the ex officio Obligation

47. The obligation on national judges to apply EU consumer law of their own motion on the basis of the case law of the Court of Justice should be clarified. One major objective of the study was to systematise the different aspects of principle and to scrutinise its application in the EU Member States. Two addressees of the principle

[18] See infra at 4.1.

must be distinguished. Firstly, Member States should adapt their procedural laws to the prerequisites of the case law of the ECJ. Secondly, national judges must closely follow the guidance given by the ECJ. In order to understand the *ex officio* obligation, different procedural constellations must be distinguished: ordinary proceedings, appeals, payment orders proceedings and the enforcement of mortgages and notarial deeds.

3.3.1. Ordinary Proceedings

48. In ordinary proceedings, the *ex officio* obligation empowers national judges to elucidate legal and factual issues by actively asking the parties about the nature of the transaction and their legal status. At present, the legal foundation of the obligation to intervene (more) actively is differently shaped in the laws of the Member States. Sometimes the *ex officio* obligation is conceived as a part of the principle "*iura novit curia*"; at other times, it is only applied to mandatory law. In some Member States, the *ex officio* obligation has been explicitly spelled out in the procedural or the consumer code. However, there are many Member States where the *ex officio* obligation has not been explicitly enacted.

49. The rules of EU consumer protection law should generally be considered to be mandatory and, therefore, be applied by the court of its own motion.

3.3.2. Appellate Proceedings

50. In the case that the *ex officio* application is not sufficiently implemented by the courts of first instance, an appeal (and also a second appeal) might be based on the insufficient application of EU consumer law, that is, the non-respect of the *ex officio* obligation, by the inferior court. Consequently, the Member States should be obliged to make clear in their procedural codes or laws that the failure of a court to apply EU consumer law (as it is implemented in national law) *ex officio* entails the right to appeal.

3.3.3. Payment Order Proceedings

51. In these types of proceedings, the consumer is usually the defendant and, quite often, does not appear to actually defend the claim. In this constellation, *ex officio* control must guarantee that EU consumer protection law is both applied, and

implemented, at the application stage or at an early stage of enforcement. In either situation, the *ex officio* control must be made by a judge. Alternatively, the national legislature may exempt critical areas of consumer protection law from the scope of national payment order proceedings.

3.3.4. Enforcement Proceedings

52. In enforcement proceedings, a review of the enforceable title is usually excluded by the res judicata effect of the judgment or judicial order. However, in cases where the title is not capable of becoming res judicata,[19] a review at the enforcement stage is needed in order to ensure the effective protection of the consumer. In this respect, the *ex officio* control requires two additional safeguards: on the one hand, the consumer must be informed at the enforcement stage about any available relief where *ex officio* control will be exercised. On the other, enforcement proceedings must provide for effective protective measures at the enforcement stage aimed at preventing adverse effects for the consumer like the loss of his or her family home (consequences which are often irreversible). In this context, special attention must be given to the specific situation of the vulnerable consumer who is not capable of efficiently using procedural remedies and engaging in procedural acts without additional assistance.

3.4 Jurisdiction and Arbitration Claims in Domestic Settings

53. With regard to jurisdiction clauses, several alternatives could be envisaged. The most far reaching would be to generally prohibit jurisdiction clauses in consumer contracts.[20] Alternatively, it might be advisable to extend the protective regime of Arts.17 to 19 of the Brussels I bis Regulation to domestic contexts (venue) in the EU Member States. Furthermore, each of the proposed changes should be aligned by a safeguard provision which dictates that the consumer is informed about the legal consequences when entering an appearance before an incompetent court (see Art.26(2) of the Brussels I bis Regulation).

[19] Usually, these enforceable titles are notarial acts and mortgages. They are not reviewed by a judge before the enforcement stage.

[20] A similar prohibition is found in Art.10(1) of the Directive on Consumer ADR 2013/11/EU.

54. Regarding arbitration clauses, Art.10 of the Directive on Consumer Alternative Dispute Resolution precludes any arbitration clause with the consumer before the materialization of the dispute. Furthermore, Art.11 of the CDR Directive should be clarified in the sense that consumer arbitration tribunals – in addition to national courts – must apply mandatory EU consumer protection law. In addition, the EU law maker should ensure that consumer arbitration implies that the financial risk and/or additional costs associated with this type of litigation shall not discourage the consumer from using these remedies.

3.5. Interfaces between Individual and Collective Proceedings

55. It is advisable to address the interfaces between individual and collective proceedings in consumer matters.

56. It should be clarified that consumer protection associations (CPAs) have legal standing to bring consumer claims either individually or in the collective interests of consumers. At the same time, the standing of CPAs in collective proceedings should not generally prevent individual claimants from bringing separate claims. Similarly, it should not bar lawyers from representing consumers either individually or collectively.

57. However, the national court should be given the discretionary power to stay individual claims, once the collective claim has been filed, until such a time as the collective proceedings are brought to an end.[21] Furthermore, the binding effect of the collective proceedings on the individual claims should be clarified. In this respect, Member States provide for different solutions (binding and non-binding effects). As such, a uniform European solution seems to be required[22].

58. The binding effect of injunctions brought by CPAs, particularly in respect of unfair terms and unfair practices, should also be clarified.

[21] Yet, the court may refrain from staying the proceedings in case the individual action has already far progressed.

[22] In order to ensure that a consumer in one Member State is not obliged to initiate individual proceedings to achieve the same result as the collective action, while this is not required in another Member State.

4. Legislative and Non-legislative measures

59. Improving consumers' access to court is not only a matter of law-making: much depends on the amounts of information held by consumers concerning available procedures and dispute resolution mechanisms within and outside the judicial framework.

60. As a matter of principle, consumer disputes often do not raise difficult issues. As such, consumers should have access to quick, simple and affordable proceedings. In order to reduce costs and complexity, Member States should be encouraged to promote simplified and affordable proceedings in the context of which self-represented consumers may bring their claims on the basis of standard forms without it being necessary that they are represented by a lawyer. These claims must not necessarily be heard by the courts of the Member States.

61. Any legislative initiative should therefore be accompanied by non-binding measures, such as a Communication on Consumer Dispute Resolution, which provides for best practices regarding the settlement of consumer disputes by courts and/or by ADR bodies, individually and collectively. As the reaction of the Irish government in the current mortgage crisis demonstrates, a focussed information campaign based on (social) media may raise the awareness of the consumers of a pending problem and encourage them to take recourse to judicial and extra-judicial relief.

Résumé

1. Application inégale du droit européen de la consommation dans les États membres de l'UE

62. Ce volet de l'étude examine et évalue de manière exhaustive les informations obtenues grâce aux 28 rapports nationaux, aux plus de 848 réponses à un sondage en ligne, aux plus de 246 entretiens avec les parties prenantes de tous les États membres ainsi qu'à toutes les données statistiques disponibles concernant l'application du droit de l'UE des consommateurs par les tribunaux des États membres de l'Union européenne. Sur la base de ces conclusions, l'étude a mis en évidence des inégalités et des lacunes considérables dans l'application du droit européen de la consommation dans les systèmes judiciaires nationaux.

63. Au cours des dernières décennies, l'UE a promulgué un impressionnant corpus de règles relatives à la protection des consommateurs, principalement par le biais de directives. Jusqu'à présent, les activités législatives de l'Union se sont surtout concentrées sur le droit matériel de la protection des consommateurs. En ce qui concerne les aspects procéduraux et la résolution des litiges de consommation, l'Union a récemment adopté une directive sur le règlement extrajudiciaire des litiges de consommation (RELC),[23] un règlement sur le règlement en ligne des litiges de consommation (RLLC),[24] ainsi qu'une directive sur les actions en cessation[25]. L'UE n'a pas promulgué d'instrument spécifique sur la protection des consommateurs dans les procédures civiles. Par conséquent, le droit européen de la consommation est appliqué et contrôlé dans le contexte du droit procédural des États membres de l'UE.

[23] Directive 2013/11/EU du 21 mai 2013 relative au règlement extrajudiciaire des litiges de consommation et modifiant le règlement (CE) No 2006/2004 et la directive 2009/22/EC (Directive relative au RELC) [2013] OJ L 165.

[24] Règlement (EU) No 524/2013 du 21 mai 2013 relatif au règlement en ligne des litiges de consommation [2013] OJ L165/1.

[25] Directive 2009/22/EC du 23 avril 2009 relatives aux actions en cessation en matière de protection des intérêts des consommateurs [2009] OJ L 30.

Or, les conclusions de ce volet de l'étude démontrent qu'il n'existe pas de conditions équivalentes dans l'ensemble de l'UE et que les tribunaux nationaux rencontrent des difficultés dans la mise en œuvre de la jurisprudence de la Cour de justice de l'Union européenne (CJUE) en matière de protection procédurale des consommateurs.

2. Questions à traiter par une intervention ciblée

64. Il pourrait être opportun d'établir des normes minimales de protection procédurale du consommateur afin d'améliorer l'accès à la justice des consommateurs et d'accroître la sécurité juridique et la transparence dans ces procédures. L'intervention devrait traiter les litiges individuels et collectifs de manière ciblée.

65. En ce qui concerne les litiges individuels, il semble nécessaire de définir et de préciser les exigences procédurales relatives à l'obligation pour la juridiction nationale d'appliquer et de mettre en œuvre d'office le droit européen de la consommation.

66. Pour ce qui est des recours collectifs, il apparaît opportun de clarifier et de renforcer le rôle des associations de protection des consommateurs lorsqu'elles déposent des recours individuels ou collectifs. La relation entre les recours individuels et collectifs des consommateurs devrait également être clarifiée.

3. Le droit de la consommation dans les procédures civiles – principales conclusions

3.1. Incertitudes entourant le concept de consommateur

67. Les directives européennes sur la protection des consommateurs définissent généralement leur champ d'application en se référant à un contrat entre un particulier et un professionnel qui se réfère au champ d'application de l'instrument de l'UE, par exemple la vente de biens, les clauses abusives ou le crédit à la consommation. On pourrait s'attendre à ce que l'application de la notion européenne par les juridictions nationales n'entraîne aucun problème. Cependant, la recherche empirique a démontré que des obstacles et des inégalités considérables se posent. D'une part, les législations nationales s'écartent du concept de l'UE en l'élargissant à des personnes comme les personnes morales, les entités ecclésiastiques, les petites entreprises, etc. En revanche, les tribunaux ne sont pas toujours conscients de

l'existence d'un litige de consommation. En particulier, en cas de procédure par défaut, ils ne sont pas en mesure d'enquêter sur les faits de la cause car, la charge de la preuve concernant l'existence d'un contrat de consommation incombe au consommateur. Cela signifie que, à moins que le consommateur présente des faits concernant son statut, le tribunal ne sera pas en mesure de traiter cette question.

68. .Une solution à la situation actuelle consisterait à prévoir légalement que chaque fois qu'une personne physique conclut un contrat de vente et / ou de services avec un vendeur ou une entreprise, elle agit en tant que consommateur. Il appartiendra à l'autre partie contractuelle (l'entreprise) de réfuter cette présomption dans les procédures judiciaires. Cela implique que le tribunal obtiendra les informations factuelles nécessaires auprès de la partie commerciale. Par conséquent, cette présomption crée un mécanisme par lequel la loi sur la protection du consommateur sera appliquée d'office par le tribunal.[26]

3.2. Approches divergentes de l'activisme judiciaire dans les États membres

69. Les litiges de consommation sont entendus par les tribunaux civils. Ces tribunaux appliquent leurs droits procéduraux respectifs qui sont, dans toute l'Europe, principalement dominés par le principe dispositif. Selon ce principe, les parties engagent la procédure, elles fournissent au tribunal les faits et les arguments juridiques. Bien que le droit procédural moderne favorise un rôle plus actif de la cour, la position d'un consommateur dans un litige civil est difficile car il est typiquement la partie faible et habituellement n'a pas de connaissance en matière juridique. Dans ce contexte, la Cour de justice a développé l'obligation pour le tribunal d'appliquer de sa propre initiative le droit de la consommation afin de protéger la partie la plus faible dans une procédure civile. Cependant, comme le montrent les entretiens et les rapports nationaux, l'approche des législations nationales (et des juges individuels) est très diverse. Parfois, les juges nationaux ne tiennent pas compte de la jurisprudence pertinente de la CJUE en la qualifiant d' «erronée».

70. Généralement, le droit procédural civil devrait habiliter le juge à donner un «coup de main» à la partie la plus faible (le consommateur). En particulier, cette obligation devrait s'appliquer lorsque le consommateur n'est pas représenté par un avocat.

[26] Cf infra 4.1.

Toutefois, la représentation du consommateur par un avocat (ou par une association de consommateurs) n'empêche pas le juge d'exercer un rôle actif. Par conséquent, il est recommandé d'énoncer expressément cette obligation du juge dans les droits procéduraux nationaux et d'énoncer ses exigences en détail.

3.3. Clarification du contenu de l'obligation ex officio

71. L'obligation *ex officio* pour les juges nationaux d'appliquer d'office le droit européen de la consommation devrait être clarifiée sur la base de la jurisprudence de la Cour de justice. L'un des principaux objectifs de l'étude était de systématiser les différents aspects du principe et d'en contrôler l'application dans les États membres de l'UE. Il convient de distinguer deux destinataires du principe. Premièrement, les États membres devraient adapter leur droit procédural aux conditions préalables de la jurisprudence de la CJUE. Deuxièmement, les juges nationaux doivent suivre de près les orientations données par la CJUE. Pour comprendre l'obligation *ex officio*, il faut distinguer différentes constellations procédurales: procédures ordinaires, appels, procédures d'injonction de payer et exécution des hypothèques et actes notariés.

3.3.1. Procédures ordinaires

72. Dans les procédures ordinaires, l'obligation *ex officio* habilite les juges nationaux à élucider les questions de droit et de fait en demandant activement aux parties la nature de la transaction et leur statut juridique. À l'heure actuelle, le fondement juridique de l'obligation d'intervenir (plus activement) est différent dans la législation des États membres. Parfois, l'obligation *ex officio* est conçue comme faisant partie du principe *iura novit curia*; À d'autres moments, l'obligation est seulement appliqué aux dispositions impératives. Dans certains États membres, l'obligation *ex officio* a été explicitement énoncée dans le code de procédure ou le code de la consommation. Toutefois, il existe de nombreux États membres dans lesquels l'obligation *ex officio* n'a pas été expressément adoptée.

73. Les règles de la législation européenne en matière de protection des consommateurs devraient généralement être considérées comme obligatoires et doivent donc être appliquées d'office.

3.3.2. Procédures d'appel

74. Dans le cas où la demande d'office n'est pas suffisamment mise en œuvre par les tribunaux de première instance, le recours (ainsi qu'un deuxième recours) pourrait être fondé sur l'application insuffisante du droit européen de la consommation, c'est-à-dire sur le non-respect de l'obligation *ex officio* par l'instance inférieure. Par conséquent, les États membres devraient être tenus de préciser dans leurs codes ou lois de procédure que l'omission pour un tribunal d'appliquer le droit européen de la consommation (tel qu'il est appliqué en droit national) entraîne d'office le droit d'interjeter appel.

3.3.3. Procédures d'injonction de payer

75. Dans ce type de procédures, le consommateur est habituellement le défendeur et, très souvent, ne semble pas réellement contester la demande. Dans cette constellation, le contrôle *ex officio* doit garantir que la législation européenne sur la protection du consommateur est appliquée et mise en œuvre au stade de la demande ou au stade ou au cours de la première phase d'exécution. Dans les deux cas, le contrôle *ex officio* doit être exercé par un juge. En revanche, le législateur national peut exclure du champ d'application de la procédure national d'injonction de payer les aspects essentiels de la législation relative à la protection des consommateurs.

3.3.4. Procédures d'exécution

Dans les procédures d'exécution, l'examen du titre exécutoire est habituellement exclu par l'autorité de la chose jugée de la décision ou de l'ordonnance judiciaire. Toutefois, dans les cas où le titre ne peut pas acquérir l'autorité de la force jugée, il est nécessaire de procéder à un examen au stade de l'application de la loi afin d'assurer la protection efficace du consommateur. À cet égard, il conviendrait de prévoir deux garanties supplémentaires: d'une part, le consommateur doit être informé, au stade de l'exécution, de toute mesure réparatrice disponible lorsque le contrôle *ex officio* sera exercé. D'autre part, les procédures d'exécution doivent prévoir des mesures de protection efficaces visant à prévenir les effets néfastes pour le consommateur au stade de l'exécution, par exemple la perte de son domicile familial (conséquences qui sont souvent irréversibles). Dans ce contexte, il convient

d'accorder une attention particulière à la situation spécifique du consommateur vulnérable qui n'est pas en mesure d'utiliser efficacement les recours procéduraux et de se livrer à des actes de procédure sans assistance supplémentaire.

3.4 Compétence juridictionnelle et arbitrage dans des situations internes

76. En ce qui concerne les clauses de compétence, plusieurs solutions pourraient être envisagées. Le plus important serait d'interdire généralement les clauses de juridiction dans les contrats conclus avec les consommateurs. Par ailleurs, il pourrait être souhaitable d'étendre le régime de protection des articles 17 à 19 du règlement Bruxelles I bis aux contextes nationaux (compétence spéciale) dans les États membres de l'UE. En outre, chacune des modifications proposées correspondre à une disposition de sauvegarde stipulant que le consommateur est informé des conséquences juridiques lors de sa comparution devant un tribunal incompétent (voir l'article 26, paragraphe 2, du règlement Bruxelles I bis).

77. En ce qui concerne les clauses d'arbitrage, l'article 10 de la Directive RELC exclut toute clause d'arbitrage avec le consommateur avant la matérialisation du litige. En outre, l'article 11 de la Directive RELC devrait être clarifié en ce sens que les tribunaux d'arbitrage de consommateurs - en plus des juridictions nationales - doivent appliquer la législation européenne impérative en matière de protection des consommateurs. En outre, le législateur européen devrait veiller à ce que l'arbitrage des consommateurs garantisse que le risque financier et/ ou les coûts supplémentaires associés à ce type de litige ne soient pas dissuasifs pour le consommateur.

3.5. Interfaces entre les procédures individuelles et collectives

78. Il est recommandé de traiter les interfaces entre les procédures individuelles et collectives en matière de consommation.

79. Il conviendrait de préciser que les associations de protection des consommateurs (APC) ont la capacité légale de présenter des recours de consommateurs soit individuellement, soit dans l'intérêt collectif des consommateurs. En même temps, la qualité des APC dans les procédures collectives ne devrait généralement pas empêcher les demandeurs individuels de déposer des recours distincts. De même, il

ne devrait pas empêcher les avocats de représenter les consommateurs, individuellement ou collectivement.

80. Toutefois, il convient de conférer au juge national le pouvoir discrétionnaire de suspendre les demandes individuelles, une fois la demande collective déposée, jusqu'à ce que la procédure collective soit terminée.[27] En outre, l'effet contraignant de la procédure collective sur les revendications individuelles devrait être clarifié. À cet égard, les États membres prévoient des solutions différentes (effets contraignants et non contraignants). Une solution européenne uniforme semble être nécessaire[28].

4. Mesures législatives et non législatives

81. L'amélioration de l'accès des consommateurs aux tribunaux ne relève pas seulement du droit: beaucoup dépend de la quantité d'informations à disposition des consommateurs concernant les procédures disponibles et les mécanismes de règlements judiciaires et extrajudiciaires des différends.

82. 23. En règle générale, les litiges de la consommation ne posent pas de problèmes difficiles. À ce titre, les consommateurs devraient avoir accès à des procédures rapides, simples et abordables. Afin de réduire les coûts et la complexité des procédures, les États membres devraient être encouragés à promouvoir des procédures simplifiées et abordables dans le cadre desquelles les consommateurs qui se représentent eux-mêmes peuvent présenter leurs demandes sur la base de formulaires standardisés sans qu'il soit nécessaire qu'ils soient représentés par un avocat.

83. 24. L'initiative législative devrait donc s'accompagner de mesures non contraignante, telle qu'une communication sur le règlement des litiges relatifs aux consommateurs, qui définit les meilleures pratiques en matière de règlement des litiges de la consommation par les tribunaux et / ou par les organes de RELC, individuellement et

[28] Afin de garantir qu'un consommateur dans un État membre ne soit pas tenu d'engager une procédure individuelle pour obtenir le même résultat que l'action collective alors que cela n'est pas nécessaire dans un autre État membre.

collectivement. Comme le démontre la réaction du gouvernement irlandais à la crise hypothécaire actuelle, une campagne d'information ciblée dans les médias (sociaux) peut sensibiliser les consommateurs à un problème en cours et les encourager à recourir à des mesures judiciaires et extrajudiciaires.

Chapter 1: General Structure of Procedural Consumer Protection

STEPHANIE LAW[29]

1. Introduction

84. The body of EU consumer legislation that forms the focus of this study has two general characteristics: firstly, it tends to take the form of directives and secondly, it grants substantive and not procedural rights to consumers.[30] That is to say, EU directives establishing substantive rights do not tend to harmonise national rules of civil procedure; rather, the principle of the procedural autonomy of the Member States pertains to national regimes of consumer dispute resolution. However, the CJEU has recognised that national rules of procedure may impact the ability of consumers to exercise, rely upon and effectively benefit from the rights derived from EU consumer law within their national systems.[31]

85. Against this background, the CJEU has acknowledged that the procedural autonomy of the Member States is limited by the principles of equivalence and effectiveness.[32]

[29] This chapter is based partially on a preliminary draft prepared by Professor Emmanuel Jeuland. However the author retains all responsibility for its content.

[30] The exceptions, that is, directives which provide for procedural protections, are the Consumer Injunctions Directive 2009/22/EC and the ADR for Consumer Disputes Directive 2013/11/EU.

[31] The key body of CJEU case law concerns those rules of national civil procedure which undermine or preclude the possibility for the national court to examine – at different stages of the proceedings – potential violations of EU consumer law of its own motion; this is discussed further in Chapter 3, 'Consumer Actions before National Courts'.

[32] Respect for the principle of equivalence requires that the national rules of civil procedure applicable to actions based on rights deriving from EU law cannot be less favourable than those applicable in similar domestic actions while respect for the principle of effectiveness demands that national rules cannot make the exercise of the rights conferred by EU law impossible or excessively difficult. See Koen Lenaerts *et al* (eds.), *EU Procedural Law* (OUP 2016), Chapter 4. Moreover, see Chapter 3, 'Consumer Actions before National Courts'.

The rules of national civil procedure that potentially undermine effective and equivalent consumer protection are various. The existence of and consequences stemming from the application of these rules tend to become evident at the EU level when the national courts refer a question for a preliminary ruling to the CJEU.[33] It is in this way that the CJEU has developed procedural requirements - examined in the four chapters that follow – which aim to promote the effective and equivalent protection of consumer rights.

86. The purpose of this introductory chapter is to examine three issues relevant to the general structure of consumer protection; these cut across procedural consumer protection in its entirety, and thus also the specific concerns examined in Chapters 2 to 5 of this report. They include: the implementation of EU consumer law into the national legal systems; the concept of the consumer in EU legislation and in national law, and the character of the enforcement[34] of consumer law within the Member States.

2. The Implementation of EU Consumer Legislation in the National Legal Systems

2.1 Summary of the Status Quo

87. EU consumer legislation predominantly takes the form of directives which establish substantive and – only recently, and indeed to a limited extent – procedural rights for consumers. The national reports set out the national legislation that has been drafted or used to transpose and implement EU directives into the Member States.[35] From the national reports, it is clear that the directives examined for the purposes of this

[33] On the basis of the procedure set out in Art.267 TFEU.

[34] It should be noted that for the purpose of this chapter, enforcement is understood broadly as the implementation of consumer law rules.

[35] National Report, Question 1.

study – EU law governing consumer contracts – have been implemented in all of the Member States. These directives include:[36]

EU legislation
Doorstep Selling Directive 1985/577/EEC (replaced by Consumer Rights Directive 2011/83/EU)
Package Travel Directive 90/314/EEC[37]
Unfair Contract Terms Directive (UCTD) 1993/13/EEC
Distance Selling Directive 1997/7/EC (replaced by Consumer Rights Directive 2011/83/EU)
Consumer Sales and Guarantees Directive 1999/44/EC
Unfair Commercial Practices Directive (UCPD) 2005/29/EC
Consumer Credit Agreement Directive 2008/48/EC
Timeshare Protection Directive 2008/122/EC
Consumer Rights Directive (CRD) 2011/83/EU

88. It is for the national legislature to identify the most appropriate mechanism; an analysis of the national reports indicates that the implementation of EU directives is made in different ways in the Member States:

(i) Transposition by code: the EU directive might be transposed into the civil code,[38] into the consumer code,[39] into the economic code[40] or into the code of civil procedure.[41]

(ii) Transposition by legislation: the EU directive might be transposed via an act on consumer protection (which can be used for the transposition

[36] NB: the directives which have been amended or repealed by the CRD are also referenced here, as the period of case law studied extends to the time before the CRD came into effect in the Member States.

[37] To be replaced by the Package Travel Directive 2015/2302/EU, to be adopted by the Member States by 1st of January 2018 and applicable from 1st of July 2018.

[38] National Reports, Question 1: Germany; the Netherlands; Slovakia.

[39] National Reports, Question 1: France; Luxembourg; Italy.

[40] National Report, Question 1: Belgium.

[41] National Reports, Question 1: Hungary; Spain.

of more than one directive, or provisions of more than one directive)[42], in statutory instruments[43] or via a number of separate pieces of national legislation (act, ordonnance or government decree), for example, with one (or more) piece(s) of legislation for each directive.[44]

89. These categorisations are not strictly established; indeed, most states adopt a combination of the two mechanisms of implementation. In almost every system which has a code, the approach adopted is a combination of the two mechanisms of transposition.[45] Where there is no code (whether civil, consumer, economic, or procedural), the approach also tends to be a hybrid one where EU legislation is implemented using various pieces of national legislation, sometimes accompanied by an act on consumer protection (which tends to provide a mechanism for the transposition of more than one directive).[46]

2.2 Problems Identified in the National Legal Systems

90. In the interviews and responses to the online survey, a number of problems arising from the implementation of EU directives have been identified across the Member States. These include fragmentation and complexity, which leads to a lack of

[42] National Reports, Question 1: Austria (KSchG); Bulgaria (Law on Consumer Protection); Denmark (Danish Consumer Contracts Act); Estonia (Law on Obligations Act); Finland (Consumer Protection Act); Latvia (Consumer Rights Protections Law); Lithuania (Law on Consumer Protection); Malta (Consumer Affairs Act); Slovenia (Consumer Protection Act).

[43] National Report, Question 1: Ireland (which should be distinguished at the common law from acts of law, which require a new act of the legislature to be passed).

[44] National Reports, Question 1: Poland; Portugal; Romania; the UK.

[45] National Report, Question 1: Luxembourg (Luxembourg seems to adopt an approach which is based predominantly on the transposition of EU directives into the Code de la Consommation with the exception of the Misleading and Comparative Advertising Directive 2006/114/EC, which has been implemented via the Loi of 30 July 2002).

[46] National Reports, Question 1: England and Wales and Scotland (This is the situation, for example, in the jurisdictions of the UK where there are various pieces of legislation which have been drafted for specific EU directives, as well as the Consumer Rights Act 2015, which implemented the CRD and also replaces some of the existing pieces of national legislation).

coherence, as well as a lack of knowledge of national and EU consumer legislation and related case law.

2.2.1 Fragmentation and Complexity in Consumer Law

91. The first problem is essentially one that concerns the relationship (or lack thereof) between the EU consumer law regime and those of the Member States. This is an issue which has long been highlighted in the legal literature[47] and which is confirmed in the analysis of data undertaken for the purposes of this study. The interviewees identify instances of fragmentation and complexity within the national system, which leads to a lack of coherence between EU and national consumer law. This fragmentation is deemed to arise in light of three factors: 1) the manner in which EU directives are transposed, 2) the substance of the EU directives and 3) the reach of EU legislation (i.e. the level of harmonisation sought by the EU legislature).

92. The first problem is one of fragmentation, which arises within the national legal system and within specific sectors of national law; it is deemed to arise from the

[47] This notion has been consistently at the forefront of the debate on the shape and character of European private law, whether in the form of directives, or in the form of a possible European civil code, a Common Frame of Reference, a proposal for a Common European Sales Law or developed from one of the other scholarly endeavours advanced. This has been true since the 1980s when Hein Kötz coined the metaphor of European private law directives as "islands in an ocean of national private laws" (Hein Kötz, 'Gemeineuropäisches Zivilrecht' in Herbert Bernstein *et al* (eds), *Festschrift für Konrad Zweigert zum 70. Geburtstag* (Mohr 1981) 481, 485. Schmid now refers to the "European law continent surrounded by an ever smaller sea of national contract law"; Christoph Schmid, *Die Instrumentalisierung des Privatrechts durch die Europäische Union: Privatrecht und Privatrechtskonzeptionen in der Entwicklung der Europäischen Integrationsverfassung* (Nomos, Baden-Baden; 2010) 212. The literature is considerable. On the fundamental change to systems of national private law, see Marco Loos, 'The Influence of European Consumer Law on General Contract Law and the Need for Spontaneous Harmonisation: On the Disturbance and Reconstruction of the Coherence of National Contract Law and Consumer Law Under the Influence of European Law', *Centre for the Study of European Contract Law Working Paper No.2006/02*, 4-7. As to the problems arising from the use of directives in particular, see Angus Johnston and Hannes Unberath., 'European Private Law by Directives: Approach and Challenges' in Christian Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law* (CUP 2010) 85, 86-87.

transposition of EU legislation and to create a "major" problem.[48] It is reported to be reflected in a lack of coherence between 1) consumer law as transposed from EU law and areas of national law by which consumers are significantly affected[49] and 2) the civil code or general civil law, and the specific legislative acts implementing European norms.[50] At least 6 interviewees have identified a problem in determining in which form EU norms should be implemented[51] (whether in specific legislative acts, in the general civil law, in the civil code or in procedural law).[52] This generates incoherence which creates difficulties for stakeholders to identify the applicable rule in any given situation and its content. In Spain, it has been highlighted that the UCTD has been duplicated in its transposition; while provisions affecting consumer protection (unfairness, vexatious nature of contract terms and practices) have been transposed into national law as part of the General Act on the Defence of Consumers, the remainder of the UCTD (on drafting, wording, and transparency) has been transposed into Spanish law via the Act on General Contract Terms.[53] The problem is perhaps not one that affects lawyers, judges or associations as much as individual consumers, particularly where they intend to avoid lawyers, and their fees. Moreover, uncertainties arise between the application of general civil law and consumer law, for example, where an EU rule does not establish a sanction for its violation but where a rule of general civil law does; here, the determination of which

[48] Interview with a Belgian ADR facilitator.

[49] Including, for example energy law and insurance law; interviews with a Belgian ADR facilitator; a Romanian lawyer and 2 Slovenian academics

[50] Interviews with 2 Slovenian academics.

[51] The lack of clarity in this determination might dictate that while directives tend to be implemented eventually, in some cases this is done with a delay; interviews with a Dutch CPA; Portuguese judge.

[52] National Reports – Consumer Protection, Question 1 and Interviews with Belgian lawyer; Dutch academic of 25 years' experience and Dutch lawyer of 21 years' experience; German lawyer; Slovenian lawyer. For example, in the Netherlands, EU rules are generally implemented into the Dutch Civil Code. The question is therefore into which part of the code the rules should be incorporated, for example, the part on general obligations, on sales law, or that on consumer law. An example of a problematic area is information duties, which are established in various directives and cut across consumer law; the lack of clarity is especially problematic for non-lawyers.

[53] Interview with a Spanish lawyer.

norm applies creates uncertainty and confusion on the part of stakeholders (and particularly, consumers).[54] Furthermore, in implementing EU rules into the civil code or general civil law, their EU background is generally lost.[55] As discussed below, the "hidden" nature of EU legislation means that stakeholders are also often unaware of related (particularly, CJEU) case law.[56]

93. Since the early 2000s, the EU legislature has recognised the potential complexity and incoherence arising at the national level from the sectoral approach to legislating for European private and consumer law.[57] The maximum or targeted maximum harmonisation preference was solidified in the 2007 Green Paper[58] for the explicit purpose of promoting coherence; it was reinforced in the Commission's Consumer Policy Strategy for 2007-2013.[59] A shift from maximum to targeted maximum harmonisation was identifiable in the CRD. The CRD initially intended to provide for full harmonisation; this is clear from its initial draft published in 2008, which provided for regulation "in a systematic fashion, simplifying and updating the existing rules, removing inconsistencies and closing gaps".[60] Much of the criticism surrounding the

[54] Interview with a Belgian academic (e.g., with respect to information obligations vis-à-vis consumers).

[55] Interview with a Dutch academic of 23 years' experience.

[56] Below at paras.104 *et seq*.

[57] Communication from the Commission to the Council and the European Parliament on European Contract Law COM (2001) 398 final; Communication from the Commission to the European Parliament and the Council, A More Coherent European Contract Law: An Action Plan COM (2003) 68 final and Communication from the Commission to the European Parliament and the Council, *European Contract Law and the Revision of the Acquis: the Way Forward* COM (2004) 651 final.

[58] European Commission, 2001 'Communication on European Contract Law' COM(2001) 398, highlighting the need for "a significantly higher degree of coherence in ECL" and 'Green Paper on the Review of the Consumer *Acquis'* COM(2006) 744.

[59] European Commission, 'EU Consumer Policy Strategy 2007-2013' COM(2007) 99.

[60] European Commission, 'Proposal for a Directive on Consumer Rights', COM(2008) 614 final.

initial proposal for the CRD concerned its reach,[61] and in particular the envisaged lack of flexibility in respect of its transposition and consequent application in the Member States.[62] "Targeted" full harmonisation was then identified as an alternative to blanket maximum harmonisation by the authors of the Consumer Law Compendium, who advocated the preliminary identification of the key areas in which barriers to trade have arisen consequent to minimum harmonisation and the imposition of fully harmonised norms and standards of protection therein.[63]

94. Indeed, the divergent levels of harmonisation at which different pieces of EU legislation aim, has also been identified as problematic by stakeholders across the Member States. A lack of clarity and consistency on the part of the EU legislature generates questions within the national system as to which provisions of national law should be maintained and which should be abolished when EU law is transposed.[64] On the one hand, minimum harmonisation is problematic as it allows the national legislature to maintain or provide for a higher level of protection than that established in the directive which generates diversities across the Member States and a lack of clarity as to the level of protection afforded, particularly in a cross-border context.[65]

[61] The criticism of maximum harmonisation approaches in various pieces of legislation has arisen from academia and the judiciary; in particular, reference can be made to the Opinion of AG Geelhoed in a number of cases, including *Case* C-52/00 *Commission v France* EU:C:2001:453.

[62] Angus Johnston and Hannes Unberath., 'European Private Law by Directives: Approach and Challenges' in Christian Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law* (CUP 2010) 85, 89.

[63] Hans Schulte-Nölke *et al* (eds), *EC Consumer Law Compendium: Comparative Analysis* (Sellier 2008) 797.

[64] Interview with a Belgian academic.

[65] See Stephen Weatherill, 'Maximum versus Minimum Harmonization: Choosing between Unity and Diversity in the Search for the Soul of the Internal Market' in Niamh Nic Shuibhne and Laurence W. Gormley (eds)*, From Single Market to Economic Union: Essays in Memory of John A. Usher* (OUP 2012) 175, 176-177. Which therefore might undermine consumer confidence in buying cross-border; interviews with Belgian business association, Belgian judge. A particular issue has been identified with the implementation in Luxembourg of the ESCP regulation; on the one hand, it is difficult for the consumer to identify the jurisdiction competent to deal with the claim while on the other, language and the costs and time in translating parts of the form is deemed to create a barrier to justice for

Moreover, the lack of harmonisation in respect of certain issues, particularly in the e-commerce context, is considered not only to be problematic for consumers but also for traders; traders dealing online may not understand whether their compliance with one set of national standards of consumer protection is sufficient.[66] On the other hand, maximum harmonisation is deemed to lead to incoherence between national and EU law as it precludes the Member States from maintaining or establishing a higher level of consumer protection than that provided for in the directive. As a result, the consumer may lose protection. Harmonisation should rather be targeted.[67]

95. Interviewees and national reporters have indicated that this fragmentation and complexity may lead to a lack of coherence, or a contradiction, between national rules and EU law. Even where EU norms have been implemented (satisfactorily) in national law, their frequent amendment generates uncertainty at the national level. Such changes must be implemented into national law and therefore not only require additional efforts at the national level but also complicate consumer protection by undermining understanding and knowledge of consumer rights.[68] This is particularly true with regard to the finance sector[69] according to number of German interviewees. Moreover, a Czech interviewee has highlighted that EU legislation is often too detailed and encompasses too many definitions; that is to say, it often deals with

consumers. The issue of translation and the costs involved has also been highlighted in the Netherlands. Interviews with a Luxembourgish and a Dutch CPA.

[66] See Norbert Reich, 'From Minimum to Full to 'Half' Harmonisation' in James Devenney and Mel Kenny (eds), *European Consumer Protection: Theory and Practice* (CUP 2012) 3. This has also been highlighted in an interview with Finnish lawyer of 16 years' experience.

[67] Interviews with French CPA of 19 years' experience; German CPA; Italian CPA and lawyer; Dutch CPA; Romanian lawyer.

[68] Interviews with a Greek academic and lawyer; Slovenian academic.

[69] The example of the information required as to the right of withdrawal is identified as particularly problematic because of the lack of required information in consumer credit agreements. Due to constantly changing standards regarding the information that shall be provided to the consumer, and requirements which are, on top of that, often unpractical, almost all information can be uncovered as "wrong". Consequently, companies face grave traps of liability whereby economic growth is inhibited; the burden is deemed to be felt mostly on the part of traders. Interviews with German lawyer and a German judge.

matters that national law does not regulate and is therefore difficult to implement into the national system.[70] In contrast, other interviewees have indicated that the EU directives often lack detail in comparison to national law; for example, a French interviewee has noted that the lack of guidelines in EU directives (for example, the UCPD) as to how mandatory assessments should be made, generates uncertainty, which is particularly problematic where a precise and clear definition and strict guidelines had been provided for at the national level.[71] A similar incoherence has been identified in Belgium in relation to the national court's obligation to examine compliance with consumer law norms *ex officio*; the intervention required of the court is more substantial in Belgian law than as established by the ECJ.[72]

96. In interviews from at least three Member States problems with the way in which EU legislation is actually transposed into national law have been identified. For example, in Slovakia, it has been said that the implementation of EU law into the national system is overly complicated and is made in a manner which is "too casuistic".[73] That is to say, four interviewees have highlighted that the courts have adopted a pro-consumer approach, one which is apparently "driven to extreme",[74] and which has been subsequently followed by the national legislature; in this sense, the EU directives have been implemented so as to give the national courts considerable powers ("extending the tasks and powers of courts beyond reasonable limits"

[70] Interview with a Czech central authority.

[71] Interview with a French lawyer.

[72] Interview with Belgian judge of 18 years' experience. *Ex officio* control is examined in further detail in Chapter 3 and National Report: Belgium (Question 11.1.1).

[73] Interview with a Slovakian lawyer and arbitrator who does not make reference to the implementation of a particular directive or to a specific consumer rule but highlights that: "The national implementing legislation is overly complicated and too casuistic (as if it was written more in an administrative-law way than a private law one). The judges seem to capitulate and generally accept an approach: everything which favours the consumer goes and everything seemingly favouring the creditor is forbidden and void."

[74] Interview with a Slovakian judge of 20 years' experience.

according to a Slovakian judge).[75] The verbatim transposition of EU law into the national system has also been deemed to be unacceptable given the complexity of both national and EU law;[76] more specifically, in Romania, the quality of the drafting of national legislation has been called into question.[77]

97. Across the board, only a few problems have been identified with regard to the transposition of specific pieces of EU legislation;[78] these include the UCTD and UCPD. In Spain, the lack of completeness of recent legislative reforms is deemed to create problems in ensuring the effective and equivalent consumer protection. A key problem has arisen with regard to legislative amendments based on the CJEU's development of the *ex officio* obligation on national courts; these reforms have dealt with payment order and enforcement proceedings but not with parallel, declaratory proceedings.[79] Moreover, the fact that Art.4(2) of the UCTD has not been expressly transposed into Spanish law has been deemed to cause "great trouble" for domestic courts.[80] Furthermore, a Hungarian interviewee highlighted a problem that arose with the implementation of the UCTD and which required consumers take an additional step in the national system to challenge the binding nature of an unfair term. The Hungarian legislation initially provided that consumers must bring an action to challenge the binding nature of unfair terms in consumer contracts; this was not in

[75] Interviews with a Slovakian lawyer and arbitrator; Slovakian academic; Slovakian lawyer of 10 years' experience; Slovakian judge.

[76] Interview with a Greek academic and lawyer.

[77] It is worth noting that only in one interview – with a Romanian lawyer – has the quality of drafting of national legislation been identified as poor and thus, problematic. Interview with Romanian lawyer.

[78] The exception is in Slovenia, where an interview with a Slovenian academic has led to the identification of instances where Slovenian law is contrary to EU law. Examples include e.g. Art.2 (5) Consumer Sales Directive (not implemented), the hierarchy of the seller's remedies from Art.3 (3) Consumer Sales Directive (not implemented) and the seller's right to recourse in Art.4 Consumer Sales Directive. Further examples include the general clause from Art.3(1) UCTD (implemented with serious shortcomings).

[79] Interviews with a Spanish judge of 17 years' experience; Spanish judge of 14 years' experience; Spanish lawyer.

[80] Interview with a Spanish lawyer.

compliance with Art.6(1) UCTD which establishes that such terms are automatically not binding on the consumer. The discrepancy between national and EU law was subsequently rectified.[81] Similarly, interviewees from Lithuania and Poland have indicated that the implementation of the UCTD and UCPD has been made in an inefficient way; in particularly, there is no coordination between the control of practices in respect of each instrument, which means that abstract and judicial control might have to be made more than once.[82]

98. It has been highlighted in the responses to both the online survey and the interviews that the complexity of national consumer law not only undermines the knowledge and understanding of EU and national law on the part of relevant stakeholders[83] but might also be a factor in the likelihood that they will bring a claim or that a lawyer, business association or CPA will advise that a claim is brought.[84] Indeed, of the 74 interviewees who responded to the question,[85] 71% indicated that complexity has an effect on the likelihood that a consumer claim would be brought, both in respect of claims made within one Member States and cross-border claims.

99. Similarly, in the online survey, the following question was asked of lawyers: If a consumer or a business has a free choice of dispute resolution mechanism, which of the following factors would be relevant to the advice/representation you provide?

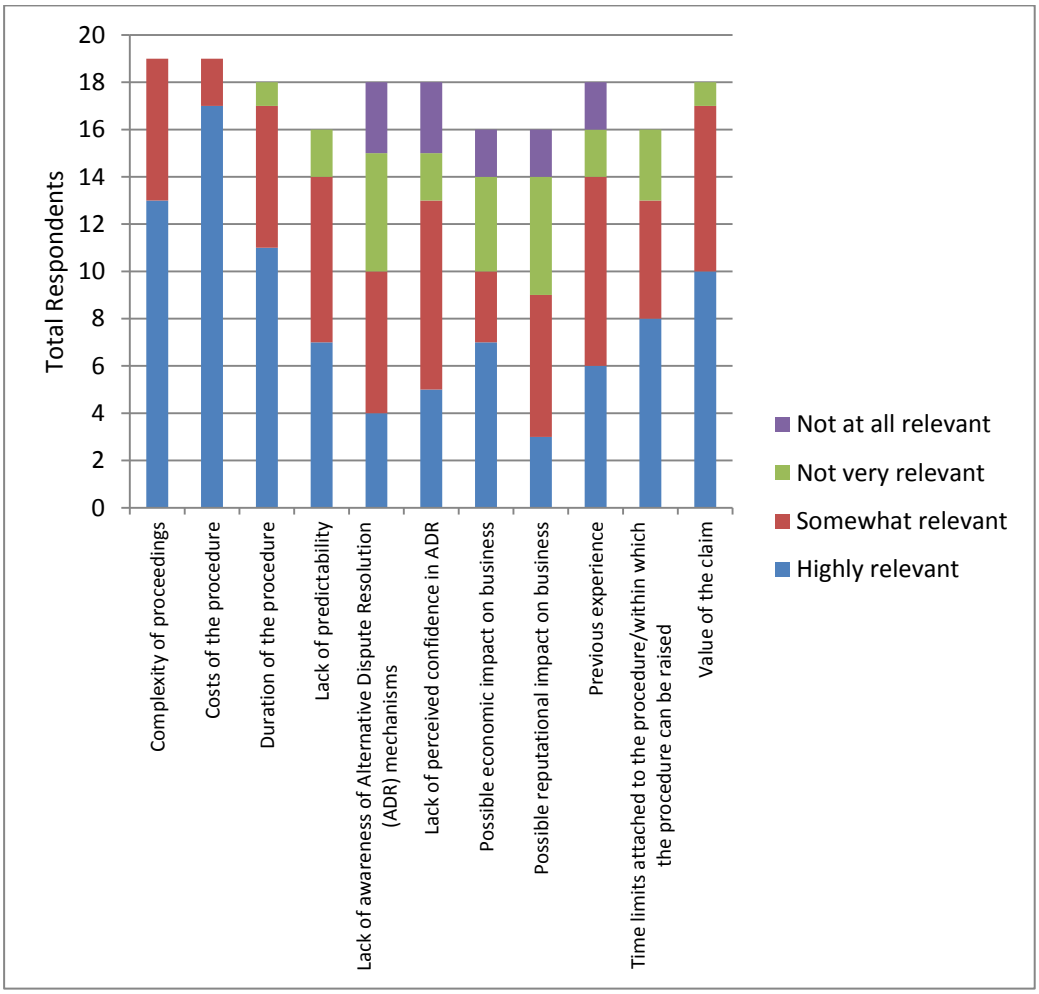
[81] Interview with Hungarian clerk, who highlighted this problem of transposition. See also National Report, Question 1: Hungary (the UCTD has been implemented by Government Decree 18/1999 on Unfair Contract Terms in Consumer Contracts, Act III of the 1952 Code of Civil Procedure, as well as Act V of the 2013 Civil Code, which replaced Act IV of the 1959 Civil Code).

[82] Interview with Lithuanian lawyer; interview with Polish judge who highlights a lack of clarity with the implementation of the UCTD has been identified. The key issue relates to the question of who has a legitimate interest in protecting consumers.

[83] Discussed below at paras.104 *et seq.*

[84] The "typical" nature of a consumer claim, as identified from the data collected in this study is examined below at paras.151 *et seq.*

[85] Interview, question A.5: In your experience, does the complexity of consumer protection law (as established in your national system and as it derives from EU law) and of the EU instruments on civil procedure, affect the likelihood that you will bring an action (or advise a consumer or business to bring an action) related to a consumer dispute?



Responses to the Online Survey.

100. Notwithstanding the small number of respondents to this particular question, the responses taken together with the interview questions indicate that the complexity of proceedings and of the applicable law are relevant in determining whether an action based in consumer law will be initiated.[86]

101. Moreover, the responses given are confirmed by the detailed information provided by the interviewees; indeed it appears to be a systemic trend. It has been reported that there is an absence of consumer actions – both actions for injunctions filed by consumer organisations and individual actions brought by consumers – due to the cost, risk and length of consumer actions.[87] Complexity is one of the considerations

[86] Interviews with a French CPA; Dutch CPA; UK CPA who highlighted that the issue tends to be of a lack of knowledge on the part of stakeholders, often reflected as complexity of the legal rules.

[87] Interview with a Czech academic.

in determining the possible prospects of success of a consumer claim;[88] it affects (and indeed, increases) the cost, duration and uncertainty surrounding dispute resolution.[89]

102. An (extreme) example of the complexity of an EU rule can be found in Art.6(2)[90] of the Rome I Regulation,[91] which provides the conflict rule to determine the applicable law to govern cross-border consumer contracts. The general rule is established in Art.6(1) and points to the law of the habitual residence of the consumer; the exception in Art.6(2) generates considerable complexity. This provision allows for a choice of law; this is usually made by the trader in his standard contract terms. However, Art.6(2) provides that this choice of law will only apply where the higher standards of protection (those which cannot be derogated from by agreement), established in the legal system of the consumer's habitual residence, are maintained. This requires that the parties and the national judge hearing the claim must make a comparative analysis of the consumer protection rules of the law chosen and that of the consumer's habitual residence in order to identify the most favourable. This comparison raises issues of knowledge, of time, of cost, and of language.[92]

[88] Interview with an Austrian lawyer of 20 years' experience.

[89] Interviews with a Belgian academic; Finnish judge; Finnish CPA; Dutch lawyer of 21 years' experience.

[90] Art.6(2): "Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1."

[91] Regulation (EC) 593/2008 **on the law applicable to contractual obligations.**

[92] A recent example in which such an examination was necessary was referred to the ECJ; see Case C-191/15 *Verein für Konsumenteninformation (VKI) v Amazon EU Sàrl* EU:C:2016:612. Here, the burden of such a comparison was not only on the individual consumers, as the CPA – VKI – collected the claims of the consumers in an action for an injunction, but on VKI itself and the Austrian court.

103. Of course, Art.6(2) Rome I was formulated from a private international law perspective – implementing a "better law" approach[93] – which is valuable for legal scholarship but unworkable in practice.[94] The consumer (and other stakeholders, including the court) would be better off if the mandatory law of his or her habitual residence was simply applied automatically.

2.2.2 The Lack of Knowledge on the Part of Stakeholders

104. The lack of knowledge of stakeholders tends to pertain to specific areas of consumer law and the "hidden EU origins" of domestic legislation (and thus, CJEU case law on both substantive and procedural protections).[95]

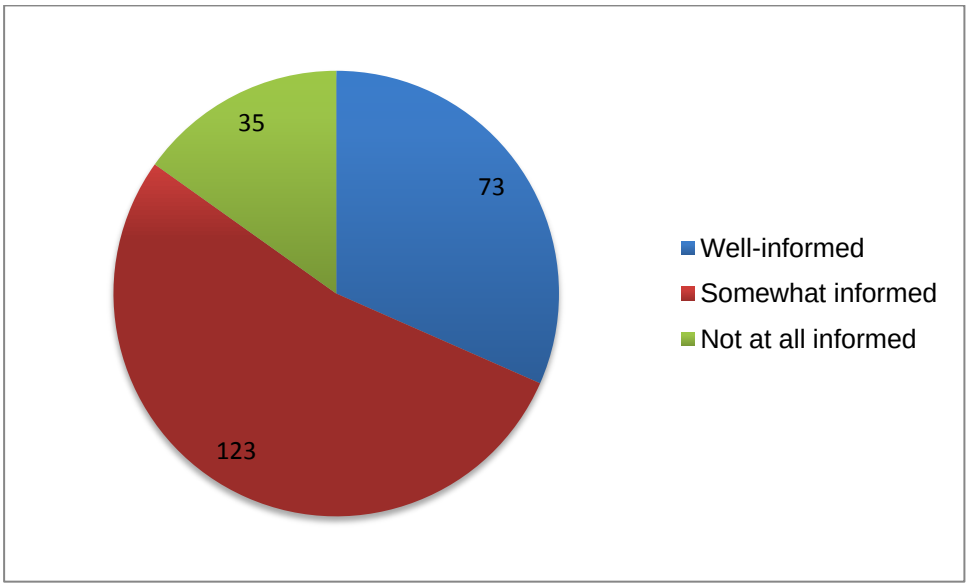
105. The following question was asked in both the online survey and the interviews: How familiar are you with the following: EU consumer protection instruments, national implementing law and CJEU case law setting out procedural requirements?

Informedness of stakeholders of the CJEU case law setting out procedural requirements of consumer protection law

[93] James Fawcett and Janeen Carruthers, *Cheshire, North and Fawcett: Private International Law* (Oxford University Press, 14th edn, 2008) 34-35.

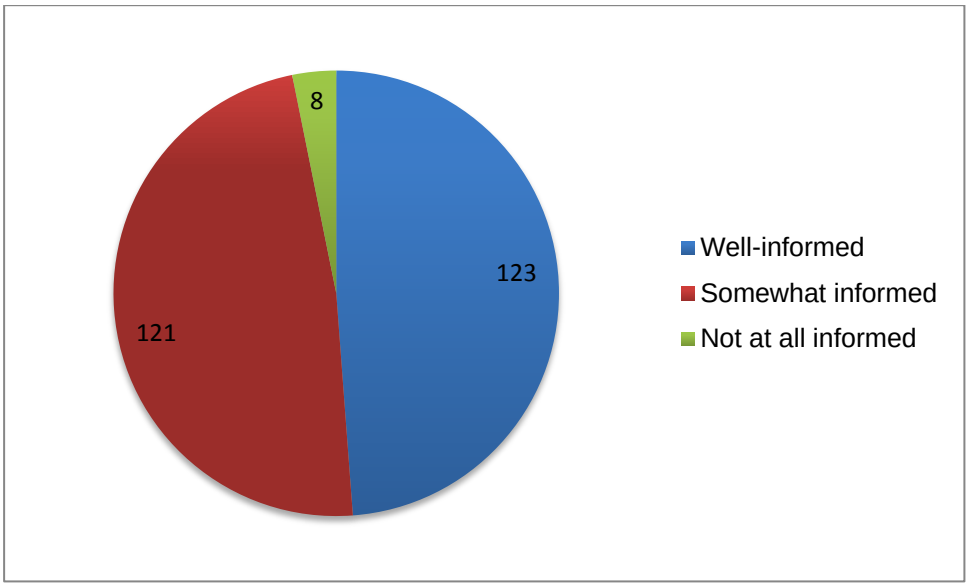
[94] Even more problematic is that this approach might operate so as to create an incentive for the trader to simply insert clauses which are disadvantageous, and even unfair, into his standard contract terms, anticipating that effect control of those terms will not be made.

[95] In particular, these procedural requirements established by the CJEU relate to the *ex officio* obligations and powers of the national courts; the problems arising in this respect are identified and examined in Chapter 3, 'Consumer Actions before National Courts'.



Responses to the Online Survey and Interviews.[96]

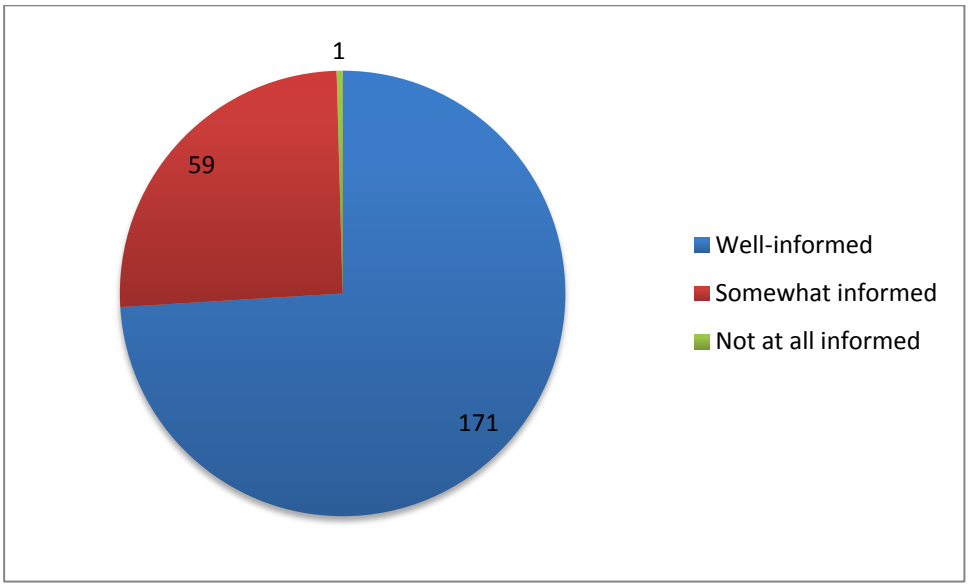
Informedness of stakeholders of EU consumer protection law



Responses to the Online Survey and Interviews.[97]

[96] Each respondent was asked how informed they considered themselves to be in relation to three levels of consumer protection: CJEU case law, EU consumer law and consumer law and to indicate for each whether they considered themselves to be very well-informed, somewhat informed or not at all informed. The respondents to the online questionnaire and interviews are – while not exactly the same individuals – from the same group of respondents, including lawyers, judges, CPAs, consumers and ADR entities. Given that the same questions were asked (and in those cases in which the data collected has been collated), the same "closed" responses presented, and in light of the small number of answers received to certain questions, we have collated the responses.

Informedness of stakeholders of national consumer protection law



Responses to the Online Survey and Interviews.[98]

106. Typically, stakeholders indicate that they have a better knowledge of national legislation and case law than EU directives. Stakeholders are therefore somewhat removed from the EU directives, which remain largely unseen behind the national

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code or national legislation.[99] Given that EU directives are transposed into national law, this finding may not be significant in itself. However, it does appear to undermine stakeholders' knowledge and awareness of relevant (and particularly recent) CJEU case law. Essentially, EU law remains hidden due to the form of EU law (i.e. as directives) and the nature of transposition.

107. Even where the legislation is deemed to be sufficiently clear, the CJEU's case law – which provides interpretations of EU norms and their implementation into national law or which establishes procedural protections – is reported to be inconsistent, to lack foreseeability and to create confusion within the Member States.[100] This lack of knowledge, familiarity and experience identified seems to arise in specific areas of consumer law (including, for example, consumer credit, air travel, unfair contract terms, and the *ex officio* obligations on national judges).[101] This has been identified as problematic to the extent that uncertainty might lead to the non-application of those norms, protections or procedural requirements.[102]

2.2.3 The Perception of the National Judge

108. A third concern stems from the two discussed above, and relates to the national judge's perception of his or her role in applying and enforcing the relevant national law which implements the EU directives and establishes rights for consumers. It is reported in the interviews that national courts – particularly lower courts – do not always, or even at all, see themselves as decentralised EU courts.[103]

109. This issue of perception has a number of consequences. It might dictate that these courts do not apply or make reference to the CJEU's case law interpreting EU law or

[99] A possible and simple solution to overcome this information gap would be to require that the transposing legislation refers to the EU directive being implemented.

[100] Interviews with 2 Slovakian lawyers and a Slovakian lawyer and CPA; Belgian academic and judge; Dutch CPA; Spanish lawyer of 18 years' experience

[101] Interviews with a Belgian lawyer; Danish academic; Romanian judge.

[102] Interviews with Bulgarian lawyer; Italian lawyer of 20 years' experience; Polish academic; Polish lawyer and academic; Swedish judge.

[103] Interviews with a Croatian CPA and a Czech CPA.

indeed the case law which has established requirements of procedural protection.[104] For example, a Czech interviewee has indicated that the lower courts do not apply EU norms properly and fail to engage in the *ex officio* control of unfairness as they consider it would be a practice that runs counter to Czech procedural law.[105] Moreover, where there is an apparent contradiction between national law and an EU rule, those courts tend to refer only to the national norm, which tends to be the one they know best; in so doing, those courts fail to engage the purpose of the directive, and often refuse to clarify the inconsistency by making a preliminary reference to the CJEU.[106]

110. This issue might be understood as a consequence of the way in which the EU directives are implemented in the national system, that is, a consequence of the nature of the national regimes created, where the EU origins of consumer rights tends to be hidden.[107]

[104] For example, the case law of the CJEU that requires the national judge to examine consumer law (and at the very least, the potentially unfair character of contract terms) *ex officio* or of his or her own motion; interviews with a Czech academic and with a Danish lawyer.

[105] Interview with a Czech academic, who highlights case 28 Cdo 4556/2010 as an example of when the courts have failed to apply EU norms and the first reference to the CJEU in Case C-377/14 *Radlinger* EU:C:2016:263.

[106] Interviews with a Croatian CPA; Czech academic and Czech CPA. The Croatian CPA referred to a particular judgment of the Croatian Supreme Court (CSC), in the 2015 case of *Franak*, which involved a clear breach of EU law (the judgment provided that a variable interest rate on loans in Swiss francs was unlawful but that the currency clause was lawful), which arose from 1) the fact that CSC refused to apply CJEU case law concerning an identical case (the implementation of the UCTD) and 2) by the fact that the court did not request a preliminary ruling from the CJEU regarding the implementation of the EU Law. Croatian courts, including the Supreme Court still do not see themselves as European courts.

[107] An exception might be found in Germany where the provisions inserted into the BGB to transpose an EU directive also tend to refer explicitly to that directive.

2.3 Assessment of the Current Situation

111. The fragmentation and complexity of national and EU law is deemed to lead to and increase complexity between the regimes. This has been highlighted by stakeholders across the Member States. With regard to the coherence of national law as it relates to the EU directives and CJEU case law, the directives might include a provision that the transposing national law should expressly refer to the EU law that is being transposed. This would not only make clear the origins of national consumer law but could also improve the knowledge held by all stakeholders (and particularly in respect of CJEU case law). The reach of EU law, i.e. the level of harmonisation, and its impact on national law is well- and long-established as a complex issue. The interviewees have highlighted that problems stem from directives which provide for minimum as well as those which aim at maximum harmonisation. Rather, the preferred approach seems to be one of targeted harmonisation.

112. In terms of the limited level of knowledge held by stakeholders, interviewees across the Member States have indicated that judges need training in order to combat their general lack of knowledge of EU law and CJEU decisions.[108] The problem also extends to all stakeholders and is arguably most difficult for individual consumers (for example, where they cannot or do not intend to engage legal representation or assistance). While stakeholders might understand legislation and case law, it is often difficult to know the latest case law of the CJEU. One feasible solution – which would operate alongside the provision in national law referring to the relevant directive being transposed – would be to include the latest case law of the CJEU in national legislation or in the relevant code. This might allow the national courts to resolve more confidently consumer disputes and also provide consumers with important and up-to-date information about their procedural rights and how they can be understood at the local level.[109]

[108] Interviews with Bulgarian lawyer; Czech lawyer; Czech lawyer and academic; Estonian judge of 12 years' experience; Italian lawyer of 20 years' experience; Polish academic; Polish lawyer and academic; Swedish judge.

[109] This would be particularly useful in respect of the *ex officio* obligations on the national courts. Interview with Bulgarian lawyer.

3. The Concept of the Consumer

3.1 Summary of the Status Quo

113. The EU directives tend to provide for a core concept of the consumer; some directives also provide for supplementary guidance, relevant to the particular area of regulation, in their recitals.[110]

EU Instrument	Reach, Status and Objective of the Instrument	Concept of the Consumer
Doorstep Selling Directive 1985/577/EEC	Minimum harmonisation (Art.8). Repealed by CRD. Recital: "For doorstep contracts, what is special, is the "surprise element", that is, "as a rule it is the trader who initiates the contract negotiations, for which the consumer is unprepared or which he does not expect; whereas the consumer is often unable to compare the quality and price of the offer with other offers".	Art.2: "'consumer' means a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession".
Package Travel Directive 90/314/EEC	Minimum harmonisation (Art.8). Revised Package Travel Directive 2015/2302/EU.	Art.2(4): "'consumer' means the person who takes or agrees to take the package ('the principal contractor'), or any person on whose behalf the principal contractor agrees to purchase the package ('the other beneficiaries') or any person to whom the principal contractor or any of the other beneficiaries transfers the package ('the transferee')".
Unfair Contract Terms Directive 1993/13/EEC	Minimum harmonisation (Art.8). Remains in force following CRD. Recital: "…whereas, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer…".	Art.2(b): "'consumer means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession".
Distance Selling Directive	Minimum harmonisation (Art.14).	Art.2(2): "'consumer' means any natural person who, in contracts

[110] The following table can be found in an amended form in Fabrizio Cafaggi and Stephanie Law (eds), *Judicial Cooperation in European Private Law* (Elgar 2017).

1997/7/EC	Repealed by CRD.	covered by this Directive, is acting for purposes which are outside his trade, business or profession".
Consumer Sales and Guarantees Directive 1999/44/EC	Minimum harmonisation (Art.8). Remains in force following CRD.	Art.2(a): "consumer: shall mean any natural person who, in the contracts covered by this Directive, is acting for purposes which are not related to his trade, business or profession".
Unfair Commercial Practices Directive 2005/29/EC	Maximum harmonisation (Art.3(5)).[111] Remains in force following CRD. Recital 18: "…this Directive takes as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice, but also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices. Where a commercial practice is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the commercial practice be assessed from the perspective of the average member of that group…The average consumer test is not a statistical test…". Recital 19 refers also to "certain characteristics such as age, physical or mental infirmity or credulity make consumers particularly susceptible to a commercial practice or to the underlying product".	Art.5: A commercial practice shall be unfair if…"(2) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer…". Art.5(3): "Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity…".
Consumer Credit Agreement Directive 2008/48/EC	Maximum harmonisation (recital 9 and Art.22).	Art.3(a): "'consumer' means a natural person who, in transactions covered by this Directive, is acting for purposes which are outside his trade, business or profession".
Timeshare Protection Directive 2008/122/EC	Targeted harmonisation (recital 3).	Art.2(1)(f): "'consumer' means a natural person who is acting for purposes which are outside that person's trade, business, craft or profession".
Consumer Rights Directive 2011/83/EU	Maximum (targeted) harmonisation (Art.4).	Art.2(1): "'consumer' means any natural person who, in contracts covered by this Directive, is

[111] However, between June 2007 and June 2013, the Member States could apply national rules providing for greater protection, beyond the UCPD, insofar as it is necessary and proportionate.

	Recital 34: "In providing that information, the trader should take into account the specific needs of consumers who are particularly vulnerable because of their mental, physical or psychological infirmity, age or credulity in a way which the trader could reasonably be expected to foresee. However, taking into account such specific needs should not lead to different levels of consumer protection".	acting for purposes which are outside his trade, business, craft or profession".
Brussels I bis Regulation 1215/2012	Regulation providing for certain rules of civil procedure.	Art.17(1): "In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7, if: (a) it is a contract for the sale of goods on instalment credit terms; (b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or (c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities."
ADR for Consumer Disputes Directive 2013/11/EU	Directive providing for certain rules of civil procedure.	Art.4(a): "'consumer' means any natural person who is acting for purposes which are outside his trade, business, craft or profession".
Package Travel Directive 2015/2302/EU	Maximum (targeted) harmonisation (Art.4). Recital 7: "The majority of travellers buying packages or linked travel arrangements are consumers within the meaning of Union consumer law. At the same time, it is not always easy to distinguish between consumers and representatives of small businesses or professionals who book trips related to their business or profession through the same booking channels as consumers. Such travellers often require a similar level of protection… this Directive should apply to business travellers, including members of liberal	Art.3(6): "traveller means any person who is seeking to conclude a contract, or is entitled to travel on the basis of a contract concluded, within the scope of this Directive"

	professions, or self-employed or other natural persons, where they do not make travel arrangements on the basis of a general agreement. In order to avoid confusion with the definition of the term 'consumer' used in other Union legislation, persons protected under this Directive should be referred to as 'travellers'."	

114. At the EU level, the core definition of consumer is the following: any "natural person" who is acting "for purposes which are not related to his trade business or profession"; thus the natural person is set against the trader in a contractual relationship.[112] The same is true for the consumer in the cross-border context, as established in Art.17(1) of the Brussels I bis Regulation. This core concept is then applied in respect of the scope and subject matter of the relevant EU directive (that is, as the directive operates to provide protection in the realm of the sale of goods, consumer credit, or commercial practices, amongst others, for example). Thus in light of the subject matter and purpose of the directives, the recitals to the UCPD and the CRD refer also to the notion of the "vulnerable consumer".[113]

115. The key concern is not the concept of consumer as it is defined at the EU level.[114] Notwithstanding the existence of a core concept in the EU directives, it has been transposed in different ways across the Member States. This has a number of consequences, leading in particular to a certain fragmentation of the concept across

[112] The exception is the UCPD which in Art.11 empowers not only consumers but all "persons or organisations regarded under national law as having a legitimate interest in combating unfair commercial practices" (including, for example, CPAs, national authorities and other commercial parties) to take legal action to stop unfair practices or to bring such unfair practices before an administrative authority.

[113] See recital 18 UCPD and recital 34 CRD, set out in the table at para.113 above.

[114] However, it is worth noting that in the context of e-trade, the concept has been deemed too be too narrow: for example, the CJEU has recently held that the UCTD does not apply to contracts concluded between natural persons contracting via IT platform under the terms and conditions of the provider of the IT platform. Recently, the ECJ extended the concept of seller for the purposes of Art.1(1)(c), Directive 1994/44/EC to a trader acting as an intermediary on behalf of a private person, Case C-149/15 *Sabrina Wathelet* EU:C:2016:840, para.26.

the national legal systems and moreover to divergent levels of consumer protection across the EU.

3.2 Problems Identified in the National Legal Systems

116. The main concern therefore is not the EU concept of the consumer as such but rather its implementation in the Member States. The prevailing concept (or indeed concepts) of the consumer in each of the national legal systems is set out in the national reports, predominantly in legislation, supplemented by domestic case law.[115]

3.2.1 Positive and Negative, Uniform and Non-Uniform Definitions of the Consumer

117. With the exception of one Member State – namely, Austria – the concept of consumer is defined positively. In Austria, consumers are defined as those who are not entrepreneurs.[116] The national reports of Austria, Cyprus, Finland, France, Germany, Ireland, Italy, Latvia, Luxembourg, Malta, Poland, Slovakia, Slovenia, and Spain set out that the concept is a uniform one.[117] In the Netherlands, the concept of

[115] The concepts of the consumer in the national legal systems are set out in the responses to the National Reports, Question 3.

[116] National Report, Question 3: Austria (§ 1(1) KSchG). "Entrepreneur" is defined in Austria as "a person who makes the transaction in the course of carrying on his business". The "consumer" can be defined as a person for whom a transaction lies outside the scope of their business. The Supreme Court has held that the concept of the consumer must be interpreted in a uniform way, regardless of whether the national act is based on European law or not (Supreme Court 24.06.2010, 6 Ob 105/10z, ECLI:AT:OGH0002:2010:0060OB00105.10Z.0624.000; Supreme Court 24.04.2012, 2 Ob 169/11h, ECLI:AT:OGH0002:2012:0020OB00169.11H.0424.000). However, it should be noted that the Austrian definition of "consumer" is much broader than the concept commonly used in EU legislation, since under Austrian law even legal entities can be qualified as consumers.

[117] National Reports, Question 3: Austria (§ 1 (1) KSchG); Cyprus (L. 133 (I) 2013, Part I, Nr. 2); Finland (Consumer Protection Act (38/1978) chapter 1 section 4); France (Art.3, LOI n° 2014-344 du 17 mars 2014 relative à la consommation); Germany (sec. 13 BGB); Ireland (S.I. No. 27/1995 - European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995, reg 2); Italy (Art.3(1)(a)) consumer code (decreto legislativo no. 206 of 2005)); Latvia (Consumer Rights Protection Law, Art.1(3)); Luxembourg (art.L.010-1 Code de la Consommation); Malta (Art.2 of the Consumer

consumer sale agreement is also given a uniform definition.[118] In practice however, it is clear that there are divergences in the concept across national legislation and case law.[119]

3.2.2 The Passive and Active Consumer

118. This idea of the passive and active consumer[120] is not explicitly mentioned in the national reports or interviews as a dimension of the substantive definition of the consumer.[121] However, in this sense, the notion of goods or services being "targeted" at particular parties may be relevant. For example, in the Netherlands, the definition of the consumer for the purposes of identifying the existence of a consumer contract is intended to be established as a uniform one. A "consumer sale" is the sale agreement related to a good (movable thing), electricity included, concluded by a seller who, when entering into the agreement, acts in the course of his professional practice or business, and a buyer, being a natural person who, when entering into the agreement, does not act in the course of his professional practice or business[122]. The consumer may similarly be defined as the target of the professional act: for example in Greece, the consumer is every person or legal entity or unions of entities without a legal personality who constitute the target group of products or services offered in the

Affairs Act); Poland (Art.22.1 of the Polish Civil Code); Slovakia (§ 52 (4) Civil Code); Slovenia (Art.1 of the Consumer Protection Act); and Spain (Art.3 of the Legislative Royal Decree 1/2007).

[118] National Report, Question 3: The Netherlands (Art.7:5(1), Dutch Civil Code).

[119] This has been highlighted in Belgium, Bulgaria and Finland (where the concept identified in the consumer protection law only applies for the purposes of that law), Croatia, Denmark, Hungary (there are different definitions, one in the civil code and one in the consumer protection law), Poland (there are different definitions, one in the civil code and one in the consumer protection law – sometimes defined as consumer, and other times as client), Portugal, Sweden, England and Wales and Scotland.

[120] For further discussion on the notion of passive and active consumer, see Jürgen Basedow, *The Law of Open Societies: Private Ordering and Public Regulation in the Conflict of Laws* (Brill 2015) 408 *et seq*.

[121] It should be noted that this dimension of passive and active consumer was not addressed explicitly in the online survey or interviews.

[122] See National Report, Question 3: the Netherlands (Art.7:5(1), Dutch Civil Code).

market, and use products or services as the end user.[123] Moreover in Hungary, the consumer is any natural person who is acting for the purposes of purchasing, ordering, receiving and using goods or services which are outside his trade, business or profession, or who is the target of any representation or commercial communication directly connected with a product.[124] The notion of the active or passive consumer is rather more relevant to the role played by the parties and the court (or ADR entity) in consumer protection-related proceedings.[125]

3.2.3 Extension of the Consumer Concept to Parties Other than Natural Persons

119. In the Member States, the consumer concept might be extended beyond the core definition established in the EU directives,[126] for example, to small and medium enterprises (France), to non-profit associations (Greece[127]), to ecclesiastical entities (Hungary[128]) or to housing cooperatives (Lithuania and Malta[129]). Moreover, in Austria, Denmark, Lithuania, Malta, Portugal, Spain, England and Wales, and Scotland, the consumer concept encompasses also legal persons acting for non-

[123] See National Report, Question 3: Greece (Art.1 Law Nr. 2251/1994 (Basic Definition)).

[124] See National Report, Question 3: Hungary (Act V of 2013 on the Hungarian Civil Code).

[125] This dimension of the analysis is examined in further detail in Chapter 3.

[126] However, see the Package Travel Directive 2015/2302/EU which at recital 7 – set out in the table at para.113 above – recognises that the distinction between consumers and representatives of small businesses or professionals is not an easy one to make and that the latter may also require similar protection to consumers. The directive therefore uses the term ”traveller” and not consumer, so as to provide the possibility for such protection.

[127] National Report, Question 3: Greece (Art.1 Law Nr. 2251/1994 (Basic Definition)).

[128] National Report, Question 3: Hungary (Act CLV of 1997 on the Consumer Protection, including any civil society organization, ecclesiastical legal entity, condominium association, housing cooperative, micro, small and medium-size enterprise acting for purposes of purchasing, ordering, receiving and using goods or services which can be regarded as outside its trade, business or profession, or that is the target of any representation or commercial communication directly connected with a product).

[129] National Reports, Question 3: Lithuania (case No.3k-3-132/2010); Malta (Art.2 of the Consumer Affairs Act).

commercial or personal purposes.[130] Where the concept is not so extended, interviewees have indicated that certain entities, including small businesses, may not be afforded satisfactory protection as they are not attributed with a consumer status.[131]

120. The financial crisis has shed light on the inconsistency between the notions of "consumer" in the Brussels I bis Regulation and "retail client" in EU financial market law. When investment firms provide financial services, the retail client protection regime will apply in line with Arts.4 and 5 of Directive 2014/65/EU (MIFID II) to investors.[132] However these "retail clients" may not necessarily be understood as "consumers" under the Brussels I bis Regulation.[133] As a result of the absence of a harmonised concept, weak parties may enjoy protection under the MIFID II regime but not under Brussels I bis, or vice versa. The problem is that this differential treatment does not always reflect the underlying needs of consumer protection. The

[130] National Reports, Question 3: Austria (§ 1(1) KSchG); Denmark (Section 2 of the Danish Consumer Contracts Act); Greece (Art.1 Law Nr. 2251/1994 (Basic Definition)); Lithuania (Law on Consumer protection; exception for legal persons established in case No. 3K-3-342/2009); Malta (Art.2(iii) of the Consumer Affairs Act); Portugal (Consumer Protection Law (Law 24/96, of 31 July, with several amendments, the last resulting from Law 7/2014, of 28 July), Art.2(1)); Spain (Art.3(b) of the Legislative Royal Decree 1/2007); England and Wales (Guidance from Civil Court Practice (Neuberger), III Con 3; Consumer Rights Act 2015, s.2(3) refers to an "individual") and Scotland (*Chris Hart (Business Sales) Ltd v Niven* 1992 SLT (Sh Ct) 53).

[131] Interview with a Cypriot interviewee (in relation to the lack of protection afforded to small businesses). The same issue has been identified with regard to "vulnerable groups" (interview with a Czech academic).

[132] The Directive classifies clients of investors into three groups: retail clients, professional clients and eligible counterparties (the latter being a subset of professional clients). The issue is whether only "retail clients" qualify as consumers. They are not necessarily natural persons.

[133] In line with the jurisdiction rule for consumer contracts established in Art.17 Brussels I bis Regulation, the text of which is set out in the table at para.113 of this chapter. The ECJ judgments in Case C-375/13 *Kolassa* EU:C:2015:37, para.20 *et seq.* and Case C-366/13 *Profit Investment SIM* EU:C:2016:282 illustrate that the ECJ continues to render a "formalistic interpretation of market transactions" for the purposes of allocating jurisdiction, "that does not draw any distinction between retail investors (or consumers) and professional investors" (Matteo Gargantini, 'Capital Markets and the Market for Judicial Decisions: In Search of Consistency' MPILux Working Paper 2016/1.

case of *Kolassa*[134] highlights the problems affecting the protection of small investors; the Court denied the existence of any contractual relationship between an investor (being a consumer) and an issuer, thus excluding the applicability of the consumer protection regime under the Brussels I bis Regulation.[135] Additional doubts arise in relation to the indirect ownership of securities[136] held through intermediaries and to the qualification of shareholders as consumers.

121. The ECJ has interpreted, and indeed recognised the need for the extension of the concept of consumer on a number of occasions; most recently, this has been done on the basis of three questions referred from Romania, concerning the status of parties to financial agreements. In *Costea*,[137] the ECJ ruled that a natural person practicing as a lawyer who concludes a credit agreement, which does not specify the purpose for which the credit is granted, may be regarded as a 'consumer' when the agreement is not linked to his profession as a lawyer. In *Bucura*,[138] the ECJ had to rule on the status of 'consumer' of a party co-debtor to a credit contract when the natural person acted for purposes considered to fall outside of his trade or profession. In *Tarcău*,[139] the ECJ held that the notion of 'consumer' includes natural persons who have given security for the performance of the obligations of a commercial company when they acted for purposes of private nature.

122. The problems surrounding the unclear concept of the consumer acting in financial markets are demonstrated by a recent judgment of the Higher Regional Court of

[134] Case C-375/13 *Kolassa* EU:C:2015:37. See also Matteo Gargantini, 'Jurisdictional Issues in the Circulation and Holding of (Intermediated) Securities: The Advocate General's Opinion in Kolassa v Barclays' (2014) *Riv. Dir. Int. Priv. e Proc.* 1095.

[135] The CJEU based the jurisdiction at the consumer's domicile on tortious liability per Art.7(2) Brussels I bis Regulation. Although this head of jurisdiction often ensures investor protection, it is less efficient than the straightforward application of the consumer protection regime, as it is not predictable for issuers.

[136] The point is raised in the same judgment: see Case C-375/13 *Kolassa* EU:C:2015:37, at para 15.

[137] Case C-110/14 *Costea* EU:C:2015:538 concerning the UCTD.

[138] Case C-348/14 *Bucura* EU:C:2015:447 concerning Directive 87/102/EEC on consumer credit and the UCTD.

[139] Case C-74/15 *Tarcău* EU:C:2015:772 concerning the UCTD.

Stuttgart:[140] In this case, the plaintiff (the sole owner of a group of companies operating drug stores across Germany) made several ex-cum trades with the assistance of a Swiss bank. Finally, the transactions failed and he ended up with a loss of over 50 million Euros. The investor initiated a legal action against the bank at his domicile under Arts.15 and 16(2) of the Lugano Convention.[141] The bank challenged the jurisdiction of the German courts by relying on an exclusive jurisdiction clause in its standard terms (which the claimant had signed). The court qualified the plaintiff as a consumer because he had acted as a private person administrating his private estate. The specific circumstances of the case, mainly that the plaintiff was an experienced businessman and had been advised by financial specialists of his firm and the fact that he had made profits out of his investment which permitted him to live from them, were deemed to be irrelevant. What counted was the "private investment"; the (at least half-) professional status of the plaintiff and the amount of his financial activities did not exclude his procedural status as a consumer. In this respect, the court stressed the need for the predictability of the heads of jurisdiction under the Lugano Convention. From the perspective of the MIFID directive, one might wonder whether the claimant qualified as a retail client or as a professional client (Art.4(11) and (13), Annex II MIFID II Directive).[142]

123. An increasingly significant consideration that also concerns the delineation between the consumer and other parties in need of protection relates to the interrelation of data and consumer protection, and of "data subject" and consumer. While the recently-approved General Data Protection Regulation (GDPR)[143] makes only one reference to consumer protection, consumer and data protection are intertwined and

[140] Oberlandesgericht Stuttgart, 4/27/2015, Recht der internationalen Wirtschaft 2015, 762; see also LG Ulm, 31.07.2014 - 4 O 66/13.

[141] These provisions correspond to Arts.17 and 18(2) of the Brussels I bis Regulation.

[142] The German court did not address the MIFID directive.

[143] At recital 42 of the GDPR, in relation to the role of the UCTD in governing pre-formulated declarations of consent of the data subject. The GDPR (Regulation (EU) 2016/679) will come into effect in May 2018 and will replace the Data Protection Directive 95/46/EC.

consumer law has a key role to play in the latter.[144] The protection afforded to data subjects[145] acting as consumers is very uncertain. Fundamentally, it is very difficult for consumers to avoid entering into contracts – e.g. when using social media or buying goods online – which potentially have a considerable impact on their privacy and the protection of their data; yet, the application of data protection, privacy and consumer protection rules to these situations is unclear, creating a regime which does not offer satisfactory protection to data subjects.[146]

3.3 Assessment of the Current Situation

124. As is clear from the other chapters of this report, the determination of the consumer status of a party to a dispute generates various consequences; it triggers the legal protection of specific consumer law, shapes the framework of dispute resolution, determines the role of the court (and indeed may give rise to obligations on its part), and influences determinations such as the allocation of the burden of proof between the parties.[147]

125. The key question that arises concerns whether there is a need for the further modification of the consumer concept at the EU level. The attempts at the EU level to establish a uniform, harmonised concept of the consumer across the Member States

[144] Preliminary Opinion of the European Data Protection Supervisor, 'Privacy and Competitiveness in the Age of Big Data: The Interplay between Data Protection, Competition Law and Consumer Protection in the Digital Economy', 2014.

[145] Defined by Art.4(1) GDPR as "an identified or identifiable natural person…who can be identified, directly or indirectly, in particular by reference to an identifier". Council of the EU as a natural person identifiable by personal data, whose data is being processed (Council of the European Union, 2016, 111).

[146] See for example, Bureau Européen des Unions de Consommateurs (BEUC), 'Key Consumer Demands for the Trilogue on the General Data Protection Regulation', 2015.

[147] In a case concerning a party found to be a consumer, see Case C-497/13 *Faber* EU:C:2015:357, paras 38-47. In a case in which the ECJ found there to be a presumption concerning the domicile of a defendant within the European Union, see Case C-292/10 *G v Cornelius de Visser* EU:C:2012:142 (which concerned jurisdiction "in matters relating to tort, delict or quasi-delict" and a claim brought for the infringement of the right to the protection of personality).

and in different types of consumer conflict are laudable, as a starting point. However, such a concept should also allow for a distinction to be drawn between different types of consumers. Such a differentiation would make provision for the following: firstly, the "confident consumer" (trusting and using the system to the extent that he or she is well informed about possible choices);[148] secondly, the "responsible consumer" (willing to take legal action when necessary); and thirdly, the "vulnerable consumer", who is not able to access the usual protective framework for reasons of illness, age or over-indebtedness.[149] The concept of the "vulnerable consumer" has been recognised in two of the directives that form the focus of the study, namely the UCPD and the CRD.[150]

126. In particular, the last group deserves additional protection, with regard to both their substantive and procedural rights.[151] A pertinent example, highlighted not only in legal scholarship and in the recent case law of the ECJ but also in the interviews undertaken for the purposes of this study, concerns the protection of consumers in the context of proceedings for the enforcement of mortgages and related eviction proceedings. In these cases – which have predominantly arisen following the financial crisis – the creditors have often claimed interest and additional amounts for late payment which were contrary to mandatory consumer protection law. The absence of efficient intervention by a judge (based on *ex officio* control) at the stage of the enforcement of mortgages (and notarial deeds) affect consumers in many

[148] This „Leitbild" of the consumers is usually applied in EU consumer law; cf. Norbert Reich and Hans-Wolfgang Micklitz, 'Economic Interests, Consumer Interests and EU Integration' in Norbert Reich *et al* (eds), *European Consumer Law* (Intersentia, 2nd edn., 2014), 6-65, 45-52.

[149] Norbert Reich and Hans-Wolfgang Micklitz, 'Economic Interests, Consumer Interests and EU Integration' in Norbert Reich *et al* (eds), *European Consumer Law* (Intersentia, 2nd edn, 2014), 6-65; Hans-Wolfgang Micklitz, *Gutachten A 69 für den Deutschen Juristentag* (Beck 2012), A 38-A 55.

[150] As noted, in recital 18 UCPD and recital 34 CRD, the text of which is set out in the table at para.113 above.

[151] In these constellations, a more pro-active role of the judge is necessary in order to assist the weaker party: Norbert Reich, 'Legal Protection of Individual and Collective Consumer Interests' in Norbert Reich *et al* (eds), *European Consumer Law* (Intersentia, 2nd edn, 2014) 339, 352 *et seq*.

Member States, such as Croatia, Hungary, Ireland,[152] Poland, Romania, Slovakia, Slovenia, and of course, Spain.[153] The case law that has been referred to the ECJ via the preliminary reference procedure reflects only to a certain degree the systemic concern that arises across the Member States; indeed, a number of interviewees have highlighted the reluctance of the national courts to make refer a question for a preliminary ruling to the ECJ.[154]

127. A striking example concerning particularly vulnerable consumers arose in the recent ECJ case of C-168/15 *Tomášová*.[155] In this case, a pensioner, with no education

[152] In a recent case the High Court in Ireland seemed to hold for the first time – and with reference to the CJEU case of Aziz - that the judge hearing a claim for a summary judgment sought by a bank has to examine of its own motion whether the terms of the loan agreement might be unfair. The application for summary judgment – the effect of which would be the loss of the consumer creditor's home – was denied and the issue was advanced for a hearing. See *AIB v Counihan* 2014 No.2662S, judgment of 21st of December 2016. In light of this case and the recognition that many lower (circuit) courts may be granting home repossessions in violation of EU law, two political parties - Fianna Fáil and Daonlathaigh Shóisialta - have called on the Irish government to introduce an immediate moratorium on home repossessions and to take action to ensure that such cases are being heard before the relevant court and by judges with adequate legal training. Moreover, it has called for the establishment of a special court to deal with cases concerning the late payment of mortgages, their enforcement and related eviction proceedings; the relevant proposal is the Mortgages Special Court Bill/Courts (Mortgage Arrears) Bill. In the meantime, consumer protection associations have launched information campaigns and the Department of Justice is working with national courts to ensure that mortgage enforcement, eviction and repossession actions are being dealt with in compliance with EU law.

[153] Interviews with a Croatian academic of 16 years' experience; an Estonian judge of 14 years' experience; a Romanian lawyer of 9 years' experience; a Romanian judge of 12 years' experience; a Slovakian lawyer/arbitrator of 10 years' experience; a Spanish lawyer of 20 years' experience; Spanish judge of 17 years' experience; a Spanish lawyer of 8 years' experience and a Spanish academic of 20 years' experience.

[154] Interview with a Romanian judge of 12 years' experience who indicated "No, in principle, I do not proceed to an *ex officio* control. This is why the parties have lawyers. These decisions of the CJEU that say there should be an *ex officio* control are wrong from my point of view. I am reluctant to everything that means *ex officio*." Interview with a Czech academic.

[155] Case C-168/15 *Tomášová* EU:C:2016:602. Ultimately, the ECJ held that the plaintiff was not entitled to compensation. It rejected the notion that state liability could arise in the particular circumstances; it held that the obligation on the national court to examine unfair contract terms *ex*

beyond that of elementary school, took out a consumer loan of approximately 250 Euros. Unable to pay back the loan from her small pension of 340 Euros per month, she found herself in trouble when late payment penalties began to apply (of allegedly 90%). She then took out another loan of 250 Euros. When she was again unable to pay, the lender attempted to take the dispute to arbitration according to the standard terms of the consumer credit contract. The place of arbitration is reported as being 400 km away from her residence. The arbitrators found in favour of the lender, and a court allowed the enforcement of the award. In total, over 2000 Euros had been recovered from Ms Tomášová by a zealous bailiff. Ultimately, on the basis of the failure of the national court to examine of its own motion (i.e. *ex officio*) the potential unfairness of the arbitration clause, she requested compensation from the Slovakian state.

128. Usually, vulnerable consumers are incapable of fully exercising their substantive and indeed procedural rights.[156] On the one hand, additional support (and representation) might be afforded by consumer protection associations in both judicial and out-of-court proceedings; of course, such an approach gives rise to questions of funding and resources. On the other hand, it may be for the courts to take a more active role in civil proceedings in order to guarantee the sufficient protection of the (often, non-represented) consumer party.

129. As a starting point, legislating at the EU level for a uniform concept of the consumer appears to be a good approach. However, it does seem to be necessary to ensure that it is possible for stakeholders to distinguish satisfactorily between different groups of consumers in order to ensure that the most vulnerable are afforded sufficient protection. Indeed, the EU and national legislatures, as well as the ECJ and national courts, must be made aware of the need for protections to be afforded to (substantially) weaker parties in circumstances in which they may not be aware of, or

officio was not fully established in EU and national law at the relevant time of the initial Slovakian judicial proceedings.

[156] This might be resolved in a number of ways, discussed in more detail in Chapter 2, 'Access to Justice' and Chapter 3, 'Consumer Actions before National Courts'.

indeed, capable of enforcing their substantive or procedural consumer rights.[157] Therefore, when necessary, EU instruments should indicate clearly the situations where an increased protection of vulnerable consumers is needed. In addition, it is advisable that when transposing EU consumer law, the national legislature designates clearly the extent to which national law deviates from the EU directive.

4. The Enforcement of Consumer Protection Law

4.1 Summary of the Status Quo

130. There are two starting points for enforcement.[158] The traditional approach[159] is that proceedings to enforce consumer law are initiated by a private individual, the law is applied and the particular act challenged in those proceedings is declared to be illegal or unlawful. This declaration is then usually followed by the imposition of a legal remedy, which might include the termination of the contract between the trader and consumer, an injunction, a declaration of invalidity or illegality, an order to pay damages or a fine, or even restitution.[160]

[157] As discussed in Chapters 2 and 3, this may be due, for example, to a lack of representation on the part of the consumer (and relatedly, a lack of knowledge of substantive and procedural rules at the national level), to the limited role of the national judge, to procedural time limits, and the nature of proceedings. Payment order proceedings, for example, are particularly problematic. See Chapter 3.

[158] Christopher Hodges and Naomi Creutzfeldt, 'Transformations in Public and Private Enforcement' in Hans-Wolfgang Micklitz and Andrea Wechsler (eds), *The Transformation of Enforcement: European Economic Law in a Global Perspective* (Hart Publishing 2016) 115, 116-117.

[159] For the purposes of this section, enforcement is understood broadly as the implementation of consumer law.

[160] Typically, in line with the directives and the autonomy of the Member States, EU directives will require that certain remedies are made available for the breach of rules of consumer protection. For example, Art.23 of the CRD requires that "Member States shall ensure that adequate and effective means exist to ensure compliance with this Directive" but that the consumer should also be able to have recourse to remedies available within the national systems. This is clear, for example, from Art.18 of the same directive, which at (4) provides "in addition to the termination of the contract in accordance with paragraph 2, the consumer may have recourse to other remedies provided for by national law."

131. The second approach is that of an action initiated by a public authority, typically with the aim of ending the infringement, obtaining injunctive relief or compensation.[161] While the traditional approach is still maintained across the Member States (such that the civil courts continue to play the predominant role in enforcement), it is clear that a simple public/private distinction can no longer be preserved due to the role played by CPAs and ombudsmen, for example.[162]

132. The primary finding for the purposes of this study is that it is not possible to identify a harmonised approach to consumer enforcement across the Member States. However it is possible to identify different national models; without providing for a comprehensive categorisation of the different architectures of implementation, the following paragraphs provide key examples of the divergent enforcement regimes existing across the Member States.[163]

133. It is not possible to draw comprehensive conclusions in this brief overview as this is an area of research that extends beyond the scope of this study. So far, it has been

[161] Typically, CPAs for example will provide assistance to individual consumers, normally by providing advice or legal representation; they might also bring individual actions together, or seek an injunction to prohibit unlawful behaviour or practices and in this sense, perform a public function. Typically ombudsmen, on the other hand, are usually public entities and take public regulatory measures; however, they may also perform a dispute resolution function.

[162] See paras.164 *et seq.* below. Notwithstanding that the traditional "public" and "private" bodies have been maintained, the responses from the national reports and interviews indicate that the reference to the terms "public", "private" and "mixed" may no longer be satisfactory to adequately describe and analyse the character of domestic regimes of consumer law enforcement. It is difficult to define each of the national approaches to enforcement, and the relationship between national ministries and public and private entities, on the basis of these terms.

[163] The responses to Question 4.1 of the national reports set out the authorities that have competence to enforce consumer law within the national system. These authorities may be public, i.e. governmental, often part of a state ministry (as in Belgium, Czech Republic, Denmark, Estonia, Finland, France, Hungary, Ireland, Italy, Lithuania, Portugal and (predominantly) Spain), or a mixture of public and private (as in Austria, Bulgaria, Croatia, Germany, Greece, Latvia, Romania, Slovakia, Slovenia, UK). It is not the case that only private bodies, i.e. consumer associations, are solely responsible.

studied only to a limited extent.[164] Indeed, there is an urgent need for further and careful examination of the numerous considerations that arise and are briefly outlined here, in order to facilitate the development of policy on best practices and guiding principles. For the sake of clarification, the following basic features can be ascertained.

4.1.2 Different Architectures of Enforcement

4.1.2.1 Initiating the Enforcement of Consumer Law

134. Consumer law not only regulates the relationships between private parties, with the aim of ensuring the protection of the individual or collective consumer interest but also plays a role in financial markets law, competition law, data protection and the regulation of the internal market.[165] Given that the regulatory purposes of consumer law go further than the governance of private relationships, its enforcement can be initiated both by private entities (for example, a CPA or a trade or business association, or even a private ombudsman) or by public authorities. Thereafter, the proceedings may be transferred to be heard by a public entity (for example, before a court) or they might continue to be dealt with only by a private body. Such a situation might arise when a letter-before-action is sent to a business in connection with alleged misleading advertising or unfair business trading practice; this letter might be followed up either by a reference to a public prosecutor (who will determine whether

[164] Jules Stuyck *et al* (eds), 'European Commission Study on Alternative Means of Consumer Redress other than Redress through Ordinary Judicial Proceedings' (2007; available at: http://ec.europa.eu/consumers/redress/reports_studies/index_en.htm); Civic Consulting, 'Study on the Use of Alternative Dispute Resolution in the European Union' (2009; available at: http://ec.europa.eu/consumers/redress_cons/adr_study.pdf); Christopher Hodges, Iris Benöhr and Naomi Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing 2012); Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2017).

[165] As is clear from the legal foundations of the majority of consumer law directives, post-Maastricht, that is, the internal market basis now established in Art.114 TFEU. See Hans-Wolfgang Micklitz and Stephen Weatherill, 'Consumer Policy in the European Community: Before and After Maastricht' (1993) 16 *Journal of Consumer Policy* 292, 298. This is a rich area of analysis; the relationship between market (re-)regulation, integration and consumer protection can be conceived in different ways. See for example, Stephen Weatherill, *EU Consumer Law and Policy* (Elgar, 2nd edn, 2013), 1-5.

an investigation concerning a criminal prosecution should be launched), by the filing of an application before a court for an injunction, or may lead to the resolution of the dispute by the interested parties without the involvement of another (public or private) body.

4.1.2.2 The Character of the Body Enforcing Consumer Law

135. The determination of whether the body that is responsible for the enforcement of consumer law is a public or a private one may also be difficult to make clearly. A court, an administrative tribunal, a government ministry, a competition or consumer enforcement authority and a prosecutor may be said to be public bodies. However, when it comes to consumer ADR, the public/private distinction becomes less clear; ombudsmen, for example, might be public or private. Moreover, while CPAs and business or trade associations are private entities, their role might include the performance of public functions, including, for example, the national enforcement of advertising or fair trading law, and self- or co-regulation of the businesses in their sectors. The character and role played by these bodies in the enforcement of consumer law is one reason underpinning the "transformation of enforcement".[166] This is evident from the national reports. For example, public bodies – which already have the power to bring criminal and administrative actions and to render such (criminal and administrative) remedies – have been empowered to bring cases in civil courts, to bring actions for damages and economic redress[167] or to bring an action to force businesses to change or cease unfair and unlawful behaviour.[168]

[166] Andrea Wechsler and Bosko Tripkovic, 'Conclusions: Enforcement in Europe as a Market of Justice' in Hans-Wolfgang Micklitz and Andrea Wechsler (eds), *The Transformation of Enforcement: European Economic Law in a Global Perspective* (Hart Publishing 2016) 377, 379 *et seq.*

[167] National Reports, Question 4.1: Denmark (Danish Consumer Ombudsman); Ireland (Central Bank of Ireland); Italy (individual examples from Banca d'Italia); several regulatory authorities in the UK (including the Citizens Advice Service, the Chartered Trading Standards Institute and Local Authority Trading Standards Services and the Competition and Markets Authority).

[168] National Report, Question 4.1: UK (the Consumer Rights Act 2015 gives wide redress powers to a wide body of public enforcers).

136. Consumer ADR bodies – which may be public or private – may be empowered to not only facilitate private dispute resolution but may also play a role in changing the behaviour of those parties, thereby performing what is typically the function of a public enforcement authority. This is the situation with the UK Financial Ombudsman Service and the Belgian Energy and Communications Ombudsmen which can require changes in the behaviour of traders. Once these bodies become aware of a systemic practice on the part of a trader (which usually comes to light following one or more individual disputes) – for example, its continued use of unfair contract terms, or misleading advertising – it can demand that the trader ceases to act in that way or use those particular practices. The use of such techniques precludes the need for the public regulatory or prosecution authorities to take action in respect of a matter in which the ombudsman is already involved.[169]

4.1.3 (Examples of) National Systems of Enforcement

137. The variations between self-regulatory, co-regulatory, ADR and private regimes of enforcement can be examined with reference to the situation in the national systems. In particular, reference will be made to the Nordic, Dutch, UK, Belgian, Spanish and Portuguese, Italian, Greek, German and CEE models.

138. The Nordic model: Similar models exist across the Nordic States.[170] These models encompass a national consumer authority and regulatory authorities for different sectors including financial services, energy and communications. There also exists a Consumer Ombudsman (which is the principal body responsible for national enforcement; it does not generally play the role of overseeing a dispute resolution function), and a Competition Authority. In this regime, most disputes between consumers and traders are directed firstly to traders; thereafter, these disputes are

[169] Christopher Hodges, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance, Culture and Ethics* (Hart Publishing 2015) 351 *et seq.*

[170] National Reports, Questions 4.1 and 4.5: Danish (Danish Competition and Consumer Authority, the Danish Consumer Ombudsman and the Danish Consumer Complaints Board), Finnish (Finnish Competition and Consumer Authority and the Consumer Ombudsman); Swedish (*Konsumentvägledare,* the *Konsumentombudsman* (KO) and the central body, the Swedish Consumer Agency, *Konsumentverket* (KV) and the Swedish National Board for Consumer Disputes, *Allmänna reklamationsnämnden* (ARV)).

sent to ADR, through a number of sectoral ADR entities and a general residual Consumer Board.[171] Very few consumer cases are handled by lawyers or in court procedures.[172]

139. The Dutch model: The Consumer Authority was created in 2007; it merged with the authorities for communications and competition in 2011 to form the Authority for Consumers and Markets (ACM).[173] Many disputes between consumers and traders are dealt with via an integrated national ADR system, in which the principal bodies cover financial services,[174] consumer complaint commissions covering 55 sectors,[175] and medical claims.[176] By virtue of these regimes, standard terms and conditions typically set higher standards than those required by law; the system involves a significant extent of self-regulation by trade bodies.[177] A kind of small claims

[171] National Report, Question 4.1: Sweden (the Swedish *Allmänna reklamationsnämnden* (ARN)). Personal injury claims are dealt with by compensation or insurance schemes).

[172] In Sweden, a problem arises where a potential violation arises in a cross-border context and where it becomes difficult to ensure that evidentiary requirements are satisfied. It is also noted that the KO "could be more active" and is suggested that the culture might change as it has recently been given greater powers (that is, a shift from a "consensual/cooperation style to more of a sanction model"). Interview with a Swedish CPA.

[173] The Dutch *Autoriteit Consument & Markt* (Netherlands Authority for Consumers and Markets (ACM)) plays a key role; the system has shifted from a private, self-regulating model, to a more public one. It is competent for both domestic and cross-border enforcement. There are some aspects that can be improved though, including the cooperation with other authorities (e.g. if an authority refuses a request to take action) and joint action with CPAs (although it is noted that these bodies already work together to strengthen protection by combining private and public enforcement actions). There also remain problems with speed and indeed with enforcing the provisions in the UCTD in a collective manner. Interviews with 2 Dutch academics and Dutch CPA.

[174] National Report, Question 4.1: the Netherlands (*Klachteninstituut Financiële Dienstverlening* (KiFiD), a separate ADR body for consumer products).

[175] *De Geschillencommissie* covering 55 sectors.

[176] *Stichting Klachten en Geschillen Zorgverzekeringen* (SKGZ).

[177] This is also the case in the UK and the Netherlands; these trade bodies police their members. Little research has been undertaken on these issues across the EU.

procedure exists in the national system;[178] actions before courts are brought by private parties but this is not a frequent occurrence.[179]

140. The UK model: National regulatory authorities exist for various sectors including financial services, energy, communications, transport, food, environment, and competition law.[180] Almost all of these authorities initiate and aim to provide for consumer redress in situations of mass violations of consumer law. Consumer trading law is enforced at the local level by the Trading Standards' officials of local authorities; these bodies are coordinated at the national level.[181] Almost all public bodies have the power to initiate criminal, administrative and civil proceedings and to impose such sanctions.[182] Advertising is enforced by the Advertising Standards Authority, a trade body. There are also numerous ADR entities, especially sectoral ombudsmen,[183] in areas including financial services, energy, and communications. Few disputes between consumers and traders go to court though a small claims procedure exists.[184] Unfair contract terms are primarily identified by the Citizens' Advice Bureaux and by sectoral ombudsmen.[185]

[178] National Report, Question 8.2.1: the Netherlands (claims with a value of less than 25,000 Euros are heard by the more informal sub-district sector instead of the civil sector of the district court).

[179] Interview with a Dutch judge of 8 years' experience. Interviews with a Dutch academic, Dutch lawyer and Dutch CPA also indicate that access to courts is limited, predominantly by court fees.

[180] National Report, Question 4.1: the UK (Enforcement of competition law is shared between sectoral regulatory authorities and the Competition and Markets Authority. The consumers' association Which? has the power to make a 'super-complaint' to the CMA but this rarely occurs).

[181] National Report, Question 4.1: the UK (Through the National Trading Standards Board, the Chartered Trading Standards Institute, and the Primary Authority scheme operated by the Regulatory Delivery Division of the Department for Business Energy and Industrial Strategy).

[182] National Report, Question 4.1: the UK (notably under the Consumer Rights Act 2015).

[183] In 2015/2016, the Financial Ombudsman Service received over 1.6 million enquiries from people with questions, concerns and complaints about money matters – over 5,000 each working day. See Financial Ombudsman Service, 'Annual Review of Complaints about Insurance, Credit, Banking, Savings, Investments: Financial Year 2015-2016' (Ombudsman Services, 2016).

[184] National Report, Question 8.2.1: UK. Interview with a British consumer protection association.

[185] National Report, Question 4.1: the UK (The Competition and Markets Authority has a nominal role that has little practical impact; its role is less than its predecessor, the Office of Fair Trading).

141. The Belgian model: Regulatory authorities exist for the principal sectors affecting consumers. Courts hear consumer actions[186] and small claims procedures are used.[187] In 2014 the Consumer Ombudsman Service brought all sectoral ombudsmen (notably for communications and energy) and other sectoral ADR entities under a single structure, which also provides extensive consumer advice.[188]

142. The CEE model: In the Central and European States, national consumer authorities may have long histories stretching back to Communist times but have developed their enforcement functions only relatively recently. The development of ADR entities is generally at an early stage. Some ADR functions exist and are operated by national regulatory authorities;[189] these bodies are generally sector-specific and also engage with CPAs.[190]

143. The Polish model: In Poland, the key role is played by the Office of Competition and Consumer Protection - the central regulatory body, with broad scope of competence of monitoring and sanctioning breaches of consumer rights – alongside sector-specific bodies. They are administrative bodies whose decisions can generally be challenged before the administrative courts. The President of the Office can impose fines and prohibit practices that violate consumer law (including the use of unfair terms). CPAs are deemed to play a kind of supplementary role by "scrutinising the market, educating consumers and business parties, as well as being able to make

[186] National Report, Question 8.2.1: Belgium. Interview with a Belgian judge with 18 years' experience.

[187] However it has been suggested that Belgium "more or less 90% of consumer disputes are resolved in a direct dialogue between the consumer and the company"; interview with a Belgian business association.

[188] Where enforcement of consumer law is made through both administrative bodies and CPAs, the approach might be different. While CPAs are focused on enforcement as marketing, administrative bodies are rather concerned with policy priorities, personal preferences of civil servants, number of actual complaints, and sweeps directed by the EU; Interview with a Belgian academic and lawyer.

[189] An example is Lithuania, where the Consumer and Communications Authorities have ADR schemes. National Report, Questions 4.1 and 4.2 and 10: Lithuania.

[190] In the Czech Republic, there are sector-specific regulatory bodies (electronic communications and postal services, and energy), which also engage with CPAs particularly in situations where there are a number of individual consumer complaints. Interview with a Czech central authority.

claims on behalf of consumers and take part in judicial proceedings." A small claims procedure exists.[191] CPAs can only bring actions on behalf of the individual consumer while collective actions must be brought by consumer ombudsmen, which operate within a "local government structure".[192]

144. The Spanish and Portuguese models: Various national regulatory authorities exist in each Member State.[193] In Spain, a single national authority was recently created; it brings together the authorities responsible for enforcement in relation to energy, transport and competition law (*Comisión Nacional de los Mercados y la Competencia*). Consumer agencies exist at the national, regional and local levels. In neither Spain nor Portugal is there a small claims procedure;[194] however in Spain there is the "juicio verbal" procedure by which claims with a value of less than 6000 Euros can be initiated. Courts may be used for private enforcement claims but consumer arbitration boards are also widely used (in Spain, this is the *Sistema Arbitral de Consumo*).

145. The Italian model: Long delays are often experienced in the courts; few judicial claims are brought. Mediation has been introduced alongside court proceedings; as these processes do not involve lawyers, they have tended to resist their development. National regulatory authorities for financial services, communications, energy and transport are active in facilitating the administrative enforcement of consumer law;[195] the related institutions also operate effective ADR schemes. An ADR-type mechanism for other sectors (*Conciliazione Paritetica*) also exists.[196]

[191] National Report, Question 8.2.1: Poland.

[192] Interviews with 3 Polish lawyers; 3 Polish academics; 2 Polish judges.

[193] In Portugal, it is said that regulatory authorities play a role in providing guidance and information but have little practical impact on consumer protection. However, two interviewees also highlight that such regulators are interested in playing a greater role but it seems there is a need for legislative proposals in this field to facilitate such developments. Interviews with 2 Portuguese ADR entities and Portuguese judge.

[194] National Reports, Question 8.2.1: Portugal and Spain.

[195] It is said that the cooperation with these authorities, consumers and CPAs works well. Interviews with 4 Italian lawyers.

[196] National Report, Question 10: Italy.

146. The Greek model: Sectoral regulatory authorities exist, and a strong ADR function is maintained by the Hellenic Consumers Ombudsman. However, it has been highlighted that there is little effective cooperation between regulatory authorities – including for example the Hellenic Consumer's Ombudsman – which are responsible for identifying and pointing out to the public violations of consumer law (but which does not bring consumer claims before courts), and consumer associations which are in practice significant for consumers by bringing actions (normally collective).[197]

147. The German model: While sectoral regulatory authorities exist, the enforcement of general consumer law, especially of unfair trading law, occurs primarily by private sector bodies, notably trade associations (*Wettbewerbszentrale* or *Handelskammern*) and consumer associations (*Verbraucherzentralen*).[198] The availability of efficient courts, court and lawyers' fees based on tariffs, and insurance for legal expenses facilitates private enforcement litigation. A small number of ombudsmen exist (notably in the sectors of insurance, transport and energy).[199] The importance of consumer protection has been increased since the competence was transferred in 2015 to the Federal Ministry of Justice and Consumer Protection.

4.2 Problems Identified in the National Legal Systems

4.2.1 Absence of Guiding Principles and Best Practices

148. It is worth noting firstly that the limited amount of research undertaken in this area undermines the scope for the development of a consistent approach that would allow for the identification of guiding policies, best practices, coherent architectures and coordinated entities dealing with enforcement.

149. The principle of subsidiarity provides that the EU is only justified in exercising its powers in circumstances when the Member States are unable to satisfactorily

[197] Interviews with Greek lawyer; 2 Greek academics and a lawyer.

[198] It has been highlighted that In Germany, regulatory authorities are rarely engaged in the enforcement of consumer law; rather this is done by CPAs or by individual consumers before courts. Interviews with a German CPA and German lawyer and academic.

[199] National Report, Question 4.1: Germany

achieve the objectives of a proposed action;[200] it therefore aims to preclude Union intervention when it is deemed to be possible for a matter be dealt with effectively by the Member States, even where this might not be true in practice. This has resulted in the passing of a huge volume of *law* at the EU level on the assumption that it will be applied and enforced equally in every Member State. In other words, the assumption has been that the law will be applied and enforced by some combination of public and/or private entities at the national level and that the same results of compliance will be achieved across the Member States. This means that the Member States will apply EU law by relevant national means, in line with the classical statement in EU legislation that is limited to applying sanctions that are "effective, dissuasive and proportionate".[201] It is remarkable that only a limited amount of analysis has been undertaken of national enforcement architectures, entities, policies, practices and outcomes.[202]

150. Moreover, it is worth noting that the regulatory authorities responsible for the enforcement of consumer law may deal with general consumer protection (for example, sales law, advertising, unfair competition and trading), general market structure and competition, or with specific sectors (for example, with financial services, energy, communications and utilities). The role of regulatory authorities responsible for areas of law like product safety (for example, concerning medicines, medical devices, biocides, tobacco and food) tends to cut across these sectors. Within the Member States, there exist multiple yet differentiated regulatory bodies. The level of coordination that exists between them, within the national system, differs across the Member States; moreover the level of cross-border coordination also differs. These considerations are relevant to the nature of the typical consumer dispute (discussed in the following section).

[200] Art.5(3) TEU; see the criteria in Protocol (No 2) on the application of the principles of subsidiarity and proportionality annexed to the Treaties.

[201] For example, Recital 57 of the CRD provides: "It is necessary that Member States lay down penalties for infringements of this Directive and ensure that they are enforced. The penalties should be effective, proportionate and dissuasive."

[202] However, reference can be made to the research cited at fn.133 above.

4.2.2 The Typical Character of Consumer Dispute Resolution

151. From responses of stakeholders to the online survey and interviews, a rough sketch of the character of a typical consumer dispute can be provided.[203]

152. When asked in how many consumer protection-related claims they were involved on average per year, an overwhelming majority of lawyers who responded indicated they were predominantly involved in domestic proceedings.[204] This result may be explained by the limited number of cross-border consumer claims in total[205] or the fact that only a handful of specialists take on these cases.[206] The limited number of consumers responding to the questions on cross-border disputes indicates that they are rarely, or indeed, have never been involved in a cross-border procedure.[207] Equally, judges have indicated that they are far more likely to be involved in domestic disputes than in cross-border disputes; however – in light of the increasing amount (and value) of contracts concluded online – it is likely that a shift will be observable in this respect in the coming years.[208] Similarly, CPAs have indicated that they are involved more often in domestic proceedings than in cross-border proceedings.[209]

[203] The respondents to the online questionnaire and interviews are – while not exactly the same individuals – from the same group of respondents, including lawyers, judges, CPAs, consumers and ADR entities. Given that the same questions were asked (and in those cases in which the data collected has been collated), the same "closed" responses presented, and in light of the small number of answers received to certain questions, we have collated the responses.

[204] See SurveyMonkey – Consumer Protection, Questions 5 and 6. Response rate: 19 lawyers answered the first question (concerning domestic disputes); 10 lawyers answered the second question (regarding cross-border disputes).

[205] See the results of the mutual trust strand.

[206] See SurveyMonkey – Consumer Protection, Question 6.

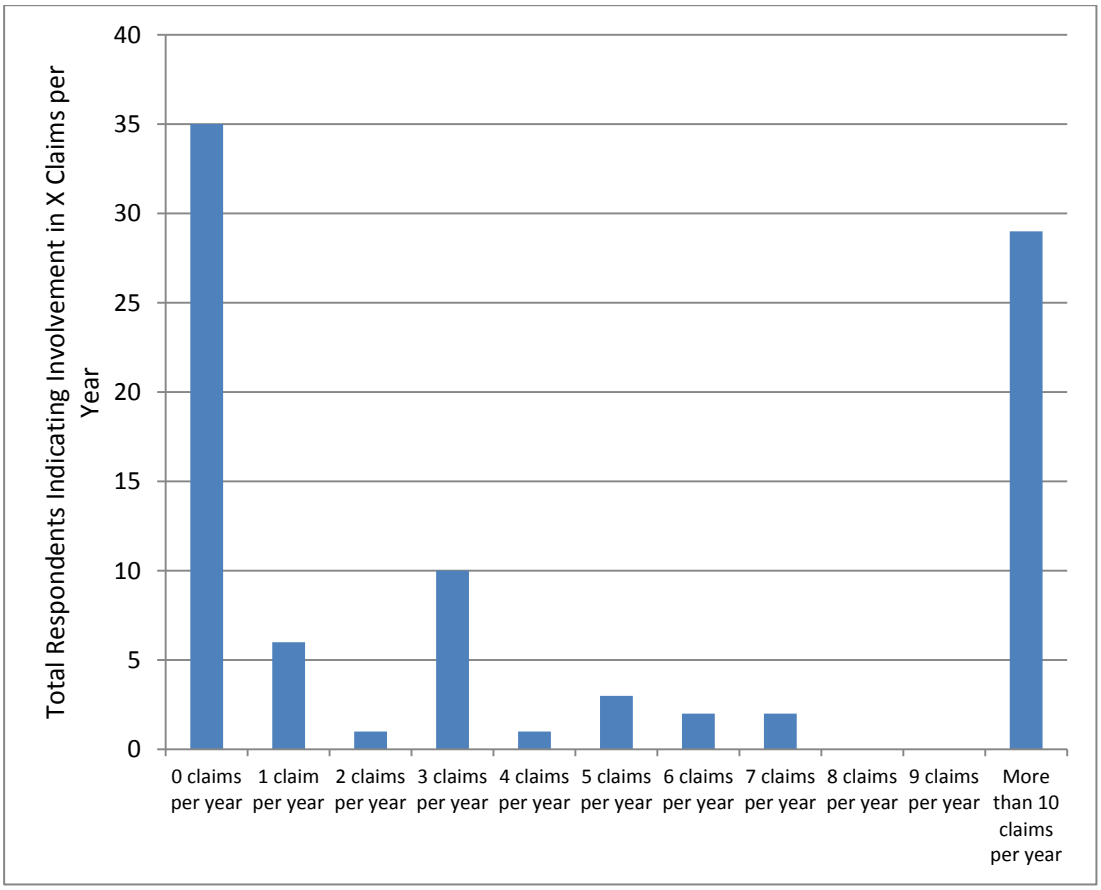
[207] See SurveyMonkey – Consumer Protection, Question 51. Reference can also be made to the EEC-Net figures in cross-border settings, which indicates for example that in the year 2015 38,048 cross-border complaints were made to EEC-Net centres across the EU Member States.

[208] See SurveyMonkey – Consumer Protection, Questions 74-75. See E-Commerce Europe's data, where it is anticipated that European B2C turnover will increase from EUR 455 billion in 2015 to EUR 510 billion in 2016 (from EUR 402 billion in 2014); http://www.ecommerce-europe.eu/app/uploads/2016/07/Infographics-2.jpg.

[209] See SurveyMonkey – Consumer Protection, Questions 135-136.

Nevertheless, while CPAs might be empowered to bring both domestic and cross-border judicial actions in many Member States, they may not often do so in practice; the exceptions are predominantly found in Germany and Austria. Regardless, the ECC-Net has reported that its centres have processed more than 300,000 (cross-border) complaints between 2005 and 2015. At present, these ECC-Net centres deal with more than 40,000 complaints per year.[210]

153. All stakeholders were asked: on average, in how many domestic (judicial) claims are you involved per year?[211]

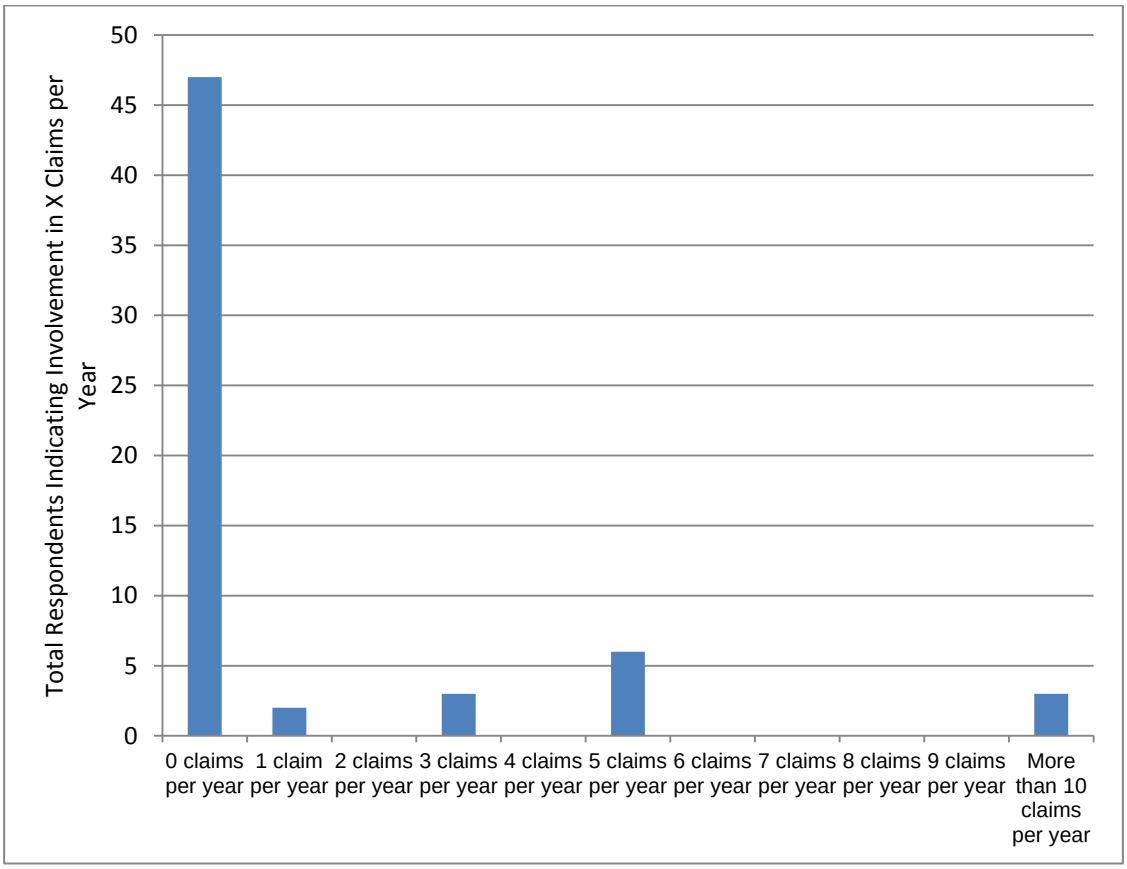


Responses to Online Survey, Question 5.

154. All stakeholders were asked: on average, in how many cross-border (judicial) claims are you involved per year?

[210] European Commission (ed), 'Le réseau des centres européens des consommateurs, ECC-Net' (2016), 7.

[211] The question was asked in the online survey to all stakeholders; 89 stakeholders responded in total. To clarify: for example, 35 respondents indicated they were involved in 0 judicial claims per year.



Responses to the Online Survey, Question 6[212]

155. Lawyers also indicated that they are rarely involved in consumer ADR proceedings; this finding may be explained by the absence of a requirement for legal representation in ADR proceedings.[213] Given the disparate and heterogeneous character of ADR mechanisms across the Member States, it has been difficult to obtain statistical data from ADR entities, both within Member States and in a cross-border context.[214] The typical consumer case for lawyers therefore seems to be the

[212] The question was asked in the online survey to all stakeholders; 61 stakeholders responded. To clarify: for example, 47 respondents indicated they were involved in 0 judicial claims per year.

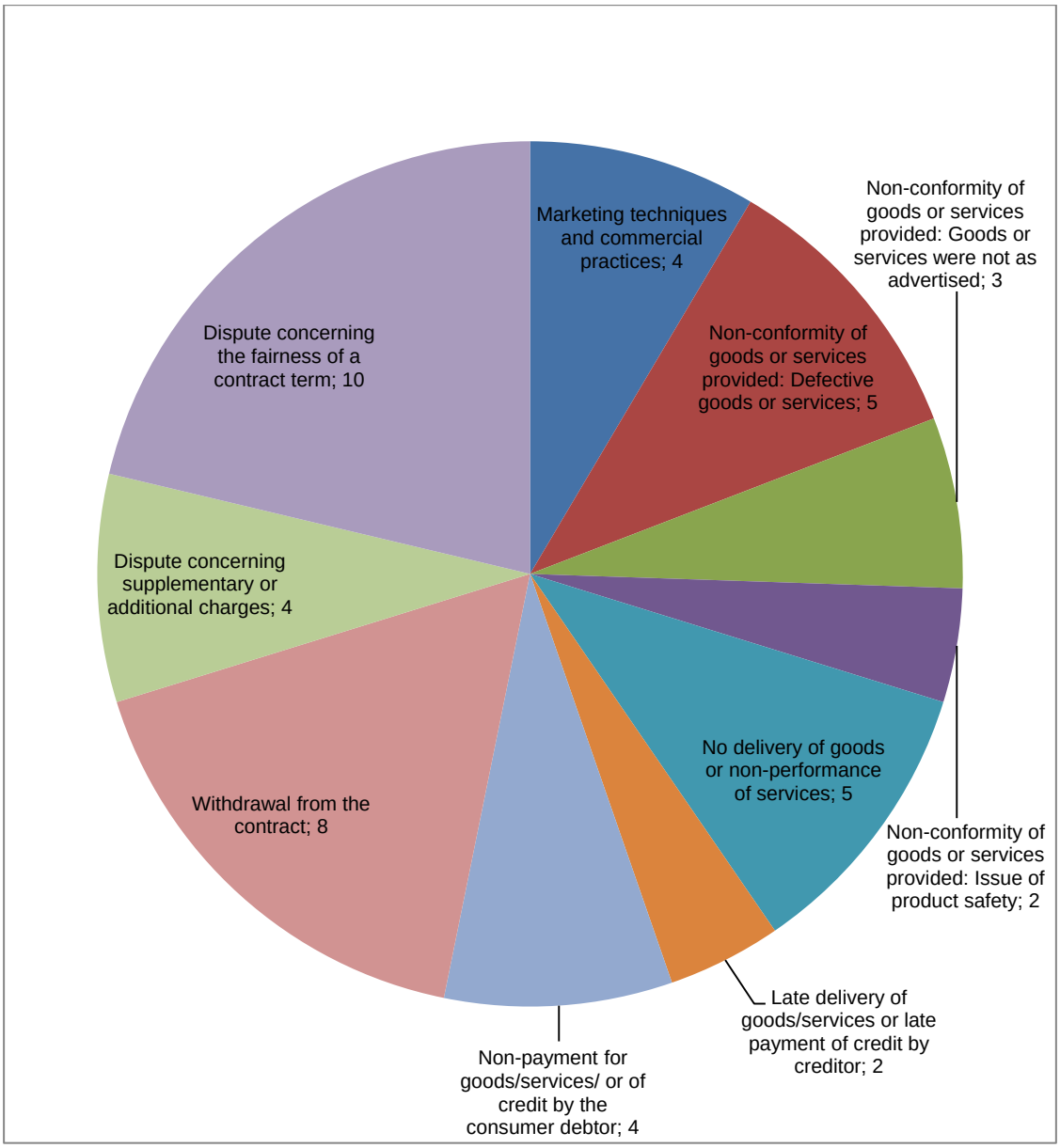
[213] See in this regard, Survey Monkey – Consumer Protection, Question 28: consumers tend to seek less legal representation in ADR procedures. On the nature of ADR and its architecture, see Chapter 5, 'Consumer Alternative Dispute Resolution'.

[214] It is worth noting that consumer ADR is not absent, even in the cross-border context; for example, the Centre Européen de la Consommation (Kehl) reports that its online mediation procedure received 1064 requests for mediation from Germany and France. Data available at: www.cec-zev.eu, accessed December 19th, 2016.

domestic judicial procedure. However, it is also clear from the data collection that there are a number of lawyers who are not involved in any judicial claims relating to consumer protection.

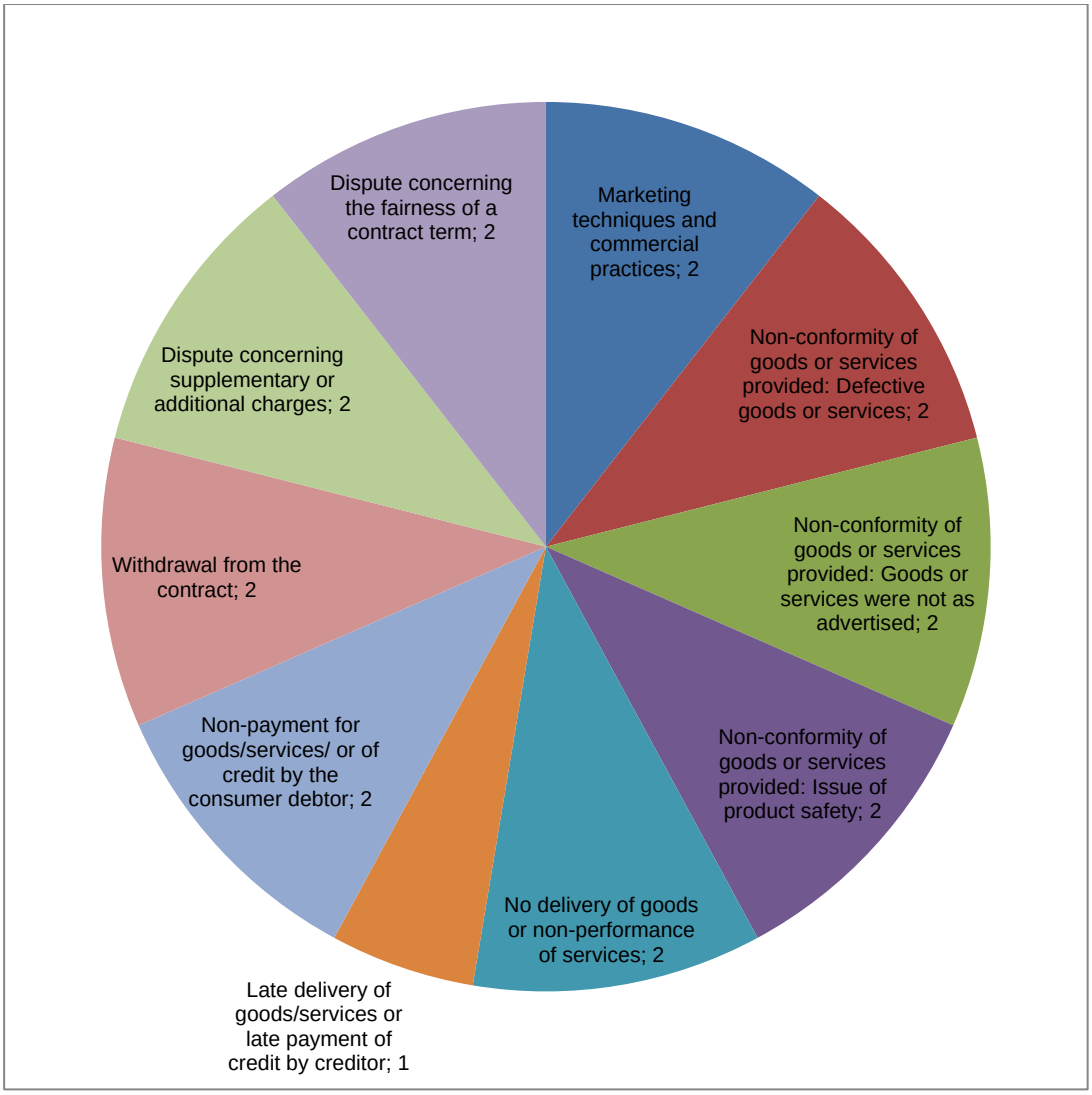
156. From the results of the online survey, it seems that there is no typical problem. Lawyers and judges indicated that disputes concerning the unfair nature of a contract term make up for more than 20% of the judicial claims in which they are involved.

157. In the online survey, the following question was asked of lawyers and judges: What was the nature of the judicial dispute arising?



Responses to the Online Survey, Question 10 (Judicial Disputes: Lawyers and Judges)[215]

158. The same question was asked of CPAs: What was the nature of the (judicial) dispute arising in which the association was involved? To this stakeholder group, the response was less clearly one type of action over another.

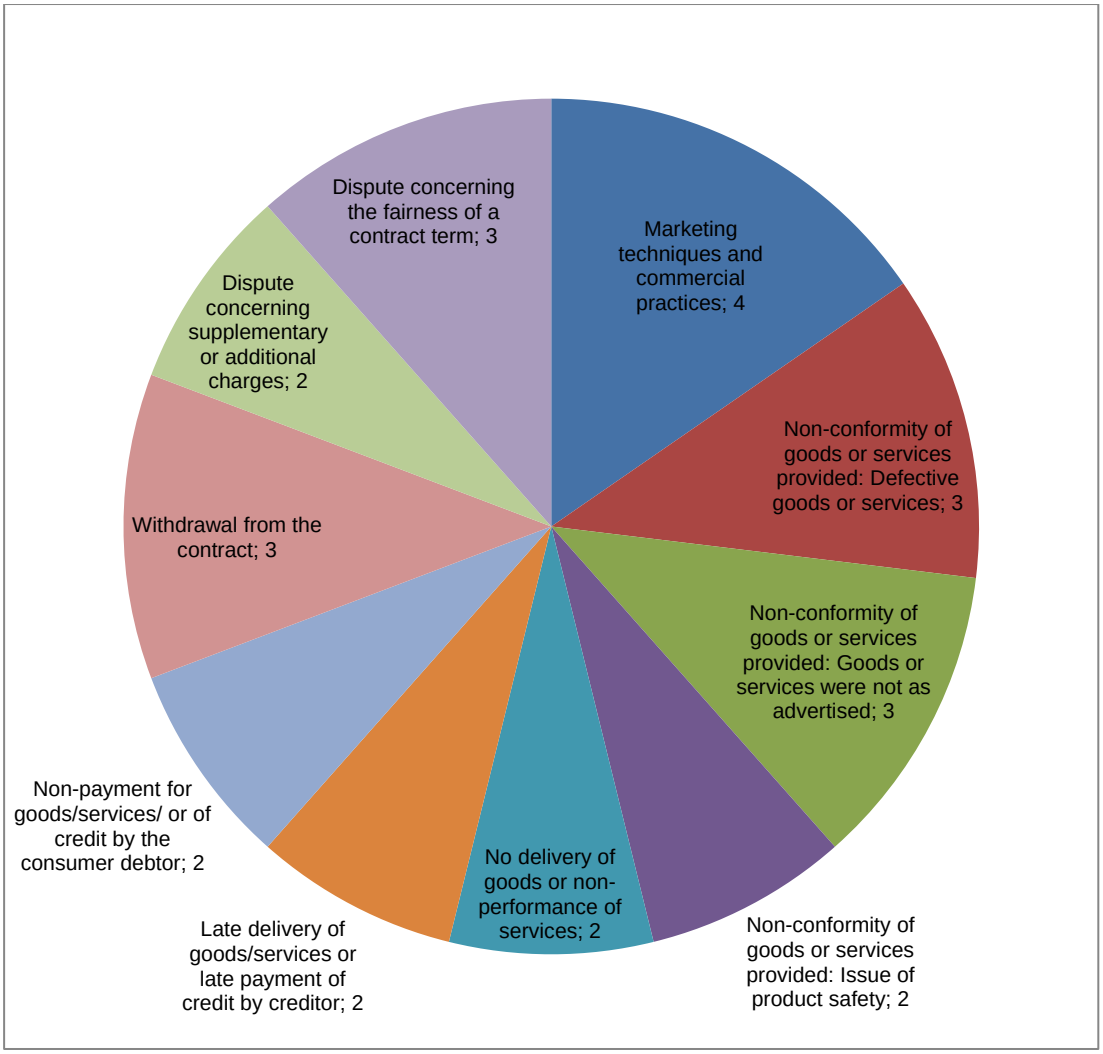


Responses to the Online Survey, Question 140 (Judicial Disputes: CPAs)[216]

[215] The question was asked in the online survey to all stakeholders who identified themselves as lawyers and judges. Each respondent was entitled to indicate more than one type of claim. We have collected all of the responses and presented the number of indications of involvement in each type of claim as a percentage of the total number of responses.

[216] The question was asked in the online survey to all stakeholders who identified themselves as CPAs. Each respondent was entitled to indicate more than one type of claim. We have collected all of

159. The same question was asked of ADR entities: What was the nature of the dispute arising before the ADR entity? Again, the responses of this stakeholder group indicated less clearly the predominance of one type of action over another.



Responses to the Online Survey, Question 202 (ADR Disputes)[217]

160. The nature of the typical consumer action has been further explicated in the online survey and the interviews. When lawyers and business associations were asked to

the responses and presented the number of indications of involvement in each type of claim as a percentage of the total number of responses.

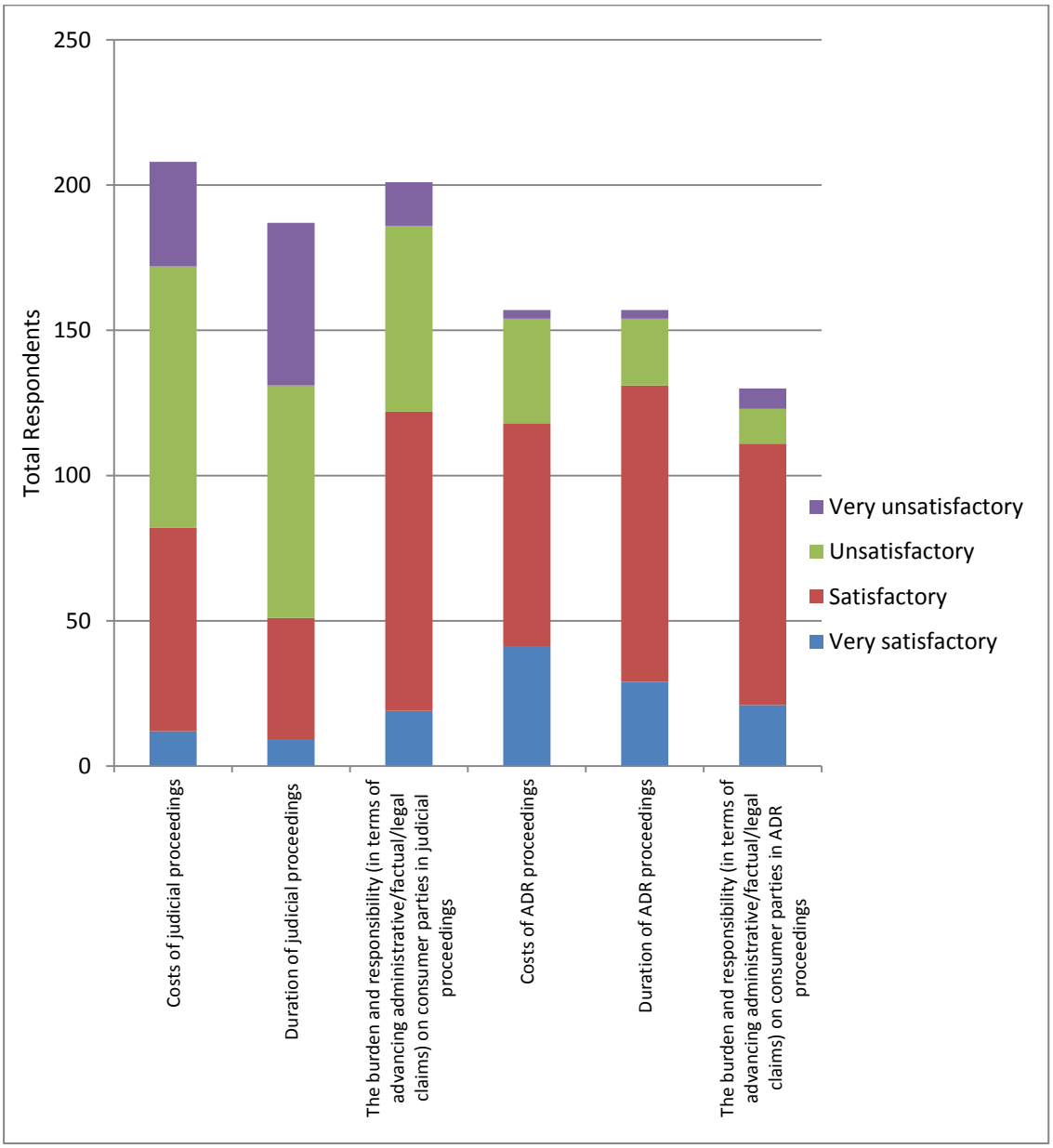
[217] The question was asked in the online survey to all stakeholders who identified themselves as ADR entities.

identify which factors would be relevant in the advice they provide to consumers or businesses on whether to bring a claim and their choice of dispute resolution mechanism (on a scale from highly relevant (4) to not relevant at all (1)[218]), the following factors were deemed to be of particular significance: the costs of the procedure (3.85), the complexity of the procedure (3.65), the duration of the procedure (3.52), the value of the claim (3.47), and the lack of predictability (3.29). Less relevant factors included the possible economic impact of the dispute resolution on the business (2.94), the lack of perceived confidence in ADR (2.84), the possible reputational impact on the business (2.71), time-limits (2.65), and the lack of awareness of ADR (2.53). Across the board, the burden of proof on each of the parties shapes the role of the litigants and the judge.[219] It is worth noting that while the burden of proof is deemed to be less problematic in the context of ADR proceedings, it is still relatively significant according to the respondents to the online survey.[220]

[218] See SurveyMonkey – Consumer Protection, Question 12. Stakeholders were asked to rate various factors on the following scale: highly relevant (4), somewhat relevant (3), not very relevant (2), and not at all relevant (1).

[219] As noted, this issue is examined in further detail in Chapter 3, 'Consumer Actions before National Courts'.

[220] See SurveyMonkey – Consumer Protection, Question 214.



Responses to the Online Survey and Closed Interview Questions (All stakeholders)[221]

161. This question shows that across the board, in accordance with responses from various stakeholders, the duration of proceedings seems to be the most problematic

[221] The respondents to the online questionnaire and interviews are – while not exactly the same individuals – from the same group of respondents, including lawyers, judges, CPAs, consumers and ADR entities. Given that the same questions were asked (and in those cases in which the data collected has been collated), the same "closed" responses presented, and in light of the small number of answers received to certain questions, we have collated the responses from all stakeholders and both the online survey and interviews.

issue, followed by costs.[222] Indeed, the duration of judicial proceedings appears to be a point of great dissatisfaction when it comes to procedural consumer protection, to an even greater extent than costs.[223] These responses can be contrasted with those given concerning the duration of ADR proceedings and the costs of ADR. The duration of consumer ADR may therefore be understood to reflect one of its main advantages. Similarly, the responses to the open questions of the interviews indicate problems with the length (and relatedly, it is determined, costs) of judicial proceedings,[224] especially in relation to cross-border disputes.[225]

162. The need for language and translation has also been identified by interviewees as being particularly problematic for consumer parties. As might be expected, this problem exists predominantly in the context of cross-border dispute resolution, in respect of the ESCP as well as ADR and ODR.[226] The language problem also potentially arises within one Member State, for example, in those states where more than one language is spoken.[227]

163. Further information has been provided in the interviews. Individual enforcement of consumer law by consumers presents challenges across the Member States because many consumer complaints involve very small amounts of money, for which it would not be rational to waste time or money in consulting a lawyer or using a

[222] See SurveyMonkey – Consumer Protection, Question 39 (lawyers, consumers, business associations) and Question 99 (judges) and Interviews, Closed Question.

[223] See SurveyMonkey – Consumer Protection, Question 39.

[224] Interviews with respondents in every Member State have indicated that costs are an issue; the issue of costs was raised in Question A.3, A.4, B.2 and B.3 of the interview template. Costs are discussed in further detail in Chapter 2, 'Access to Justice'.

[225] Interviews with Finnish judge and Finnish lawyer, Lithuanian CPA and UK CPA.

[226] For example, it has been highlighted that while consumers from other Member States will be able to apply for ADR in Austria, they will undoubtedly face language barriers if they cannot communicate in German; Interview with Austrian ADR entity.

[227] Languages in different parts of the country and conduct of proceedings creates difficulties for consumers (although it is stated, not necessarily for lawyers); Interviews with Austrian ADR entity; French CPA; Luxembourgish CPA and Dutch CPA.

court, even where small claims procedures exist.[228] For example, it has been advanced that consumers tend not to bring an action with a value of below 2000 Euros before a court[229]. The cost of bringing an action may be too high in comparison to the value of the action; it has also been noted that costs may be too low and result in abuse of the system.[230] Moreover, it has been indicated – as set out above – that the level of knowledge held by interested parties may be low. Sometimes consumers may not know which information to provide in court.[231] For example, in cross-border cases, consumers often encounter problems to determine the competent court[232] and the applicable law.[233] The issue of the lack of resources has also been highlighted; for example, it has been noted that where a court has exclusive jurisdiction, it may often be overburdened.[234] Sometimes the consumers are forced to appear in court, which may discourage them from bringing an action, even though this may be the only way that they can have the unfair practice and term prohibited or obtain the compensation to which they are entitled.[235] These issues of costs and representation are examined in further detail in Chapter 2 of this report.

[228] See summary of the evidence in C Hodges, 'Consumer Redress: Ideology and Empiricism' in Kai Purnhagen and Peter Rott (eds), *Varieties of European Economic Law and Regulation: Festschrift for Hans Micklitz* (Springer 2014).

[229] Interview with a Czech academic.

[230] Interview with a Polish lawyer (in Poland, while the consumer action is free of charge, this process has been abused by claimants who have brought many actions against the same defendants for the same unfair clause).

[231] Interviews with a German lawyer and academic and a Luxembourgish judge of 20 years' of experience; this has been highlighted as a particularly prevalent situation in relation to banking law since there are constant changes to the applicable rules.

[232] Interviews with a French lawyer and a Luxembourgish CPA.

[233] Interviews with a German lawyer and academic and a Polish academic.

[234] Interview with a Polish judge.

[235] Interview with a Slovenian CPA.

4.2.3 Different Mechanisms of Enforcement for Different Types of Problems

164. A great variety of problems arise across consumer law[236] – the violation of misleading advertising rules, the non-delivery of goods or delivery of damaged goods, the non-performance or sub-standard performance of services, the non-payment or late payment of goods or services, the use of unfair contract terms, practices of over-pricing or over-billing, the violation of unfair competition rules, as well for example, as regulation in service sectors, including telecommunications, healthcare, tourism and so forth – are often dealt with in different ways and by different authorities.[237]

165. For the purposes of this report, it is worth noting that there is no coordinated approach to enforcement in respect of the problems arising across different areas of consumer law. In some Member States, it is considered that the level of cooperation between different bodies is satisfactory. For example, cooperation is deemed to be particularly satisfactory in Austria[238] (between the Association for Consumer Information, Chamber of Labour, Ministry for Social Affairs, and so forth) evidenced

[236] As is evident from the responses to the online survey, discussed above in this chapter at paras.157 *et seq*.

[237] It should be noted that, especially in the area of consumer law and in the EU context, little empirical and comparative research has been undertaken which would allow for a comprehensive assessment of how these diverse problems are resolved in practice. Studies are usually (necessarily) limited in their scope and assessment, in terms of content and geographical coverage; see for example, Franziska Weber, *The Law and Economics of Enforcing European Consumer Law* (Ashgate 2014) (which deals with misleading advertising and package travel) and particularly Chapters 2 to 5. These issues extend beyond the scope of this study; further and deeper examination of the substantive and procedural rules of different disciplines as well as interviews with experts working in these sectors, is required.

[238] In the Austrian system, ADR entities also communicate and coordinate with meetings for exchanging experience and practices. Interviews with Austrian ADR facilitator; Belgian ADR facilitator and Belgian academic. It is worth noting however that only one Austrian interviewee responded in the opposite sense, noting that “De facto there is no cooperation. Everyone works on their own”; interview with Austrian CPA.

by the success of judicial claims[239] and out-of-court settlements.[240] This kind of informal and formal cooperation and discussion also exists in Belgium between ombudsmen and national regulators (and in particularly in the energy field), and indeed, others indicate that even more cooperation would be appreciated on the part of CPAs.[241]

166. Even in these systems, it is acknowledged that the scope for cooperation could be improved. While the VKI CPA in Austria is very prominent and active, there is a problem with litigation funding which affects both individual and collective claims.[242] The same issue has been highlighted in Belgium, where it is recognised that regulatory authorities and CPAs lack the legal means and human resources to do their job properly. As there are limited resources in Belgium, choices will have to be made.[243]

167. One question concerns the scope of the powers of regulatory authorities, that is to say, whether their power is limited to identifying violations and fining traders, whether

[239] Including, for example, the case of VKI v Amazon EU which was referred by the Austrian Supreme Court (OGH – 2 OB 204/14k) to the CJEU (Case C 191/15 *VKI v Amazon EU Sàrl* EU:C:2016:612).

[240] According to the Bureau Européen des Unions de Consommateurs (BEUC), of which the VKI is a member, the VKI – in enforcing collective consumer rights (where necessary by taking judicial action) – has secured around 55 million Euros in compensation and settlement payments between 2011 and 2014. Data available at: http://www.beuc.eu/beuc-network/members/verein-fur-konsumenteninformation-vki; Last accessed: 18th of January 2017.

[241] Interviews with Belgian ADR facilitator and Belgian academic.

[242] Interviews with an Austrian judge of 20 years' experience and an Austrian lawyer of 20 years' experience who highlights that "What needs to be criticised is the current system of litigation funding because in most cases the quota litis prohibition is in fact levered out due to the fact that the legal representative 'also' represents the interest of the litigation funder. The conflict of interests of the legal representative of the consumers leads to socially undesirable results."

[243] Interviews with a Belgian CPA (who highlights the lack of legal means and resources) and with a Belgian academic and lawyer (who indicates that the approach taken by regulatory bodies and CPAs diverge; "Enforcement is done both through the administration and CPA. They both have, however, a different means of proceedings and different priorities: o CPA: enforcement = marketing. o Administration: policy priorities, personal preferences of civil servants, number of actual complaints, sweeps directed by the EU; limited resources, choices will have to be made").

they might in limited circumstances also engage with CPAs, whether they might (also possibly in limited circumstances) engage with collective consumer claims, or whether their competence extends to ruling over individual disputes.[244]

168. From the perspective of the lack of coordination, it is possible to indicate where certain improvements have already been made and where further reforms might be made. This might include revision of the Product Safety Regulation and the Market Surveillance System by which compliance with product safety rules is assessed and regulated.[245] This Commission has begun to examine how coordination and collaboration between public bodies and private entities affects innovation; increased coordination should facilitate compliance and satisfaction of performance standard however for this, it is clear that adequate mechanisms for the sharing of data are required.[246]

169. As responsibility for the enforcement of EU law lies with the Member States in line with the principle of subsidiarity, the EU has legislated in order to try to coordinate cooperation between national authorities. National regulators have joint surveillance and communication networks that operate primarily on a sectoral basis but are not linked with other sectors. The European Commission often facilitates these sectoral networks, and also administers networks for general product safety and general (i.e. residual) consumer enforcement (CPC). ADR entities in financial services have a network (FIN-NET), but operate with different national models (independent financial ombudsmen, ADRs within regulatory authorities, and independent ADRs). For general cross-border consumer claims, the network of national European Consumer

[244] It has been suggested that regulators that are only responsible for investigating and finding traders for violations of consumer law should also be given the responsibility for providing redress or restitution to consumers: "There should also be more interaction / exchange of data between regulators and consumer ADR entities / consumer ODR tools. This will enhance consumer protection in the sense that consumer law violations will be detected more easily and will be resolved much faster and cheaper." Interview with a Belgian judge and academic.

[245] European Commission, 'A Deeper and Fairer Single Market', 2015.

[246] European Commission, 'Opportunity Now: Europe's Mission to Innovate', 2016.

Centres (ECC-NET) works well but within constraints.[247] The assumption is therefore that there should be coordinated relationships between the authorities responsible for the enforcement of consumer protection laws, including for example, regulatory authorities and CPAs, in order to ensure that EU legislation (as transposed into the national systems) is applied in a consistent and coherent manner across the Member States. Moreover, the 2015 ODR platform is intended to bring together national ADR entities.[248]

170. As the responses to the National Reports and interviews indicate, often this coordination is lacking, both in a domestic and cross-border context; this lack of cooperation generates problems in resolving cross-border disputes (not only, for example, in finding, identifying and contacting the other party, but also in identifying

[247] Based on Regulation 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection law, OJ 2004 L 364/1. A new proposal has been advanced by the Commission in May 2016: European Commission, 'Proposal for a regulation on cooperation between national authorities responsible for the enforcement of consumer protection laws' COM(2016) 283 final. *Report on a New Agenda for European Consumer Policy* (2012/2133(INI): European Parliament, May 2013).

[248] While the ODR platform has been accessible to consumers since the 15th of February 2016, problems have been identified in a number of Member States. It has been reported in the interviews that "the ODR-platform constitutes a problem as ADR proceedings are usually only possible in English due to the fact that the translation tool […] only work[s] to a limited exten[t]"; interview with an Austrian ADR entity. It has also been suggested that consumer regulators do not engage satisfactorily or facilitate interaction between the tools at their disposal – including regulators and consumer ADR entities / consumer ODR – in order to ensure a balance between investigating and fining traders and compensation/redress for consumer parties; interview with a Belgian judge. Moreover, a Croatian academic has identified a problem stemming from the fact that the ADR directive has not yet been implemented in Croatia. As a result, ADR frameworks already in place do not satisfy the standards in the directive, and "there are no registered ADR bodies within the meaning of ADR Directive that may offer their services though the ODR platform", meaning that ODR is not possible; interviews with 2 Croatian academic of 10 and 15 years' experience, respectively. In Denmark, Finland and Sweden, ODR (as well as ADR) is said to work well; interviews with a Danish academic of 19 years' experience, a Finnish lawyer of 10 years' experience and a Swedish CPA of 18 years' experience.

the applicable law, the relevant dispute resolution fora, and relatedly, applicable procedural rules).[249]

171. The proposal to revise Regulation 2006/2004 aims to provide enforcement authorities with the powers they require to work together, and for example, to request information from website registrars and banks to identify traders, to carry out mystery shopping (and similar) and to order that websites are immediately taken down. The European Commission will also be empowered to initiate and coordinate actions across Member States in order to address cross-border, systemic problems. To both ends, organisations interested in the protection of consumer rights will be able to highlight problematic practices arising across Member States to both national enforcement authorities and the Commission and additionally, a list of relevant laws will be updated and maintained (online, presumably). Thus, it can be anticipated that the problems identified in a number of the responses to the interviews and the national reports – which indicate that cooperation, both within and across Member States, is lacking – may be resolved with the revised regulation.

4.2.4 Measures beyond Enforcement

172. The enforcement of consumer law can only be understood to be one dimension of what is required for the development of a fair market in which there is adherence to consumer rules and compliance with requirements of consumer protection.

173. Two perspectives can be identified. On the one hand, it has traditionally been understood that the law is to be complied with, and that all instances of non-compliance with legal rules or breaches of standards of protection will be identified by another party to the legal relationship or by a public authority and rectified by enforcement action.

[249] In Finland, it has been highlighted by almost all interviewees that cooperation works well within the national system however problems may arise in the cross-border context. For example, while it is said that the Consumer Disputes Boards are efficient nationally, it has also been noted that their decisions are often not followed by businesses established in other states. – Interviews with a Finnish judge, Finnish lawyer and Finnish CPA.

174. The “developed” perspective rather brings to the fore the notion of a constant continuum or cycle of functions related to monitoring and the facilitation of compliance. Such steps might include: the provision of advice to market providers and users, the observation of actions and omissions on the part of traders, the identification of certain behaviour that might be problematic but might not constitute an infringement of the law, the identification of the root causes of problems potentially leading to violations of consumer law, the determination of what preventative action might be necessary to avoid infringements, action to preclude behaviour that is illegal, and the rectification of market balance through removal of illicit gains and payment of redress. Such steps, if taken, might be complemented by ongoing monitoring to ensure that re-balancing has been achieved and is maintained and also to determine whether any additional action is required.

175. Evidently, the second perspective provides for a much wider understanding of enforcement, its aims and objectives and its scope. Indeed, the first focuses only on one or two steps of this cycle and in particular, focuses only on individual enforcement, or at least on enforcement in individual instances of infringement, which can be remedied by civil orders for compensation or by administrative fines. In contrast, the second is not only focused on redress in individual instances but also on achieving change in the behaviour of a broader group of stakeholders.[250]

4.3 Assessment of the Current Situation

176. The key points to be made for the purpose of this study are the following: The volume of ‘consumer protection’ law is enormous; it extends beyond unfair trading and unfair contract terms to deal with horizontal and sectoral measures relating to safety, and regulated trading. This study focuses on certain directives and the rules and practices of national civil procedure that impact the effective and efficient protection of consumers. As such, in relation to its enforcement, an incomplete picture of national consumer and market protection may arise. It is therefore important not to

[250] Christopher Hodges, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance, Culture and Ethics* (Hart Publishing 2015).

make comprehensive or overly general statements regarding consumer protection and its enforcement (other than before courts) across the EU.

177. In some Member States, courts play a limited role in the enforcement of consumer law, partly because other mechanisms are used instead of courts (or which provide for a limited or infrequent involvement of courts), or because (public, private and other) procedures used may take place 'in the shadow of courts' but be concluded either before court procedures are started or before a judgment is given. It is not currently possible to define, explain or categorise the multiple non-court means by which consumer protection law is enforced, or by which consumers are protected. Useful detailed studies have been undertaken,[251] but a huge area of law and practice remains under-researched, especially in relation to regulated sectors. Nevertheless, it is worth noting that civil courts continue to play a considerable, and even the predominant, role across the Member States. It is for this reason that the study makes proposals for the strengthening of their function.[252]

178. The notion of coordination between diverse mechanisms of enforcement is difficult in itself. Different conclusions might be reached by an administrative body and a court, or that the consequences of a decision by such different bodies might be different, meaning that a consumer might have to invoke more than one mechanism in order to achieve a practical result.[253]

[251] See above at fn.133.

[252] See Chapter 3, 'Consumer Actions before National Courts'.

[253] The subsequent sentence that in Lithuania "the courts do not recognise that regulatory authorities [in this case the national Consumer Rights Protection Authority] have the power to defend the rights of all consumers" is a situation that clearly needs governmental attention (Interview with a Lithuanian lawyer). A similar issue has been identified in Slovenia and Romania, where the lack of coordination between the institutions responsible for enforcing consumer protection (e.g. civil courts and the Market Inspectorate, an administrative body) is deemed to be problematic in respect of the final outcomes of a claim or complaint; interviews, with Romanian lawyer and 2 Slovenian academics. This problem of coordination also arises with regard to individual and collective redress, discussed in Chapter 4.

5. Proposals and Improvements

5.1 Need for Increased Transparency and Knowledge Dissemination

179. The mechanisms of transposing EU directives diverge across the Member States.[254] The stakeholders across almost all Member States have indicated that via the process of transposition, the EU origins of the legislation is hidden; this is not a problem in itself but poses a problem when it comes to drawing a connection between national legislation and CJEU case law. As discussed above, one solution might be to require that the transposing national law should expressly refer to the EU law that is being implemented.[255]

180. There is also a need for increased knowledge dissemination and training of stakeholders. This can be facilitated by non-legislative mechanisms such as networks, databases and training platforms by virtue of which information is provided to and experiences are shared amongst stakeholders. Moreover, consumers can also be made aware in this way of available procedures and dispute resolution mechanisms for their specific complaint. Specifically, it is necessary to ensure that lawyers, judges and ADR entities – as well as consumers – are made aware of and have access to recent case law, which establishes and reinforces procedural consumer protections. One possible solution,[256] which would operate alongside the requirement to refer to the relevant directive being implemented in the transposing national law, is to explicitly refer to the findings of (and standards established in) the CJEU's case law[257] in the same piece of national law. Together, such endeavours would promote stakeholder awareness and knowledge of the CJEU's case law and the (substantive and procedural) requirements identified by it. This is relevant not only for the confident resolution of consumer disputes on the part of the judge or ADR entity but is also important to ensure that consumers – particularly those acting individually and without legal representation – have access to and up-to-date

[254] See this chapter, above at paras.87 *et seq.*

[255] See above at para.111 of this chapter.

[256] See above at para.112 of this chapter.

[257] As well, potentially as reference to the case law itself, as is done in Luxembourg; interview with a Luxembourgish judge.

knowledge of their procedural rights and how they operate in the relevant national legal system.[258] Fundamentally, these requirements would ensure that a connection can be drawn between the EU directive, the national legislation and the relevant case law.

5.2 Clarification of the Consumer Concept

181. The concept of consumer – while established in a core formulation at the EU level – differs across the Member States.[259] However, it is not advisable to establish a mandatory definition of the consumer concept. Such an approach – which could be made via maximum harmonisation – might entail that the level of consumer protection established in certain national systems is reduced.[260] However, a (new) directive on the procedural protection of consumers should refer to the pertinent EU directives on consumer protection in order to guarantee that the minimum substantive standards established therein are also implemented in (domestic) civil proceedings. It will be for the national lawmaker to decide to what extent the specific procedural guarantees also apply to the enlarged scope of national consumer protection. Such a directive should however – related to ensuring that the *ex officio* control of consumer law is made by the national courts – provide for a presumption that a contract for sale or services between a natural person and a trader is a consumer contract. It will then be for the other contractual party (the trader) to rebut this presumption in the court proceedings. This entails that the court will obtain the necessary factual information from the trader and ensure that consumer protection law will be applied by the court *ex officio*, as the trader bears the burden of proof and must make relevant factual allegations in this regard.

[258] This would be particularly useful in respect of the *ex officio* obligations on the national courts. Interview with Bulgarian lawyer.

[259] See this chapter, above at paras.113 *et seq.*

[260] For example, where the consumer status is extended to small and medium enterprises or to non-profit organisations.

5.3 Need for Increased Cooperation

182. There should clearly be greater collaboration and coordination between regulatory authorities and consumer associations (but also other bodies, including trade bodies). Three distinct cleavages can be said to exist.[261] The first is between vertical, sectoral groups of regulators (financial services, energy, communications, utilities, transport, general consumer trading, medicines, medical devices, all other CE marked products, cosmetics, biocides, food, general consumer safety) and horizontal authorities (general consumer, competition, equality and human rights, and environmental protection). The second arises from the lack of coordination between ECC-NET, FIN-NET, and with regulators, surveillance and enforcement authorities. The third cleavage is between public authorities, trade bodies and CPAs.

183. The functions adopted and objectives sought by these different bodies and which are necessary for implementation of the rules in the market, must be understood broadly. This issue is far wider than just looking at the mechanisms for enforcement or the implementation and application of consumer law. Based on such an analysis—and only after such an analysis—it should be possible to propose the architecture, structure and mechanisms that would constitute effective and best practice in relation to have market laws and rules should be applied.

[261] See this chapter above at paras.130 *et seq.*

6. Recommendations to the European Commission

Problems identified	Need for action?	What action? If no action recommended, why?
Fragmentation and complexity in consumer law	Yes	Transposing national law should explicitly refer to the EU law that is being implemented. Moreover, this law could also make reference to the relevant CJEU case law (consider Luxembourg's code as an example).
Lack of knowledge	Yes	Increased knowledge dissemination and training of stakeholders via non-legislative mechanisms (e.g. networks, databases and training platforms).
The perception of the national judge (of consumer law)	No	A matter of national culture and tradition – best left for the Member States.
Divergent definitions of the consumer concept	Yes	A core of the consumer concept exists at the EU level and across the Member States; however, there is a need for clarification re the extension of the consumer concept (e.g. to SMEs). It should be for the national lawmaker to decide to what extent consumer procedural guarantees also apply to an enlarged scope of national consumer protection, that is, when the consumer concept also applies, e.g. to SMEs. Any proposed directive should provide for a rebuttable presumption that a contract for sale or services between a natural person and a trader is a consumer contract
Enforcement of consumer law	Yes	Need for increased cooperation but best to consider first the changes that will emerge from the revised CPC Regulation (replacing Regulation 2006/2004, as proposed by the EC in May 2016). An additional study would be required to identify further the typical character of consumer dispute resolution and enforcement as this diverges considerably across the Member States alongside a focus on different mechanisms of enforcement. This new study could also identify guiding principles and best practices, which are currently lacking.

Chapter 2: Access to Justice

REMO CAPONI

(Sections 1 and 3)

JANEK TOMASZ NOWAK

(Sections 2, 3 and 4)

1. Introduction to the Chapter

184. "Effective access to justice can […] be seen as the most basic requirement – the most basic 'human right' – of a modern, egalitarian legal system which purports to guarantee, and not merely proclaim, the legal rights of all."[262]

185. This statement, made about forty years ago by Mauro Cappelletti and Brian Garth in their *World Survey* in the framework of the *Florence Access to Justice Project*, remains valid today. It reflects the idea that effective access to justice makes an essential contribution to the realisation of the goals of the welfare state and is no less important than other such goals, including, healthcare and education. It also means that the state is required to take action to guarantee effective access to justice; it cannot only be the passive bystander that provides for a court system. This idea also reflects the case law of the European Court of Human Rights (hereinafter, ECtHR), beginning with the findings in with *Airey v. Ireland* (1979). In this case, the ECtHR held that the right of access to courts cannot be effectively protected without legal aid provided for by the state authorities.[263] In subsequent judgments, the ECtHR has

[262] Mauro Cappelletti and Brian Garth, 'A World Survey' in Mauro Cappelletti and Brian Garth (eds), *Access to Justice* (Sijthoff & Noordhoff, 1978), vol I, 9.

[263] *Airey v. Ireland* (1979) 2 EHRR 305 [24]-[25] The ECtHR held: "The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective [...] This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial." "In the first place, hindrance in fact can contravene the Convention just like a legal impediment [...]. Furthermore, fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot

identified additional positive obligations that fall within the scope of the fair trial guarantee.[264] In its case law, the ECtHR has contributed to a radical change in the European perception of the right to a fair trial, leading to a shift from the sphere of limitations on state activity to the sphere of positive obligations on the state. This is also reflected in Art.47 of the Charter of the Fundamental Rights of the European Union (hereinafter CFR), which explicitly states that legal aid shall be made available to ensure effective access to justice.

186. Legal aid was seen as a means to overcome barriers to access to justice. Such barriers, Cappelletti and Garth acknowledged, are diverse and often interrelated. They are most evident for small claims and for individuals, especially those having limited means. It was recognised that legal aid was not sufficient and that a complex strategy would be needed in order to tackle these barriers. Accordingly, the movement for access to justice was supposed to be characterised by three "waves".[265] The first wave consisted of developing mechanisms to provide for legal aid. The second wave was characterised by the idea of giving representation to "diffuse" collective interests and/or to protect "homogeneous" individual interests. This was to be done through mechanisms such as class actions or through the development of the possibility for consumer and environmental associations to bring cases in the public interest or on behalf of a large group of citizens. The third wave was based on the simplification of proceedings and the development of alternative methods of dispute resolution. The distinctive feature of their approach was that only

simply remain passive [...]. The obligation to secure an effective right of access to the courts falls into this category of duty."

[264] In particular the scope of Art.6, para. 1 ECHR was extended to cover the right to effective enforcement of judicial decisions by the landmark decision *Hornsby v. Greece* (1997) 24 EHRR 250. Furthermore, the right to effective judicial protection of rights, requiring an effective remedy was regarded as a key element of the fair trial guarantee. The leading case here is *Kudla v. Poland* (2002) 35 EHRR 198, invoking Art.13 ECHR.

[265] Mauro Cappelletti and Brian Garth, 'Chapter 1: Introduction – Policies, Trends and Ideas in Civil Procedure', in *International Encyclopedia of Comparative Law*, Mauro Cappelletti (ed), *Vol. XVI Civil Procedure* (Mohr/Siebeck & Nijhoff, 1987), 68.

the harmonious and proportionate combination of the three waves could possibly respond to the demand for justice from society.[266]

187. Today, we see that similar problems continue to exist in relation to access to justice in consumer protection matters. This acknowledgment comes as no surprise as typical consumer cases fall largely within the scope of the Access to Justice Study; often they concern small claims and defendants with a lack of means. As such, the problem of ensuring access to justice in consumer disputes is not limited to this chapter but cuts across the entire study. This chapter, however, will limit itself to three fundamental and interrelated issues, namely costs, legal representation and standing, and legal aid.

188. An analysis of the legal systems of the EU Member States, drawing on the national reports, the answers to the SurveyMonkey Online Questionnaire and the interviews, reveals diverging understandings of what is meant by access to justice, what it encompasses and how it might be promoted or restricted by national rules of civil procedure. By examining this diverse legal landscape from a consumer law perspective, a number of common problems can be detected; these include the level of lawyers' costs, the complexity of the law and the corresponding need for legal representation, the existence of rules on mandatory representation, the lack of alternative means of representation, strict conditions for legal aid, and (a lack of) awareness of consumer rights.

189. The chapter concludes with a number of modest yet effective proposals to enhance the legal protection of consumers in the European Union, reflecting the three waves of Cappelletti and Garth's access to justice movement. They constitute a realistic approach to what can be done at the EU level and do not necessarily require that considerable changes are made to national procedural law. Small changes, vast progress, limited intrusion into national procedural law; this appears to be the appropriate approach to advance this politically-sensitive topic.

[266] For a proposal to launch a second Florence Access to Justice Project, see Kim Economides, 'Mauro Cappelletti's Legacy: Retrospect and Prospect' (2016) *Annuario di diritto comparato e di studi legislativi* 7.

2. Costs

2.1 Summary of the Status Quo

2.1.1 The Issue of Costs

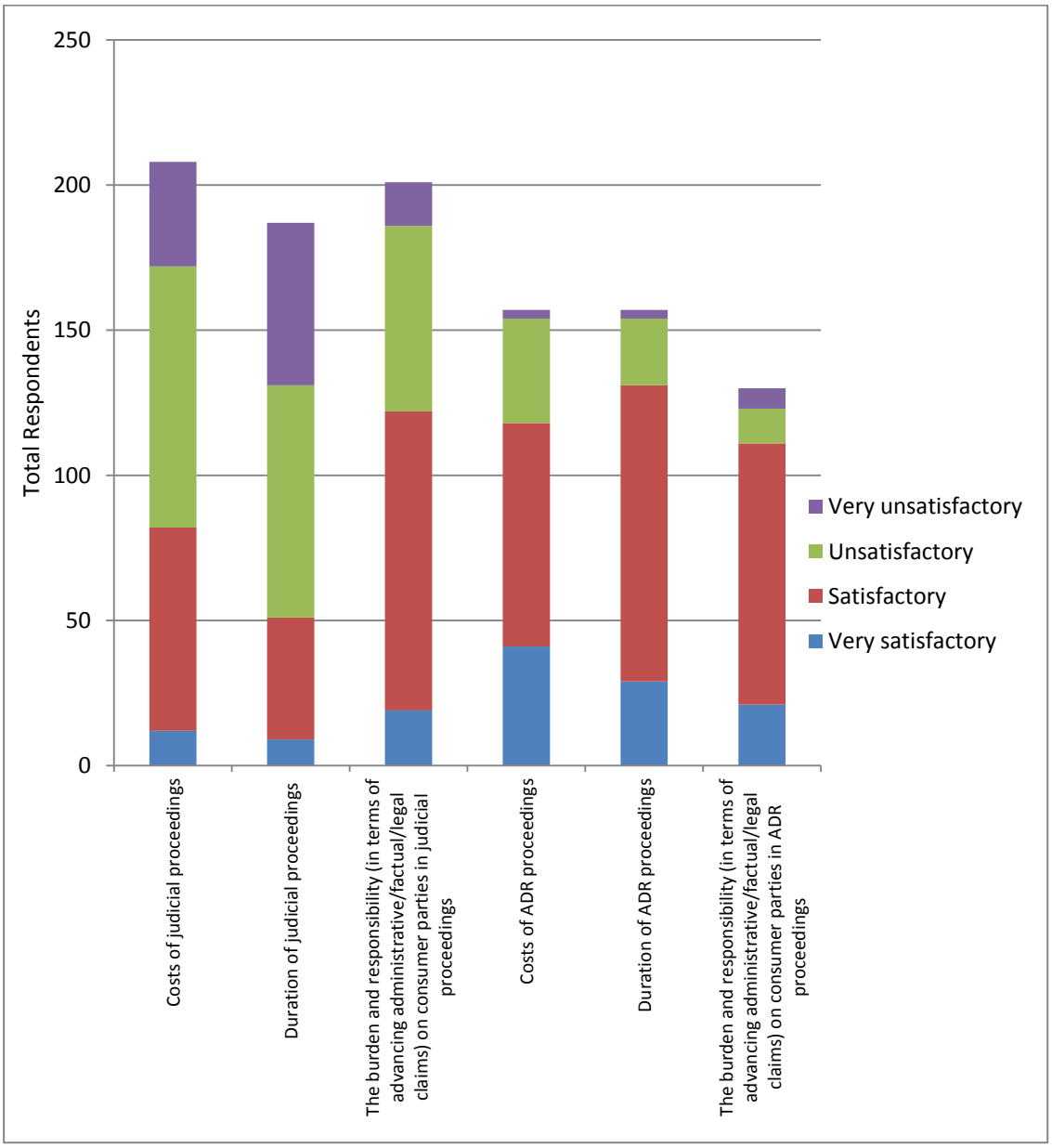
190. Lawyers and business associations were asked to evaluate the dimensions of a case that would be relevant to the advice they would provide to consumers or businesses in respect of their choice of dispute resolution mechanism; on a scale from highly relevant (4) to not relevant at all (1) [267], costs came out on top with a value of 3.85. The answers of other stakeholders given to similar questions follow the same line.[268] This should come as no surprise. It is accepted in general that costs are an important matter when deciding whether to go to court;[269] the situation is no different for consumer law litigation.

191. The costs of judicial proceedings are also an important source of frustration; this finding derives from the combined results of the online questionnaire and the interviews. Around 44% of the respondents find the level of costs in their Member State to be "unsatisfactory"; 17% of the respondents found the costs of judicial proceedings even to be "very unsatisfactory".

[267] See SurveyMonkey Online Questionnaire, Question 12. Stakeholders were asked to rate various factors on the following scale: highly relevant (4), somewhat relevant (3), not very relevant (2), and not at all relevant (1).

[268] See SurveyMonkey Online Questionnaire, Questions 39, 46, 53, and 99

[269] Mathias Reimann, 'Cost and fee allocation in civil procedure: A synthesis' in Mathias Reimann (ed.), Cost and fee allocation in civil procedure (Springer, 2011) 3, 4. See also Interviews with a Czech central authority and a Slovenian central authority.



Responses to the Online Survey and Interviews.[270]

192. This frustration is borne out of the fact that costs form an important barrier to access to justice, not least for consumers. The idea is widespread within the relevant

[270] The respondents to the online questionnaire and interviews are – while not exactly the same individuals – from the same group of respondents, including lawyers, judges, CPAs, consumers and ADR entities. Given that the same questions were asked (and in those cases in which the data collected has been collated), the same "closed" responses presented, and in light of the small number of answers received to certain questions, we have collated the responses.

literature[271] and is also confirmed in the answers of numerous interviewees.[272] This is the situation notwithstanding the fact that legal aid is widely available in the Member States of the European Union.[273]

193. Respondents to the online questionnaire and interviewees draw a distinction between two issues: on the one hand, costs in general and on the other, costs in relation to the value of the claim. It appears that this last point is the most problematic in consumer cases.

2.1.2.1 Costs in Relation to the Value of the Claim

194. It is generally accepted that consumer claims are usually low-value claims.[274] The limited amount of data generated on this point appears to be in line with this general idea: when looking at the value of a dispute, the respondents to the online questionnaire have indicated that the majority of individual consumer disputes have a value of less than 5000 Euros.[275]

[271] See inter alia Franziska Weber, *The law and economics of enforcing European consumer law* (Ashgate, 2014), 46; Peter Spiller and Kate Tokely, "Individual consumer redress" in Geraint Howells, Iain Ramsay, Thomas Wilhelmsson and David Kraft (eds), *Handbook of research on international consumer law* (Edward Elgar, 2010), 483; Anthony J. Duggan, "Consumer access to justice in common law countries: a survey of the issues from a law and economics perspective" in Charles E.F. Rickett and Thomas G.W. Telfer (eds), *International perspectives on consumers' access to justice* (Cambridge University Press 2003), 46-67.

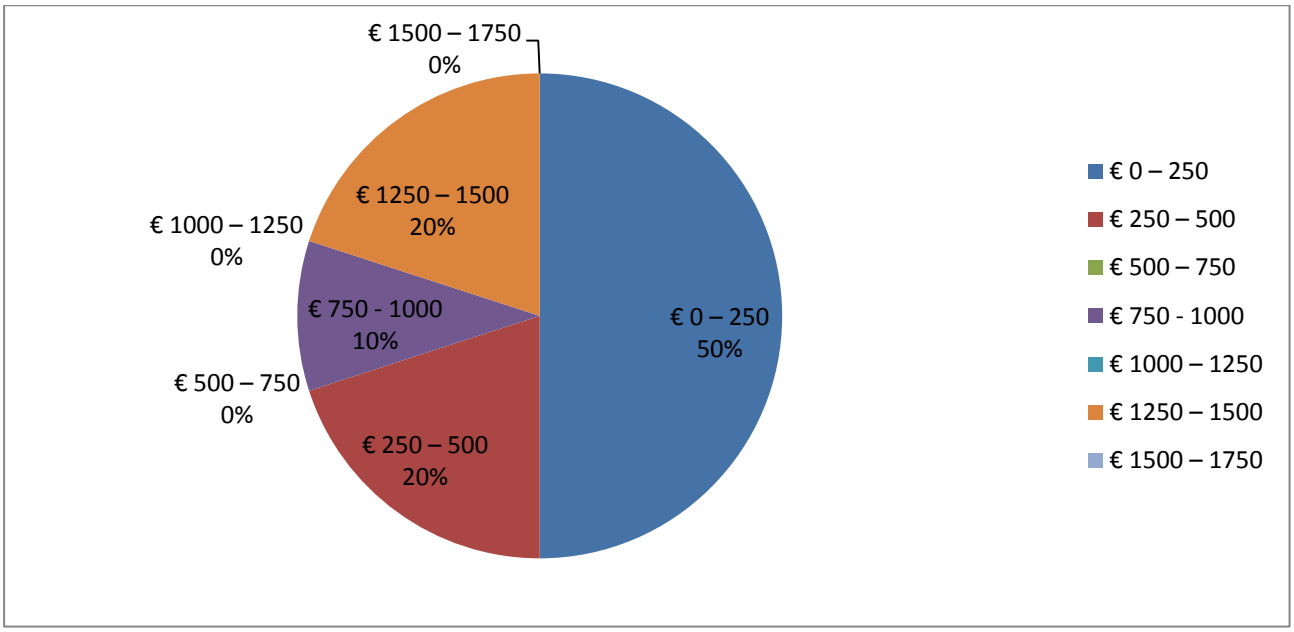
[272] Interviews with an Austrian ADR facilitator, an Austrian lawyer, an Austrian consumer protection association, a Belgian legal counsel, a Belgian lawyer, a Belgian judge, a Belgian ombudsperson, a Croatian consumer association, a Polish judge, a Portuguese consumer association, a Romanian lawyer, a Slovenian consumer association, a Slovenian central authority, a Spanish academic, and a Spanish lawyer.

[273] See section 2 of this Chapter

[274] Interview with a Belgian judge, a Danish lawyer, 2 Estonian judges, a Finnish consumer association, 2 Finnish judges, a Latvian lawyer, a Polish judge, and a Portuguese consumer association.

[275] See SurveyMonkey Online Questionnaire, Question 8. (mixed group, mainly lawyers and judges, of 26 respondents)

195. When asked about the average costs of judicial proceedings in respect of a claim of 500 Euros, it appears that in 50% of the cases, the costs for pursuing a claim amount to at least half of the amount claimed by the plaintiff.



Responses to the Online Survey.

196. A simple cost-benefit analysis may thus prevent a consumer from defending an arguable or meritorious claim. In economic literature, this has been referred to as 'rational apathy' or 'rational disinterest'.[276] This trend is reflected in numerous answers of interviewees[277] and corresponds to the results of the 2010 Special Eurobarometer on Consumer Empowerment[278], in which it was reported that 43% of

[276] Franziska Weber, *The law and economics of enforcing European consumer law* (Ashgate, 2014), 35; Michael G. Faure and Hanneke A. Luth, 'Behavioural economics in unfair contract terms' [2011] 34 Journal of Consumer Policy, 337; Hans-Bernd Schäfer, 'The bundling of similar interests in litigation, the incentives for class action and legal actions taken by associations' [2000] 3 European Journal of Law and Economics, 183.

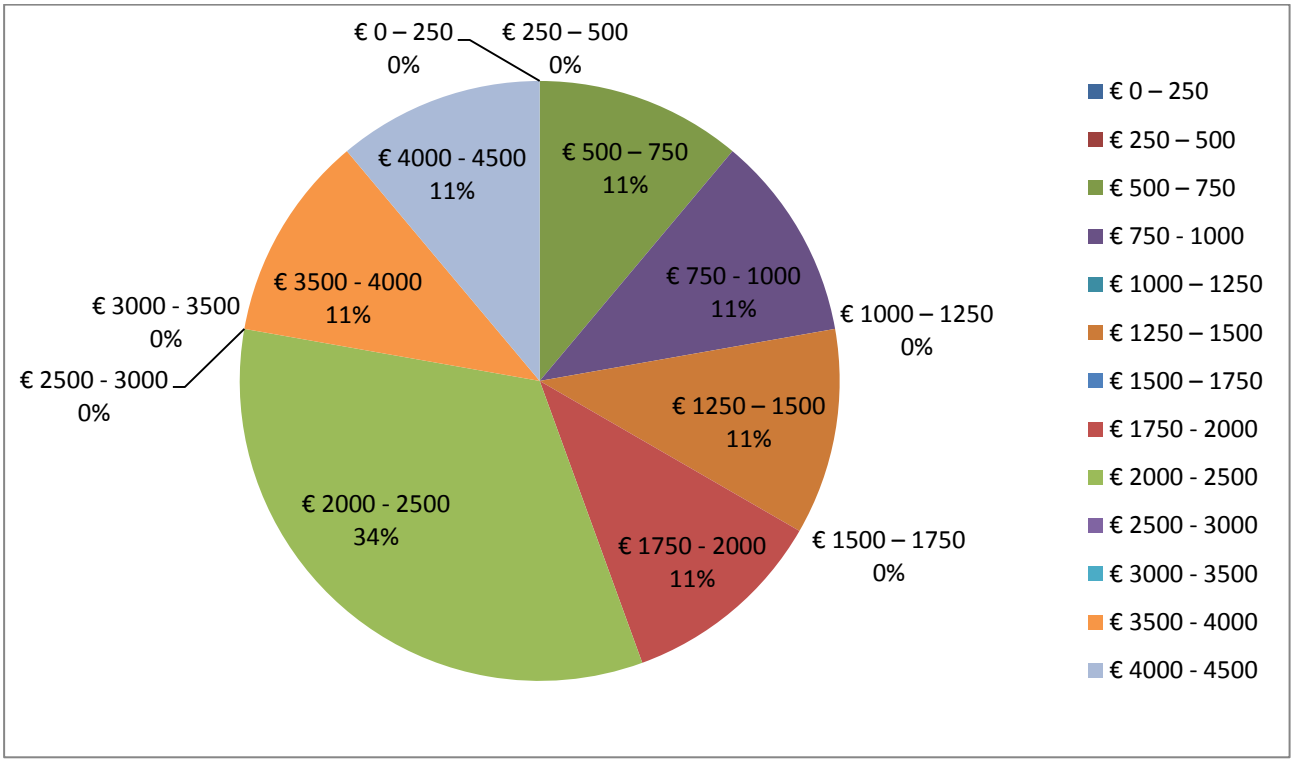
[277] Interviews with an Austrian judge, an Austrian lawyer, a Belgian judge, 2 Croatian academics, a Czech consumer association, a Czech academic ("Under 2000 EUR value of the claim Czech consumer do not file a suit at national Court."), an Estonian judge, a Finnish judge, a Greek lawyer, a Latvian lawyer, a Luxembourg consumer association, a Dutch consumer association, a Portuguese consumer association, a Romanian lawyer.

[278] http://ec.europa.eu/public_opinion/archives/ebs/ebs_342_en.pdf

EU consumers would not take a business to court for a claim below 500 Euros. In the 2013 Special Eurobarometer on the European Small Claims Procedure, it appears that the average monetary threshold for going to a court is 726 Euros. A fundamental obstacle to access to justice for consumers is therefore the fact that the costs of judicial proceedings are often disproportionately high in relation to the value of the claim.

2.1.2.2 Costs in Relation to Means

197. Another important issue is the deterrent effect of costs regardless of the value of the claim. Costs are indeed not only analysed in relation to the value of the claim but also in relation to the means one has available, as litigation entails the risk of losing and having to pay the costs of the opposing party. For example, our data shows that for a claim with a value of 20,000 Euros the costs range between 500 and 4500 Euros.



Responses to the Online Survey.

198. While these costs appear to be far more proportionate than those that arise for a small claim, the question still arises as to whether a claim of 20,000 Euros should not be characterised as a small claim;[279] a consumer might still need to advance costs or have to pay the costs of the opposing party. That is to say, 4500 Euros and indeed lower amounts, may still constitute an important barrier for the average consumer. IN this regard, various interviewees have underlined the deterrent effect that such costs may have on consumers.[280]

2.1.3 Which Costs are Involved?

2.1.3.1 Court Costs

199. Court costs generally encompass two sets of costs, namely court fees and court expenses.

200. *"Court fees"* are to be understood as fees levied in order to bring a claim. They differ from Member State to Member State both in terms of their level[281] and their determination. A flat rate may apply to all cases[282] or only to non-pecuniary cases.[283] In other Member States, the court fee is determined in relation to the value of the claim. This can be done either by taking a percentage of the value of the claim[284] or by applying a flat rate within certain value thresholds,[285] or by a combination of the

[279] For example, in the Netherlands, claims under € 25.000 are subject to a simplified procedure akin to a small claims procedure. See National Report, Question 8.2: the Netherlands.

[280] Interviews with a Belgian lawyer, 2 Czech lawyers, a Finnish judge, an Italian lawyer (in relation to consumer associations), a Dutch academic, a Slovenian central authority, a Slovenian consumer association, 2 Spanish academics, and a Swedish academic.

[281] Taking into consideration only the court fees for an individual claim of a value of 5000 Euros, the variety is impressive, ranging from those Member States, where consumers are exempted from paying court fees, to Germany, where court fees amount to € 438 Euro.

[282] National Report, Question 6.1: Finland (500 euros)

[283] National Report, Question 6.1: Poland (200 zloty).

[284] National Reports, Question 6.1: Austria, Bulgaria, Poland and Spain.

[285] National Reports, Question 6.1: Austria, Belgium, Croatia, Estonia, Germany, Greece, Hungary, Italy, Malta, the Netherlands, Portugal, Slovenia, Sweden and the United Kingdom.

two approaches.[286] The latter mostly applies in high-value disputes.[287] It should further be pointed out that individual and collective claims may be differentiated in determining the calculation method of court fees.[288] A notable exception is Luxembourg, which does not charge a general court fee but charges fees for several procedural steps;[289] the same is generally also true in the legal systems of the United Kingdom.[290]

201. *"Court expenses"* are to be understood as any other cost associated with court litigation. Since these types of costs vary enormously from case to case it is difficult to paint a coherent picture. Recurring court expenses include costs associated with witnesses,[291] costs for the service of the document instituting proceedings on the other party,[292] translation costs,[293] and legal procurator costs.[294]

2.1.3.2 Costs of Legal Representation

202. Costs of legal representation are also important, especially in proceedings where representation is mandatory or where there exists an appearance of a need for representation.[295] It seems that even in systems without mandatory representation, consumers still choose to be represented by a lawyer.[296] While the cost of legal representation varies from Member State to Member State, without precise figures being available, a concern was raised amongst interviewees that lawyers' fees are

[286] National Reports, Question 6.1: Austria, Denmark, Latvia, Spain and the United Kingdom.

[287] National Reports, Question 6.1: Austria and the United Kingdom.

[288] National Reports, Question 6.1: Poland and Spain.

[289] National Report, Question 6.1: Luxembourg.

[290] National Report, Question 6.1: the United Kingdom.

[291] National Report, Question 6.1: Finland.

[292] National Report, Question 6.1: Luxembourg.

[293] National Reports, Question 6.1: Austria, Germany and Luxembourg.

[294] National Reports, Question 6.1: Malta and Spain.

[295] Interviews with a Greek lawyer and a Slovenian consumer association. See also, *infra*.

[296] See SurveyMonkey Online Questionnaire, Question 18.

too high.[297] This finding is supported by the literature, where such costs are perceived to be the main direct costs for litigants.[298] The requirement to be represented by a lawyer may therefore discourage a consumer from going to court, especially since many consumer claims are of a low value.[299]

2.1.4 Who Pays for the Costs of Judicial Proceedings?

203. Every EU Member State knows the 'loser pays principle'. This means that embarking upon litigation entails a risk for consumers, either as a plaintiff or as a defendant. Such a risk is often considered to be a barrier to access to justice, given that a party will not only be responsible for its own costs but also for the costs of the other party. A number of mechanisms exist in the Member States to mitigate costs for consumers. They are not necessarily the result of specific rules for consumers but are rather part of the general system of costs' rules in the Member States. Cost mitigation may exist in relation to the consumer's own costs or to costs borne by the other party and payable upon his or her losing the case.

204. Exemptions from court fees in the context of consumer cases exist; individual consumers[300] and also CPAs[301] can benefit from a general exemption from court fees. In Finland, court costs are waived for the Consumer Ombudsman when bringing collective proceedings;[302] in Poland for applications for the declaration of

[297] Interview with an Austrian judge, a Belgian legal counsel, a Finnish judge, a Finnish consumer association, a Luxembourg consumer association, a Dutch lawyer, 2 Dutch academics, a Slovenian business, a Spanish lawyer

[298] Anthony J. Duggan, 'Consumer access to justice in common law countries: a survey of the issues from a law and economics perspective' in Charles E.F. Rickett and Thomas G.W. Telfer (eds), *International perspectives on consumers' access to justice* (Cambridge University Press 2003), 48.

[299] William M. Landes and Richard A. Posner, 'The Private Enforcement of Law' [1975] 4 J. Legal Stud., 33; Hans-Bernd Schaefer, 'The Bundling of Similar Interests in Litigation. The Incentives for Class Action and Legal Actions Taken by Associations' [2000] 9 European Journal of Law and Economics, 195.

[300] National Reports, Question 6.1: Lithuania, Romania, Slovakia and Spain.

[301] National Reports, Question 6.1: Romania and Slovakia.

[302] National Report, Question 6.1: Finland.

abusive contract terms;[303] in Hungary, when the Hungarian Authority for Consumer Protection brings a claim;[304] Slovenia[305] and Portugal[306] provide for reductions if the proceedings end in settlement. Waivers from court fees can also be obtained in connection with the general legal aid system.[307] That being said, this does not necessarily exempt a consumer from paying the court fees of the other party in case the consumer loses his or her case.[308]

205. Limitations also exist in relation to lawyers' fees. In Germany, lawyers' fees are to a great extent fixed by the law in order to make sure that they are always proportionate in relation to the value of the claim.[309] This also protects consumers when they lose their case. However, given that these amounts are fixed by the law, the judge is not allowed to deviate from them in cases of hardship. In Belgium, the possibility to claim lawyers' fees from the losing party is limited by the law; the amount that can be asked for depends on the value of the claim. A low-value claim will therefore correspond to a low risk. Judges are even allowed to deviate from the amounts laid down in the law in cases of hardship, provided that the legislative criteria are met and they go not fall below a certain minimum threshold.[310]

[303] National Report, Question 6.1: Poland.

[304] National Report, Question 6.1: Hungary.

[305] National Report, Question 6.1: Slovenia.

[306] National Report, Question 6.1: Portugal.

[307] National Reports, Question 6.1: Belgium, Bulgaria, Croatia, Denmark, Germany, Hungary, the Netherlands, Portugal, Romania and Spain; National Reports, Question 5.4: Austria, Belgium, Bulgaria, Croatia, Denmark, Germany, Greece, Poland, Portugal, Romania, Slovakia, Slovenia and Spain. See also Section 2 of this Chapter.

[308] National Reports, Question 5.4: France and Germany.

[309] National Report, Question 6.1: Germany (Law on the Remuneration of Attorneys (Gesetz über die Vergütung der Rechtsanwältinnen und Rechtsanwälte or Rechtsanwaltsvergütungsgesetz (RVG)), 5 May 2004 (*BGBl*. I S. 718, 788), as lastly amended by Art.5 of the Law of 21 December 2015 (*BGBl*. I S. 2517)). See also National Report, Question 6.1: Croatia (Tariff on Awards and Reimbursement of Costs for Lawyers Work).

[310] National Report, Question 5.1: Belgium. See also National Report, Question 6.1: Latvia, where a similar system can be found.

2.2 Assessment of the National Legal Systems

2.2.1 Particular Issues Relating to Costs

2.2.1.1 Court Costs

206. In the wake of the financial crisis, several EU Member States have increased their court fees to various degrees. Interviewees have highlighted this as an issue, in particular with regard of those Member States in which such an increase has been perceived to be significant.[311] In general, they remain, however, relatively proportionate to the value of the claim. Moreover, various exemptions exist throughout the Member States, either part of or falling outside the legal aid system. In sum, the issue cannot be considered to be a major problem warranting any action.

207. Specific court costs tend to be limited in typical consumer disputes, with the exception of those arising in relation to the service of documents. While savings could be made in this regard by encouraging service via less expensive ways, the issue appears not to be a pressing one. Moreover, exemptions from such costs could be obtained as part of the legal aid system.

208. The main issue in relation to costs appears to be costs for lawyers, which are examined in the following paragraphs.

2.2.2.2 Costs of Representation by a Lawyer

General

209. While the costs of legal representation vary from Member State to Member State, a concern that has often been raised in the interviews is that lawyers' fees are high.[312] The requirement to be represented by a lawyer may therefore discourage a consumer from going to court, especially since many consumer claims are of a low

[311] Interviews with a Dutch academic and a Swedish consumer association; National Report, Question 6.1: United Kingdom.

[312] Interviews with an Austrian judge, a Belgian legal counsel, a Finnish judge, a Finnish consumer association, a Luxembourg consumer association, a Dutch lawyer, 2 Dutch academics, a Slovenian business, and a Spanish lawyer.

value.[313] The issue of costs was also recognised by the Court of Justice in its case law on the *ex officio* application of consumer law[314] and is supported both in the literature and by the results of the online survey and the interviews mentioned above.

The Requirement to be Represented by a Lawyer

210. Three national reports have identified that legal representation is mandatory in first instance proceedings.[315] In other Member States, the need for representation depends on the value of the claim[316] or on the nature of the proceedings.[317] Legal representation is also mandatory when parties do not have the legal capacity to represent themselves.[318] A number of Member States allow *pro se* litigation in principle but provide for the possibility for the court to deviate from this requirement

[313] William M. Landes and Richard A. Posner, 'The private enforcement of law' [1975] 4 J. Legal Stud., 33; Hans-Bernd Schaefer, 'The Bundling of Similar Interests in Litigation. The Incentives for Class Action and Legal Actions taken by Associations', [2000] 9 European Journal of Law and Economics, 195.

[314] See Chapter 3 of this Study

[315] National Reports, Question 7.3: Germany (for higher regional courts but not for local (Amtsgerichte) courts), Greece and Italy.

[316] National Reports, Question 7.3: Austria (not mandatory unless the claim value is higher than € 15.000 (regional court) or € 5.000 (district courts)); Greece (no mandatory legal representation in small claims procedures); Hungary, Italy (mandatory before the Giudice di Pace when the value of the claim exceeds € 1.500); Malta (mandatory representation when a claim value is higher than € 15.000 Euros, First Hall of the Civil Court); the Netherlands (before district courts when claim value exceeds € 25.0000); Slovenia (mandatory when claim value exceeds € 20.000, district court); Spain (mandatory when claim value exceeds € 2.000).

[317] National Reports, Question 7.3: Greece(no mandatory legal representation when special circumstances require immediate action); Hungary (legal representation mandatory in consumer disputes relating to unfair contract terms); Luxembourg (no mandatory representation in declaratory actions concerning the unfairness of contract terms before the president of the Tribunal d'arrondissement in commercial matters and no mandatory representation before the Justice of the Peace); Malta (no mandatory legal representation before the Consumer Claims Tribunal or the Small Claims Tribunal); Slovakia (only mandatory legal representation in proceedings related to bankruptcy, reorganisation, competition law, unfair competition, commercial secret, and intellectual property disputes).

[318] National Report, Question 7.3: Croatia.

where the party is unable to present his or her case in an appropriate way[319] or where it is necessary given the circumstances of the case.[320] In other Member States, there is no formal requirement to be represented by a lawyer.[321] Some Member States allow legal representation by relatives or labour unions[322] or allow persons with a law degree to represent themselves.[323] Generally, representation by a lawyer is always required in third instance/cassation proceedings.[324] Some Member States also provide for mandatory representation at the appeal stage.[325] Legal representation is never mandatory in ADR proceedings.

211. It therefore appears that most Member States require legal representation at some stage of the legal proceedings. However, it must be highlighted that for claims below a certain value, the requirement is less well established. Some Member States do not require legal representation at all. Given that many consumer claims are claims of a low value, it could be argued that legal representation in consumer cases may not be such a big problem. This would be too easy a conclusion to draw however. It appears that thresholds vary considerably. For example, while in the Netherlands legal representation is only required for claims above 25,000 Euros, mandatory representation in Italy is established for claims above 1500 Euros. Low-value thresholds combined with mandatory representation may put consumers off bringing or defending a claim in court. Furthermore, given that a representation requirement applies more frequently in higher-instance proceedings, it is very likely that important questions of principle will remain stuck and unsolved at the first instance level. This may possibly explain why so relatively few cases of consumer law have come up to national Supreme Courts and the ECJ.

[319] National Reports, Question 7.3: Belgium and Portugal.

[320] National Reports, Question 7.3: Denmark and Greece.

[321] National Reports, Question 7.3: Bulgaria, Finland, Lithuania, Poland, Romania, Slovenia (local courts), Sweden and the United Kingdom.

[322] National Report, Question 7.3: Belgium.

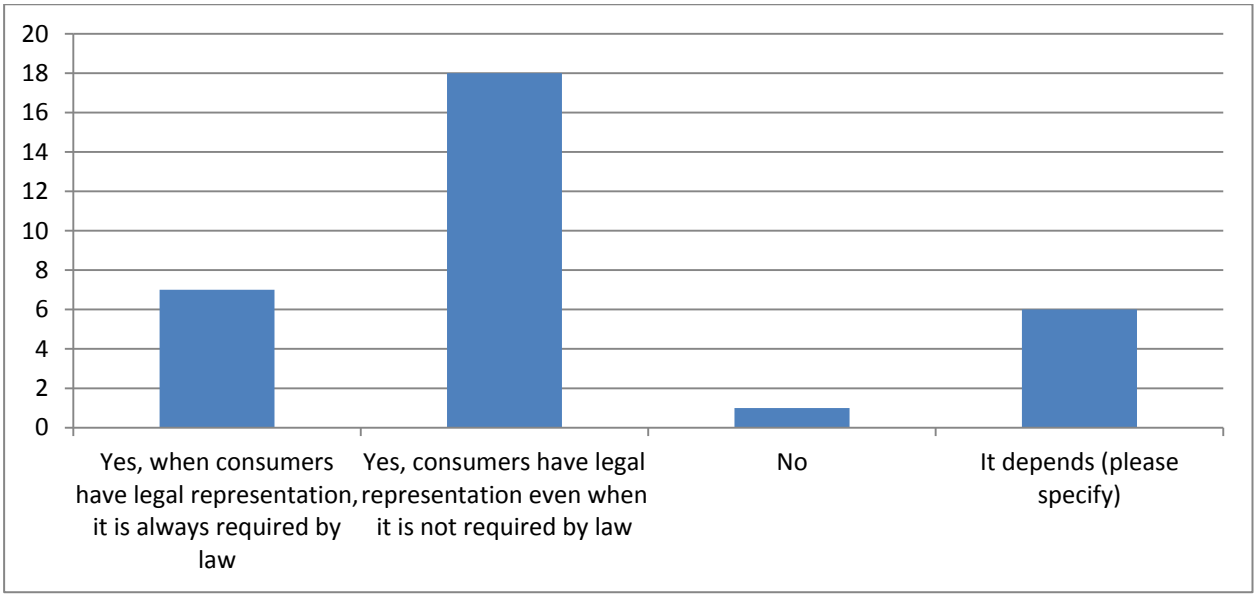
[323] National Report, Question 7.3: Hungary.

[324] National Reports, Question 7.3: Austria, Belgium, Malta, Poland and Slovenia.

[325] National Reports, Question 7.3: the Netherlands and Portugal.

The Necessity to be Represented by a Lawyer

212. It also appears that even in systems without mandatory representation, consumers often choose to be represented by a lawyer. While data is limited, the view is confirmed by various interviewees.[326]



Responses to the Online Survey.

213. Various reasons may exist for this trend. One is the *availability of funds*.[327] Consumers tend to be represented when they have legal expenses insurance or legal aid available to them.[328] They may also be represented when they are supported by CPAs[329] or by public authorities.[330] The *complexity of the law* might be another reason for a consumer to seek representation notwithstanding that legal

[326] Interviews with a Belgian lawyer, a Czech judge, 2 Dutch academics, a French consumer association

[327] Interview with a French consumer association.

[328] Interviews with an Austrian judge, two Dutch academics, a Dutch senior court clerk, and a Swedish consumer association.

[329] Interviews with 2 Austrian judges and a Croatian public notary.

[330] Interviews with a Belgian lawyer, a Belgian academic and a Bulgarian lawyer.

representation is not mandatory per national rules of procedure.[331] For example, while legal representation in both England and Wales is optional, the Law Society nevertheless recommends that consumers seek legal advice, assistance and representation in complex or high-value cases, or where the dispute resolution procedure to be followed is complicated.[332] Thus, while representation is not required for a small claim, it suggests that advice should be taken for small claims allocated to the fast or multi-track, which appear to be complicated.[333] Moreover, the determination of the consumer to seek representation depends on the subject-matter of the case. Thus, if the claim concerns incorrect practices in the banking sector, nullity of bank contracts, or unfair contract terms, for example, it is likely that consumers will be represented.[334] Member States may even require representation in such cases because of their complexity.[335]

214. A number of interviewees have indicated that, in their experience, consumers do not seek representation. They advance costs as the main reason for this.[336] Consumers may then embark upon pro se litigation, which appears to affect negatively the

[331] Interview – Consumer Protection, Greece, Question B.2; Interview with a Belgian lawyer ("Legal representation is not required, but the vast majority of applicants / defendants chooses to have a lawyer. The complexity of the law (regarding the procedure as well as regarding the merits of the case) is an important factor. Consumers feel ill at ease in court without a lawyer."), a Czech academic ("The procedural law is so complicated (the plaintiff should lead the procedure and the excepted level of the burden of proof is so high), and the consumer issues so diffuse, und the output of the decision are not certain, that without legal representation the plaintiff is lost."), a Danish central authority, a Danish academic, a Finnish judge, a Greek lawyer, a Dutch lawyer ("Consumers do not need a lawyer to litigate before the sub-district court (generally claims up to 25,000 EUR). But in practice consumers are not comfortable litigating without a lawyer."), a Romanian lawyer and a Slovenian lawyer. See also Chapter 1, 'General Structure of Procedural Consumer Protection'.

[332] National Report, Question 7.3: the United Kingdom. See also Interview with a Slovenian consumer association.

[333] National Report, Question 7.3: the United Kingdom.

[334] Interviews with a Croatian and a Spanish lawyer.

[335] In Croatia, consumers must have legal representation where the case concerns a specific are of law (for example, in financial services claims): Interview with a Croatian CPA.

[336] Interviews with an Austrian judge and a Belgian judge.

outcome of their case.[337] Alternatively, they may drop their case.[338] These experiences reflect the point made above, namely that legal representation may be necessary even in cases where it is not mandatory as a matter of law.[339]

2.2.2.3 Costs Risk

215. A number of interviewees have highlighted the risk for consumers in bearing the costs of the proceedings.[340] Such a risk also exists in cases where access to justice is relatively cheap, i.e. when a consumer is exempted from paying court fees or where he or she benefits from another form of legal aid. When the consumer loses the case, the reimbursement of the costs of the opposing party may be potentially problematic for consumers. [341] This may discourage consumers from litigating in the first place.[342]

2.2.2 General Assessment Regarding Costs

216. It may come as no surprise that costs constitute a major impediment to access to justice in consumer disputes. The most important obstacle in that regard appears to be lawyers' fees. They appear to be too high both in relation to the means of an average consumer and in relation to the value of a typical consumer claim. In order to

[337] Interview with an Austrian CPA.

[338] Interview with a Belgian legal counsel, a Czech CPA, a Finnish judge, and a Slovenian central authority.

[339] Interview with a Danish lawyer: "Before the Danish courts, it is a significant problem that consumers are often not represented by lawyers. The small claims proceedings do not function will in this regard, because too much initiative is required from the consumer (despite the courts' obligation to guide the consumer etc.). In ordinary civil proceedings, representation by a lawyer is deemed essential for reaching the right legal result, despite the district courts' general obligation to guide parties without legal representation."

[340] Interview with an Austrian CPA, a Czech academic, a Czech central authority, a Finnish CPA, a Dutch academic, and a Swedish CPA.

[341] Interview with an Austrian judge, a Polish judge. See also National Reports, Question 5.4: France, Germany and Greece.

[342] Interview with an Austrian judge, a Czech consumer association, a Czech academic, a Dutch academic, a Finnish judge, a Slovenian central authority and 2 Spanish academics.

find a solution to the problem of costs as a barrier to access to justice, one has to look at the financing of legal representation through legal aid, the most important policy tool to secure access to justice. It also appears from the interviews that the issue of costs is largely connected to the issue of legal aid.[343] Therefore, before proposing potential strategies in relation to the problem of costs, it is necessary to look firstly at the issue of legal aid. The fact that costs are problematic may also indicate that legal aid is similarly problematic.

3. Legal Aid

3.1 Introduction to Legal Aid

217. The main problem of costs appears to be the legal or *de facto* necessity of legal representation. In order to guarantee access to justice, national policymakers have responded by devising systems of legal aid. The systems of legal aid differ considerably amongst Member States and have problems of their own, the key concerns in relation to which will be set out in this section.

218. Generally, legal aid can be understood as any resource apt to ensure effective access to justice in cases in which: (a) the applicant lacks sufficient resources, and (b) his or her claim or defence is not manifestly unfounded.

219. When we talk about resources in the field of legal aid, we tend to think instinctively in terms of financial (and human) resources being deployed in a fragmented way, i.e. in connection with applications for legal aid by a party to a dispute. However, the notion of “resource” can also consist of establishing institutions which are responsible for some of the services normally encompassed by legal aid; this might include the provision of general advice on the alternative mechanisms available to resolve the dispute (alternative dispute resolution, judicial proceedings, etc.) and specific advice and assistance with both determining the key elements of the case and negotiating, if appropriate, an out-of-court settlement. The latter meaning of “resource” is relevant in the field of consumer protection, as it could provide the conceptual basis for deploying the budget devoted by national governments to legal aid in a more efficient

[343] See, for example, Interviews with an Austrian lawyer and a Finnish judge.

way (i.e. by creating institutions dealing with a number of cases as opposed to allocating the funds to a myriad of applications in connection with an individual case).

220. An institution to be held as an example in this respect is the Swedish National Board for Consumer Disputes (ARN).[344] It is a public authority whose task is to impartially try disputes between consumers and business operators. Claims are filed by the consumer. Before the complaint is filed with ARN, the business operator must have rejected the complaint in part or in whole (or alternatively, must have failed to respond entirely). The ARN submits recommendations on how disputes should be resolved; it might provide, for example, that a business operator shall repair the product. The ARN's recommendations are not binding but in practice the majority of companies follow them. It usually takes about six months from the time at which the claim is submitted to the time at which a decision is rendered. All claims submitted are accessible to the public upon demand. The ARN's inquiry is free of charge, a feature that makes it attractive as a means to deliver legal aid and access to justice. While this may be a viable option to be explored in the future, the focus will be on legal aid *sensu stricto*. Further issues concerning ADR and ODR are dealt within in Chapter 5 of this Report.

3.2 Summary of the Status Quo

3.2.1 Availability of Legal Aid in Consumer Protection Disputes

221. Legal aid is available to consumers in disputes before the courts in the overwhelming majority of Member States, both when bringing and defending a claim.[345] A notable exception is, however, England and Wales, where legal aid is in principle not available for consumer cases and other contractual disputes.[346] In Malta, legal aid is

[344] See http://www.arn.se/info-konsument/innandu-anmaler/kanarn-prova-tvisten/

[345] See National Reports, Question 5.1: All Member States.

[346] National Report, Question 5.1: the United Kingdom. The rules on civil legal aid are set out in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the Civil Legal Aid (Procedure) Regulations 2012. In the process of reforming legal aid, it was considered that: "For other proceedings, such as disputes involving consumer law, our view is that, given the need to reduce legal aid expenditure, the issues are not of sufficient priority to justify publicly funded support": cf. Ministry of

available in cases brought before a court but not before a tribunal, including the Consumer Claims Tribunal and the Small Claims Tribunal.[347]

222. Moreover, in the majority of Member States, legal aid is also available when trying to avoid court litigation through negotiated (or mediated) settlements.[348] There are only a few exceptions. In Italy, for example, legal aid encompasses only assistance in judicial proceedings; legal aid in mediation proceedings is limited to an exemption from the payment of mediation fees in mandatory mediation proceedings.[349]

3.2.2 Nature of Legal Aid Systems

223. On the basis of the data provided, two types of legal aid regimes can be detected throughout the Member States. On the one hand, there are homogeneous systems of legal aid. This is the case for the majority of the Member States. These systems provide for legal aid for those who are in need and do not make a distinction depending on the subject-matter of the dispute or the aid offered. On the other hand, a few Member States have established a differentiated system, providing for different legal aid tracks. These will be presented in the paragraphs that follow. It should be highlighted that these systems genuinely provide for multiple legal aid tracks; these systems are different from those which provide for exemptions in relation to the payment of certain costs (such as is the case in Poland for example, where applicants filing for a declaration of an abusive contract term are exempted from

Justice, *Proposal for the Reform of Legal Aid in England and Wales* (Consultation Paper, CP12/10) para 2.28. The decision to remove legal aid for consumer and general contract claims was criticised. Legal aid may, however, be available in respect of claims related to the protection of consumer rights, for example, claims relating to debt or housing, or discrimination claims arising from consumer matters. Legal aid may also be available for cross-border disputes.

[347] National Report, Question 5.1: Malta.

[348] National Reports, Question 5.1: Belgium, Hungary and Sweden; National Reports, Question 5.2: Latvia, and Slovenia; National Reports, Question 5.4: Austria, Bulgaria, Croatia, Lithuania, Poland, Slovakia and Spain.

[349] National Report, Question 5.4: Italy. See also, National Report, Question 5.4: Malta.

paying court fees)[350], and those that provide for wider protection for certain protected parties.[351]

224. Three types of differentiated regimes can be distinguished. Regimes may differentiate in accordance with the persons eligible for legal aid, the subject-matter of the dispute, or the parties' participation in alternative dispute resolution mechanism organised by the state.

3.2.2.1 Differentiation Based on Who Benefits

225. In Belgium, a two-tier system of legal aid is available. First-line (or primary) legal aid is available to everyone regardless of their financial means; it is also available to companies. It encompasses free legal advice from a lawyer or a specialised body, such as a tenants' association. It consists in providing applicants with initial, free legal advice regarding any legal issue and is unconnected to litigation. Second-line (or secondary) legal aid is means-tested and encompasses free assistance from a lawyer in the form of elaborate legal advice, legal assistance or legal representation in court. It may also consist of an exemption from court costs, consisting in full or partial exemption from stamp duties and registration charges, as well as other costs of proceedings.[352] A very similar regime exists in Lithuania.[353]

3.2.2.2 Differentiation Based on the Subject Matter of the Dispute

226. Croatia provides for a two-tier legal system depending on the subject-matter of the legal dispute. Also here, a distinction is being made between primary and secondary legal aid. Primary legal aid can be offered in every legal dispute upon fulfilment of the eligibility criteria. It encompasses general legal information, legal advice, preparation of petitions and representation in proceedings before public authorities, the ECtHR and international organisations, as well as legal aid in settlement procedures.

[350] National Report, Question 6.1: Poland.

[351] National Report, Question 5.3: Romania.

[352] National Report, Question 5.1: Belgium.

[353] National Report, Question 5.4: Lithuania.

Secondary legal aid is reserved for proceedings related to real estate rights (except for land registration proceedings), labour relations, family relations, execution proceedings, and peaceful dispute resolution. A distinction is drawn between these proceedings and other types of proceedings on the basis that they are considered to be more complex from a legal point of view. Exceptionally, secondary legal assistance is available in all other administrative and civil law court proceedings, when such a necessity derives from the concrete living circumstances of the applicant and his household members. Secondary legal assistance encompasses legal advice, assistance in the preparation of petitions in proceedings relating to the protection of employees' rights directly before the employer, the preparation of petitions and representation in court proceedings, an exemption to the payment of court fees and other costs related to court proceedings, and legal aid in peaceful dispute settlement procedures.[354]

3.2.2.3 Differentiation Based on Having Previously Completed an ADR Procedure Provided for by the State

227. In Denmark, a two-track legal aid model applies in consumer disputes, depending on the party claiming legal aid having successfully participated in a procedure before the Danish Consumer Complaints Board or any other authorised Danish consumer complaints board. In the situation where a consumer obtains a favourable decision but the opposing party does not comply with the decision, a consumer may take the case to court in order to have the decision enforced. In that context, the Danish Competition and Consumer Authority and/or an appointed lawyer will represent the consumer in court. Alternatively, a consumer may directly seek a decision before a court. When he applies for legal aid in such a situation, he must comply with the financial requirements laid down in legislation; moreover, his claim should be reasonable.[355]

[354] National Report, Questions 5.2 to 5.4: Croatia.

[355] National Report, Question 5.3: Denmark.

3.2.3 Requirements of Legal Aid for Consumer Protection Disputes

228. From the national reports, it appears that in all Member States two main criteria are being used in order to determine eligibility for legal aid. On the one hand, these requirements relate to conditions concerning the applicant's finances and on the other, to the assessment of the merits of the claim. Additional requirements must be satisfied in certain Member States.

3.2.3.1 Financial Parameters for Granting Legal Aid

229. Eligibility for legal aid depends in all Member States on a means-based assessment. For that purpose, both criteria determining the financial basis of an applicant and eligibility parameters have been established. The financial capacity of a person may be determined by taking into account their income, their wealth, or both. When it comes to eligibility parameters, Member States may either set fixed financial thresholds in the law (so-called 'hard parameters') or allow for a general appreciation of the financial inability of a person to meet the costs of litigation (so-called 'elastic parameters'). In case of the latter, the distinction between financial assessment and eligibility parameters is to a certain extent blurred since the financial situation of the party claiming legal aid will immediately determine his or her eligibility. The combinations of these elements allow for a variety of models to be identified. This is also reflected in the differences that exist throughout the EU Member States;[356] some examples will be given in the paragraphs that follow.

230. Examples of a financial assessment based on income combined with hard parameters can be found in, amongst others[357]: France (where no legal aid is currently available if the monthly income of the applicant amounts to more than 1500 Euros[358]); Greece (a person is entitled to legal aid when his or her annual family income is less than two-thirds the minimum annual personal pay stipulated by the

[356] See National Reports, Question 5.3: All Member States.

[357] See also, National Reports, Question 5.3: Denmark, Lithuania and Spain.

[358] National Report, Question 5.3: France.

national general Collective Labour Agreement[359]); Italy (where no legal aid is available if the annual income amounts to more than 11,528,41 Euros in 2015[360]); Luxembourg (where no legal aid is available if the monthly income amounts to more than the minimum guaranteed income, which is 1340 Euros for a one-person household or 2022 Euros for a two-person household (plus 122 Euros per child), as of 2016[361]) and Slovenia (where no legal aid is available if the monthly income of the applicant exceeds two times the maximum income threshold for receipt of social security benefits[362]).

231. Examples of financial assessment based on "income plus assets" combined with hard parameters can be found, amongst others, in Croatia[363], Ireland[364], Malta[365] and the Netherlands. For example, in the Netherlands no legal aid is available if the annual income amounts to more than 26,000 Euros (for one-person households) or 36,800 Euros (for two-person households) and assets amount to more than 21,139 Euros.[366] The notion of assets may be defined differently across the Member States. For example, while any property is being taken into account in England & Wales,[367] the dwelling house is excluded from calculating capital assets in Ireland.[368]

232. An example of a financial assessment based on assets combined with hard parameters can be found in Sweden, where no legal aid is available if the total sum

[359] National Report, Question 5.3: Greece.

[360] National Report: Italy, Question 5.3.

[361] National Report, Question 5.3: Luxembourg. This is similar for Belgium: see National Report, Question 5.3: Belgium.

[362] National Report, Question 5.3: Slovenia.

[363] National Report, Question 5.3: Croatia.

[364] National Report, Question 5.3: Ireland.

[365] National Report, Question 5.3: Malta.

[366] National Report, Question 5.3: the Netherlands.

[367] National Report, Question 5.3: the United Kingdom. See also, National Report, Question 5.3: Malta.

[368] National Report, Question 5.3: Ireland.

of assets minus debts and support commitments amounts currently to more than 260.000 SEK (approximately 27,807 Euros).[369]

233. Examples of a system based on elastic parameters can be found , amongst others, in: Austria (where natural persons applying for legal aid have to show that they are unable to bear the costs of the proceedings without endangering the minimum subsistence level necessary to enjoy a simple standard of living[370]); Germany (where legal aid is available if the applicant, due to his or her personal and economic circumstances, is unable to pay the costs of litigation or is able to pay them only in part or only in instalments[371]) and Poland (where legal aid is available if a party proves that he or she does not have sufficient means to bear the costs of a lawyer or an advisor[372]).

3.2.3.2 Assessing whether a Claim or Defence is Meritorious

234. A significant number of Member States also provide for a second criterion when it comes to assessing the necessity for legal aid, namely the determination of whether the claim is meritorious.[373] Most Member States focus in this regard only on the prospect of the claim succeeding, i.e. whether a claim is not manifestly inadmissible or unfounded.[374] The elements that should be taken into account in order to analyse the prospect of success may, however, differ from Member State to Member State and include both objective and subjective considerations. Objective elements relate to the determination of whether the claim is inadmissible or unfounded[375],

[369] National Report, Question 5.3: Sweden.

[370] National Report, Question 5.3: Austria. Under Austrian law legal persons are entitled to legal aid under even more restricted circumstances. Legal persons have to show that neither they nor those persons having an economic interest in the proceedings (e.g. shareholders of a corporation or members of an association) are able to bear the costs.

[371] National Report, Question 5.3: Germany (in particular, Sec. 114, para 1 ZPO).

[372] National Report, Question 5.3: Poland.

[373] See National Reports, Question 5.3: All Member States.

[374] *Ibid.*

[375] National Reports, Question 5.3: Italy and France.

unsustainable[376], not strong[377], or expired.[378] For example, in Spain, if the lawyer responsible for a case considers the claim or defence to be of an "unsustainable nature", he or she will notify the legal aid board, which may decide to reject the application for legal aid.[379] Subjective elements relate in this context to the behaviour of the party concerned. Thus, in Austria and Germany, legal aid is unavailable for frivolous or vexatious claims; the frivolous or vexatious nature is determined by the question of whether a party who is not entitled to legal aid would withdraw from the proceedings or pursue only part of the claim.[380] A different approach is taken in Malta, where an applicant has to confirm by oath that he has reasonable grounds for bringing, defending or continuing a claim.[381]

235. Advancing the analysis one step further, elements which do not necessarily relate to the prospect of the claim succeeding may also be taken into account. For example, in Sweden, no legal aid is available if it is unreasonable for the state to support the costs of litigation, by taking into account the subject-matter of the case, its importance, the value at stake, and other relevant circumstances.[382] The reasonability criterion relates not only to the chances of succeeding, which is comparable to other Member States, but also to the question of whether the matter relates to the everyday livelihood of the applicant, thereby excluding cases relating to expensive hobbies, luxury objects, or transactions with a dubious purpose.[383]

[376] National Report, Question 5.3: Spain.

[377] National Report, Question 5.3: the United Kingdom.

[378] National Report, Question 5.3: the Netherlands.

[379] National Report, Question 5.3: Spain.

[380] National Reports, Question 5.3: Austria and Germany.

[381] National Report, Question 5.3: Malta.

[382] National Report, Question 5.3: Sweden.

[383] National Report, Question 5.3: Sweden.

3.2.3.3 Further Legal Aid Requirements or Conditions

236. In a few national legal systems, further requirements or conditions must be satisfied in order to be eligible for legal aid. These must be satisfied in addition to the lack of financial resources on the part of the applicant and the sufficient prospect of the success of the claim or defence. They may include the obligation to try to settle the dispute through alternative dispute resolution,[384] the requirement that the claim for which legal aid is being sought has a minimum value,[385] the fact that legal aid is only available where legal representation is mandatory or necessary,[386] a limitation of legal aid to expenses not covered by legal expenses insurance,[387] or the limitation of legal aid in circumstances where the compensation obtained exceeds a certain value.[388]

3.2.4 Content of Legal Aid

237. Legal aid can be granted in various forms; it might include the exemption from certain costs, the reimbursement of legal expenses, the provision of free legal advice, the appointment of a lawyer by a court or the bar, representation by a state authority like an ombudsman, or a system of alternative dispute resolution organised by the Member State. Often, Member States combine various options, depending on the financial means of the applicant or the phase of the dispute. The following provides an overview of the various options that exist throughout the Member States, grouped under three headings: exemption from payment, legal advice, and legal representation.

[384] National Reports, Question 5.3: Denmark and Latvia.

[385] National Reports, Question 5.3: the Netherlands and Sweden.

[386] National Report, Question 5.3: Austria.

[387] National Report, Question 5.3: Sweden.

[388] National Report, Question 5.3: the Netherlands.

3.2.4.1 Exemption from Payment of Certain Costs

238. All Member States provide for exemptions to the payment of court fees. These may include registration fees, stamp duties, fees for witnesses, experts and interpreters, translation costs[389], travel expenses, or costs for a court-appointed guardian for the other party.[390] Exemptions are often part of a legal aid scheme and depend on the fulfilment of the conditions underpinning eligibility for legal aid. It should be pointed out, however, that some Member States provide for certain exemptions which are unconnected to a legal aid scheme but which form part of a policy to protect certain weaker partiers regardless of their financial position. For example, in Poland, parties making application for maintenance fees or for a declaration concerning the abusive nature of a contract are exempted from paying court fees.[391] Further to this, it appears that some Member States have opted to advance or to reimburse certain costs rather than exempt parties from them.[392]

3.2.4.2 Legal Advice

239. Legal advice is provided for in every system in one way or another. Legal advice may either be connected to court proceedings, alternative dispute resolution or settlement negotiations or be unconnected to any type of dispute.[393] Various legal systems draw a distinction between general legal advice and advice in the course of court proceedings, the latter being more elaborate and often less widely available.[394] In

[389] But not necessarily: See National Report, Question 5.4: Germany.

[390] National Reports, Question 5.4 and 6.1: All Member States.

[391] National Report, Questions 5.4 and 6.1: Poland. See also National Reports, Question 5.1: Lithuania, Romania and Spain.

[392] National Report, Question 5.4: Slovakia.

[393] National Reports, Question 5.4: All Member States.

[394] National Reports, Questions 5.1 and 5.4: Belgium, Finland Lithuania the Netherlands, Portugal, Romania, Slovakia and Spain.

some Member States, legal advice is only available as a means of legal aid in the context of court proceedings.[395]

3.2.4.3 Legal Representation

240. Legal representation is usually provided in kind via a court appointed lawyer,[396] a lawyer appointed by the bar[397] or a lawyer appointed by another state authority.[398] Alternatively, a consumer may be represented by a state authority.[399] In Germany, Romania, Slovenia and Sweden, legal aid consists in the payment of a certain proportion of lawyers' fees instead of providing for actual representation.[400]

241. An alternative to legal representation is the so-called notion of 'help in court'. In such situations, a lawyer assists the consumer without formally representing him.[401]

3.3 Problems Identified in the National Legal Systems

3.3.1 Limited Availability of Legal Aid in Out-of-court Proceedings (Settlement, Mediation)

242. Legal aid should be granted on the same terms for both judicial proceedings and out-of-court dispute resolution methods, such as mediation. In general, the analysis of the national reports shows that the national legal systems share this approach, with some exceptions.[402] That being said, it appears from the national reports and the

[395] National Reports, Question 5.4: Cyprus and Malta. This to a certain extent also in Italy: National Report, Question 5.4: Italy.

[396] E.g. Bulgaria, Denmark, Poland

[397] E.g. Belgium

[398] E.g. Denmark, Slovakia

[399] National Reports, Questions 5.1 and 5.4: Denmark, Finland, Poland.

[400] National Report, Question 5.1: Sweden; National Report, Question 5.4: Germany.

[401] National Report, Question 5.1: the United Kingdom. However, as indicated earlier, legal aid is not available in many consumer cases.

[402] National Reports, Question 5.2: Cyprus, Italy and Malta.

interviews that legal aid is still predominantly connected with general legal advice and judicial proceedings. Promoting legal aid in relation to mediation proceedings may be considered.

3.3.2 The Means Test for Obtaining Legal Aid May Be Too Strict

243. The maximum income and/or level of wealth required for obtaining legal aid, as well as the ways in which the financial situation of the applicant for legal aid is assessed, vary remarkably across the Member States. These differences might well be appropriate in light of the different costs of living in each of the Member States. In other words, to identify the right incentives for individuals, especially for the needy, to obtain access to justice, one needs to strike a balance not only between the level of income (and/or assets) and the costs (and fees) of proceedings, but also between the value of access to justice and the costs of other goods and services that individuals need in order to make a decent living. The comparison between the costs of access to justice and the general cost of living in the Member States cannot be addressed here; such a task falls outside the scope of the study.

244. However, various interviewees across different Member States have stated that the conditions for granting legal aid are too strict.[403] While this may be a cause for concern, it is first and foremost for the Member States to decide how many human and financial resources should be devoted to legal aid rather than to other public goods and services. Given the substance of Art.47(3) CFR, it may become an issue of EU law, if it appears that the lack of legal aid leads to the systemic under-enforcement of EU law in the Member States. At the moment, no evidence points in this direction however.

[403] Interviews with a Belgian lawyer, a Belgian judge, a Finnish judge, a Finnish consumer association, a French lawyer, a Greek lawyer, a Luxembourg judicial clerk, a Luxembourg judge, a Dutch academic, a Dutch consumer association, a Polish academic, a Slovenian consumer association, and a Swedish consumer association See also Anthony J. Duggan, “Consumer access to justice in common law countries: a survey of the issues from a law and economics perspective” in Charles E.F. Rickett and Thomas G.W. Telfer (eds), *International perspectives on consumers’ access to justice* (Cambridge University Press 2003) 51

245. Moreover, other alternatives may exist in securing access to justice for those who do not qualify for legal aid yet are unable to fund litigation themselves. For example, people may take out legal expenses insurance.[404] It appears from the interviews that in some Member States, legal expense insurance is becoming increasingly important.[405] Interviewees have also suggested that litigation funding and profit-sharing should be allowed.[406] CPAs may play a key role in this respect.[407] They can underwrite costs and risks, usually have more funds than individuals and can file faster as they are generally more organised.[408] However, it has also been noted that a lack of resources is problematic for CPAs,[409] particularly where they receive no public funding.[410] Alternative funding strategies are therefore being considered. On the one hand, for example, interviewees from various Member States have highlighted that there are an increasing number of law firms dealing with small-value consumer claims due to the (apparent) high chances of success in certain cases.[411] On the other, internet platforms offering litigation services including third-party funding appear to be on the rise.

3.3.3 The Assessment of the Merits of a Claim as a Condition for Eligibility

246. While the wording may vary across the national legal systems, the idea that is expressed is fundamentally the same: no legal aid should be available if the claim or the defence lacks any merit. While Art.47(3) CFR does not explicitly mention an assessment of the meritorious nature of a claim or a defence as an eligibility

[404] Interview with a Belgian lawyer.

[405] Interviews with 2 Dutch academics and a Swedish consumer association.

[406] Interviews with an Austrian lawyer and an Irish lawyer. It should also be added that Spanish lawyers have recently started experimenting with success fees: Interview with a Spanish lawyer.

[407] Interview with an Austrian judge

[408] Interview with an Austrian judge.

[409] Interview with a Dutch consumer association.

[410] Interview with a Slovenian consumer association

[411] Interviews with a Polish lawyer, a Slovakian CPA, and 2 Spanish lawyers. See also National Report, Question 5.4: England & Wales.

requirement for legal aid, it could nevertheless be interpreted as meaning that manifestly unmeritorious claims or defences do not trigger the necessity of ensuring that legal aid is provided. The requirement as such is thus not problematic and might even contribute to the availability of legal aid by allowing for a rational distribution of resources.

3.3.4 Additional Requirements for Obtaining Legal Aid

247. By shedding light on the specific elements required by some national legal systems for granting legal aid, one can assess the even broader range of solutions and the variety of policy choices (for example, providing incentives for the out-of-court settlement of disputes or insurance for legal expenses as means to lower the public expenditure for legal aid, etc.) that are intertwined with each other across Europe, depending on the decisions of the national policy makers as to how legal aid should be financed and the amount of resources should be devoted to it. Such a diversity does not water down the common European definition of legal aid, focused on the two core elements examined above (lack of financial resources and prospect of success), but rather illustrates that efforts to fully harmonise the regulation of legal aid requirements would not be appropriate. That being said: value thresholds, the requirement of legal expenses insurance or the fact that legal aid should be granted when a case involves a certain amount of complexity, may have a specific impact in consumer disputes, which are typically of a low value and therefore may fail to reach the value threshold or may not justify legal expenses insurance. From the empirical data it appeared, however, that potential problems in this regard were limited to a small number of Member States.

3.3.5 The Content and Quality of Legal Aid

248. The data obtained shows that a common understanding of the content of legal aid exists between the Member States. The systems differ considerably, however, when it comes to their actual functioning. While one system may see legal aid as the reimbursement of lawyers' fees, others may see it as free legal representation, whether or not combined with a state-organised system of ADR. It therefore appears

that the systems are too different and too dependent on local factors for meaningful action to be taken at the EU level on this particular issue.

249. A factor that may nevertheless have an impact on the legal aid provided for is the quality of the free representation offered. A number of interviewees raised strong concerns about the knowledge of lawyers of (EU) consumer law, both within and outside the context of legal aid.[412]

3.4 Additional Issues Appearing from the Interviews

3.4.1 Lack of Knowledge

250. An additional problem that appeared from the interviews concerns the lack of knowledge in general, and of the cost structures of civil proceedings and their relationship to legal aid.[413] One interviewee stated that certain quarters of society can simply not be reached, even though legal aid is available.[414] This issue appeared in interviews relating to a number of Member States and also reflects to an extent the wider issue that the law is too complex for ordinary consumers to understand fully.[415]

[412] The issue was specifically referred to in National Report, Question 5.4: Austria. See further, Paul Oberhammer, 'Kollektiver Rechtsschutz bei Anlegerklagen' in Susanne Kalss and Paul Oberhammer (eds), *Anlegeransprüche – kapitalmarktrechtliche und prozessuale Fragen: Gutachten zum neunzehnten österreichischen Juristentag* (Manz, 2015) 81 and an Interview with a Spanish lawyer. Regarding lawyers in general, various interviewees pointed at a lack of awareness or understanding of EU consumer law: Interviews with a Belgian judge, a Croatian consumer association, a Dutch judge, a Slovakian lawyer, a Slovenian academic and a Spanish lawyer. This also reflects to a certain extent the answers given to the closed questions, where knowledge of EU consumer law and the case law of the CJEU appeared to be far less compared to their knowledge about national consumer law. See further on the quality of lawyers assisting consumers: Interview with a Czech lawyer (describing legal representation of consumers as 'poor').

[413] Interviews with a Danish academic, an Estonian dispute facilitator, a French consumer association, a Latvian lawyer, a Dutch consumer association, a Polish lawyer, a Polish judge, a Romanian lawyer, a Slovenian consumer association, a Spanish lawyer. For example, one interviewee mentioned that in Poland, that the existence of exemptions of costs in proceedings concerning prohibited clauses in general terms and conditions of consumer contracts is often not known.

[414] Interview with a Belgian lawyer.

[415] See also Chapter 1, 'General Structure of Procedural Consumer Protection'.

A lack of knowledge of legal aid may thus constitute an important barrier to access to justice. This is something that may be taken up as it appears to be a wider issue.

3.4.2 The Need to Apply For Legal Aid and Administrative Formalities to Be Completed

251. In order to obtain legal aid, an applicant has to apply for it. This may require a number of administrative formalities to be completed,[416] which is not always self-evident for certain groups in society. Thus, even where legal aid is said to be available, it is considered that a deterrent dimension exists as consumers have to apply for it.[417] Certain consumers may therefore not obtain the legal aid to which they are entitled.[418]

3.4.3 Risk of Overconsumption

252. It was highlighted that in certain circumstances an exemption from costs could operate in a way that negatively impacts the judicial system as a whole. For example, in Poland, where there are no fees for claims in which the general conditions of contracts are challenged, the interviewee highlighted the existence of a trend indicating the existence of abuse of this free access to justice.[419] In this situation, costs for consumers are either non-existent or relatively low. That being said, only a

[416] National Report, Question 5.1: Latvia.

[417] Interview with a Spanish lawyer.

[418] One could refer to this category of persons as 'vulnerable consumers'. On the concept of vulnerable consumers, see European Commission study on Consumer vulnerability across key markets in the European Union, Contract n° 2013 86 05 EAHC 2013/CP/0, January 2016, available from http://ec.europa.eu/consumers/consumer_evidence/market_studies/docs/vulnerable_consumers_approved_27_01_2016_en.pdf.

[419] Interview with a Polish judge.

few interviewees have highlighted this issue, which suggests that it is not a position that arises across all Member States.[420]

4. Proposals and Recommendations

4.1 Reducing the Cost of Legal Representation by Developing Cost Avoiding Strategies

253. It appears from section 2.3.2 that the need for legal representation, either borne out of a legal obligation or the complexity of the law, creates an obstacle to consumer access to justice. It leads to extra costs for consumers, which are often disproportionate in relation to the value of a consumer claim, which is typically of a rather low value. This also appears from the interviews, which indicate that in some Member States, consumers tend not to be represented, normally due to costs, a lack of legal aid and the disproportionate balance between the value of a claim and the costs of representation.[421] The issue of representation is therefore part and parcel of the wider issue of costs. An attempt to tackle the issue of costs in consumer disputes should therefore focus on taking away or mitigating the reasons as to why consumers seek legal representation by a lawyer.

4.1.1 Representation by another Party than a Lawyer

254. A first option would consist in giving other actors a right to represent consumers in court. Viable options are CPAs or regulatory authorities. Action may be taken to allow such entities to represent or to support an individual consumer in court. It should be pointed out that we are focusing on individual court cases in this section. Representation of a collective interest via collective redress is covered in Chapter 4 of this report.

[420] Interview with a Cypriote lawyer: “litigation is subsidised and thus cheap and as such, a lot of cases do not settle and are not dealt with in a cost efficient way”. See further, Interviews with an Italian and a Romanian lawyer.

[421] Interviews with a Belgian judge, a Czech lawyer, a Greek lawyer, a Latvian lawyer, a Polish academic, a Slovenian business..

4.1.1.1 Representation by a Consumer Protection Association

255. One alternative for representation by a lawyer may be representation by a CPA. Representation should in this instance be understood in its broadest sense. This can take various forms.

256. The most radical option would be to allow a CPA to replace a lawyer as a legal representative in court.[422] In various national systems, persons other than lawyers are allowed to represent a party in court. For example, in Belgium trade unions can act as a representative for their members. Such a system could also be envisaged for consumers.

257. Alternatively, provision should be made for allowing the assignment of an individual claim of a consumer to a CPA, who then may start proceedings in court in its own name.[423]

258. A third option would be to allow CPAs to intervene in court proceedings in support of an individual consumer,[424] or even merely to assist a consumer in court proceedings.[425] This would be done without the CPA formally representing the consumer.[426]

259. In this regard, measures should also be taken in order to determine what CPAs might be eligible to adopt such a role. In all Member States, certain criteria should be satisfied before a CPA can be deemed to be qualified to bring legal proceedings.[427]

[422] Interviews with an Austrian judge.

[423] National Reports, Question 7.2: Austria (in such cases, irrespective of the claim value, legal representation by a lawyer is mandatory); Denmark (Mandatarfuldmagt); Italy (Art.140-bis(1) ICCP) and Poland. Such an approach is explicitly prohibited in Slovakia however: National Report, Question 7.2: Slovakia.

[424] National Reports, Question 7.2: Greece, Poland and Slovakia.

[425] National Report, Question 7.2: Sweden.

[426] Cfr. The help-in-court system in the United Kingdom. See National Report, Question 5.3: England & Wales.

[427] National Reports, Question 7.2: All Member States.

Often a requirement of registration or authorisation applies.[428] This may be problematic if conditions would be interpreted strictly or authorisations would be rejected for reasons unrelated to consumer protection.[429] Where a model is chosen which allows CPAs to act in court, this consideration should also be engaged.

4.1.1.2 Representation by a Regulatory Authority

260. Another alternative to representation by a lawyer arises where a regulatory authority is empowered to take an individual claim to court or to represent or support an individual consumer. Such practices already exist in Belgium[430], Denmark[431], Finland[432], and Poland.[433] However, it appears that, similar to CPAs, the standing of regulatory authorities may be limited to collective actions.

261. This may also require Member States to set up new authorities where they do not already exist; on the contrary, CPAs already exist throughout the European Union and are generally involved in legal proceedings in one way or another.[434] Representation by CPAs may therefore be more easily achieved than representation by regulatory authorities.

4.1.2 Pro se Litigation

262. A second option would consist in allowing and promoting pro se litigation in simple and low-value consumer disputes. In such cases, legal representation by a lawyer is

[428] National Reports, Question 7.2: All Member States.

[429] Antonina Bakardjieva Engelbert, 'Public and private enforcement of consumer law in Central and Eastern Europe: Institutional choice in the shadow of EU enlargement' in Fabrizio Cafaggi and Hans-W. Micklitz (eds), *New frontiers of consumer protection. The interplay between private and public enforcement* (Intersentia, 2009) 119-123.

[430] Interviews with a Belgian ADR-facilitator and a Belgian academic.

[431] National Report, Question 5.4: Denmark.

[432] National Report, Question 5.1: Finland.

[433] National Report, Question, 5.1: Poland.

[434] See, for example, Interviews with an Austrian judge

in principle not necessary provided that the consumer is assisted in an appropriate way. This would imply tackling two important reasons for which consumers seek legal representation, namely legal representation resulting from a requirement in the law (obligation) and legal representation resulting from the need for assistance because of the complexity of the law (necessity).

4.1.2.1 Abolishing Mandatory Representation in Consumer Disputes

263. Mandatory legal representation by a lawyer should be abolished for simple and low-value consumer disputes. The main issue in facilitating such a change would be to determine when a consumer dispute is simple and of a low value.

264. First, it is important that consumer disputes should be appropriately defined. For this purpose, the proposals in Chapter 1 of this report should be examined.

265. Second, the value threshold for a low-value consumer dispute should be determined. It appears from the national reports that considerable differences exist between Member States regarding the definition of a low-value claim and the concomitant dispensation of legal representation. While it would probably not be for the EU legislator to set a specific amount, Member States should be encouraged to set the value threshold at an appropriate level, i.e. at one which is not too low.

266. Third, a determination should be made as whether a consumer dispute is simple. It appears from practice that in the vast majority of cases, a consumer dispute is fairly simple from a legal point of view, even though it may not necessarily be perceived as such by a consumer. It will therefore only be in exceptional cases that a typical consumer dispute is deemed to be complex. Establishing criteria to determine whether a case qualifies as an exceptional case in which legal representation is required does not seem to be very useful; each case is different and the attribution of the character of “simple” will depend on the ability of the consumer concerned. Discretion should be given to the judge in order to determine whether he or she finds it necessary that a consumer should be assisted by a lawyer. This is reflective of the systems in the Member States that do already allow for pro se litigation: a judge may decide that a party is unfit to represent him or herself and should thus seek the

assistance of a lawyer. Emphasis should be placed on the exceptional character of such necessity.

4.1.2.2 Tackling Complexity in Consumer Disputes

267. Asked whether the complexity of consumer law had an impact on the likelihood that they would bring a claim, 71% of the interviewees responding to this question answered in the affirmative.[435] Various interviewees have also specifically stated that the complexity of consumer law is an issue for various reasons, such as the scope of application of consumer law instruments, the relationship between various consumer law instruments, and the complex legal wording of consumer law instruments.[436] Complexity is also one of the reasons why consumers seek legal representation, even when this would not be required by law. This increases costs and cost risk.[437] An attempt to promote pro se litigation must therefore be accompanied by attempts to make consumer law less complicated: a consumer must have the necessary resources in order to bring or defend a claim without the assistance of a lawyer. Less complexity should lead to lower costs.[438] Various strategies can be adopted in this regard.

<u>General Recommendations to Tackle Complexity</u>

Promotion of Informal Proceedings that are Consumer Friendly

[435] See answers to Interviews, Question A.5: 74 stakeholders answered to this question.

[436] Interviews with an Austrian lawyer, a Belgian lawyer, a Belgian academic, a Croatian consumer association, a Czech academic, a Czech lawyer, a Danish academic, a Finnish judge, a German lawyer, a Lithuanian lawyer, a Dutch lawyer, a Dutch consumer association, 2 Polish judges, a Polish academic, a Slovakian arbitrator, 2 Slovakian lawyers, a Slovakian judge, a Slovenian academic, and a Slovenian business.

[437] Interview with an Austrian lawyer.

[438] Anthony J. Duggan, "Consumer access to justice in common law countries: a survey of the issues from a law and economics perspective" in Charles E.F. Rickett and Thomas G.W. Telfer (eds), *International perspectives on consumers' access to justice* (Cambridge University Press 2003) 64.

268. There is a tendency in legal systems to require legal representation when proceedings appear to be formal. Thus, the higher upon the judicial ladder, the more legislators are inclined to make legal representation mandatory. There may be good reasons for this: formal proceedings require certain knowledge and the failure to comply with prescribed steps may cause a claim to be rejected. The requirement of legal representation in such cases has the object of protecting the parties concerned. When proceedings would be less formal and 'mistakes' would be corrected rather than penalised, part of the argument for the necessity of legal representation would disappear. In basic consumer disputes, such formalism is not warranted as they typically take place before lower judges. There is a general tendency to deformalise simple disputes, often of a low value and often consumer related. Such an approach should become the general approach as it would allow consumers to defend themselves. Member States should be encouraged to deformalise consumer disputes as much as possible. This view is also supported by 62% of the stakeholders who were interviewed.[439]

Better Regulation

269. The stimulation of pro se litigation also requires a mentality change on part of the legislator. Legislation should henceforth not be drafted for lawyers but for average consumers who have no or little legal knowledge. This requires a less technical approach to legislative drafting and more transparency regarding the relationship between the various applicable instruments.[440] This applies both to procedural law and substantive consumer law.

270. At the level of the European Union, a more coherent approach to the existing consumer acquis with clear and uniform concepts may be contemplated.[441] In this regard, reference should be made to Chapter 1 of this report.

[439] 62% of the interviewees responding (175) to the question "What does it mean to you to say that the protection of consumer rights deriving from EU law should be effective and equivalent in the national legal system?" (Question A.4)

[440] Interviews with a Danish lawyer working for a CPA and a German lawyer.

[441] Interviews with an Irish lawyer and a Spanish lawyer.

Specific Proposals to Tackle Complexity

Standard Defence Forms

271. In the majority of cases, a consumer will act as a defendant. Consumers often suffer from a lack of knowledge in order to defend themselves satisfactorily.[442] In order to allow for pro se litigants to defend themselves in a meaningful way in basic consumer disputes, standard forms should be made available that will explain the steps to be taken in order to prepare for their defence. Forms should contain in plain and simple language the typical defences a consumer may advance when confronted with a typical consumer claim, e.g. unfairness of a contract term or prescription of a claim. Defences available in relation to costs should also be identified.

272. Forms should either be attached to a citation or be available in the court building and at the website of the court (or of the respective dispute resolution authorities). Alternatively, it may be possible to involve consumer protection authorities or CPAs[443], stimulating and supporting them in developing and distributing a standard defence form that could be used by a consumer in court.

273. An interesting example appears from a group interview with five Belgian judges specialised in consumer disputes. One judge had individually fabricated a standard document that allowed a defending consumer to dispute all amounts resulting from unfair contract terms. He gave this document to consumers at the beginning of the hearing. While the other judges were of the opinion that he was going quite far in securing the application of the law, the judge took pride in the fact that because of his practice traders refrained from claiming amounts based on unfair contract terms in

[442] Interviews with a Belgian ombudsperson, a Czech consumer association, a French consumer association, a Dutch consumer association, a Polish academic, and a Slovenian consumer association.

[443] This appears already to be the case in Spain: Interview with a Spanish judge.

his district. It is a perfect illustration of how consumer protection can be increased considerably even only with little adjustments.[444]

Enlarging the Role of the Judge

An Active Judge

274. Pro se litigants should be assisted by the judge when defending their claim. This would require an enlargement of the scope of the obligation of *ex officio* application of EU consumer law. For some judges, this may also require a mentality change: it has been noted that where consumers do not have representation, judges do not always find it easy as they may feel compelled to take a more consumer-friendly position.[445] Other judges have difficulties in striking the balance between supporting a non-represented consumer and principle of the equality of arms.[446] Providing judges with extra information or training in this regard may therefore be necessary.

275. Further issues concerning the *ex officio* application of consumer law will be dealt with in Chapter 3 of this report.

Transparency of Claims

276. An enlarged task for judges to support pro se litigants generates extra workload on their part. This additional workload may lead to judges being less active, which would undermine the choice for a pro se litigation system in consumer disputes. Therefore, the workload of the judge must be reduced. A simple and attractive approach to facilitate this may be a standardised claim form in which the claimant must identify potential problems of consumer protection law, such as the existence of unfair

[444] See also Interview with a Spanish judge: "When it is not mandatory (below 2000 euros) consumers do not appear with a lawyer. Nevertheless, many litigants in person appear provided with a document prepared by a lawyer (belonging to a consumer office or to a consumer association)."

[445] Interviews with a Spanish judge and a Polish judge.

[446] Interviews with a Belgian judge ("In some instances consumers are not represented by lawyers (for example before Justices of the Peace). This is difficult for the judge (I can speak from experience). One has to find a right balance between being objective and neutral and wanting to "help" the pro se consumer."), a Luxembourg judge and a Swedish judge.

contract clauses, penalty clauses, etc. Such a form may also require the claimant to calculate the exact amount of penalty or interest sought, instead of leaving this exercise to the judge.

277. Standard forms already exist in various Member States, and in particular those which have a simplified procedure for small or uncontested claims. This is true, for example in the context of the electronic order for payment procedure in Germany. They do not, however, tend to focus on issues of consumer protection but rather on the position of the trader. A potential step would therefore be to generalise such claim forms in consumer disputes and to include appropriate content that allows for the easy identification of violations of consumer protection law by a judge.

4.2 Promoting a Better Knowledge of Legal Aid amongst Consumers

4.2.1 Information Campaign

278. Information about legal aid appears to be a key issue. Member States should be encouraged to make the legal aid regime more transparent by providing accessible and consumer-friendly information on legal aid. This can be done through websites, advertising campaigns or a legal aid hotline.

4.2.2 Standard Letter

279. General information may, however, not help everyone. That is why the information regarding legal aid should be brought to consumers when they need it the most, namely when they are confronted suddenly with a legal claim. Consumers who are confronted with a citation letter should also automatically receive information regarding their potential eligibility for legal aid. This could take the form of a standard letter explaining to the consumer whether he or she is eligible for legal aid. The explanation should be given in plain and simple language; in extreme cases this may require that the Member States simplify their legal aid requirements. A means test

may be provided online, and the address of the website would be indicated on the letter.[447]

4.3 Alternative Strategies for Litigation Funding: Third-Party Funding Through Intermediaries via the Internet

4.3.1 Concept

280. Interviewees have suggested that litigation funding and profit-sharing should be allowed in order to overcome deficiencies in national legal aid systems.[448] A recent phenomenon that aims to address the issue of costs and deficient legal aid is third-party funding (hereafter TPF) via internet platforms. TPF is the practice whereby a third party is responsible for funding litigation in return for a proportion of the amount won where the litigation is successful. Various companies offer the service of TPF via internet platforms. The services provided by such companies are not however limited to merely providing funding. It appears that third-party funders also act as intermediaries between lawyers and parties, taking care of all necessary steps in case of litigation: instructing a lawyer, filing papers, assembling evidence, developing a litigation strategy, entering into settlement negotiations, etc. Thus, upon completion of the required electronic forms, a consumer will have its case litigated for him or her without any cost risks arising. Further to this, they will not have to occupy themselves with litigating the actual case or with engaging in correspondence with a lawyer.

4.3.2 Advantages

281. Litigation through such intermediaries may effectively remove all obstacles that prevent a consumer from going to court: consumers bear no financial risk apart from having to give up a proportion of their compensation if they win; the intermediary is responsible for all steps required to litigate, which means that the complexity issue no longer affects the consumer; and access to such platforms is relatively easy as they

[447] See for example the UK system, where eligiblity for legal aid can be determined online via https://www.gov.uk/check-legal-aid. National Report: the United Kingdom, question 5.1.

[448] Interviews with an Austrian lawyer and an Irish lawyer. It should also be added that Spanish lawyers have recently started experimenting with success fees: Interview with a Spanish lawyer.

provide for websites where consumers can enter their claim in standard forms. Thus, with the exception of the need to complete a form on the internet, consumers are basically left with no barrier to access to justice. They merely have to wait until their case has been litigated.

282. The practice of litigation through intermediaries via the internet may therefore provide for a solution to a number of consumer claims that are not being litigated at the moment, including low-value claims for which the level of costs and complexity are too high to bring a court case.

4.3.3 Problems

283. The model may have a number of drawbacks and will likely face problems in its interaction with national procedural rules.

284. First, consumers may not necessarily obtain the just compensation to which they are entitled, as intermediaries charge a proportion of the compensation for their services. This may not necessarily be a problem in the case of delayed flights, where there is in principle no actual damage, but may be problematic in cases where there is actual pecuniary damage and the amount received after the deductions made by the intermediary is not sufficient to make good the damage incurred. A good example in this regard is the case of Hausfeld and My-right against Volkswagen in the context of the so-called Abgas-Skandal.[449] They will file a claim for a take-back operation, including reimbursement of the initial price of the car. Consumers could then use that money to buy a new car. However, they will take 35% of the money obtained by the consumer through the court case. As a result, the consumer will be left with far less than the money necessary to buy a similar car and consumer law remains under-enforced. The question is therefore how to strike a balance between, on the one hand, access (motivating intermediaries to bring cases and to take the risk of litigation) to justice and on the other, the full realisation of consumer rights (allowing for just and/or complete compensation).

285. Second, the legal framework is far from clear. A first problem concerns the relationship between the consumer and the intermediary. Does the completion of an

[449] https://www.my-right.de/ueber-uns/

internet form lead to the assignment of a claim or does it merely constitute the bundling of a claim? A consumer may not always be aware of this distinction and the information provided on websites is far from clear. Who makes decisions when it comes to litigation strategies? A platform may opt to settle whereas it may be in the interest of the consumer to continue litigation. What information requirements apply to the intermediary? What if disputes arise between the platform and the consumer? What if the platform refuses to pay out the compensation obtained? These issues are very unclear at the moment and may have an impact both on the success of these platforms as well as on the level of consumer protection afforded to consumers. A second problem concerns the relationship between the consumer and the lawyer instructed by the intermediary. In a normal situation, a consumer enters into a contractual relationship with a lawyer, the latter having a number of legally-defined obligations vis-à-vis his client. In litigation via intermediaries, this relationship disappears and the consumer becomes completely dependent on the intermediary. A number of special guarantees on which a consumer can rely when he deals directly with a lawyer no longer exist; these include, amongst others, the duty of confidentiality, moderation when it comes to fees and special rules regarding payments received by lawyers on behalf of their clients. Rules should be enacted to provide the consumer with adequate protection in this regard. A third problem relates to national procedural law. In the vast majority of the Member States, maintenance or champerty is prohibited. This means that success fees are prohibited for lawyers. Success fees may also generate an enormous amount of costs litigation, which puts a heavy burden on the civil justice system. However, via intermediaries such a prohibition can be circumvented and the practice of success fees can be introduced via the backdoor, along with all of its related problems. Moreover, it is also not very clear to which extent lawyers working for such platforms are bound by a prohibition on success fees.[450] Further, other national procedural obstacles might exist: does completing a form on the internet lead to the assignment of a claim? What is the position of a consumer in terms of the actual litigation? How do cases brought by such platforms relate to individual cases in which similar issues are at stake? The

[450] See also, in relation to CPAs, Interview with an Austrian lawyer.

lack of clarity surrounding the legal framework may constitute an important barrier for such platforms to play a role in securing access to justice.

286. Third, it cannot be excluded that intermediaries providing for such services may use the number of claims they manage to collect as a means to force companies into settlements. Their practices may be very aggressive. The model may thus have a drawback for businesses in Europe.

4.3.4 Regulating TPF via Internet Platforms

287. TPF through intermediaries via the internet is on the rise and may provide consumers with proper access to justice, in particular in cases of delayed or cancelled flights.[451] The promotion of litigation through intermediaries may be a good strategy to undercut the current enforcement deficit of consumer law. Such mechanisms should therefore not be excluded per se and might even be promoted. A proper regulatory framework is, however, necessary. At present, they appear to operate in a legally grey or even unregulated area. Given that such internet platforms often work in a cross-border context, it may neither be practical nor possible for Member States to regulate such practices themselves. Since they also may contribute to the effective enforcement of EU consumer law, it might be advisable for the EU to examine further this matter and to devise an appropriate regulatory framework for consumer litigation through intermediaries via the internet. Such a framework should take into account the following points: transparency, the consumer-intermediary relationship, a number of legal guarantees for consumers, and procedural obstacles in national procedural law.

[451] See, e.g., http://www.claimit.eu/ (delayed or canceled flights), https://www.euclaim.nl/over-euclaim (delayed or canceled flights), http://www.nocurenopay.nu/ (all types of cases), https://www.claimingo.nl/dit-zijn-wij (delayed or canceled flights), http://consumentenclaim.nl/over-ons/over-ons/algemeen/no-cure-no-pay (all types of cases), and https://www.my-right.de/ueber-uns/ (a one-issue platform: the Volkswagen Abgas-Skandal).

5. Recommendations to the European Commission

Problems identified	Need for action?	What action? If no action recommended, why?
Court costs	No	Too diverse; very different systems; not a pressing matter apart from a few Member States.
Costs for legal representation	Yes	Indirect measures reducing the need for legal representation by a lawyer: allowing CPAs to represent consumers, allow and/or stimulate pro se litigation. In case of the latter, also complexity issues should be tackled. (see para.267 et seq.)
Complexity of consumer law	Yes	In general, consumer law should be less technical and more accessible. Also, less formality in proceedings should be promoted. Furthermore, standard defense forms could be designed for basic cases. This can be done in cooperation with national CPAs. Legislation would not be required.
Transparency of claims	Yes	Standard claim forms may be designed. This will allow judges to identify immediately pressing issues of consumer law. Forms can be designed in cooperation with representatives of business.
Lack of knowledge of legal aid	Yes	Provide for better dissemination of information by the State or cooperate on this with CPAs. Design of a standard letter informing a party of his/her rights to legal aid to be joined to a claim.
Third-party funding through online platforms	Yes	Monitor developments closely.

Chapter 3: Consumer Actions before National Courts

BURKHARD HESS AND PIET TAELMAN[452]

1. The Framework of the National Procedures: Flexible vs. Formalistic Approaches

1.1 The Respective Role of the Parties and Judges in Civil Proceedings

288. There is no general framework across the Member States that shapes the role of the parties and the role of the courts in civil proceedings. This is a matter which – while guided by certain general principles, whether explicitly or implicitly – appertains to the national legal systems according to their respective domestic procedural rules and litigation cultures.

1.1.1 Party Disposition as an Overarching Principle

289. As a general rule, across the Member States, all national reporters and interviewees have identified – whether explicitly or implicitly – the principle of party disposition (or party autonomy) as the guiding principle for the respective role of the parties and the courts in civil proceedings.[453] Well-summarized and quite telling in this respect is the view of a Finnish judge regarding the role of the parties to the action and the role of the judge in practice: "Court proceedings are, of course, party driven."[454]

290. Although the concrete interpretation and practical operation of the principle of party disposition diverges within and across the Member States, several general principles and similar (recent) trends and developments can be distinguished.

[452] The authors are very grateful to Dr. Stephanie Law and Janek Nowak for their valuable support.

[453] See the answers to National Reports, Question 8.1.6.

[454] Interviews, Question C.1.a; the question asked was as follows: "Can you describe, briefly and according to your experience, the role of the parties to the action and of the judge in practice, in terms of providing the relevant facts and advancing factual and legal arguments, in a dispute concerning a civil law claim?"

291. In general, it may be stated that there is unanimous agreement that the principle of party disposition implies that it is solely within the discretion of the parties to decide if and when proceedings are initiated and ended.[455] The most telling formulation of party disposition, across the Member States, is found in the leading principles ("Les principes directeurs du procès") of the French Code of Civil Procedure.

    - Art.1 of the French Code of Civil Procedure states:
    - "Seules les parties introduisent l'instance hors les cas où la loi en dispose autrement. Elles ont la liberté d'y mettre fin avant qu'elle ne s'éteigne par l'effet du jugement ou en vertu de la loi."[456]

292. Party disposition also implies that is it solely within the discretion of the parties to decide what the subject matter of the proceedings will be.[457]

    - Art.4 of the French Code of Civil Procedure provides:
    - "L'objet du litige est déterminé par les prétentions respectives des parties.
    - Ces prétentions sont fixées par l'acte introductif d'instance et par les conclusions en défense. Toutefois l'objet du litige peut être modifié par des demandes incidentes lorsque celles-ci se rattachent aux prétentions originaires par un lien suffisant."[458]

293. Indeed, across the Member States, there seems to be general agreement that the parties are responsible for specifying the relief sought (the so-called object or '*petitum*' of the claim) and that the court is bound by the claims c.q. defences of the parties. In other words, it is for the parties to define the judicial dispute, i.e. the issues which the court is requested to adjudicate. The court should not identify issues that

[455] See the answers to the respective National Reports, Question 8.1.6. See also the answers to the interviews, Question C.1.a.

[456] Author's English translation: "Unless otherwise provided by law, only the parties may institute legal proceedings. They are at liberty to put an end to the proceedings prior to their extinction by virtue of the court's decision or by virtue of the law."

[457] National Reports, Question 8.1.6 and interviews, Question C.1.a.

[458] Author's English translation: "The subject-matter of the dispute is determined by the respective claims of the parties.

The writ of summons and the defence submissions define such claims. However, the subject-matter of the dispute may be modified by interlocutory claims provided that they have a sufficient link with the initial claims."

the parties have not brought to the table, even if these may seem to the court to arise on the basis of the alleged facts.[459]

294. In addition, there seems to be general agreement that the court cannot *ex officio* change or modify the object of the claim, nor can it grant a claim that was not expressed (*ultra petita*)[460] or grant more than was claimed (*extra petita*).[461]

295. The parties' freedom to decide which claims and allegations they wish to make may be limited, however, in particular by rules of public policy ("ordre public"), which are generally considered *ex officio* by the court, provided that the facts of the case make it sufficiently clear that such rules apply.[462]

1.1.2 Factual Allegations Made

296. There is general agreement that it is primarily the responsibility of the parties to present the facts relied upon to substantiate the relief sought, as well as to bring forward appropriate evidence in support of the factual allegations.[463]

297. As a general rule, the judge may not introduce new facts of his own motion or rely on facts that have not been (eventually) properly advanced by the parties.[464]

[459] For example, the existence of a fact, advanced by one of the parties, cannot be denied if the other party also relied on that particular fact.

[460] National Reports, Question 8.1.6: England & Wales (where the court cannot put forward additional claims, but can award a remedy which has not been sought or claimed by a party in its statement of case; Civil Procedure Rules, Part 16.2 (5)).

[461] National Report, Question 8.1.6: France (Art.5 of the French Code of Civil Procedure: "Le juge doit se prononcer sur tout ce qui est demandé et seulement sur ce qui est demandé"). Author's English translation: "The judge must rule upon all what is claimed and only upon what is claimed."

[462] National Reports, Question 8.1.6: Denmark.

[463] See in particular National Reports, Question 8.1.6: Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Finland, Germany, Hungary, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and The Netherlands. See also Interview with a Cypriot lawyer ("The factual basis of the dispute is exclusively established by the parties"); Interview with an Estonian judge ("The facts and evidence have to be brought before the court by the parties"); Interview with a Greek judge ("The parties must provide the court with the facts in support of their case and submit related evidence").

298. In some Member States however – and this is probably one of the main differences between the different Member States – the court has the power (or even duty) to adopt a more "inquisitorial" or "investigative" role in relation to the facts and evidence.

299. The least far-reaching form of this inquisitorial role of the court consists in the power to rely on information deduced from the facts or from material presented by the parties, even though the parties did not mention this information explicitly in their briefs or did not make the deduction themselves. In France, for example, this power of the court is explicitly stated in Art.7(2) of the French Code of Civil Procedure[465]:

- "Le juge ne peut fonder sa décision sur des faits qui ne sont pas dans le débat.
- Parmi les éléments du débat, le juge peut prendre en considération même les faits que les parties n'auraient pas spécialement invoqués au soutien de leurs prétentions."[466]

300. A more far-reaching form of the court's inquisitorial role comprises of the power to ask "appropriate questions" and/or give "necessary instructions" to the parties at the hearing regarding the presentation of the facts and relating evidence, thus directing a party to assert certain relevant facts, c.q. to adduce certain relevant evidence. In Austria, for example, the so-called "extenuated principle of judicial investigation" requires the court to elicit further information from the parties where their submissions are incomplete, inconsistent or not conclusive and to designate evidence accordingly, as well as to urge the parties to bring forward all factual information relevant for the case.[467] Similarly, in Poland, the court is obliged to

[464] This prohibition influences the extent to which the judge can "legally qualify" (*i.e.* describe in a judicial way) the dispute: he can only do so to the extent he sticks to the facts on which the parties have based their respective claims, see *infra* para.325.

[465] National Report, Question 8.1.6: Germany (§ 139 (2) German ZPO, which provides that the court may base its decision on an aspect that a party has recognizably overlooked or has deemed to be insignificant, provided that this does not merely concern an ancillary claim, and provided that the court has given corresponding notice of this fact and has allowed the opportunity to address the matter).

[466] Author's English translation: "The judge may not base his decision on facts which are not in the debate.

Among the facts mentioned in the debate, the judge may even take into consideration such facts that the parties have not expressly relied upon to support their claims."

[467] National Report, Question 8.1.6: Austria (Austrian ZPO, § 182).

attenuate the principle of adversarial proceedings by asking questions, so that the parties present the complete factual circumstances of the case.[468] Also, in Germany, while the court will not assist the party in gathering factual information as such, it will – by providing "hints" and "feedback" – guide the parties to assert relevant facts and related evidence.[469]

301. In some Member States, this has also been conceived as the court having an active role in "truth-finding". In Romania, for example, although it is primarily the duty of the parties to prove their claims and defences, the court has the duty to aim, using all legal means, to prevent any error in finding the truth of the case. To this end, the court is entitled to require that the parties offer clarifications regarding the facts and the legal grounds that they assert, to supplement the parties' discussion with any legal or factual circumstances, even if these are not specified in the claim or in the defence statement, and to order any other legal measures (including the taking of evidence; on this point, see also *infra*, para.303).[470]

[468] National Report, Question 8.1.6: Poland (Polish Code of Civil Procedure, Art.212, § 1).

[469] National Report, Question 8.1.6: Germany (German ZPO, § 139(1), which provides that the court is to work towards ensuring that the parties to the dispute make declarations in due time and completely, regarding all significant facts, and in particular is to ensure that the parties amend by further information those facts that they have asserted only incompletely, that they designate the evidence, and that they file the relevant petitions). More or less similar provisions can be found in the respective domestic procedural codes of Bulgaria (Art.145-146 Bulgarian Code of Civil Procedure); Croatia (Croatian Civil Procedure Act, Art.294 *et seq.*); France (French Code of Civil Procedure, Art.8); Latvia (Latvian Civil Procedure Law,Art.93); Romania (New Romanian Code of Civil Procedure, Art.22); The Netherlands (Dutch Code of Civil Procedure, Art.22).

[470] National Report, Question 8.1.6: Romania (New Romanian Code of Civil Procedure, Art.22. However, Art.254 (6) of the New Romanian Code of Civil Procedure states that the parties cannot raise, as grounds for appeal, the lack of active role of the judge – that is, the fact that the lower court did not order *sua sponte* the taking of evidence not proposed by the parties themselves. This seems to imply that the correctness of the fact-finding will have to rely on the parties' effort to prove their allegations, and that the (socialist) conception of the "material truth" has actually been abandoned in favour of the "judicial truth" (*Spinei*, Evidence in Civil Law (2015), p. 7)). Cf. National Reports, Question 8.1.6: Slovakia (where the court's power to perform its own investigation into the "true" state of affairs has recently been limited to a specific type of disputes (*i.e.* "non-disputes"), whereas for other disputes it is for the parties to provide and prove the factual allegations on which their claim is based.

302. By contrast, in other Member States, the procedural rules do not confer on the courts – in relation to evidence and proof – any inquisitorial powers; in these Member States, it remains primarily for each party to decide what its case is and how best it is to be presented to the other parties and the court. A Czech Consumer Protection Association (CPA) expressed the following view: "(…) it is the plaintiff who bears the burden of proof. If the facts are not proven, the judge will decide against the claim even though the claim may be just. The judge does not investigate the case *ex officio* but only evaluates the arguments of the parties."[471]

303. In its most far-reaching form, the court's inquisitorial role comprises of certain powers with respect to the production and means of evidence with which facts that are asserted and contested by the parties can be proven. Indeed, some national reporters have clearly identified the court's power to take evidence *ex officio*, for example, by ordering a complementary inquiry consisting of, for instance, the submission of certain documents, witness depositions, an official visit to the scene of the facts, the personal appearance of the parties in court, or an opinion of an expert witness.[472]

An exception is, however, made for consumer disputes; Slovakian Code of Civil Procedure, § 295; see also *infra*, para.337).

[471] Interview with a Czech CPA; National Reports, Question 8.1.6: Czech Republic. The same approach prevails in England & Wales (National Report, Question 11.2.2: England and Wales); National Reports, Question 8.1.6: Estonia; Malta; Spain.

[472] National Reports, Question 8.1.6: Austria; Belgium (Belgian Code of Civil Procedure, Art.871 *et seq.*); Germany (with the exception of witness testimony); Luxembourg (Luxembourg Code of Civil Procedure, Art.348); Romania (New Romanian Code of Civil Procedure, Art.22 and 254); The Netherlands (Dutch Code of Civil Procedure, Art.22 and 162 *et seq.*). Cf. National Reports, Question 8.1.6: Croatia (Croatian Code of Civil Procedure, Art.7 (2) and Slovenia (Slovenian Civil Procedure Act, Art.7), where the power to take evidence *ex officio* is limited to situations where the court suspects that the parties do not advance evidence with the intention of performing dispositive acts which they are not entitled to perform per national law. Compare also with Lithuania (Lithuanian Code of Civil Procedure, Art.179 (2)) and Poland (Polish Code of Civil Procedure, Art.232), where the court can only collect evidence *ex officio* if public interest is at stake. National Reports, Question 8.1.6: Lithuania (in Lithuania, it is widely believed that consumer cases are such cases); Poland (in Poland this issue sparks controversy).

304. In contrast, in other Member States, the court in principle has no power to order the taking of evidence unless the parties so request;[473] nevertheless the court may, in some cases, "suggest" to the parties that further evidence might be advanced in order to complete their statements of fact.[474]

1.1.3 The Increasing Role of Case Management

305. A considerable number of national reporters have highlighted the (more or less recent) trend towards considerable 'case management' or 'process management' powers for the courts.

306. In its strict meaning, judicial case management means that the court is entrusted with and responsible for controlling and managing the orderly conduct and evolution of the proceedings. In other words, the court has to see that the procedural rules are respected and that a judgment is rendered within a reasonable period of time. The latter implies that the court has the power – and even the obligation – to direct and instruct the parties in order to ensure that the progress of the proceedings is maintained or even accelerated.

307. When it comes to the conduct and progress of the proceedings, it may be stated that there is a clear shift in all Member States – possibly under the influence of Art.6 of the European Convention on Human Rights – from the court being a "mere passive observer" to the "master of the proceedings".[475] Indeed, the common feature of

[473] National Reports, Question 8.1.6: Denmark; Estonia; Malta; Sweden; National Report, Question 11.2.2: England and Wales. Cf. National Report, Question 8.1.6: Slovakia (where the court has, due to a very recent reform of the civil procedural rules, in most cases no power anymore to gather evidence *ex officio*, thus departing from the previously dominant socialist concept of "material truth". An exception is, however, made for consumer disputes; Slovakian Code of Civil Procedure, § 295; see also *infra*, para.337).

[474] National Reports, Question 8.1.6: Spain and Latvia.

[475] National Reports, Question 8.1.6: Belgium ("the court plays an active role with respect to the procedure"); Bulgaria ("the court undertakes all measures necessary for moving forward the course of the proceedings until a decision is reached"); Croatia ("the judge or presiding judge of a panel plays an active role in the civil proceedings"); Denmark ("Danish courts have significant control over the litigation process"); Finland; Germany; Luxembourg; Poland; Romania (per Art.6 of the New Romanian

modern civil procedure seems to be that greater scope is provided for the court to adopt a leading role when it comes to the orderly conduct of the proceedings and its time frame.

308. This trend is adequately summarized in Art.3 of the French Code of Civil Procedure:

- "Le juge veille au bon déroulement de l'instance; il a le pouvoir d'impartir les délais et d'ordonner les mesures nécessaires."[476]

309. However, this trend is also clearly recognisable in Member States where the court is understood to be rather passive. In England & Wales, for example, where the judge is traditionally viewed as "coming to court without any prior knowledge of the case"[477], the Civil Procedure Rules have introduced considerable changes in respect of the role of the judge, giving the judge a wide discretion in respect of procedural case management.[478] Pursuant to Part 1 (1) CPR, the overriding objective of the Civil Procedure Rules is to enable the court "to deal with cases justly and at a proportionate cost"; pursuant to Part 1 (4) (2) CPR, active case management includes, *inter alia*, "fixing timetables or otherwise controlling the progress of the case" and "giving directions to ensure that the trial of a case proceeds quickly and efficiently".

310. Moreover, some national reporters have identified a broader interpretation of the notion of case or process management in the sense that this (also) includes the

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Code of Civil Procedure, which prescribes the right of the parties to a resolution of the case in an optimal and predictable time, which entails the duty of the court to order any necessary measures to ensure the functioning of this principle); Sweden ("the judge has general procedural case management powers"); Scotland; England & Wales and The Netherlands (per Art.20 of the Dutch Code of Civil Procedure, which states that the court should guard against an unreasonable delay of the procedure and order any necessary measures in this respect).

[476] Author's English translation: "The judge sees to the orderly progress of the proceedings; he has the authority to define the time limits and order the necessary measures."

[477] Remme Verkerk, 'England and Wales' in Remco Van Rhee (ed), *European Traditions in Civil Procedure* (Intersentia 2005) 307 *et seq*.

[478] Simon Whittaker, 'Who Determines What Civil Courts Decide?' in Dorota Leczykiewciz & Stephen Weatherill (ed), *The Involvement of EU Law in Private International Relationships* (Hart Publishing 2013) 93-98, who talks of a shift from "judicial passivity to a degree of judicial management" with the 1999 CPR reforms.

power and responsibility of the court to set the direction of the proceedings and to ensure that matters are properly focused. This implies a duty for the court to guide and assist the parties in identifying the core issues of the case and the disputed and undisputed elements of the case.[479] In England & Wales, for instance, active case management also includes "identifying the issues at an early stage".[480] The same goes for Scotland, where in the context of small claims, "the Sheriff shall identify and note on the summons the issues of fact and law which are in dispute".[481]

311. Some national reporters have even highlighted the court's right or duty to work for the clarification of issues and to provide judicial guidance, as part of his management task.[482] This means that the court is authorised to ask questions during the hearing and to invite and encourage the parties to provide the explanations necessary in order to further clarify their legal claims and factual allegations which appear to be relevant to the outcome of the case, e.g. if it is unclear what a party to the proceedings claims, what the legal and factual basis for the case is, which legal or factual arguments the party wishes to invoke or which evidence the party invokes.

312. Again, these principles are incorporated in the leading principles of the French Code of Civil Procedure.[483]

[479] National Report, Question 8.1.6: England & Wale (where active case management includes "identifying the issues at an early stage"; Civil Procedure Rules, Part 1(4)(2)(b)). National Report, Question 8.1.6: Scotland (where in the context of small claims, "the Sheriff shall identity and note on the summons the issues of fact and law which are in dispute"; Small Claims Rules, Rule 9.2). This can be compared with National Report, Question 8.1.6: Bulgaria (where the court explains which facts and circumstances do not need to be proven, the distribution of the burden of proof and which of the alleged facts are not supported by evidence; Bulgarian Code of Civil Procedure, Art.146).

[480] National Report, Question 8.1.6: England and Wales (Civil Procedure Rules, Part 1 (4) (2) (b)).

[481] National Report, Question 8.1.6: Scotland (Small Claims Rules, Rule 9.2). National Report, Question 8.1.6: Bulgaria (Compare also with Bulgaria, where the court explains which facts and circumstances do not need to be proven, the distribution of the burden of proof and which of the alleged facts are not supported by evidence; Bulgarian Code of Civil Procedure, Art.146).

[482] It should be noted that the distinction between these judicial management powers and the court's inquisitorial role in relation to facts and evidence (as described above under para.300) is rather thin.

[483] A similar formulation is found in5 other Member States. National Reports, Question 8.1.6: Austria (Austrian ZPO, § 182); Denmark (Danish Administration of Justice Act, Section 339); Finland;

- Art.8 of the French Code of Civil Procedure states:
- "Le juge peut inviter les parties à fournir les explications de fait qu'il estime nécessaires à la solution du litige."[484]
- Art.13 of the same Code states:
- "Le juge peut inviter les parties à fournir les explications de droit qu'il estime nécessaires à la solution du litige."[485]

313. The court must, however, make sure that it does not make use of these "managerial powers" in a way that would endanger the perception of its impartiality, and may never provide legal advice.[486] Moreover, the court must – evidently – stay within the limits of the claims and the main factual background of the case.

Germany (German ZPO, § 139 (1)) and Sweden. This power *c.q.* duty of the court is also referred to as the so-called "materielle Prozessleitungspflicht" (in Austria), "materielle Prozessleitung" (in Germany) or "materiell processledning" (in Sweden). Compare also with Luxembourg, where the court may invite the parties to provide the factual explanations necessary for deciding the case; National Reports, Question 8.1.6: Luxembourg (Luxembourg Code of Civil Procedure, Art.57) and Poland (where the court strives to clarify the relevant, disputable circumstances of the case; Polish Code of Civil Procedure, Art.212, § 1).

[484] Author's English translation: "The judge may invite the parties to provide factual explanations that he deems necessary for the resolution of the dispute."

[485] Author's English translation: "The judge may invite the parties to provide explanations on the legal arguments that he deems necessary for the resolution of the dispute."

[486] National Report, Question 8.1.6: Finland ("The line between guidance and legal advice is drawn in the water. The judge may not suggest the party invoke certain claims, facts or arguments. The judge should not draw issues that the parties have not mentioned at all, but once a party mentions a circumstance or an argument, the judge may ask for clarification if the party wishes to invoke the fact or argument. Sometimes the tone of voice of the judge or his or her body language may be decisive, or the stage of the proceedings may influence if a question is considered guidance or legal advice. For instance, if a natural person claims for compensation due to a mechanical problem with a car, the judge may ask if the claimant bought the car and uses it as a consumer. However, if the vehicle would be a tractor or a wheeled loader, the same question would be considered impertinent").

1.1.4 Influence of the Court's Investigative and Managerial Powers on the Settlement of the Dispute

314. Some national reporters have pointed out that the court's investigation and judicial management powers, as described above (see supra, paras. 300-303 and 311), may – to a certain extent – influence the substantive outcome of the case. Indeed, the information resulting from the court's "hints" and "feedback" may induce the parties to present additional factual allegations and/or evidence in support of their claims, as well as to alter their respective claims or introduce new claims. Generally, however, such an alteration of the claim and/or introduction of new facts (if allowed in that stage of the proceedings; see infra para.332) still has to be formally introduced by one of the parties.[487]

315. Moreover, it is generally acknowledged that the court may not found its judgment upon facts or evidence on which the parties have been denied the opportunity to be heard.[488]

316. A clear and powerful articulation of the court's obligation to observe, in all circumstances, the rights of defence is found in Art.16 of the French Code of Civil Procedure:

- "Le juge doit, en toutes circonstances, faire observer et observer lui-même le principe de la contradiction.
- Il ne peut retenir, dans sa décision, les moyens, les explications et les documents invoqués ou produits par les parties que si celles-ci ont été à même d'en débattre contradictoirement.
- Il ne peut fonder sa décision sur les moyens de droit qu'il a relevés d'office sans avoir au préalable invité les parties à présenter leurs observations."[489]

[487] National Reports, Question 8.1.6: Denmark and Germany.

[488] See in particular National Reports, Question 8.1.6: Belgium (with reference to the Belgian Code of Civil Procedure, Art.774), Croatia (with reference to the Croatian Civil Procedure Act, Art.7(3)) and Slovenia.

[489] Author's English translation: "In all circumstances, the judge must ensure the respect of, and he must himself respect, the adversarial principle. In his decision, the judge may take into consideration arguments, explanations and documents relied upon or produced by the parties only if the parties had an opportunity to discuss them in an adversarial manner. He shall not base his decision on legal arguments that he has raised *sua sponte* without having first invited the parties to comment thereon."

1.1.5 Influence of Factual Circumstances, especially Whether Parties are Represented or Not

317. One should bear in mind that – even within Member States that strictly adhere to the principle of party disposition – the extent to which the court will actively intervene and/or raise certain questions of its own motion is shaped by different (factual) circumstances such as the nature of the proceedings, the level of the proceedings, the nature of the judicial body and the question of whether or not a party has representation or legal assistance.

318. As far as legal representation is concerned, several national reporters have explicitly highlighted that the court might be expected to be more active when lawyers are not present, i.e. when the weaker party is not represented, with the aim of reducing the inequality of power between the parties.

319. In some Member States, this "helping hand" of the court is an obligation which is incorporated into the respective domestic procedural codes. In Denmark, for example, the court has the duty to guide the party, who is not represented by a lawyer, about what he or she should do to elucidate his or her case and to protect his or her interests.[490] Similarly, in Austria, where the court has a general duty to work towards ensuring that parties bring forward all factual information relevant for the decision[491], the assistance provided by the court goes even further where parties are not represented by an attorney and are also not legally trained themselves. In this case, the court is required to assist parties – where necessary – with their procedural actions and provide them with substantive information about the legal consequences of their actions and omissions in the course of the proceedings.[492] Even more far-reaching, in small claims proceedings in Greece, where legal representation is not mandatory, is the exceptional power of the court to go beyond what the parties have

[490] National Report, Question 8.1.6: Denmark (Danish Administration of Justice Act, Section 339 (4). See also Slovenian Civil Procedure Act, Art.12, which stipulates that parties who are not represented by an attorney and who by reasons of ignorance fail to exercise their procedural rights shall be advised by the court of the acts of procedure which they are entitled to execute).

[491] National Report, Question 8.1.6: Austria (Austrian ZPO, § 182 (see *supra*, paras.300 and 311)).

[492] National Report, Question 8.1.6: Austria (Austrian ZPO, § 432).

advanced before it, in order to seek the truth in the swiftest and most efficient fashion.[493]

320. By contrast, in other Member States, the court's helping hand when parties have no legal representation seems only to be a (more or less) generally accepted practice. In Finland, for example, where the court is authorised to ask clarifying questions and provide judicial guidance (see *supra*, para.311), the court will be likely to ask more detailed questions and will be more likely to ask questions for clarification when a party is unrepresented.[494] The same is true for Sweden, where the court's case management duty may be more active if a party has no legal representation.[495]

1.1.6 The Court's Obligation c.q. Power to Apply the Law of its own Motion

321. While it is up to the parties to decide on the claims and factual allegations they wish to make, it is usually for the court to render the judgment based on the relevant legal provisions. In both the interviews and the national reports, the principles of *iura novit curia* ("the court knows the law") and *da mihi factum dabo tibi jus* ("give me the facts and I shall give you the law") are identified as applying across the Member States.[496]

322. These principles are generally understood to entail an obligation for the court to independently (*i.e.* regardless of the legal arguments of the parties (if any)) and *ex*

[493] National Report, Question 8.1.6: Greece (Greek Code of Civil Procedure, Art.469, § 2).

[494] National Report, Question 8.1.6 and 11.1.6: Finland.

[495] National Report, Question 11.1.3: Sweden. Compare with National Reports, Question 11.1.3: Belgium and Luxembourg (where the informal proceedings before the "juge de paix" allow for more leeway in the conduct of the proceedings, which may also entail that the court might be more accommodating towards a non-represented party).

[496] National Reports, Questions 8.1.6 and 11.1.1: Austria; Belgium; Denmark; Finland; France; Germany; Italy; Luxembourg; Poland; Portugal; Romania; Slovenia, Sweden and The Netherlands. This approach was also confirmed in interviews with an Austrian judge ("The assertion of legal arguments is the court's task"); a Cypriot lawyer ("The legal basis of the dispute is, more often than not, set by the parties, albeit the court may raise other legal issues and render a judgment on different legal arguments than those invoked by the parties on the grounds of the general principle *iura novit curia*"); an Estonian judge ("The application of law is done by the court. The parties usually present their legal arguments but the court is not bound by the parties' legal assessment of the dispute").

officio consider which legal rules, whether national or foreign, are relevant and applicable to the case. In other words, the court is not bound by the parties' legal qualification of the dispute and must, where appropriate, complete and/or substitute the parties' legal argumentation, provided that the court must stay within the limits of the claim and the factual background of the case, as well as respect the rights of defence[497].

323. The clearest formulation of the *iuria novit curia* principle is found in Art.12 of the French Code of Civil Procedure:

- "Le juge tranche le litige conformément aux règles de droit qui lui sont applicables.
- Il doit donner ou restituer leur exacte qualification aux faits et actes litigieux sans s'arrêter à la dénomination que les parties en auraient proposée.
- Toutefois, il ne peut changer la dénomination ou le fondement juridique lorsque les parties, en vertu d'un accord exprès et pour les droits dont elles ont la libre disposition, l'ont lié par les qualifications et points de droit auxquels elles entendent limiter le débat. (…)"[498]

324. It is worth noting in this respect that the standing of the applicable legal rules is generally deemed to be irrelevant; the duty to apply the law *ex officio* applies to all rules of law, whether of a public policy character or not.[499]

325. It should be pointed out that the obligation of the court to *ex officio* consider and apply the law assumes that the facts necessary to apply a rule are sufficiently covered by the allegations of the parties.[500] After all, rules apply to specific facts and

[497] Meaning, *inter alia*, that the court must give both parties the opportunity to express their point of view on the legal grounds that the court has invoked *ex officio* (cf. National Reports, Question 8.1.6: Belgium, Luxembourg France (Art.16 of the French Code of Civil Procedure); Romania).

[498] Author's English translation: "The judge settles the dispute in accordance with the rules of law applicable thereto. He must legally qualify or re-qualify the disputed facts and deeds notwithstanding the legal qualification given by the parties. However, he may not change the legal qualification or the legal ground where the parties, pursuant to an express agreement and in respect of such rights that they may freely dispose of, have bound him by such legal qualifications and legal grounds to which they intend to limit the debate."

[499] Compare National Report, Question 11.1.1: Belgium and National Report, Question 11.1.2: Germany.

[500] Cf. National Report, Question 11.1: Belgium (where, pursuant to the case-law of the Belgian Court of Cassation, the judge is only obliged to invoke *ex officio* such legal grounds of which the application

if the facts necessary to apply a rule have not been advanced by the parties, the court cannot apply this rule. In this way, even though the courts are not as such bound by the legal argumentation of the parties, the (factual) allegations of the parties affect the legal rules applied by the courts.

326. A Luxembourg judge with 15 years of experience expressed the following view regarding the interplay between the *iura novit curia* principle and the establishment of the facts: "It is important that the consumer appears in court so as to give to the judge the facts. If the consumer does not appear, the task of the judge becomes much more difficult. You need to be active as a party in litigation, you cannot simply rely on the fact that the judge will do everything for you because it simply might not be possible if the judge has no facts "dans son panier" ["in his basket"] from which to draw."[501]

327. In a small minority of the Member States, the *iura novit curia* principle seems to be more limited in scope, c.q. play a less significant role.

328. In England & Wales, as well as Estonia and Malta, the court seems to be (more) dependent upon the legal arguments advanced by the parties. The court's function is essentially to adjudicate on the exclusive basis of the parties' submissions. Hence, the court cannot in principle attribute a different legal basis to the claims advanced by the parties (although it will take on its own motion a point which is a matter of public policy).[502] The same situation is found in Ireland.

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is warranted by the facts that the parties have specifically advanced ("faits spécialement invoqués") in support of their claims. Facts that have only been mentioned casually or incidentally ("faits adventices") do not trigger the obligation of the judge to apply the law *ex officio*; In such circumstances, the *ex officio* application of the law is a mere (discretionary) power of the judge).

[501] Interview with a Polish lawyer: "As regards the legal arguments, courts are obliged to apply relevant legal provisions *ex officio*. In practice, the parties have also a significant role in advancing legal arguments, since their specification of the factual background of the case and the formulation of claim has an impact on the court's understanding of the legal grounds of the case"..

[502] National Report, Question 11.1.5 and 11.2.2: England & Wales; National Reports, Question 8.1.6: Estonia and Malta.

329. In Spain, where a very traditional conception of the principle of party disposition prevails[503], the judge is even prohibited by law from introducing a different legal perspective to the case. The court may intervene only to correct parties' mistakes in the selection of the applicable rule of law, but not to place the case in a different legal perspective, amounting to change the relevance of the facts.[504]

1.1.7 Acceleration of the proceedings

330. A noteworthy (recent) development in the procedural laws of a great number of Member States is the attempt to strive for a certain balance between taking a decision on a sound legal and factual basis while at the same time ensuring a speedy and efficient decision-making process. Indeed, it seems that one of the main objectives of modern civil procedural law is to accelerate the oft-criticised speed of court proceedings, as well as to rationalise its cost.

331. In some Member States, this implies that the *iura novit curia* principle is complemented with greater procedural obligations for the parties to litigate their case in an active way and to assist the judge in identifying the legal grounds underpinning their claims. Notwithstanding the fact that the parties will customarily make arguments in relation to the relevant legal provisions and sources (especially when represented by counsel), some Member States have (recently) adopted legislation which obliges the parties to explain the legal relevance of the facts to such an extent that it is clear for the other parties and the court how the alleged facts may legally justify the claim. In Denmark, for example, the parties are – since the recent reform of the Danish civil procedure – required to also include statements of their legal arguments in the pleadings.[505]

[503] Cf. interview with a Spanish lawyer: "The Spanish judiciary sticks very strictly to the principle of disposition; the judge is not active in determining facts or legal arguments" (Spanish lawyer) and "A too classical approach of the principle of disposition prevails: no *ex officio* evidence, no judge questioning witnesses and parties".

[504] National Report, Question 8.1.6: Spain.

[505] National Report, Question 8.1.6: Denmark (Danish Administration of Justice Act, Section 348 (2) (4) and 351 (2) (3)).

332. Other national reporters have underlined the obligation on the parties to concentrate their procedural material within the order and/or time frame established by law or set by the court. In Poland, for example, the "principle of concentration" requires the parties to present their allegations and evidence in due time (i.e. as early as possible) – otherwise the court will disregard the belated material.[506] Similarly, in Portugal, the defendant has a duty to concentrate his defence; facts which could have been invoked or opposed when the defence was lodged are not admissible at a later stage of the procedure, as the facts alleged by the plaintiff are deemed to have been accepted by agreement.[507] Likewise, in Slovakia, the court may – under the notion of "judicial concentration" – order the parties to present all of their evidence within a specified time frame. Otherwise, this evidence will not be taken into account when deciding on the merits of the matter.[508] Finally, in Belgium, parties have been recently prevented by law from re-introducing a claim on the basis of the same factual allegations but on a different legal ground.[509]

1.1.8 General Assessment

333. While the principle of party disposition remains the dominant principle for the allocation of tasks and responsibilities between the parties and the court in civil proceedings, there is an undeniable tendency, across the Member States, towards a more active role being played by the court.

334. A clear distinction must be made, however, between the active role of the court with respect to the management of the course of the proceedings and the active role of the court with respect to the content or substance of the proceedings, i.e. with respect to the factual and legal basis underpinning the parties' respective claims.

335. As to the management of the course of the proceedings, there is a clear common development towards a more active role of the court. Where, in the past, the parties

[506] National Report, Question 8.1.6: Poland (Polish Code of Civil Procedure, Art.217, §2).

[507] National Report, Question 8.1.6: Portugal (Portuguese Code of Civil Procedure, Art.574(2)).

[508] National Report, Question 8.1.6: Slovakia.

[509] National Report, Question 8.1.6: Belgium (Belgian Code of Civil Procedure, Art.23).

used to control the progress of the proceedings[510], the court is nowadays expected to engage in efficient and effective case management in order to ensure that a judgment is rendered within a reasonable delay and at a reasonable cost. In all Member States, a similar trend is recognisable in the sense that the court may and must intervene to secure the proper progress of the case by fixing timetables and/or giving otherwise directions to the parties.[511]

336. As to the substance of the proceedings, the picture is somewhat more nuanced. There is general agreement that the parties are expected to assume the leading role in setting out the relevant facts and related evidence, as well as the legal arguments on which they wish to rely. In some Member States, however, this duty of the parties is attenuated by or complemented with certain investigative powers of the court. Indeed, the most important set of differences between the Member States nowadays seems to be linked to the rights and obligations of the court to investigate, of its own motion, factual issues as well as their legal qualification. An important issue in this respect is whether the court may order the taking of evidence of its own motion. Another issue is whether the court has the power (or duty) to actively stimulate the parties to state the facts and to produce evidence. In some Member States, there is a clear expectation that the court is actively involved in the fact-finding and evidence-taking process, whereas in other Member States the establishment and clarification of the disputed facts is seen as the more or less exclusive obligation of the parties.[512] The same is true for the establishment of the legal basis of the parties' respective claims. Although, in all Member States, the court is understood and expected to know the law: some Member States leave substantial room for manoeuvre to the court in determining the legal nature of the facts, while in others, the court is (more) dependent upon the legal arguments advanced by the parties.[513]

[510] In practice, this often implied that the party who wanted to advance with the proceedings was dependent upon the goodwill of the other party.

[511] *Supra*, paras.306-307.

[512] *Supra*, paras.298-303 and 310-311.

[513] *Supra*, paras.321-327.

1.2 Modifications of the National Procedures

1.2.1 No Specific Courts or Special Court Procedures for Consumer Disputes

337. As a general rule, across the Member States, the national reporters have identified neither specialised tribunals nor self-standing special court procedures for consumer protection disputes. The general rules and principles of civil procedure – as set out above – thus seem to apply.[514]

338. There are two noteworthy exceptions in this respect. The first exception is Malta, where a specialised forum has been established under the Consumer Affairs Act, namely the Consumer Claims Tribunal, which has competence over certain consumer related disputes.[515] The second exception is Slovakia.[516] While the procedure at first instance in consumer disputes is by its nature an ordinary civil procedure, there are several specialised procedural rules which are applied only to consumer disputes (Slovakian Code of Civil Procedure, § 291 et seq.):

- The court has a wider obligation to instruct the consumer about (i) the possibility to be represented in the proceedings and (ii) his or her procedural rights and duties, not only within the limits of the general notification duty, but also regarding the evidence to be produced, the possibility to apply for urgent interim measures and other possibilities needed for an effective application or protection of the consumer's rights (§ 292); According to the national reporter, it is not yet clear whether and to what extent the duty to instruct the consumer also applies to the substance of the case, but it cannot be ruled out that the courts will opt for a more pro-

[514] See the answers the National Reports, Questions 8.1 and 8.3.

[515] National Reports: Germany (the (ordinary) courts may themselves constitute special chambers or departments competent for consumer protection disputes, which many courts did) and Malta (Consumer Affairs Act Malta (1994), Art.16-27).

[516] In addition, in Poland, the consumer is, in some cases, obliged to follow an out-of-court complaint and redress procedure with the provider of the service, before filing a lawsuit. If the consumer does not comply with this requirement, the lawsuit will be rejected (National Report, Question 8.1.4: Poland (e.g. Polish Postal Act of 23 November 2012, Art.94, which provides that "The right to pursue claims defined in the Act with regard to non-performance or inadequate performance of universal services in judicial proceedings, mediation proceedings or proceedings before a permanent consumer arbitration court, shall be available to the sender or addressee, having exhausted the complaint procedure.").

consumer approach and instruct the consumer also on substantive issues (aiming at the effective protection of the consumer's rights)[517];

- The joinder of claims is not possible, unless all claims are consumer disputes (§ 293);
- The change of the claim is not admissible if the claim is brought against the consumer (§ 294);
- The court is empowered to perform its own factual inquiry and to take evidence not proposed by the consumer (§ 295);
- The time limit regarding the possibility to produce evidence (see supra, para.332) does not apply in consumer disputes and the consumer may produce evidence until the judgment has been rendered (§ 296), unless the consumer is represented by an attorney (§ 291 (3)).

339. Moreover, there seem to be some differences as regards the allocation of the burden of proof, more specifically as regards the burden of proving the consumer status (i.e. the burden of proving the existence of a consumer contract and the applicability of consumer law). In some Member States, the ordinary rules apply, meaning that the party claiming to be a consumer must prove his or her consumer status.[518] In other Member States, there is a general assumption that a natural person has acted as a consumer, thus shifting the burden of proof to the professional.[519] Some national reporters also refer to the duty of the court to apply the law *ex officio*, which would also mean that the court is under an obligation to establish on its own motion whether consumer law applies to the dispute, provided that the facts and relating evidence submitted to the court are sufficient to allow for this assessment.[520]

340. Finally, as set out above (*supra,* paras.318-320), the court will typically adopt a helpful stance and be more active in its management of the case towards the weaker

[517] National Report, Question 11.1.6: Slovakia.

[518] National Report; Question 11.1.3: Austria; Bulgaria; Cyprus; Estonia; France; Hungary.

[519] National Report; Question 11.1.3; Austria (Konsumentenschutzgesetz, § 6 and 12); Germany, (Bürgerliches Gesetzbuch, Section 13); Romania (Government Emergency Ordinance 34/2014, Art.5; Law 363/2007, Art.11; Government Ordinance 85/2004, Art.24; Law 193/2000, Art.4(3)): England & Wales (Consumer Rights Act (2015), Section 2 (4) and The Consumer Contracts (Cancellation, Information and Additional Charges) Regulations (2013), Regulation 17).

[520] National Reports, Question 11.1.3: Belgium; Finland; Italy; Poland; Portugal; Slovenia; Spain; Sweden.

party, especially when lawyers are not present, i.e. when the consumer has no representation or legal assistance. [521]

341. It should be noted, however, that the court's "helping hand" towards the unrepresented party does not differ depending on whether that party has a consumer status or not. In Austrian procedural law, for example, there is a distinction drawn as to how far judicial guidance given to the parties is required (see *supra,* para.319). This distinction, however, is made between parties represented by counsel on the one hand and those who do not have legal representation and thus arguably lack sufficient legal knowledge ("unvertretene, rechtsunkundige Partei") on the other hand (Austrian ZPO, § 432). Consumers can thereby fall within the first as well as the second group – as can entrepreneurs. Hence, also entrepreneurs are given a higher degree of judicial guidance where the criteria of § 432 are fulfilled.[522]

342. Also worth mentioning in this respect is the view expressed by a Dutch academic with 23 years of experience in respect of the allocation of tasks between the parties and the court in a civil procedure concerning consumer protection law: "This very much depends on whether the consumer is represented. In practice, when the consumer does not have legal representation, the judge is willing to aid the consumer. Of course, the judge would need the facts in order to be able to assess whether indeed there is a consumer contract, and the consumer would need to provide proof in this regard. But, intentionally or unconsciously, the judge will facilitate the consumer to this end."[523]

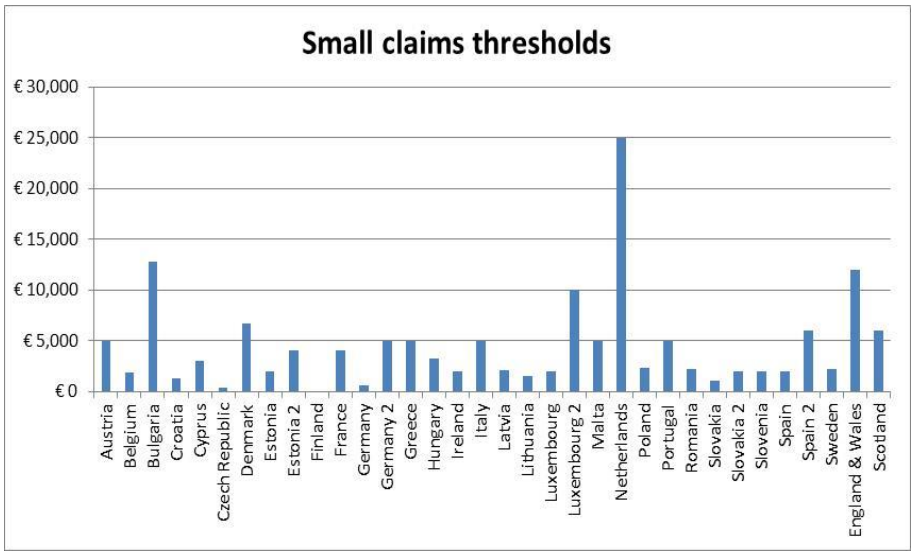
[521] The interview (question C.1.a) was as follows: "Can you describe, briefly and according to your experience, the role of the parties to the action and of the judge in practice, in terms of providing the relevant facts and advancing factual and legal arguments, in a civil procedure dispute concerning consumer protection law?"

[522] National Report, Question 11.1.6: Austria.

[523] Compare with the situation in Germany; National Report, Question 11.1.3: Germany ("the court has an obligation to give hints and feedback (…) and a consumer who is not represented will receive more hints and feedback than a businessman". This practice corresponds to the requirements of the Faber-case, wherein the Court expresses the opinion that when it is required to determine whether the purchaser may be classified as a consumer within the meaning of directive 1999/44/EC – even if the purchaser has not relied on that status – the judge simply has to make a request for clarification to the parties; Case C-497/13,*Faber* EU:C:2015:357).

1.2.2 Small Claims Proceedings

343. The procedure may be simplified if the claim qualifies as a small claim, *i.e.* if the monetary value of the claim does not exceed a certain monetary threshold. In this case, the procedural laws of several Member States provide for a particular (voluntary or obligatory) small claims procedure.[524] Other Member States do not provide for a specific small claims procedure but allocate claims below a certain value to lower courts, where procedures are typically less formalistic. There are, however, considerable differences between Member States in what is considered to be a low-value claim. Some Member States (Estonia, Germany, Luxembourg, Slovakia, and Spain) even provide for multiple small claims thresholds and corresponding procedures.



[524] The following Member States have no particular (national) small claims procedure: National Reports, Question 8.2.1: Austria, Bulgaria, Finland, France, Germany, Italy, Luxembourg, Portugal, Slovakia, Spain, and The Netherlands. Nevertheless, in most of these Member States the procedure is somewhat simplified before the lower courts, competent to deal with limited financial value claims (e.g. in Germany, the claims that do not exceed € 5,000 are dealt with before the local courts; in these courts, representation by an attorney is not required; the same is true for The Netherlands, where claims below the value of € 25,000 (or below € 40,000 in consumer credit cases) can be heard before the (more informal) sub-district sector, where no legal representation is required.

* For Member States in which the Euro has not been adopted, the amounts are based on the market exchange rate between the Euro and their currency [9th November 2016].[525]

344. Generally, however, this simplified procedure does not differ depending on whether the matter is a consumer dispute or not.[526]

345. In addition, the rules on the allocation of tasks between the parties and the court do not differ greatly from the rules applicable to ordinary civil proceedings (as set out above).

346. Nevertheless, it is worth noting, that there is a clear tendency to assist the weaker party in small claims procedures, who are often not represented in practice.[527] Hence, the observations made above in relation to the court's "helping hand" as a way to reduce the inequality of power between the parties seem to apply *a fortiori* in the context of small claims proceedings.[528] The most compelling example in this respect is the small claims procedure in Greece (where legal representation is, unlike in other proceedings, not mandatory). The Greek small claims judge will assist the weaker parties and has the exceptional power to go beyond what the parties have advanced before the court.[529] Similarly, in Denmark, the court will provide guidance to the unrepresented consumer.[530]

347. Furthermore, in some Member States, a standard application or standard claim form is made available to the claimant in small claims proceedings, which may help the latter (especially when this is the (unrepresented) weaker party) in formulating his or

[525] The amounts in the original currency are: 10,000 kn (Croatia); DKK 5,000 (Denmark); 10,000 GBP (England & Wales); 1,000,000 Ft (Hungary); 10,000 PLN (Poland); 10,000 RON (Romania); 3,000 GBP (Scotland) and SEK 22,150 (Sweden).

[526] See the answers to National Reports, Question 8.2.

[527] Which is probably due, in part, to the fact that in some Member States legal representation is in principle mandatory, but not in small claims.

[528] *Supra*, paras.318-320 and 340.

[529] National Report, Question 8.2.3: Greece (Greek Code of Civil Procedure, Art.469, § 2).

[530] National Report, Question 8.2.3: Denmark.

her claim.[531] If the claimant is a consumer, he or she may resort to a consumer association for general assistance and information regarding the completion of the form.[532]

348. As to the rules on the taking of evidence, the general rules are in principle also applicable in small claims disputes. In some cases, however, the rules are more flexible. In small claims proceedings in Denmark, for example, any evidence that is likely to be of relevance to the case must be approved by the court.[533] Similarly, in Malta, the court is not bound by the ordinary rules of evidence and may take into account any evidence advanced by the parties that is sufficiently reliable to reach a conclusion.[534] In small claims proceedings in Greece, the court is allowed to deviate from the ordinary procedural rules; it may take into account non-admissible evidence and, in general, deploy any methods that allow for the truth to be sought in the swiftest and least costly fashion.[535] The same situation exists in Germany. In practice, the small claims procedure is seldom applied (see infra para.401).[536]

2. Ex officio Application and Control of EU Consumer Law

2.1 The Meaning of ex officio – An Assessment of the Case Law of the ECJ

349. In the legal literature, the *ex officio* application of EU consumer law by the national judge is considered to be one of the most controversial and unsettled issues of EU consumer protection law. In the online survey and in the interviews, we explicitly

[531] National Reports, Question 8.2.3: Denmark Latvia; Malta; Romania; England and Wales; Scotland.

[532] National Reports, Question 8.2.3: Malta, Romania and England & Wales.

[533] National Report, Question 8.2.5: Denmark (Danish Administration of Justice Act, Section 403. Furthermore, there is a special procedure for the taking of court-appointed expert evidence in small claims proceedings; Danish Administration of Justice Act, Section 404).

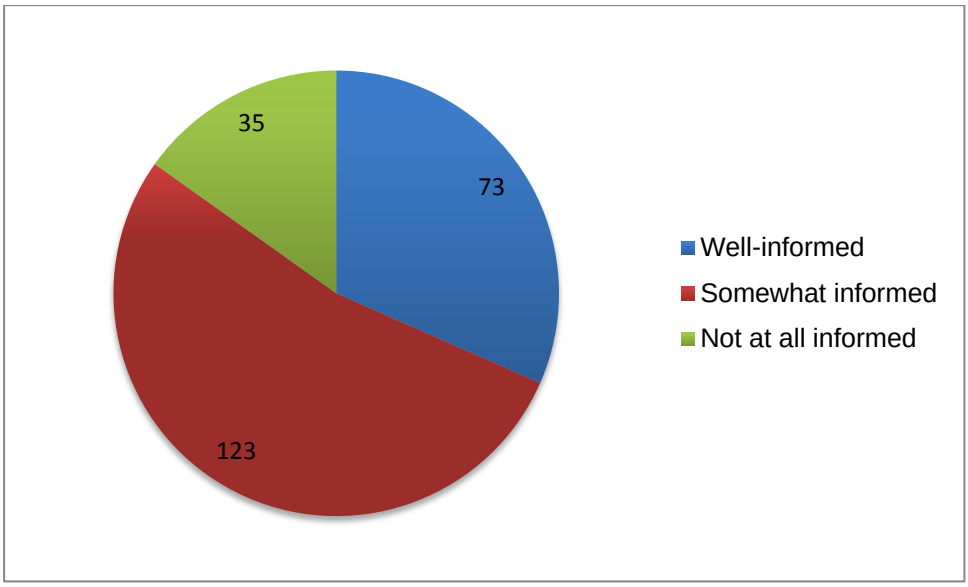
[534] National Report, Question 8.2.5: Malta (Laws of Malta, Chapter 380, Art.9).

[535] National Report, Question 8.2.5: Greece (Greek Code of Civil Procedure, Art.469, § 2).

[536] Section 495a ZPO, see Otto Schmidt, *Zöller/Vollkommer, ZPO Commentary* (Beck 31 ed. 2017) paras.8 ff.

asked the interviewees about their knowledge of the pertinent case law of the ECJ (the term "*ex officio*" was expressly mentioned).[537]

Informedness of stakeholders of the CJEU case law setting out procedural requirements of consumer protection law

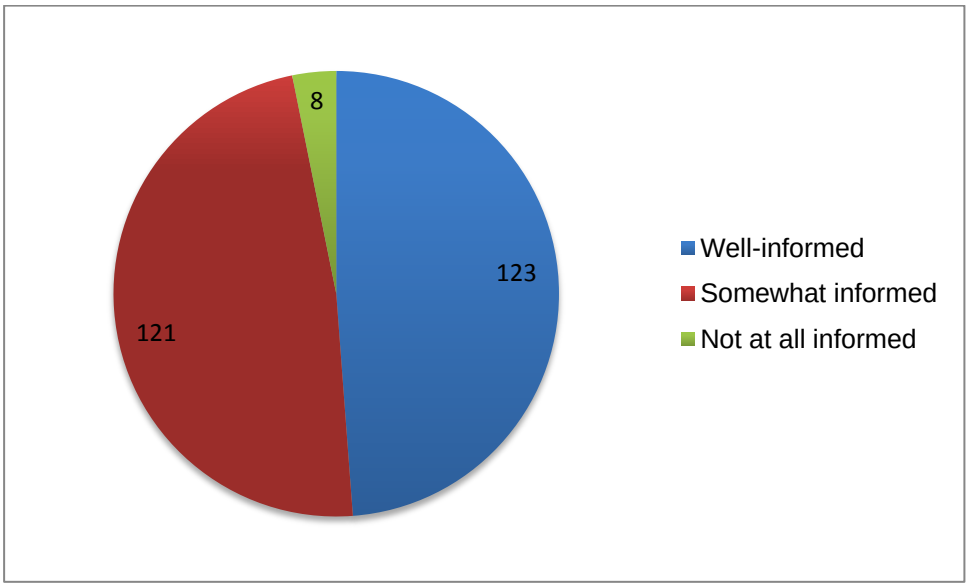


Responses to the Online Survey and Interviews.[538]

Informedness of stakeholders of EU consumer protection law

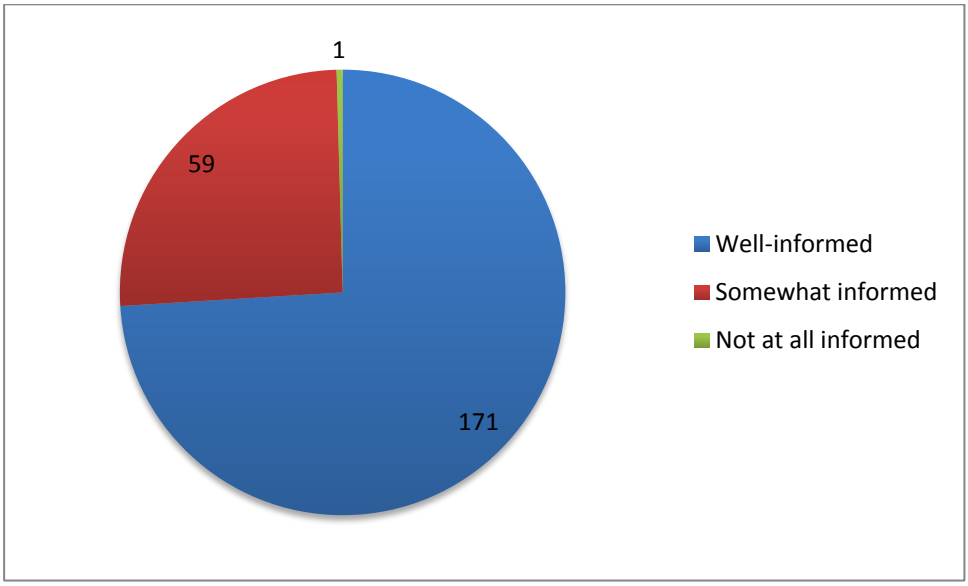
[537] The question asked was as follows: "In its case law, the Court of Justice of the European Union (CJEU) has established certain procedural requirements in respect of the resolution of consumer disputes. (These include, for example, the *ex officio* – that is, on its own motion – control of consumer protection law by dispute resolution facilitators, discussed further below). Would you consider yourself to be well-informed about national and EU consumer protection law?"

[538] Each respondent was asked how informed they considered themselves to be in relation to three levels of consumer protection: CJEU case law, EU consumer law and consumer law and to indicate for each whether they considered themselves to be very well-informed, somewhat informed or not at all informed. The respondents to the online questionnaire and interviews are – while not exactly the same individuals – from the same group of respondents, including lawyers, judges, CPAs, consumers and ADR entities. Given that the same questions were asked (and in those cases in which the data collected has been collated), the same "closed" responses presented, and in light of the small number of answers received to certain questions, we have collated the responses.



Responses to the Online Survey and Interviews.[539]

Informedness of stakeholders of national consumer protection law



[539] Each respondent was asked how informed they considered themselves to be in relation to three levels of consumer protection: CJEU case law, EU consumer law and consumer law and to indicate for each whether they considered themselves to be very well-informed, somewhat informed or not at all informed. The respondents to the online questionnaire and interviews are – while not exactly the same individuals – from the same group of respondents, including lawyers, judges, CPAs, consumers and ADR entities. Given that the same questions were asked (and in those cases in which the data collected has been collated), the same "closed" responses presented, and in light of the small number of answers received to certain questions, we have collated the responses.

Responses to the Online Survey and Interviews.[540]

350. The answers given demonstrate that there is generally a good understanding of national consumer law, a less comprehensive understanding of general EU consumer law while the case law of the ECJ is not well known. With regard to *ex officio*, this situation entails specific problems as the obligation of the national judge to apply consumer law of his or her own motion tends only to be found in the Court's case law. Against this background, the following section explains and assesses the case law of the Court of Justice; thereafter the practice in the Member States will be addressed.

2.1.1 The Development of the Case Law

351. The power – and in some situations, obligation – of the national judge to apply EU consumer law (as transposed into national law and implemented by national legislation), the *ex officio* examination of consumer law is one of the most controversial issues of this study.[541] In a series of judgments rendered over the last 20 years[542] and relating to various fields of national law affected by Union law, the ECJ has developed the concept of *ex officio* and relatedly the task of the national judge to actively apply mandatory EU consumer law.[543] In a landmark decision,

[540] Each respondent was asked how informed they considered themselves to be in relation to three levels of consumer protection: CJEU case law, EU consumer law and consumer law and to indicate for each whether they considered themselves to be very well-informed, somewhat informed or not at all informed. The respondents to the online questionnaire and interviews are – while not exactly the same individuals – from the same group of respondents, including lawyers, judges, CPAs, consumers and ADR entities. Given that the same questions were asked (and in those cases in which the data collected has been collated), the same "closed" responses presented, and in light of the small number of answers received to certain questions, we have collated the responses.

[541] See answers to the online survey (consumer protection), questions no 20 ff. and (more telling) the answers given in the interviews.

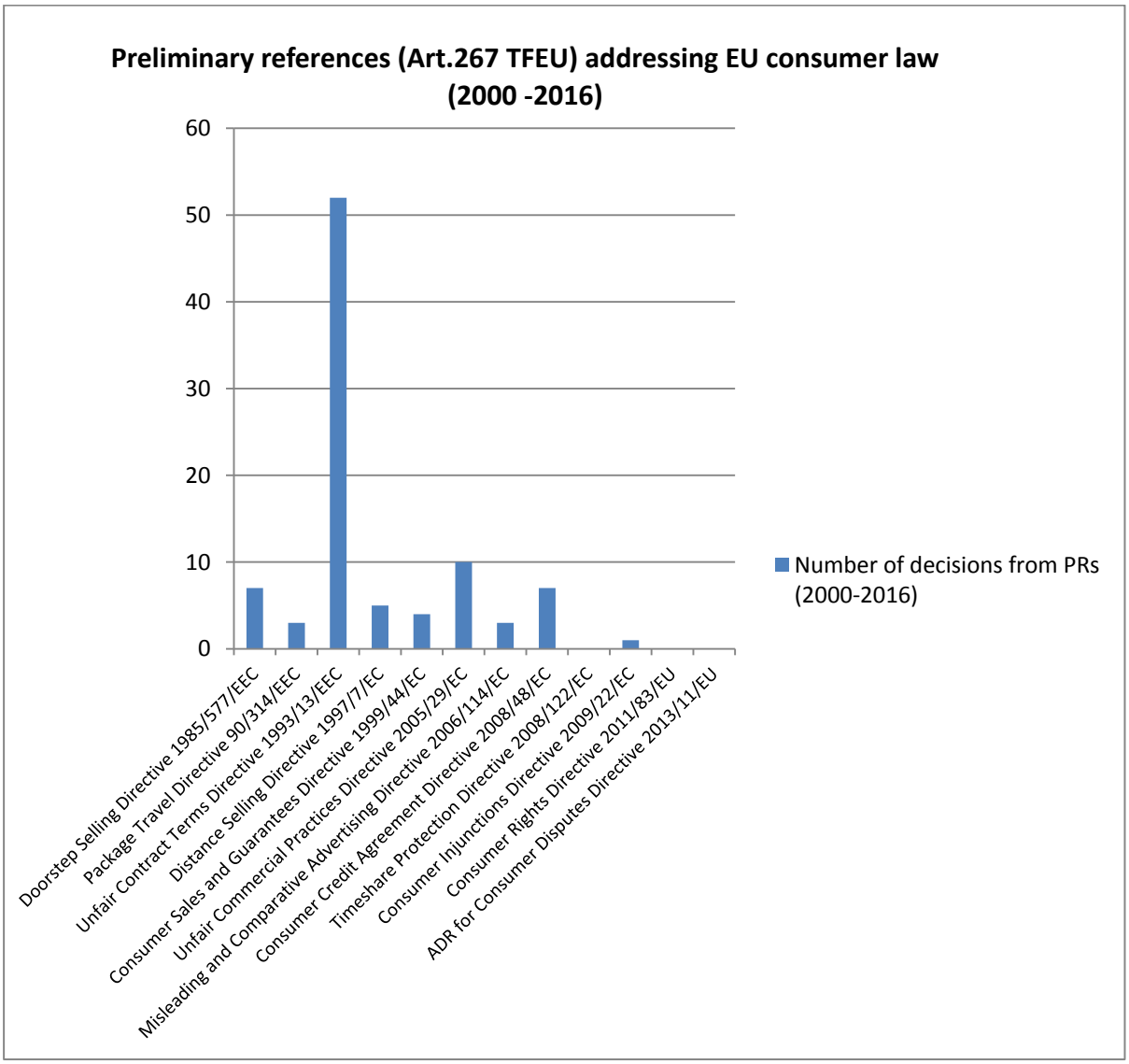
[542] Beginning with Joined Cases C-240/98 to C-244/98 *Océano Grupo* EU:C:2000:346, discussed further below, the judgment in which was given on 27 June 2000.

[543] Koen Lenaerts *et al* (eds) (Maselis/Gutman/Nowak) *EU Procedural Law* (OUP 2014) para.4.39.

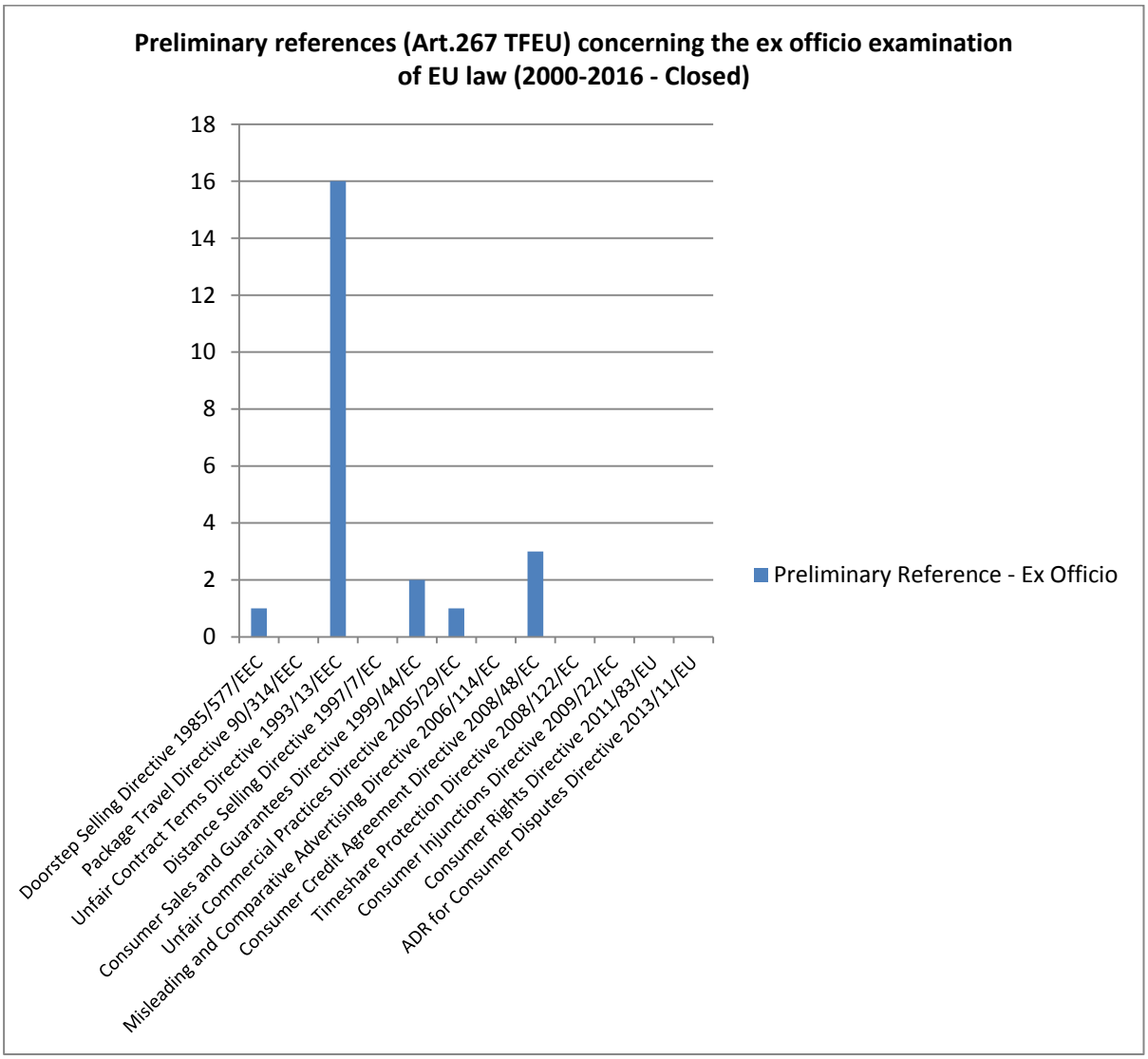
relating to EU competition law, the ECJ initially held that it is for the national court to apply mandatory EU Treaty provisions even where the party who would benefit from their application has not relied on them, and to examine of its own motion the compatibility of national law with those provisions of primary Union law. However, the ECJ held that this obligation does not arise where such an examination would oblige the national court to abandon the rather passive role assigned to it under national civil procedural law.[544]

352. The most prominent field of application of the *ex officio* power relates however to consumer protection. Moreover, it has been developed predominantly in relation to unfair contract terms. Indeed, it is worth noting that the majority of requests for preliminary rulings made by national courts concern the UCTD. This is evident from the graph below, which indicates the number of preliminary references dealing with each of the directives covered by this study.

[544] Joined Cases C-430/93 and 431/93 *Van Schijndel./.Stichting Pensioenfonds voor Fysiotherapeuten* EU:C:1995:441 paras.17, 19–22.



353. Furthermore, most of the requests for preliminary rulings on the issue of the *ex officio* assessment of mandatory consumer law also arise from the application of the UCTD, as implemented in the national legal systems.



354. Art.6 of the UCTD obliges the EU Member States to provide for an efficient remedy against violations.[545] This provision – along with Art.7 – has provided a basis in the text of the directive itself on which the ECJ initially identified that the national courts must not be precluded by national civil procedural rules from examining *ex officio* compliance with the UCTD and subsequently, that the national courts are obliged to examine *ex officio* compliance with the UCTD.

[545] Directive 93/13/EEC, Art.6(1) reads as follows: "(1) Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms."

355. It should be noted, as discussed in further detail below, that the ECJ has also indicated that in relation to other instruments of EU consumer legislation, there may exist a power on the part of the national courts to examine *ex officio* compliance with Union law.[546] As such, in respect of these judgments, the legal basis of the *ex officio* principle remains unclear; that is to say, it cannot be attributed to the existence in the relevant EU instrument of a specific obligation of the Member States to efficiently enforce EU consumer law.[547]

356. The first judgment on the *ex officio* application of mandatory consumer law was given in Joined Cases C-240/98 to C-244/98 *Océano Grupo*.[548] The ECJ described the role of the national judge as follows:

- "25. As to the question of whether a court seised of a dispute concerning a contract between a seller or supplier and a consumer may determine of its own motion whether a term of the contract is unfair, it should be noted that the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms.
- 26. The aim of Art.6 of the Directive, which requires Member States to lay down that unfair terms are not binding on the consumer, would not be achieved if the consumer were himself obliged to raise the unfair nature of such terms. In disputes where the amounts involved are often limited, the lawyers' fees may be higher than the amount at stake, which may deter the consumer from contesting the application of an unfair term. While it is the case that, in a number of Member States, procedural rules enable individuals to defend themselves in such proceedings, there is a real risk that the consumer, particularly because of ignorance of the law, will not challenge the term pleaded against him on the grounds that it is unfair. It follows that effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion."

[546] Still, most of the cases of the ECJ relate to unfair standard terms, especially in consumer credit contracts. Much of the recent case law was triggered by the financial crisis in Spain; almost 50% of all preliminary references on the UCTD derived from the Spanish courts.

[547] Koen Lenaerts *et al* (eds) (Maselis/Gutman/Nowak) *EU Procedural Law* (OUP 2014) para.4.40, refer to the principle of sincere cooperation (Art.4(3) TEU).

[548] Joined Cases C-240/98 to 244/98 *Océano Grupo Editorial and Salvat Editores* EU:C:2000:346. The cases related to a jurisdiction clause in a consumer contract.

357. Since *Océano*, the ECJ has framed the *ex officio* application as a tool that can be engaged by the national judge to actively apply and enforce EU law[549] in order to protect the consumer as the structurally weaker party in civil proceedings.[550] However, it must be stressed that in principle, the concept operates in light of the so-called procedural autonomy of the EU Member States.[551] According to this principle, the courts of the EU Member States will apply first and foremost their national civil procedures when deciding disputes concerning EU consumer protection law.[552] Nevertheless, the procedural framework of the national adjudicative systems must correspond to the minimum standards of protection established in Union law. In this regard, and notwithstanding the prevalence of the principle of procedural autonomy, the *ex officio* principle constitutes a kind of residual EU standard to be invoked by the national judge in order to overcome evident shortcomings generated by the application of national procedural rules.[553] In practice, the possibility for the *ex officio* control of consumer law largely depends on the circumstances of the individual case before the court,[554] which entails a high degree of unpredictability.

358. Moreover, the application of the *ex officio* principle in the context of national proceedings has led to further references from national courts to the ECJ about its meaning and operation in the context of very different procedural situations, such as

[549] In the context of the UCTD, the *ex officio* principle was initially formulated as emanating from the principle of the effet utile of the directive.

[550] Piet Taelman, 'Some European Challenges for Belgian Civil Procedure' in Anna Nylund and Bart Krans (eds), *The European Union and National Civil Procedure* (Intersentia 2016) 5, 6 *et seq*.

[551] Case C-33/76 *Rewe./.Landwirtschaftskammer für das Saarland* EU:C:1976:188, para.5; Burkard Hess, *Europäisches Zivilprozessrecht* (Müller 2010), § 11, para.4.

[552] Procedural autonomy only operates to the extent that the EU legislator has not legislated for procedural standards. Functionally, the principle corresponds to the lex fori principle in private international law, Burkard Hess, *Europäisches Zivilprozessrecht* (Müller 2010), § 11, para.4.

[553] In this respect, the principle of *ex officio* is intertwined with the corresponding principles of equivalence and effectiveness and effective judicial protection, see infra 2.

[554] Verica Trstenjak and Erwin Beysen, 'European Consumer Protection Law: curia semper dabit remedium?' (2011) 48 *CMLR* 95, 102 on the principle of effectiveness.

ordinary proceedings,[555] appeals,[556] in respect of the enforcement of arbitral awards[557] and notarial deeds,[558] in order for payment proceedings[559] and with regard to provisional measures.[560] As the national courts usually make a reference to the ECJ in the context of a very specific instance of national proceedings, the *ex officio* concept has emerged as one which is difficult to develop in a comprehensive and consistent manner. Consequently, it has been recognised that it is challenging to transpose the judgments rendered by the ECJ to similar situations arising in other EU Member States (i.e. beyond the Member State of the referring court). It is therefore no surprise that the concept remains a matter of legal uncertainty: at present (as of the 30th of January 2017), there are no less than seven preliminary references pending before the ECJ in which the national judges have requested a ruling from the ECJ on the application of the concept of *ex officio*.[561]

359. The conceptual ambiguities of the EU principle therefore also stem from its operation within the heterogeneous procedural regimes of the EU Member States. With regard to the *ex officio* application of the law and the exploration and assessment of facts, national procedures themselves often do not provide for clear concepts and terminologies. One example is German law. In civil proceedings, the courts rely on the principle of party disposition and the obligation of the parties to submit the

[555] Case C-472/00 P *Kommission./.Fresh Marine* EU:C:2003:399; Case C-32/12 *Duarte Hueros* EU:C:2013:637; Case C-497/13 *Faber* EU:C:2015:357.

[556] Case C-371/11 *Punch Graphix Prepress Belgium* EU:C:2012:647.

[557] Case C-168/05 *Mostaza Claro* EU:C:2006:675; Case C-168/15 *Tomášová* EU:C:2016:602; Case C-40/08 *Asturcom Telecomunicaciones* EU:C:2009:615; Case C-76/10 *Pohotovosť* EU:C:2010:685; Case C-168/15 *Tomášová* EU:C:2016:602.

[558] Case C-415/11 *Aziz* EU:C:2013:164; Case C-613/15 *Ibercaja Banco* EU:C:2016:195.

[559] Case C-243/08 *Pannon GSM* EU:C:2009:350; Case C-137/08 *VB Pénzügyi Lízing* EU:C:2010:659; Case C-618/10 *Banco Español de Crédito* EU:C:2012:349.

[560] Case C-169/14 *Sánchez Morcillo and Abril García* EU:C:2014:2099.

[561] The last judgment of the Court dates from 21st of December 2016: Joined Cases C-154/15, C-307/15 and C-308/15 *Nrjanjo* EU:C:2016:980, paras.73 and 74.. The Grand Chamber stressed the mandatory nature of Arts.4(2), 6 and 7 UCTD and that the national judges must, of their own motion, not apply a temporary limitation to the finding of the existence of unfair terms. Moreover, seven additional cases – still pending – concern the temporal effects of the finding of unfairness.

necessary factual allegations and proof to the court. However, the court will apply the law of its own motion (*da mihi factum, dabo tibi ius*).[562] Only in non-contentious matters and in administrative proceedings will the courts dispose of their investigative powers to explore and assess the facts of the case (Amtsermittlung). However, there is a third category of case – the "examination *ex officio*" (Prüfung von Amts wegen) – wherein the courts are permitted to request additional information from the parties when the factual allegations are not sufficient to establish the admissibility of the lawsuit (see § 56 ZPO).[563] The concept of the "*ex officio* application of mandatory EU law" does not easily fit into a procedural environment where the basic notions themselves appear to be unsettled.

360. Finally, the term "*ex officio* application" is also used in different ways in different EU instruments. For instance, Art.4 (1) of the new Insolvency Regulation (EIR)[564] states that the court seized of a request to open insolvency proceedings shall of its own motion examine whether it has jurisdiction pursuant to Art.3 EIR at the place of the centre of the main interests (COMI) of the debtor. Obviously, this examination mainly relates to the facts constituting the COMI of the insolvent debtor and the court shall fully investigate whether the opening of main insolvency proceedings is justified.[565] Similarly, Art.27 of the Brussels I bis Regulation requires the court to examine of its own motion whether another Member State has exclusive jurisdiction; Art.28 Brussels I bis also requires the court to examine of its own motion whether it has jurisdiction when the defendant does not enter an appearance. These provisions are a reaction to the heterogeneous situations in the EU Member States. In some Member States, the jurisdiction of the court would only have been examined when

[562] See supra at paras.321-329.

[563] The concept of the «Ermittlung von Amts wegen» is not entirely clear, cf. Friedrich Stein and Martin Jonas, *Commentary ZPO* § 56 (Beck 23rd edn, 2015), Jonas § 56 ZPO, paras.5 ff.; Friedrich Stein and Martin Jonas, *Commentary ZPO* § 128 (Beck 22nd edn, 2011) paras.162 ff.

[564] Regulation (EU) 2015/848 on Insolvency Proceedings.

[565] Reinhard *Bork* and Kristin *van Zwieten, Commentary on the European Insolvency Regulation (OUP 2016)* Art.4.03 ff (Art.3 EIR). The *ex officio* examination had been proposed by Burkhard Hess, Paul Oberhammer and Thomas Pfeiffer (eds), *The Heidelberg-Luxembourg-Vienna Report on European Insolvency Law* (Beck 2014), paras.478-480, as the practice in the Member States had proven to be inconsistent.

the defendant challenged it expressly.[566] The provisions in the revised regulation clarify that the courts are obliged to undertake the legal assessment on their own initiative. Notwithstanding, it remains the case that the provisions are not uniformly applied across the EU Member States.[567]

361. Against this general background, it is not surprising that the concept and application of the *ex officio* principle has been considered as a disturbed and insecure area of Union law. Accordingly, the task of this part of the report is to clarify the concept and to formulate its core obligations in the different procedural contexts in which it is applied.

2.1.2 EU Principles Underpinning ex officio: Effectiveness and Equivalence of EU Consumer Protection Law in the National Civil Procedures

362. Generally, the obligation of the national judge to apply EU law in the framework of his own procedural law is subject to the controlling principles of equivalence and effectiveness.[568] With regard to the principle of equivalence, the Court has held that the national judge must apply mandatory EU law *ex officio* whenever national procedural law permits the application of mandatory provisions *ex officio*.[569] Thus, the principle of equivalence requires implies that EU law should not be treated worse than mandatory domestic law. The principle of equivalence has therefore operated to allow the national judge to apply his procedural law – when necessary - in an

[566] Felix Koechel, 'Wann steht die Zuständigkeit des zuerst angerufenen Gerichts im Sinne von Art.27 EuGVVO fest?' *IPRax* 2014, 394, 395 (with references to French case law in fn. 21).

[567] Felix Koechel, 'Wann steht die Zuständigkeit des zuerst angerufenen Gerichts im Sinne von Art.27 EuGVVO fest? *IPRax* 2014394, 395 f, with many examples.

[568] Burkard Hess, *Europäisches Zivilprozessrecht* (Müller 2010); § 11, paras.5 ff.

[569] Case C-126/97 *Eco Swiss* EU:C:1999:269.

innovative way[570] in order to make mandatory Union law effective at the domestic level.[571]

363. In cases where national law has not provided adequate procedural tools, the ECJ has also utilised the principle of effectiveness in order to empower the national judge to implement mandatory Union law.[572] From this perspective, the UCTD offers an additional legal basis on which the national judge can be empowered. As Arts.6 and 7 of the Directive require the Member States to implement the prohibition of unfair clauses efficiently,[573] the ECJ interprets these provisions as creating an obligation on the part of the national judge to apply the provisions (and the implementing laws) of the Directive of his or her own motion even when national procedural law does not empower the judge to do so.[574] In this context, it was thus easy for the ECJ to derive the procedural obligation of the national judge to implement the directive from a positive norm of the UCTD itself.

[570] Here, the requirement of equivalence usually transforms a discretionary power under national law in an obligation under EU law, often in connection with the obligation of *effet utile* of the respective EU instrument.

[571] The ECJ tends to examine firstly consumer protection in line with the principle of equivalence and subsequently with the principle of effectiveness. In *Asturcom* (Case C-40/08 *Asturcom Telecomunicaciones* EU:C:2009:615) the Court, beginning from the importance of *res judicata*, did not find that the principle of effectiveness was undermined by the national procedural rule (a time limit), (and in particular that effectiveness should not operate to "compensate" for the "complete inertia" on the part of the consumer); it then turned to consider the equivalence principle, finding that Art.6 UCTD should be understood as a rule having the ranking of public policy (and thus be invoked in similar circumstances).It has also conceived of Art.6 UCTD as a rule of public policy in *Asbeek Brusse*, (Case C-488/11 *Asbeek Brusse* EU:C:2013:341).

[572] Koen Lenaerts *et al* (eds) (Maselis/Gutman/Nowak) *EU Procedural Law* (OUP 2014), para.4.05.

[573] Text supra at fn. 379.

[574] Case C-243/08 *Pannon GSM* EU:C:2009:350*;* Case C-618/10 *Banco Español de Crédito* EU:C:2012:349.In the legal literature, some authors stress the duty of the national judge to invoke the unfair nature of an unfair term on her own motion, see Jules Stuyck, ''Case C-243/08, Pannon GSM Zrt. v. Erzsébet Sustikné Györfi, Judgment of the Court (Fourth Chamber) of 4 June 2009, and Case C-40/08, Asturcom Telecominicaciones SL v. Maria Cristiba Rodriguez Nogueira, judgment of the Court (First Chamber) of 6 October 2009'' (2010) 47 CMLR 879, 890.

364. Sometimes, the ECJ has relied on the principle of effectiveness (as well as on *ex officio*) in order to reinforce and enlarge the power possible to be exercised by the national judge to control the (unfair) clause.[575] In these constellations, effectiveness was used to overcome overly formalistic approaches of the national procedures.[576] However, the principle of effectiveness is not unlimited as it is usually balanced against the objectives of the national procedural rule invoked.[577]

2.1.3 Constitutional Underpinnings: The Duty of Effective Judicial Protection

365. In the early case law of the ECJ, the *ex officio* application of the UCTD appeared to constitute an integral reflection of the guiding principles of equivalence and effectiveness.[578] In recent years, it is increasingly formulated as a self-standing principle of EU procedural consumer law.[579] However, there are also judgments where the Court used *ex officio* as a principle that operates to provide for and promote effective judicial protection. Sometimes, the Court directly referred to Art.47 CFR (and to Arts.6 and 13 ECHR) where the principle of effective judicial protection is clearly stated.[580] Based on this "constitutional background" the ECJ even

[575] Case C-40/08 *Asturcom Telecomunicaciones* EU:C:2009:615, paras.33–34; Case C-618/10 *Banco Español de Crédito* EU:C:2012:349, paras.42 f.

[576] Case C-618/10 *Banco Español de Crédito* EU:C:2012:349; compare Case C-415/11 *Aziz* EU:C:2013:164. Cf. Maria Berger, *Organisation und Verfahren der ordentlichen Gerichtsbarkeit im Lichte der Rechtsprechung des Gerichtshofs der Europäische Union* (Manz 2013) 161 -163.

[577] Case C-415/11 *Aziz*, EU:C:2013:164 para.53: "As regards the principle of effectiveness, it is the Court's settled case-law that every case in which the question arises as to whether a national procedural provision makes the application of European Union law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies."

[578] Joined Cases C-240/98 to 244/98 *Océano Grupo Editorial and Salvat Editores* EU:C:2000:346; Case C-429/05 *Rampion and Godard* EU:C:2007:575.

[579] Since Case C-40/08 *Asturcom Telecomunicaciones* EU:C:2009:615, paras.33–34; Case C-243/08 *Pannon GSM* EU:C:2009:350, paras.31-32; Case C-618/10 *Banco Español de Crédito* EU:C:2012:349, paras.42 f.

[580] Typically, the AG made reference to the CFR and to Art.47 in particular while the Court has been reluctant to refer explicitly to the Charter. Increasingly, express reference is also made by the Court

reinforced the procedural obligations of the national judge who must address the unfairness of a general term even when the issue was not raised by any party[581] and who must clarify whether the dispute concerns a consumer even when this argument has not been brought by the parties. As a result, the ECJ encouraged judicial activism, based on constitutional underpinnings.

366. Against this background, one should not try to clearly separate the *ex officio* application from the (effectiveness and equivalence) principles of EU law that can be considered to be complementary.[582] Indeed, it has been conceived as a concretisation of these underlying principles: that is to say, of equivalence when a national remedy was available, and of effectiveness in order to overcome the unreasonable impediments of the national procedure. Effective judicial protection was used to reinforce the autonomy of the national judge in the framework of his or her own procedural law.[583] When it comes to the efficient protection of consumer

(Case C-169/14 *Sánchez Morcillo and Abril García* EU:C:2014:2099). Reference is made not only to Art.47 but also other CFR provisions; see for example: Case C-470/12 *Pohotovosť* EU:C:2014:101 (reference to Art.38 CFR). In some cases, this might be based on the formulation of the questions of the referring court (Case C-503/15, *Margarit Panicello*), in others, the AG or ECJ might reformulate the question to make reference to effective judicial protection (see, for example, Case C-472/11 *Banif Plus* EU:C:2013:88) and in others still, the referring court engages Art.47 and the ECJ avoids responding to this particular dimension of the case (see Case C-49/14 *Finanmadrid* EU:C2016:98 and compare the approach of AG Szpunar, who analyses the Art.47 aspect, at paras.78 *et seq.*)

[581] Case C-243/08 *Pannon GSM* EU:C:2009:350, paras.31-32, see *Ancery* and *Wissink*, EuRPL 2010, 307 ff.

[582] Further references on different delineations in the legal literature cf. Koen Lenaerts *et al* (eds) (Maselis/Gutman/Nowak) *EU Procedural Law* (OUP 2014) para.4.05 at fn. 13.

[583] It should be noted that these principles do not always coincide. An illustration was given by the Case C-312/14 *Banif Plus Bank* EU:C:2015:794, paras.28–36, where the Court evaluated requirements flowing from the principle of effectiveness in light of the principle of effective judicial protection as laid down in Art.47 CFR. The case concerned a Hungarian procedural rule which obliged a judge, after having established the unfairness of a contractual term of its own motion, to give the parties the opportunity to make submissions in regard of that finding. Failing to do so the judge was prevented from declaring the term invalid. The referring judge wondered whether such rule was compatible with the duty imposed upon him to draw all necessary conclusions from the finding that a contract term was unfair. The issue thus concerned whether the requirement following from the principle of effectiveness, namely drawing all necessary conclusions from the finding that a contract

rights, the national judge might even transgress these impediments of his or her own procedural law and adopt a more active or protective role.[584] However, the ECJ usually refrains from giving clear instructions to the national judge on how to deviate from the national procedures.[585]

367. From the perspective of the national judge, the legal foundation of *ex officio* is not easy to understand. As long as it is based on equivalence, the national judge will finally apply his or her own procedural law. When the principle is derived from effectiveness or the effective judicial protection under Art.47 CFR, the legal basis is EU law. When this issue was raised in the interviews, only a few answers were given (which in itself seems to be telling). Generally, the legal foundation and the ambit of the *ex officio* principle seem to be unclear.[586]

368. The following question was asked in both the online questionnaire and the interview: According to the case law of the CJEU, judges must apply consumer protection law *ex officio* (i.e. of their own motion). Please indicate – on the basis of your experience – if it is clear to you when consumer protection law should be applied *ex officio*.

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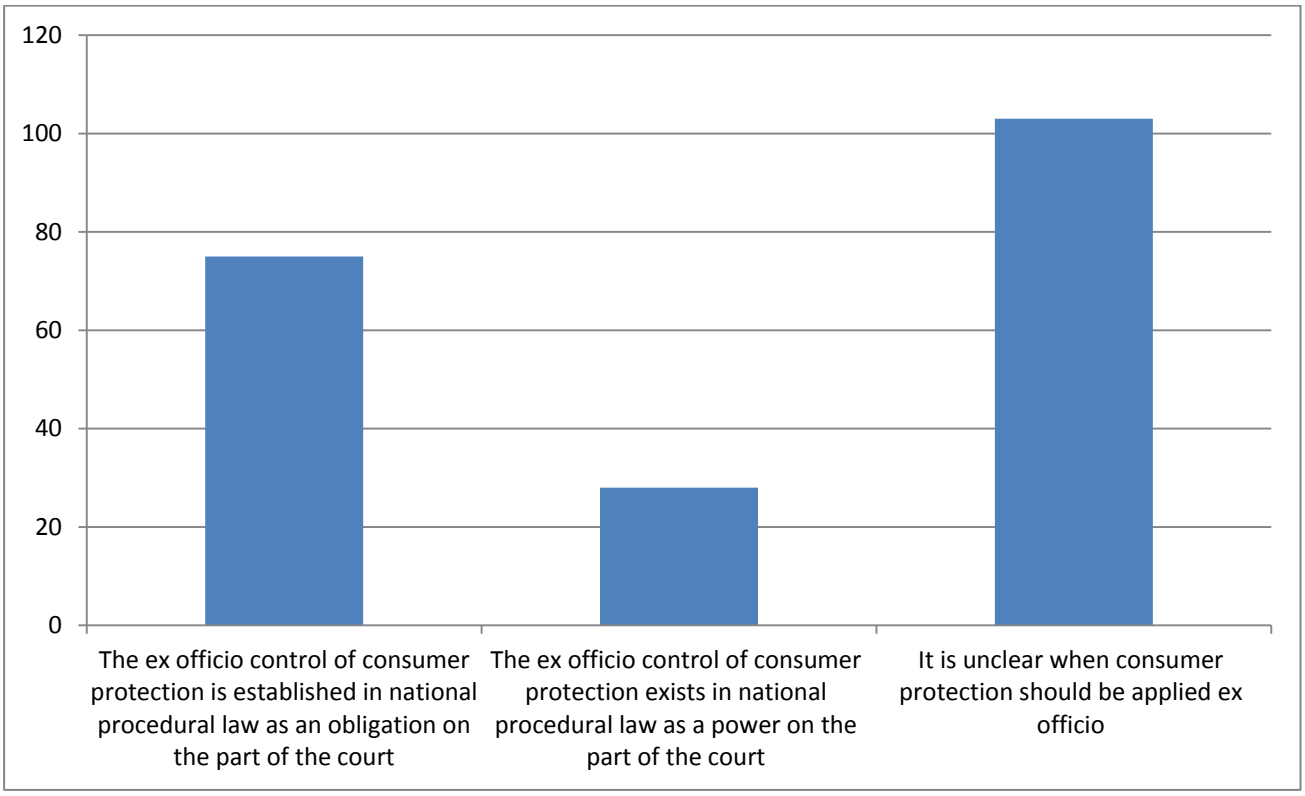
term is unfair, was compatible with the right to be heard, which is part of the principle of effective judicial protection. The ECJ did not come to opposite conclusions in regard of both principles and held that the right to be heard "cannot, moreover, be regarded as being, in itself, incompatible with the principle of effectiveness".

[584] Alain Ancery and Mark Wissink, 'ECJ 4 June 2009, Pannon GSM Zrt. v. Erzsébet Sustikné Győrfi' (2010) 18 *ERPL* 307, 313 ff. (providing for "guidelines for judicial activism").

[585] Example: Case C-32/12 *Duarte Hueros* EU:C:2013:637, paras.35 ff. where the Court held that Spanish procedural law obliging the consumer to anticipate different outcomes of the proceedings is "completely uncertain in nature" and make the enforcement of EU consumer law "impossible" (para.40). The Court stated that the Spanish procedural law was "not in conformity with the principle of effectiveness" (para.41). However the Court ended by saying: "it is up to the national judge (…) to achieve (…) an outcome which is consistent with the objective pursued by this directive."

[586] In this case, the question asked was specifically about the *ex officio* assessment of the validity of standard contract terms: "According to the case-law of the CJEU, judges (and potentially other dispute resolution facilitators) must assess contract terms as to their unfairness *ex officio* (i.e. of their own motion), where they have available the legal and factual information necessary for this task. In your national legal system, is it clear when this *ex officio* assessment of the unfairness of contract terms should be made?"



Responses to the Online Survey and Interviews.[587]

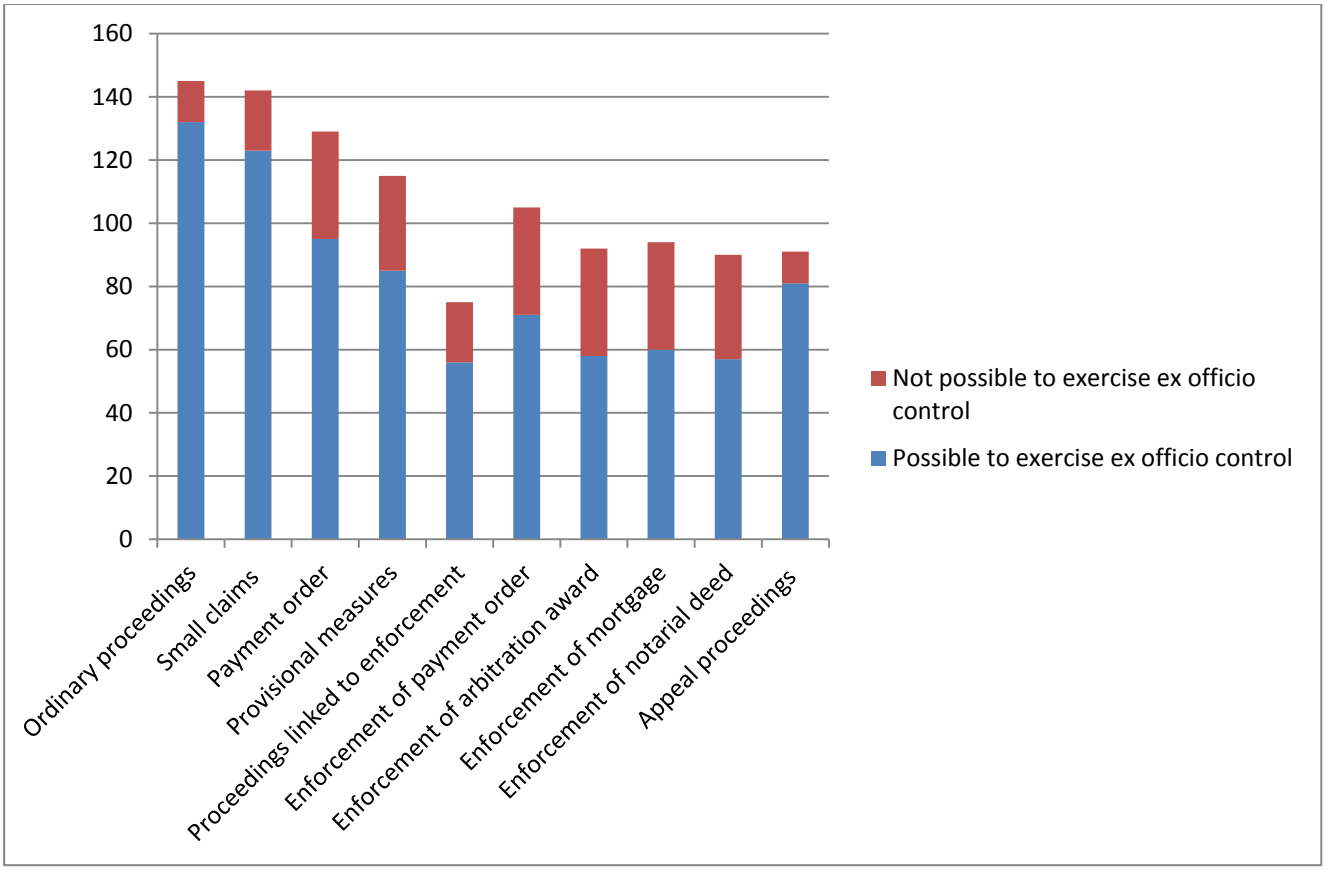
2.2 The practical operation of the concept

369. As the *ex officio* application of EU consumer law is very much related to the applicable domestic procedural law and to the individual case under consideration,[588] it seems to be necessary to explain the principle against the background of the different procedural contexts in which it has been identified as applicable by the ECJ. The answers given in the online survey and interviews demonstrate that the *ex officio*

[587] This question was asked to all stakeholders in both the online survey and the questionnaires. The respondents to the online questionnaire and interviews are – while not exactly the same individuals – from the same group of respondents, including lawyers, judges, CPAs, consumers and ADR entities. Given that the same questions were asked (and in those cases in which the data collected has been collated), the same "closed" responses presented, and in light of the small number of answers received to certain questions, we have collated the responses. Here, the responses to the online survey and the interviews, as well as responses from all stakeholders, have been collated.

[588] For a very critical analysis, see Hanna Schebesta, "Does the National Court Know European Law? A note on *Ex officio* Application after Asturcom" (2010) 18 *ERPL* 847, who opines that the ECJ's approach is not consistent.

principle is applied differently in the stages of ordinary proceedings and in special procedures:[589]



Responses to the Online Survey and Interviews.[590]

[589] The following question was asked in the interviews: "On the basis of your experience, can you indicate at what stage the court will examine, or will refrain from examining, consumer law *ex officio*? If this particular stage of the procedure is not heard before a court but by another authority, is there a requirement, per national procedural law, that this authority should examine consumer law *ex officio* (or alternatively, does it limit the possibility for such an examination)?"

[590] This question was asked to all stakeholders in both the online survey and the questionnaires. The purpose of the question was not to identify whether ex officio control should be made in a particular national legal system but whether stakeholders understood whether or not it should be made or had experience of ex officio control. The question of whether ex officio control should be made was one for the national reports. The respondents to the online questionnaire and interviews are – while not exactly the same individuals – from the same group of respondents, including lawyers, judges, CPAs, consumers and ADR entities. Given that the same questions were asked (and in those cases in which the data collected has been collated), the same "closed" responses presented, and in light of the small number of answers received to certain questions, we have collated the responses.

2.2.1 Ordinary proceedings

370. Initially, the obligation to apply consumer protection law of the court's own motion was developed with regard to *jurisdiction and arbitration clauses* in the context of the UCTD. A typical example of its application to jurisdiction clauses arose in the case C-243/08 *Pannon.*[591] In this case, a telephone subscription contract provided for a jurisdiction clause at the place of the entrepreneur (Pannon). The company sought a payment order in the agreed court which was 275 km away from the (vulnerable[592]) consumer's home; no public transportation was available.[593] When the consumer filed an opposition (without submitting further arguments), the judge realised that the territorial jurisdiction of the court could only be based on the jurisdiction clause. However, as the jurisdiction was not exclusive, under Hungarian procedural law, it was no longer possible to raise that issue after the first filing by the defendant of her defence to the substance of the dispute. In these circumstances, the referring judge asked the ECJ whether Art.6 (1) UCTD permitted him to raise the issue of territorial jurisdiction of his own motion. The ECJ relied on its existing case law and answered that Art.6 UCTD empowers the national judge to examine the unfairness of the term of his own motion even when the [vulnerable][594] consumer has not challenged the term.[595]

371. In this context, the *ex officio* application of consumer law applies to all legal and factual issues concerning the validity of the clause, especially in cases where the

[591] Case C-243/08 *Pannon GSM* EU:C:2009:350, annotated by Alain Ancery and Mark Wissink, 'ECJ 4 June 2009, Pannon GSM Zrt. v. Erzsébet Sustikné Győrfi' (2010) 18 *ERPL* 307.

[592] On this categorisation see supra, Chapter 1, 'General Structure of Procedural Consumer Protection'.

[593] The consumer was receiving social invalidity benefits and, obviously, not in a factual position to defend the case in front of the designated court.

[594] As usual, the ECJ did not explicitly stress this element which – to our opinion – was a decisive factor.

[595] In addition, the ECJ clarified that the expression "as provided for under their national law" in Art.6(1) UCTD cannot be understood as an obligation for the consumer to contest successfully the unfair term by lodging the relevant application.", Case C-243/08 *Pannon GSM* EU:C:2009:350, paras.27 -28.

clause in fact prevents the consumer from taking legal action – namely, when the designated court is too remote from the consumer's domicile[596], when the arbitration proceedings are more expensive than the losses claimed,[597] or when arbitration proceedings are practically not accessible for the consumer,[598] for example. From a procedural perspective, the *ex officio* control of the validity of the jurisdiction and/or arbitration clauses under Arts.3 and 6 UCTD appears to constitute an indirect control of a factual impediment to the consumer's right to an efficient remedy under Arts.47 CFR and 6 ECHR. One might wonder whether the imposition of an exclusive head of territorial (local) jurisdiction (similar to Art.17 and 18 of the Brussels I bis Regulation) might better protect the consumer against the abusive imposition of jurisdiction clauses.[599]

372. The same might be said to apply to arbitration clauses: the choice of remote, inaccessible and too expansive arbitration fora should be prohibited in consumer cases. Yet, the case law of the ECJ demonstrates that an examination of the specific case at hand might be more appropriate for arbitration.[600] Accordingly, the case law demonstrates that the Court makes an individual and comprehensive assessment of arbitration clauses which might be more appropriate under Arts.3 and 6 UCTD. This approach has been endorsed by Art.11 of the Consumer ADR Directive[601] which provides that "the solution imposed shall not result in the consumer being deprived of the protection afforded to him by the provisions that cannot be derogated from by

[596] Joined Cases C-240/98 to 244/98 *Océano Grupo Editorial and Salvat Editores* EU:C:2000:346; Case C-137/08 *VB Pénzügyi Lízing* EU:C:2010:659.

[597] Case C-76/10 *Pohotovost'* EU:C:2010:685.

[598] Case C-168/15 *Tomášová* EU:C:2016:602.

[599] This option would not exclude that the consumer freely submits to the jurisdiction of a court seized by the trader after the dispute has arisen, see the new Art.26 (2) of the Brussels I bis Regulation.

[600] It might be advisable to clearly delineate these constellations from the ADR proceedings under the ODR Regulation 534/2013 (EU) which are often based on online procedures. However, it must be noted that in many of the cases referred to the ECJ the (vulnerable) consumers would likely not have been able to make use of sophisticated IT tools in order to defend their rights.

[601] Directive (EU) 2013/11 on Consumer ADR.

agreement by virtue of the law of the Member State where the consumer and the trader are habitually resident".[602]

373. More broadly, the ECJ has been asked by the national courts to clarify the extent to which national judges are empowered to raise of their own motion legal and factual issues which the consumer has not addressed. These situations relate to the existence of potentially unfair terms (even when no conflict in that area was raised at first instance, at the hearing, or during the appeal),[603] the existence of a consumer situation[604] and the extent of the control of the validity of a consumer contract to related issues not explicitly raised by the parties.[605] Here, the ECJ relied on the principle of effectiveness in order to extend the power of the national judge to apply mandatory consumer law.[606] However, the Court usually balances the obligation of the national judge against the procedural provisions of national law restricting the judge's power and the limitations of national procedures derived from general principles; these include the notion of party control and disposition (over factual allegations and proof) and the need to accelerate proceedings by imposing

[602] Art.11(2) ADR Directive which (only) applies to binding awards.

[603] Case C-227/08 *Martín Martín* EU:C:2009:792 (Appellate court must control the nullity of a clause even when no plea had been raised in the first instance, nor in appellate proceedings); Case C-397/11 *Erika Jőrös* EU:C:2013:340 (para.30).

[604] Case C-497/13 *Faber* EU:C:2015:357 (National court must determine whether the purchaser may be classified as a consumer within the meaning of that directive, even if the purchaser has not relied on that status, as soon as that court has at its disposal the matters of law and of fact that are necessary for that purpose or may have them at its disposal simply by making a request for clarification. Art.5(3), Reg. 1999/44 must be regarded as a provision with equal standing to national rule with status of public policy and be applied *ex officio*).

[605] Case C-137/08 *VB Pénzügyi Lízing* EU:C:2010:659; Case C-34/13 *Kušionová* EU:C:2014:2189; Case C-397/11 *Jőrös* EU:C:2013:340.

[606] Case C-32/12 *Duarte Heros* EU:C:2013:637, paras.35 ff., for a critical analysis, see Christoph Althammer, 'Mindeststandards und zentral Verfahrensgrundsätze im deutschen Recht' in Christoph Althammer and Matthias Weller (eds), *Mindeststandards im europäischen Zivilprozessrecht* (Mohr 2015) 3, 19 who asserts that the ECJ does not show much respect with regard to the national procedure – but finally comes to the conclusion that (German) national procedural law opens up a solution the national judge can endorse.

procedural obligations on the parties to litigate their case in an active way.[607] Consequently, the outcomes of these cases are less predictable than in the first case group.

374. Nevertheless, the *ex officio* application of EU consumer law in this constellation means that the court is empowered to clarify the factual and legal circumstances by asking questions of the parties, by inviting them to present additional means of evidence and to discuss extensively legal issues when there are facts at hand which indicate that the case is subject to (mandatory) consumer law. If the judge does not sufficiently raise and explore these issues in the first instance, this might be seen as a procedural deficiency to be remedied in the second instance. Generally, national judges are empowered to use their (modern) procedural function in order to be vigilant and helpful regarding the application of EU consumer protection law.

2.2.2 Default Proceedings and Payment Orders

375. The structural problem of default procedures and payment orders results from their basic framework; that is to say, these proceedings are initiated by the creditor against the consumer, usually for the non-payment of a debt arising out of a consumer contract. Often, the consumer does not defend the case (giving rise to the situation of the default judgment) or can only defend the case when the enforceable title (the payment order) has already been issued. Here, the question arises as to whether the possibility to advance a defence against the claim entails an effective remedy which also permits a full review of the validity of the consumer contract. The issue has been often raised in payment order proceedings where experience shows that consumers rarely use the review procedures. Consequently, national judges who have had to issue a payment order have referred questions to the ECJ asking whether they could review *ex officio* the validity of a clause which was attached to the application of the payment order. The ECJ derived from Art.6 UCTD that the national judge (or judicial

[607] Case C-397/11 *Jőrös* EU:C:2013:340.

secretary[608]) must be able to assess *ex officio* the unfairness of a clause in a consumer contract before issuing the payment order.[609]

2.2.3 Enforcement of Judgments and of Other Enforceable Titles

376. Providing for effective consumer protection in enforcement proceedings has much to do with deficiencies in the previous proceedings (especially in payment order procedures). The starting point of these proceedings is usually the fact that either the consumer often has not filed an opposition to the claim[610] or that the national procedures permit the establishment of an enforceable title, with the involvement of neither the consumer nor a judge. This group of case law mainly arises in relation to notarial deeds[611] and to mortgages.[612] Here, the question that comes to the fore is whether the enforcement organ or the judge responsible for the surveillance of the enforcement proceedings must verify *ex officio* whether the claim underlying the title was given in compliance with EU consumer law. In these contexts, the ECJ usually applies the principles of effectiveness and effective judicial protection in order to assess the procedural system of the Member State as a whole.[613] In case the national procedural system does not provide for any efficient review of the claim with

[608] In payment order procedures. It is necessary that the legality of the contract terms is reviewed at some point in the procedure; the CJEU held that national law which precludes the court ruling on the enforcement of payment order to assess of its own motion whether a term is unfair, when the authority (the *secretario judicial*) hearing the application for the payment order is not empowered to make such an assessment, appears to run counter to the principle of effectiveness. It considered that the assessment should be made at the "earlier" stage. See Case C-49/14 *Finanmadrid* EU:C:2016:98 (Spanish law was changed accordingly).

[609] Case C-618/10 *Banco Español de Crédito* EU:C:2012:349.

[610] In the case of payment order proceedings, consumers had often not opposed to the payment order, example: Case C-49/14 *Finanmadrid* EU:C:2016:98

[611] Case C-32/14 *ERSTE Bank Hungary* EU:C:2015:637; Case C-169/14 *Sánchez Morcillo and Abril García* EU:C:2014:2099.

[612] Case C-537/12 *Banco Popular Español* EU:C:2013:759; Case C-482/13 *Unicaja Banco and Caixabank* EU:C:2015:21; Case C-613/15 *Ibercaja Banco* EU:C:2016:195.

[613] Case C-32/14 *ERSTE Bank Hungary* EU:C:2015:637.

regard to EU consumer law, the ECJ requires an *ex officio* review by the enforcing judge. The outcome might be different when the national procedure provides for a review at the stage when the enforceable title is established. However, the protection of the (vulnerable) consumer may require additional review (and provisional protection – that is to say, the staying of the enforcement proceedings while the potential violation of consumer law is assessed) when the enforcement entails irreversible consequences (such as the loss of the family home).[614]

377. From a procedural point of view, these cases mainly relate to the issue of whether the consumer disposes of an effective remedy to a judge who is able to assess the validity of the contract. Again, the problem predominantly concerns Arts.47 CFR and 6 ECHR and the right to effective judicial protection. In consumer cases, effective judicial protection includes the obligation of the judge to assess of his or her own motion the validity of the clause, once the judge has been seized by the consumer.

378. It should be noted that some Member States have reacted to the case law of the ECJ and adapted their procedural laws accordingly. The most prominent example is Spain where several specific *ex officio* control mechanisms were introduced in 2013. When it comes to the enforcement of a payment order, the court must now assess of its own motion whether the terms in the enforcement instrument are compliant with EU consumer law; in addition, the *secretario judicial* is also now obliged to assess the fairness of the clauses *ex officio* before issuing a payment order.[615] In the case of non-judicial enforcement titles (notarial deeds, mortgages), the party against whom enforcement is sought (usually the consumer) can object on the basis that the contract includes unfair terms.[616] However, in other Member States the issue has not yet been resolved so far.[617]

[614] Case C-415/11 *Aziz* EU:C:2013:164.

[615] Case C-49/14 *Finanmadrid EFC* EU:C:2016:98.

[616] National Report, Questions 8.4.5; 8.4.7; 8.6.1; 11.1.1; 11.1.4; 11.4.1; and 11.4.3: Spain (Law on civil procedure of 2000, amended by Law 1/2013 (LEC): Art.551(1) LEC - enforcement order can be issued once claim has been lodged, procedural rules and requirements have been observed, and no formal defect; Art.552(1) LEC – if the court considers terms in enforcement instrument to be unfair, it shall hear parties within 15 days; thereafter, it shall decide on issue within five working days; Art.557(1) LEC - where enforcement is ordered on basis of non-judicial/arbitral instrument, party against whom enforcement is sought can object on the basis the term includes unfair terms (other

2.2.4 Arbitration and ADR

379. Consumer arbitration has mainly been an issue with regard to mobile phone contracts providing for arbitration clauses.[618] Two main situations are to be distinguished. On the one hand, the consumer may bring a civil action and the businessman might invoke the arbitration clause as a defence against the admissibility of the lawsuit. Here, the national court must assess on its own motion whether the arbitration clause corresponds to Arts.3 and 6 of the UCTD.[619] On the other, the situation arises where annulment proceedings against the arbitral award are often initiated in the context of the enforcement of the award. Here, the arbitral award is subject to a limited review by the national judge. The latter must usually verify whether the arbitration agreement was valid and determine that the award does not infringe public policy. In this context, the Court has held that the national judge (not the arbitral tribunal itself) must apply mandatory EU law which includes consumer protection law. Now, Art.10 (1) of the EU Directive on Consumer Alternative Dispute Resolution[620] explicitly states that an agreement between a consumer and a trader to submit dispute to arbitration shall not be binding if it has been concluded before the dispute materialised.[621] In addition, Art.11 of the ADR

grounds also identified); Arts.815 and 816 LEC set out requirements to be satisfied by the *secretario judicial* in making enforcement order).

[617] This is currently the case in Ireland, see the information available at the government's information website: http://www.citizensinformation.ie/en/housing/losing_your_home/home_repossession.html, visited on 01/18/2017.

[618] The latest developments in Europe and the US are summarized by Dagmar Coester-Waltjen, 'Verbraucherschiedsgerichtsbarkeit' in Burkhard Hess (ed), *Der europäische Gerichtsverbund* (2017).

[619] See supra at para.370.

[620] Directive (EU) 2013/11 on Consumer ADR.

[621] As a result, mandatory arbitration clauses in consumer contracts are no longer permitted, Dagmar Coester-Waltjen, 'Verbraucherschiedsgerichtsbarkeit' in Burkhard Hess (ed), *Der europäische Gerichtsverbund* (2017).

Directive obliges arbitral tribunals to apply mandatory consumer law.[622] The same obligation applies to state courts when they review the award in recognition or annulment proceedings.

380. In the context of consumer arbitration, the Court has developed the *ex officio* application on the basis of the principle of equivalence. As national arbitration laws usually establish an obligation on the part of the judge to review the validity of the arbitration clause and the respect of mandatory law by the arbitral tribunal, the Court stressed that these rules on the review must also be applied with regard to EU consumer law. However, the role of the judge in the enforcement proceedings must be an active one; that is to say, at the moment when the judge is confronted with consumer arbitration he or she must of their own motion examine and determine whether the arbitration agreement and the award are compatible with the pertinent EU consumer law.

381. Finally, it should be noted that implementation of the EU Directive on Consumer Alternative Dispute Resolution[623] by the Member States raises some concerns regarding the efficient implementation of mandatory consumer law. According to Art.11 of the Directive, ADR bodies involved in consumer disputes shall respect the principle of "legality" when proposing a mandatory settlement of the dispute between the trader and the consumer. Legality requires that "the solution imposed shall not result in the consumer being deprived of the protection afforded to him by the provisions that cannot be derogated from by agreement by virtue of the law of the Member State where the consumer and the trader are habitually resident." Accordingly, mandatory consumer law must also be applied and implemented by ADR bodies when they impose binding settlements as arbitral awards.

382. However, most of the consumer ADR schemes do not provide for binding, but rather for amicable settlements. Here, the role of mandatory consumer law is thus still

[622] However, this provision is drafted using a very complicated wording as it directly borrows the wording of Art.6 (2) of the Rome I Regulation (which is much too complicated, too).

[623] Directive (EU) 2013/11 on Consumer ADR.

unsettled.[624] Yet, as these proceedings are aimed at achieving a consensual solution, the proposal of the ADR body (which is often financed by the trader) may deviate from mandatory Union law for the sake of a compromise. In some EU Member States (i.e. in Germany), the implementation of the Directive has modified these requirements in the sense that the settlement proposal shall only "respect" mandatory consumer protection law.[625] One might argue that the proposed settlement will not bind the consumer and that the latter might subsequently institute legal proceedings.[626] However, it seems highly probable that the consumer will agree to an immediate partial payment of his or her damages instead of initiating lengthy, costly and unpredictable court proceedings.[627] Compared to court proceedings, consumer ADR often appears to be quicker, less costly (or even cost-free) and more accessible.[628] As a result, large areas of consumer protection law might be shielded from the civil judiciaries of the EU Member States and – ultimately – also from the ECJ itself.[629] Consequently, mandatory EU consumer law might only be partially enforced by private bodies, a situation that could entail a kind of "enforcement light".

[624] Burkhard Hess and Nils Pelzer, 'Cautious Steps towards the Construction of an ADR System' in Felix Steffek and Hannes Unberath, *Regulation of Dispute Resolution in Germany* (Hart Publishing 2013) 209.

[625] National Report: Germany (Cf. Section 19 (1)2 of the German Implementing Law (Verbraucherstreitbeilegungsgesetz), Bundesgesetzblatt 2016 I 254: „Der Schlichtungsvorschlag soll am geltenden Recht ausgerichtet sein und soll insbesondere die zwingenden Verbraucherschutzgesetze beachten." The German lawmaker referred to Art.9 (2) (b) (iii) of Directive 2013/11 according to which: „ the proposed solution may be different from an outcome determined by a court applying legal rules." However, this provision relates to the information of the consumer about the proceedings and does not explicitly address mandatory law). '

[626] Reinhard Greger, 'Commentary § 19 Verbraucherstreitbeilegungsgesetz' in Reinhard Greger, Hannes Unberath and Felix Steffek, *Recht der alternativen Konfliktlösung* (Beck 2016) paras.5 and 6.

[627] Horst Eidenmüller and Martin Engel, 'Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe' (2014) 29 *Ohio State Journal on Dispute Resolution* 261, 280; Burkard Hess, 'Prozessuale Mindestgarantien in der Verbraucherschlichtung' (2015) *Juristenzeitung* 548.

[628] It is the intention of the Directive to improve consumer ADR.

[629] Burkard Hess, 'Prozessuale Mindestgarantien in der Verbraucherschlichtung' (2015) *Juristenzeitung* 548.

This would be an unwelcome outcome. Therefore, an efficient rights-based dispute resolution model for consumer protection should be guaranteed in the Member States and be based on a new EU Directive, setting minimum rules for consumer litigation in state courts and ADR bodies.

3. The practice in the EU Member States

3.1 Ordinary proceedings

3.1.1. Jura novit curia and the ex officio Application of Consumer Law

383. The national reports demonstrate the different ways in which the *ex officio* obligation is applied by the courts of the Member States. In 8 Member States, *ex officio* is limited (despite the case law of the Court of Justice) to the control of the unfair contract clauses under the UCTD.[630] In the others, the *ex officio* control goes further as consumer protection law may qualify as mandatory law which is generally applied *ex officio*. Again, there are many divergences in the scope and the operation of the principle.[631]

[630] National Reports: Austria, Bulgaria (where a lack of legal clarity is reported; that is to say, it is difficult to identify the relevant legislation), Finland, Hungary (where a lack of legal clarity is reported), Latvia and Lithuania (in both Member States the general legal provision of the consumer code was reduced to the *ex officio* control of unfair contract terms); Spain (unclear whether *ex officio* goes beyond the control of unfair terms); United Kingdom (CPA 2015, s.71, which provides "Duty of court to consider fairness of term: (1)Subsection (2) applies to proceedings before a court which relate to a term of a consumer contract. (2)The court must consider whether the term is fair even if none of the parties to the proceedings has raised that issue or indicated that it intends to raise it. (3)But subsection (2) does not apply unless the court considers that it has before it sufficient legal and factual material to enable it to consider the fairness of the term").

[631] National Reports: Belgium (some provisions are of public policy), Croatia, Cyprus (it is unclear whether consumer law is part of public policy), Denmark, Germany, Greece, Italy (by express provisions, Arts.36 and 143 Consumer Code), Netherlands (Art.6:248 Civil Code mainly applied to unfair terms), Poland (*jura novit curia*), Portugal (public policy), Slovakia, Slovenia and Sweden.

384. Thus far, 8 Member States have inserted into their national laws express provisions on the *ex officio* control of either unfair terms or mandatory consumer protection law.[632] The pertinent provisions are sometimes found in relevant acts of consumer protection, and at other times in the national procedural laws[633]. In all other Member States the *ex officio* application has been recognised by the national courts – sometimes as a requirement of Union law[634], sometimes simply as part of the general principle *iura novit curia*[635] or because a specific provision has been considered to form part of the body of rules on public policy.[636] Providing for an express provision in national law seems to improve legal certainty for national judges.[637] With the exception of Spain[638], the courts of these Member States have seldom referred preliminary references to the ECJ addressing the scope of *ex officio* control.

385. From the perspective of the national judge, the issue of *ex officio* application is often perceived differently. The national judge operates in the environment of his or her national procedure as demonstrated above (see paras.1 ff.). Accordingly, the protection of the consumer depends on whether and to what extent the judge is empowered to apply all legal provision of mandatory law on his or her motion or at least as part of public policy. In the latter case, the *ex officio* application depends on the status of the EU consumer law in the national legal order, which often appears to

[632] National Reports: France: Consumer Code, Art.R632-1; Italy: Art.339 § 3 CCP; Latvia, Art.6 Consumer Protection Act; Lithuania: Art.6.228 Consumer Protection Act; Netherlands: Art.162 DCCP; Portugal: Art.16 Consumer Protection Act; Slovakia: Art.5 Consumer Protection Act; Spain: *ex officio* is partially addressed in the LEC as a reaction to case law of the ECJ); England & Wales (Consumer Protection Act 2015, S.71)

[633] See supra footnote 172.

[634] National Reports, Question 11.1.1: Austria (Supreme Court 16.11.2012, 6 Ob 240/11d, ECLI:AT:OGH0002:2012:0060OB00240.11D.1116.000); Bulgaria; Finland; Luxembourg.

[635] National Report, Question 11.1.1: Poland.

[636] This is, for example, the case for some consumer law provisions in Belgium. National Report, Question 11.1.1: Belgium.

[637] National Report, Question 11.1.1: Romania; Interview with a Belgian judge.

[638] National Report, Questions 8.4.7; 8.6.1 and 11.4.1: Spain (the legal provisions were a reaction of the national lawmaker to the case law of the ECJ).

be unclear. In the next paragraph, the situation in these Member States is described more specifically.

386. In Belgium, some consumer law provisions are considered to be of public policy and have to be applied *ex officio* on that basis.[639] While the principle of *iura novit curia* usually applies, the mandatory nature of consumer law will nevertheless make a difference since in default proceedings courts are only obliged to verify rules of public policy *ex officio*.[640] In Denmark, a court will in principle apply the relevant laws in respect of the pertinent the facts in accordance with the *iura novit curia* principle. Danish courts appear to have a margin of discretion in this regard.[641] They are, however, obliged to apply *ex officio* 'mandatory statutory law', a notion akin to public policy or 'ordre public'. This includes mandatory rules under EU consumer law.[642] The same goes for Sweden: while the principle of *iura novit curia* applies, a judge will be bound by the claims of the parties if it concerns matters amenable to settlement. However, matters not amenable to settlement a.k.a. mandatory provisions of law must be applied *ex officio*. This may include provisions of consumer law, such as the rules on unfair contract terms. [643] Also in France, a court has the discretionary power to apply the relevant law but is obliged to apply rules of public policy. It is, however, unclear, to what extent consumer law is encompassed by this notion.[644] In Lithuania,

[639] National Report, Question 11.1.1: Belgium.

[640] National Report, Question 11.1.1: Belgium (Art.806, Belgian Judicial Code). According to interviews with a Belgian judge of 18 years' experience ("The *ex officio* obligation is especially unclear when defendant consumers do not enter an appearance") and a lawyer of 5 years' experience, ("ECJ consumer case law is widely ignored, unless explicitly invoked by the parties"; "*ex officio* control – also in consumer law – may be well-established on paper but is less so in practice; Belgian judges tend to look only at national (consumer) law, and not at the relevant European directives").

[641] National Report, Question 8.1.6: Denmark.

[642] National Report, Question 11.1.1: Denmark.

[643] National Report, Question 11.1.1: Sweden.

[644] Interview with a French CPA and a French judge who provided "While national law might provide for a power (Art.R632-1 of Consumer protection code) on the part of the judge to engage in *ex officio* examination of consumer law, this is not necessarily established as an obligation; it has been suggested that it should be clarified as such".

a court is required to be active in all cases where the public interest is affected.[645] Moreover, since 2011 Lithuanian judges are even allowed to collect evidence *ex officio* if the public interest so requires.[646] Similarly, a Croatian judge must assess whether parties' dispositions are not contrary to mandatory rules and public morality in civil proceedings, which encompasses mandatory rules of consumer protection law.[647] The same goes in principle for Bulgaria. An interviewee has, however, remarked that there is a difference between theory and practice.[648] The overview shows that there is a great deal of insecurity about the nature of consumer law in Member States. This is not without consequences since it has an impact on judges' powers to apply EU consumer law *ex officio* and thus also on the effective protection of consumer rights.[649]

[645] National Report, Question 8.1.6: Lithuania (Judgment of the Lithuanian Constitutional Court, 21 September 2006).

[646] National Report, Question 8.1.6: Lithuania (Lithuanian Code of Civil Procedure, Art.179, 2nd paragraph. Interview with a Lithuanian CPA and Lithuanian lawyer "Even where the obligation to examine consumer law (limited to unfair contract terms) is established in national law (with a broad basis, namely, in the constitution as is the situation in Lithuania), in practice, the courts may not be as "active" as necessary, which dictates that consumers must take a more active role and make the consumer dimension of the contract clear".

[647] National Report, Question 11.1.1: Croatia and interview with a Croatian judge.

[648] Interview with a Bulgarian lawyer of 10 years' experience.

[649] A striking example of the current uncertainties is found in an interview with a Romanian judge who declared: Interviewer: "There were several judgment of the CJEU that ruled on the duty of the judge to verify *ex officio* the compliance with consumer protection law. Are the courts in Romania proceeding according to this case law?" Respondent: "I do not know what to answer to you. I am not sure whether the Romanian judge is able to do this in a civil litigation that concerns the private interest of the parties and it is governed by the principle of party disposition (non ultra petita). I mean the court should issue a judgement on what it was requested. We have in our domestic legislation reasons for revision based on the fact the judge gave more than what the parties asked. This principle seems to be somehow against this way of acting."

3.1.2. The Specific Situation Concerning Unfair Contract Terms

387. In various Member States, specific rules apply in relation to the *ex officio* control of unfair contract terms. The *ex officio* application of the UCTD is situated mainly within this framework. These states include Estonia[650], Finland[651], Greece[652], Hungary, Latvia[653] the Netherlands[654], Portugal[655], Romania[656], Slovenia[657], and Spain.[658] In some Member States, these rules exist next to general provisions regarding the *ex officio* powers of judges. This is *inter alia* the case for Belgium, Croatia[659], France[660], Italy, Slovakia[661], England & Wales, and Scotland.[662]

388. Only in a very few Member States do parties bear in principle the full responsibility for the legal qualification of the facts and courts will not apply the law *ex officio* on the basis of the facts submitted. This is the case for Hungary[663], where the legal statements made by the parties are binding upon the court, unless otherwise provided by law. That being said, courts will go beyond the mere formal qualification of facts and look at the actual content of the legal statements provided by the parties.

[650] National Report, Question 11.1.1: Estonia (see, for example, the Judgment of the Estonian Supreme Court, 18 January 2006, N° 3-2-1-155-05).

[651] National Report, Question 11.1.2: Finland.

[652] National Report, Question 11.1.1: Greece.

[653]National Report, Question 11.1.1: Latvia.

[654] National Report, Question 11.1.1: the Netherlands (Dutch Civil Code, Art.6:233).

[655] National Report, Questions 11.1.1 and 11.1.2: Portugal (Portuguese Consumer Protection Law, Art.16).

[656] National Report, Question 11.1.2: Romania.

[657] National Report, Question 11.1.2: Slovenia.

[658] National Report, Questions 11.1.1 and 11.1.2: Spain.

[659] National Report, Question 11.1.2: Croatia.

[660] Interview with a French academic.

[661] National Report, Question 11.1.1: Slovakia.

[662] National Report, Question 11.1.1: United Kingdom (Consumer Rights Act, s.71, the text of which is set out above).

[663] National Report, Question 8.1.6: Hungary.

This may be akin to a limited *ex officio* verification of the legal qualification of facts.[664] A similar picture emerges from Malta. Whereas a court should in principle not make inferences or arguments on behalf of either party (that is to say, it is in general only allowed to determine the matter on the basis of the evidence and arguments submitted to it), a court may in limited circumstances raise a plea *ex officio*.[665] Explicit provisions with regard to consumer law do, however, not exist.[666] Similarly in Spain, the *iura novit curia* principle is applied very narrowly; a judge is only allowed to correct mistakes made by parties in the selection of the applicable rule of law and does not have the possibility to approach the case from a different legal perspective.[667] A similar reluctance applies with regard to the nullity of contracts: only in exceptional cases, will Spanish judges declare unfair contract terms void *ex officio*.[668] The most extreme version of party disposition can be found in the Czech Republic where, according to the national report, consumer law is not considered *ex officio* by the courts.[669]

[664] "*Ex officio* control might not be established in legislation (but in the case law of the Supreme Court), might only be possible in relation to unfair terms, and only possible with regard to the claim made by the plaintiff (which precludes the judge from examining the entire contract, if not engaged in the claim, for example)"; interviews with a Hungarian academic/court clerk; Hungarian CPA; Hungarian judge of 17 years' experience.

[665] National Report, Question 8.1.6: Malta; compare the discussion at para.328.

[666] National Report, Question 11.1.1: Malta.

[667] National Report, Question 8.1.6: Spain (Spanish Civil Procedure Act, Art.218.1 II); compare the discussion at para.329.

[668] National Report, Question 11.1.1: Spain.

[669] National Report, Question 11.1.1: Czech Republic. The interviewees are a bit more nuanced but it is indeed questionable whether consumer law is applied *ex officio*: Interview with a Czech ADR entity, who remarks that the general impression is that it is only the Supreme Court and the Constitutional Court that apply EU consumer law. The situation of Ireland is discussed above at fn.149 and 601; in this Member State, the lower (circuit) courts had failed to engage in an *ex officio* examination of EU law protecting against unfair contract terms.

3.1.3. The Issue of Facts

389. An important question is which facts can be used by a court to apply the law *ex officio*. In a judgment from 2005[670], the Belgian Supreme Court held that a judge is obliged to decide upon a claim in conformity with the applicable legal rules, meaning that he has the duty to invoke all grounds of which the application is warranted by the facts specifically put forward by the parties in support of their claim.[671] Thus, so-called peripheral facts that may be found in the case file cannot be used by a Belgian court to invoke a plea of law *ex officio*. In Luxembourg, the courts have the power to raise points of law of their own motion on the basis of the factual elements adduced by the parties, provided that they invite argument in that regard.[672] This goes as far as substituting of their own motion a wrong legal qualification of the facts by the correct applicable legal ground.[673] Luxembourg courts have used this power to apply EU consumer law *ex officio*, notwithstanding that no explicit requirement to apply consumer law *ex officio* exists in Luxembourgish law.[674] The situation in Germany is similar: When the judge is confronted with (uncontested) facts, he or she may draw the legal conclusions even if the parties have not addressed the issue. However, the judge must invite the parties to make the pertinent arguments.

[670] National Report, Question 11.1.1: Belgium (Judgment of the Belgian Supreme Court (Cour de Cassation), 14th April 2005).

[671] National Report, Question 11.1.1: Belgium.

[672] National Report, Question 11.1.1: Luxembourg (Code of Civil Procedure, Art.65). Interview with a Luxembourgish judge of 15 years' experience: "The implementation of the *ex officio* obligation by the courts is not necessarily clear in Luxembourg, particularly when proceedings are characterized as adversarial, notwithstanding their low value and the participation of a consumer. Part of this problem is balancing the desire of the judge to provide protection to the weaker party with the need for the judge to maintain a position of neutrality".

[673] National Report, Question 11.1.1: Luxembourg (Judgment of the Luxembourg Supreme Court (Cour de Cassation), 10 March 2011. This was confirmed in two judgments of 24th October 2013).

[674] National Report, Question 11.1.1: Luxembourg (Judgment of the Tribunal d'arrondissement, no 307/2011, 3 November 2011; Judgment of the Tribunal de Paix, no 889/2016, 25 February 2016).

3.1.4. Ex officio Application of Consumer Law and Issues of Evidence

3.1.4.1. The Power of the Court to Take Measures of Inquiry

390. The leading principle amongst all Member States is that the burden of proof lies on the party who claims legal relief in his or her favour. Thus, every party is responsible for adducing the proof of its allegations. However, such a principle is not absolute; the Member States have provided for various exceptions to this rule. These vary from mild judicial powers (e.g. allowing courts to give hints to parties) to wide powers of the court to act *ex officio*. Within this range, Member States' rules and practices seem to differ considerably on this point. Much depends on the national laws of civil procedure (see supra at paras.296-304).

391. Apart from the odd exception, the procedural laws of all Member States provide courts to a certain extent with powers to instruct parties to provide additional evidence and to ask questions of the parties for clarification; this includes Austria[675], Bulgaria[676], Denmark[677], Germany[678] Latvia[679], Poland[680], Romania[681], Sweden[682], England & Wales[683], Scotland.[684] While they paint the picture of an active judge, these powers can be seen as typical features of judicial case management, having as their primary goal the acceleration of litigation or the remedying of certain deficiencies in parties' submissions. The matter differs when it comes to actual

[675] National Report, Question 8.1.6 and 11.2.4: Austria (Austrian Code of Civil Procedure, §182).

[676] National Report, Question 8.1.6: Bulgaria (Bulgarian Code of Civil Procedure, Art.145).

[677] National Report, Question 11.1.1: Denmark.

[678] National Report, Question 8.1.6: Germany (German Code of Civil Procedure, Section 139).

[679] National Report, Question 8.1.6: Latvia (Latvian Civil Procedure Law, Art.93)..

[680] National Report, Question 8.1.6: Poland (Polish Code of Civil Procedure, Art.207, §3, 1st sentence; Polish Code of Civil Procedure, Art.212, §1).

[681] National Report, Question 8.1.6: Romania (Romanian Code of Civil Procedure, Art.22).

[682] National Report, Question 8.1.6: Sweden.

[683] National Report, Question 8.1.6: England and Wales.

[684] National Report, Question 8.1.6: Scotland.

measures of inquiry, for example, where the courts gather evidence of their own motion through the *ex officio* hearing of witnesses, the *ex officio* ordering of the production of evidence by third parties, the *ex officio* hearing of experts, or an *ex officio* visit to any relevant place. This goes beyond the mere asking of questions or requiring the submission of extra documents; rather courts begin to take matters into their own hands.

392. A number of Member States have conferred wide powers upon judges in this regard. Thus, in France, judges are allowed to take into account facts that have not been introduced or substantiated by the parties.[685] German judges can, apart from witness testimonials, order any other admissible form of evidence to be taken of its own motion.[686] In Italy, within the context of summary proceedings (distinguished from small claims procedures), a judge has quasi absolute discretion 'to accomplish the evidentiary acts which are relevant in relation to the object of the requested decision'.[687] Maltese judges may at any stage of the examination or cross-examination of a witness ask questions it deems necessary or expedient.[688] In the Netherlands, courts may order any party to present documents that may be of relevance for the case.[689] Courts may also order expert witnesses to present a report regarding a claim that was made by one of the parties.[690] Belgian judges, in situations where the parties have failed to produce sufficient evidence, can order a complementary inquiry, which may inter alia consist of a request to submit certain documents, witness dispositions, an official visit to the scene of the facts, or the personal appearance of the parties in court.[691]

[685] National Report, Question 8.1.6: France French Code of Civil Procedure, Art.7, 2nd paragraph (*supra* para.12).

[686] National Report, Question 8.1.6: Germany.

[687] National Report, Question 8.1.6: Italy (Italian Code of Civil Procedure, Art.702-ter, fifth paragraph).

[688] National Report, Question 8.1.6: Malta.

[689] National Report, Question 8.1.6: the Netherlands (Dutch Code of Civil Procedure, Art.162).

[690] National Report, Question 8.1.6: the Netherlands.

[691] National Report, Question 8.1.6: Belgium.

393. In other Member States, the powers of courts are limited to issues of public policy. In Lithuania, judges are allowed to collect evidence *ex officio* if the public interest so requires.[692] Polish judges may exceptionally admit *ex officio* evidence which has not been presented by a party, namely in cases where the public interest is at stake, when the court suspects that proceedings were instigated with a fictitious intent, or when a party is disproportionally week or helpless.[693] Similarly, Slovenian judges may *ex officio* establish facts and produce evidence that was not presented by the parties if it would appear that the parties intend to dispose with claims to which they are not entitled.[694]

394. Another group of Member States allows *ex officio* evidence gathering in specifically defined situations. Thus, Slovakian judges are allowed to gather of their own motion data from public registries in case parties have provided diverging information[695], evidence necessary to decide on questions of admissibility or the competence of the court, evidence to determine the enforceable nature of a decision and evidence for the purposes of identifying foreign law.[696] Furthermore, in consumer disputes, they may order the production of evidence that was not asked for by the consumer but is necessary to decide the case.[697]

395. In Spain, a court may only order the taking of evidence after being requested to do so by a party.[698] An exception exists in cases concerning family matters and civil status matters, in which a court can take evidence *ex officio*.[699] In all other cases, the most active a judge can be is to suggest that the parties advance further evidence in order

[692] National Report, Question 8.1.6: Lithuania (Lithuanian Code of Civil Procedure, Art.179, 2nd paragraph).

[693] National Report, Question 8.1.6: Poland (Polish Code of Civil Procedure, Art.232, 2nd sentence).

[694] National Report, Question 8.1.6: Slovenia (Slovenian Civil Procedure Act, Art.7).

[695] National Report, Question 8.1.6: Slovakia (Slovakian Code of Civil Procedure, §185(2)).

[696] National Report, Question 8.1.6: Slovakia (Slovakian Code of Civil Procedure, §185(3)).

[697] National Report, Question 8.1.6: Slovakia (Slovakian Code of Civil Procedure, §295).

[698] National Report, Question 8.1.6: Spain (Spanish Civil Procedure Act, Arts.282 and 339.5).

[699] National Report, Question 8.1.6: Spain (Spanish Civil Procedure Act, Art.752).

to complete their claims.[700] From the Czech national report, it appears that the judge has practically no role in the collection of evidence.[701] The same is true of Estonia.[702]

3.1.4.2. Necessity to Establish Consumer Status

396. An important issue concerns the question of whether a dispute qualifies as a consumer law dispute. The ECJ has held that a judge must verify *ex officio* whether a dispute falls within the scope of the UCTD; moreover, in respect of the Directive concerning certain aspects of the sale of consumer goods and associated guarantees, the national court is required to take measures of inquiry in this regard. National law paints a different picture, with various Member States requiring a consumer to establish his or her consumer status in line with the general rules on the burden of proof.

397. In Austria, the consumer status has to be established in principle by the parties.[703] However, where it is evident that a case is a consumer dispute, a party is not required to adduce proof in this regard. This notion of 'evident' is interpreted strictly, the majority of legal scholars rejecting a general principle of in *dubio pro consumatore* as this would interfere to too great an extent with the general principles for the allocation of the burden of proof. In Bulgaria, the matter is regulated by the general rules on the burden of proof, meaning that a consumer will have to establish the application of consumer law.[704] Also in Cyprus[705], the Czech Republic[706],

[700] National Report, Question 8.1.6: Spain (Spanish Civil Procedure Act, Art.429.1). Interviews with 2 Spanish judges of 14 and 17 years' experience; Spanish lawyer of 18 years' experience, Spanish lawyer: "Almost all of the Spanish interviewees identify a shift in the judicial culture, largely promoted by the lower courts and the Supreme Court, notwithstanding that there may still be "a lack of guidance as to how and when activate *ex officio* powers".

[701] National Report, Question 8.1.6: Czech Republic.

[702] National Report, Question 8.1.6: Estonia.

[703] National Report, Question 11.1.1 and 11.1.3: Austria.

[704] National Report, Question 11.1.3: Bulgaria.

[705] National Report, Question 11.1.3: Cyprus.

[706] National Report, Question 11.1.3: Czech Republic.

Estonia[707], France[708], Greece[709] and Malta[710] a consumer has to establish the application of consumer law. However, when the consumer is not represented, judges in Greece and Malta will be more flexible in this regard.

398. In other Member States, the question of establishing consumer status is part of the task of the court in application of the *iura novit curia* principle; the court is required to apply the relevant legal rules to the facts of the case. This is the case for Belgium[711], Croatia[712], Finland[713], Hungary[714], Italy[715], Latvia[716], Lithuania[717], Poland[718], Portugal[719], Slovakia[720], Slovenia[721], Spain[722], Sweden[723], and the United Kingdom.[724] That being said, the consumer will have to advance sufficient facts in order for the court to establish the application of consumer law. It can be gathered

[707] National Report, Question 11.1.3: Estonia.

[708] National Report, Question 11.1.3: France.

[709] National Report, Question 11.1.3: Greece.

[710] National Report, Question 11.1.3: Malta.

[711] National Report, Question 11.1.3: Belgium.

[712] National Report, Question 11.1.3: Croatia (Croatian Civil Procedure Act, Art.186(3)).

[713] National Report, Question 11.1.3: Finland.

[714] National Report, Question 11.1.3: Hungary.

[715] National Report, Question 11.1.3: Italy.

[716] National Report, Question 11.1.3: Latvia.

[717] National Report, Question 11.1.3: Lithuania.

[718] National Report, Question 11.1.3: Poland.

[719] National Report, Question 11.1.3: Portugal.

[720] National Report, Question 11.1.3: Slovakia.

[721] National Report, Question 11.1.3: Slovenia.

[722] National Report, Question 11.1.3: Spain.

[723] National Report, Question 11.1.3: Sweden.

[724] National Report, Question 11.1.3: UK.

from the national reports that judges will also be more flexible on this point if the consumer is not represented.[725]

399. Between those two positions, the situation of Denmark is different, where the courts may help consumers to establish their consumer status.[726] Different but equally in between is the situation in Germany, where a rebuttable presumption exists that a contract entered into by a natural person who acts predominantly outside his trade, business or profession is a consumer contract. When the presumption is challenged, however, the consumer has to establish his or her consumer status. In such a case, the judge may support the consumer by giving hints or feedback. He will not establish the consumer status him or herself however. The amount of support given is deemed to form part of the discretion of the judge. That being said, an unrepresented consumer is likely to receive a higher degree of support.[727] A similar rule exists in Romania.[728]

3.1.5. Small Claims Procedures

400. Small claims procedures are typically less formal than ordinary proceedings in the first instance. Therefore, the question arises as to whether a judge in small claims procedures will be more active when it comes to assisting the consumer in gathering evidence. This is a relevant question, given that consumer disputes are often heard in small claims proceedings (see supra paras.343-348).

401. Evidence of a more active judge in small claims procedures, in deviation from the normal rules on evidence, can only be found in a very limited number of Member States. In Greece, for example where Art.469 § 2 Code of Civil Procedure allows for the judge to deviate from procedural provisions, to take into consideration non-admissible evidence, and generally to seek the truth by following the safest, swiftest,

[725] National Reports, Question 11.1.3: Italy and Spain.

[726] National Report, Question 11.1.3: Denmark.

[727] National Report, Question 11.1.3: Germany.

[728] National Report, Question 11.1.3: Romania.

and least costly ways in accordance with his judgment.[729] It should be noted that the less strict application of the rules on evidence is often the consequence of the fact that representation is not required. Thus, in Germany, claims which do not exceed 5,000 Euros are normally dealt with before local courts. In these courts, representation by an attorney is not required. Consequently, in line with § 139 ZPO, a court may provide a party with the necessary assistance. Furthermore, if the value in dispute does not exceed 600 Euros, the court has a discretion with regard to the applicable rules of procedure, including the rules on evidence.[730]

3.1.6. Unrepresented Consumers

402. The question arises as to whether an unrepresented consumer may be "entitled" to a more active judge than a represented consumer. The evidence that appears from the national reports gives a mixed reply in this regard.

403. A distinction should be made between assistance by a judge in the qualification phase, i.e. the determination of whether the case qualifies as a consumer dispute, and the actual assessment of the case. Regarding former, we refer to our assessment above (see supra paras.395-398). In this section, we will focus on the assistance provided for by a judge in the actual assessment of the dispute.

404. In various Member States, an unrepresented consumer will receive guidance from the judge (see supra paras.318-320). In Denmark, a legal obligation is imposed upon the national judge to provide guidance to an unrepresented party.[731] Also in Sweden, a court may be required to be more active in the situation where a litigant is not represented.[732] In Finland, judges are under an obligation to provide judicial guidance, in particular to weaker parties.[733] This will probably include unrepresented

[729] National Report, Question 8.2.5: Greece.

[730] National Report, Question 8.2.5: Germany.

[731] National Report, Question 11.1.1: Denmark (Danish Administration of Justice Act, Section 339(4)).

[732] National Report, Question 8.1.6: Sweden.

[733] National Report, Question 8.1.6: Finland. It must be acknowledged hhowever, that high litigation costs prevent consumers from bringing claims to the courts. See Chapter 2, 'Access to Justice'.

parties, who are usually considered to be 'weaker parties'. Unrepresented consumers will benefit also in Austria from guidance given by the court.[734] A (valuable) distinction is, however, made between parties that are legally trained and other parties.[735]

405. In other Member States, such a legal requirement does not exist as such; however courts will nevertheless support the unrepresented consumer to a certain extent.[736] This is even truer when the consumer defaults.[737]

406. Support for represented consumers seems, however, to be excluded in Member States like Luxembourg[738] and the Czech Republic[739].

3.1.7 Appellate Proceedings

407. The powers of a court to assess the law *ex officio* are often limited in appeal proceedings. This was demonstrated by the case of *Asbeek Brusse*.[740] This section considers to what extent Member States' legal systems allow for the *ex officio* application of EU consumer law in appeal proceedings.

408. In Member States in which the appeal has a devolutionary effect, like Belgium, France, Luxembourg, and Romania[741], the case is tried a second time and the powers of the appeal judge are akin to the powers of the first instance judge.[742]

409. In most Member States, however, an appeal has a more limited ambit; judges are only competent to review the legality of the decision given at first instance. In such an

[734] National Report, Question 11.2.4: Austria.

[735] Ibid.

[736] National Report, Question 11.2.1: Belgium and Luxembourg.

[737] National Report, Question 11.2.1: Luxembourg.

[738] National Report, Question 11.2.1: Luxembourg.

[739] National Report, Question 11.2.3: Czech Republic.

[740] C-488/11 *Asbeek Brusse* EU:C:2013:341.

[741] National Report, Question 8.5.2: Romania.

[742] Cf. Frédérique Ferrand and Bruno Pireyre (eds), *Prospective de l'appel civil* (Legis compare 2016) providing for a comparison of French, German, Swiss and Spanish laws.

appeal system, one can distinguish between two models. In the first, a judge may *ex officio* verify whether the law has been applied correctly with regard to the points submitted in the appeal proceedings. Thus, under Slovenian law, the correctness of the application of substantive law is assessed *ex officio* by the appeal court.[743] Also in Germany, a court of appeal undertakes a complete review of the law.[744] In a second model, a judge may only apply rules *ex officio* if they are considered to be of public policy. This would be the case, for example, of the Netherlands.

410. From a procedural point of view, the issue might be addressed in different ways: In Member States which permit a full repetition of the case in the 2nd instance, an *ex officio* control by the appellate judge is not limited by national procedure. In Member States which only provide for a limited review of the first instance proceedings by the appellate court, the failure to apply *ex officio* EU consumer law might be considered to be a procedural deficiency to be remedied by the appellate court. Thus, the explicit insertion of an obligation to apply EU consumer law *ex officio* in the domestic procedures will immediately improve the *ex officio* control, the undertaking of which can be reviewed by the appellate court.

3.2 Default and Payment Order Procedures

3.2.1 Default Judgments

411. As with the payment order procedure, the possibility in theory and in practice for the national courts to examine potential violations of consumer law in default proceedings is identified throughout the national reports – where default proceedings are discussed – as problematic; it is an issue that is subject to debate in the majority of Member States.[745] Moreover, there is a considerable lack of case law and practice

[743] National Report, Question 11.1.1: Slovenia (Slovenian Civil Procedure Act, Art.350).

[744] National Report, Question 11.1.1: Germany.

[745] National Report, Question 11.1.1: Belgium (For example, in Belgium, there is an ongoing debate among judges, lawyers and academics as to whether all rules or only those of a public order nature should be invoked *ex officio* in default proceedings; the Judicial Code provides (Art.806) that only the latter should be engaged. See interviews with Belgian justices of 1st instance. The situation also

across the Member States.[746] Thus, it remains unclear in the majority of Member States whether the control exists as an obligation or a power on the part of the national judge.[747]

412. For the purposes of this analysis, the most interesting point of analysis arises where a default procedure exists as an alternative to payment order proceedings. In Belgium, payment order proceedings cannot be used in relation to B2C disputes. Rather, there are a number of alternative procedures: "short debates" for uncontested claims and a "summary procedure for payment of a sum of money" for

remains unclear in unilateral proceedings. The discussion is a broader one concerning the nature of consumer protection rules – whether or public order/protective nature (in respect of which traditionally on the former – a category into which consumer law did not fall – could be examined *ex officio*) – is therefore significant, for ordinary, default and unilateral proceedings. In Spain, the situation in default proceedings is also unclear).

[746] National Report, Question 11.1.1: Denmark (it is unclear how active the courts have to be in respect of default proceedings. There is not yet any relevant case law as most consumer disputes are resolved via ADR (where the Danish complaints boards are obliged to "investigate relevant facts to decide the complaint and to ascertain and apply relevant law, including EU law"). According to interviews with a Danish academic and a Danish judge of 10 years' experience: "There is a particular lack of knowledge of the *ex officio* powers and obligations on the part of the judge; this problem requires training and education to be resolved; there is very little reference to the issue of *ex officio* control in Danish rules of civil procedure".

[747] National Report, Question 11.1.1: Finland (For example, in Finland, in relation to default proceedings, the Supreme Court has held that as proceedings are in principle adversarial, there is little scope for the court to hold powers to investigate *ex officio*. Consumer cases are treated in the same way as other types of proceedings. However, the Supreme Court found per EU law a requirement that national courts investigate *ex officio* if a contract term is unfair for a consumer before a default judgment is given (KKO 2015:60)); Luxembourg (the judge will also examine consumer law *ex officio* in default proceedings (Tribunal de paix de Luxembourg, Rep.fisc. no 889/2016, judgment of 25.02.2016, unreported); the court then invited the consumer to appear, and concluded that the term was unfair (Tribunal de paix de Luxembourg, Rép. fisc. No 1580/2016 du 15.04.2016). It will also examine *ex officio* and make a determination of unfairness in default proceedings, even if the consumer does not appear when invited; Tribunal d'arrondissement, 1er chambre, jugement civil du 03/11/2011, no 307/2011, num. 13487 du rôle, non publié).

claims for small amounts of money[748]. There are simplified alternatives to a normal civil procedure; as such, as noted above, the judge is required to exercise *ex officio* control.[749] In Finland, there is a simplified procedure for uncontested pecuniary claims; court employees, working under the supervision of a judge deal with such cases.[750] In the Netherlands, there is no payment order; the EOP is used as an alternative.[751] In England and Wales, there is a small claim procedure or the claimant can claim a fixed payment of money online. If the defendant does not respond, the claimant should apply for a default judgment.[752] In Scotland, there is a small claim procedure. If the claim is not defended, the pursuer must lodge a minute on the basis of his claim; if this is done, the sheriff may grant decree/the order sought. If the pursuer does not lodge a minute on the basis of the claim, the sheriff will dismiss the claim.[753]

3.2.2 Payment Order Procedures[754]

413. The payment order proceeding is seen as an effective means for businesses to recuperate outstanding debts; it is mostly used by businesses against consumers. Thus, consumers are usually the defendant party. The payment order proceeding can be problematic. It potentially facilitates the under-enforcement of consumer protection laws given its purposes, that is, the quick and easy resolution of disputes over payment.

[748] National Report, Question 11.1.4: Belgium (Belgian law provides for a procedure covering monetary claims not exceeding € 1,860; according to case law amount must be certain, fixed and have fallen due. In practice, this summary procedure is seldom used).

[749] National Report, Question 11.1.4: Belgium.

[750] National Report, Question 11.1.4: Finland. Interview with a Finnish judge who states that in Finland, *ex officio* control will be made before a default judgment is given.

[751] National Report, Question 11.1.4: The Netherlands.

[752] National Report, Questions 8.4.1 and 8.4.2: England and Wales.

[753] National Report, Questions 8.4.1 and 8.4.2: Scotland.

[754] For an overview on the different payment order procedures in 14 EU Member States see Walter Rechberger and Georg Kodek (eds) *Orders for Payment in the European Union* (Kluwer 2001).

414. The lack of clarity of *ex officio* control in payment order proceedings has been explained by the conflicting interests between, on the one hand, the formal nature of the proceedings which aims to provide expedient results and on the other, the requirements per the ECJ case law for the *ex officio* examination in payment order proceedings concerning consumers, even where the consumer has not raised the possible violation of consumer law.[755]

3.2.2.1 Does a Payment Order Proceeding Exist?

415. Payment order proceedings do not exist in all Member States. However, a distinction should be drawn between those Member States in which: (1) Payment order proceedings exist; (2) A payment order proceeding exists but is not available for the resolution of (certain) business-to-consumer disputes; (3) No payment order proceeding exists; (4) No payment order proceeding exists but there is a functional equivalent.

416. Payment order proceedings seem to exist in most Member States. Though, the Belgian legislator has excluded B2C claims from the recently-introduced out-of-court payment order procedure.[756] This has been done for a number of reasons, one of which is the potential lack of consumer protection to which the procedure gives rise. In Bulgaria[757] and Luxembourg,[758] there are two types of payment order proceedings. Moreover, in Germany, it is not possible for an entrepreneur to launch summary proceedings for a payment order for a claim that arises under a consumer credit

[755] National Report, Question 11.4.4: Bulgaria.

[756] National Report, Question 11.4.4: Belgium.

[757] National Report, Question 8.4.3: Bulgaria (for claims up to 25 000 leva (approx. 12,780 EUR) (Art.104 Nr. 4, Art.103 of the Code of Civil Procedure, and the second regardless of the value of the claim).

[758] National Report, Question 8.4.1: Luxembourg (“conditionnelle de paiement” before the ”justice de paix” for claims not exceeding 10,000 EUR and “provision sur requête” before the “tribunal d’arrondissement” for claims exceeding 10,000 EUR).

contract and where the interests claimed are 12% higher than the basis interest rate of the time when the contract was concluded.[759]

3.2.2.2 Which Authority Hears the Payment Order Proceedings?

417. A particular problem arises where payment order proceedings are not heard by a judge but in an extra-judicial forum. In the latter context, there is likely to be decreased scope for the engagement of *ex officio* control.[760] Rather, it is likely that such control will only be possible in subsequent proceedings, either when the consumer objects or when the applicant seeks an enforceable title. The problem in this respect is – as identified by the Finnish national reporter – that clerks and office staff engaged in this assessment may not actually have sufficient legal training or knowledge.[761]

418. A distinction should therefore be made between those Member States in which: (1) Payment order proceedings are only held before courts; and (2) Payment order proceedings are held in extra-judicial venues.

419. In Austria, Bulgaria, Croatia, the Czech Republic, Estonia, and France, payment order proceedings are heard before the judge.[762] In Germany,[763] Hungary, [764]

[759] National Report, Question 8.4.7: Germany (ee § 688 (2) ZPO: "(2) No proceedings for a payment order may be brought: 1. For claims that an entrepreneur has under a contract pursuant to sections 491 to 509 of the Civil Code (Bürgerliches Gesetzbuch, BGB), if the effective annual rate of interest to be provided for in accordance with section 492 (2) of the Civil Code is in excess, by more than twelve (12) percentage points, of the base rate of interest, pursuant to section 247 of the Civil Code, applicable at the time the contract is concluded;…" It should be noted that all applications for payment orders are processed automatically and that the information in the application enables the program to sort out this application automatically).

[760] This limited review is mainly found in EU Member States where thousands of payment orders are issued each year. This is the case in Austria, Germany and Portugal.

[761] National Report, Question 8.4.3: Finland.

[762] National Report, Question 11.4.2: Austria; Bulgaria; Croatia; Czech Republic: Estonia and France.

[763] National Report, Question 11.4.2: Germany (Before a "court clerk" – a Rechtspfleger).

[764] National Report, Question 11.4.2: Hungary (Before a "notary public"); Croatia (see the Conclusions pf AG Bobek in Case C-551/15 *Pula Parking* EU:C:2016:825, paras.12 ff).

Denmark[765], Finland, Portugal and Spain, payment order proceedings are heard by judicial clerks or even in outside fora.[766]

3.2.2.3 What Information is Available to the Authority Hearing the Claim for a Payment Order?

420. A distinction should be made between those Member States in which: (1) there is a standard form; (2) there is a standard form and an authentic document must be submitted; (3) no standard form but an authentic document must be submitted; (4) no standard form is provided and no particular information requirements must be satisfied.[767]

421. In Austria, Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, Germany, Lithuania, Slovakia, England and Scotland, there is a requirement to use a standard form but not to present an authentic document (or other written evidence).[768] In Bulgaria and Croatia (for claims above a certain value), and Latvia, there is a requirement to use a standard form and an authentic document (or other written evidence) must also be submitted.[769] In France, Greece, Malta, Poland,

[765] National Report, Question 11.4.2: Denmark (Before a "bailiff's court").

[766] National Report, Question 11.4.2: Finland, Portugal and Spain.

[767] It should be noted that this problem became evident when the European Payment Order Procedure was enacted. Member States and the Commission were unable to come to a consensus of the standard of review concerning the merits of the claim. Finally, Arts.7 and 8 of Regulation (EU) 1896/2006 left the issue open. In addition, the different language versions of the Regulation are not consistent, cf.

[768] National Reports, Question 8.4.3: Austria; Bulgaria (for claims with a value of up to 25000 leva, approx. 1,300 EUR); Croatia (for claims with a value of up to 500kn, approx. 661 EUR); Czech Republic (via electronic forms and with electronic signature, for claims of a value of up to CZK1000000, approx. 37,037 EUR), Denmark, Estonia (via electronic forms and with electronic signature), Finland (there is a possibility for electronic submission of documents); Germany; Lithuania; Poland; Slovakia; England and Wales (can be made online for claims with a fixed value of up to £100,000) and Scotland, Q.8.4.3.

[769] National Reports, Question 8.4.3: Bulgaria (for claims with a value of more than 25000 leva, approx. 1,300 EUR); Croatia (for claims with a value of more than 500kn, approx. 661 EUR); Italy; Latvia.

Romania, Spain and Slovenia (in the latter, for claims above a certain value), there is no standard form but an authentic document (or other written evidence) must be submitted.[770] In Italy, Slovenia, Luxembourg and Sweden, there is no standard form and no particular information (or other written evidence) requirements to be satisfied.[771]

422. In order to speed up the payment order proceedings process, the information required is generally less detailed than in ordinary proceedings, thereby precluding a full review of the dispute. The requirements diverge across the Member States. Typically, an application contains the following information: name and addresses of the parties, a specification of the claim (principal amount, interest, etc.), and a short account of the factual and legal circumstances on which the claim is based. Only two Member States, namely Poland and Romania, also require that the applicant has explicitly required payment of the defendant before submitting a claim for a payment order.[772] Also in Latvia, the defendant must be informed before the application for a payment order is made.[773]

423. This can give rise to particular problems. One is the determination of whether there is no unfair assertion of jurisdiction by the (professional) claimant. In Austria, the Czech Republic, Denmark, Estonia, Finland,[774] Germany, Hungary,[775] Latvia, Portugal, Romania, Spain, England and Wales and Scotland, it is necessary that the address of the defendant is provided when the application for the payment order is made.[776]

[770] National Reports, Question 8.4.3: France (documents justicatifs; standard form is not required but recommended); Greece; Malta (but there is a judicial letter, and only for claims of a value up to 25,000 EUR); Poland; Romania; Spain and Slovenia (for claims with a value of more than 2000 EUR).

[771] National Reports, Question 8.4.3: Italy; Luxembourg; Slovenia (for claims with a value of less than 2000 EUR) and Sweden.

[772] National Report, Question 8.4.3: Romania.

[773] National Report, Question 8.4.5: Latvia.

[774] National Report, Question 8.4.3: Finland.

[775] National Report, Question 8.4.1: Hungary.

[776] National Reports, Question 11.4.4: Austria; Czech Republic; Denmark; Estonia; Germany; Latvia; Portugal; Romania; Spain; England and Wales and Scotland. Compare the situation in Lithuania, where the court will only check jurisdiction where the address of the debtor is known (or where the

This information at least provides the opportunity for the national authority or court hearing the application to assess whether there is no unfair assertion of jurisdiction. In the Czech Republic, Hungary and Latvia, it has been specifically provided that the payment order proceedings only apply to defendants (debtors) domiciled in that Member State.

424. The absence of a minimum amount of information, and even the lack of a particular form in which this information must be provided by the application for a payment order, dictates that often, there is a very limited amount of information available to the judge or other authority before the payment order is made. Even where the national payment order proceedings provide for the use of a standard application form, which should include certain information, the parties in practice rarely provide all of the necessary information.[777]

425. It can be considered that satisfactory amount of information is provided or where a lack of information is shaped by the requirement[778] or (in the majority of Member States) the absence of a requirement of legal representation for the parties.[779]

3.2.2.4 The Scope of Review at the Application Stage

426. According to the national reports, a distinction should be made between those Member States in which: (1) only the formality dimensions of the claim are examined; (2) the formality dimensions of the claim and the potential unfairness of contract terms can be examined; (3) the formality dimensions of the claim and other issues of consumer law can be examined. However, there are also Member States in which (4) it is not possible to make any kind of examination of the claim.

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claim is manifestly ungrounded); National Report, Question 11.4.4: Lithuania (though the application should include information on the address of the debtor, per Question 11.4.1).

[777] This is highlighted in the responses to the National Reports, Question 8.4.3.

[778] National Report, Question 8.4.3: Greece.

[779] National Reports, Question 8.4.3: Denmark, Estonia, Finland, Germany, England, Scotland, Lithuania, Luxembourg, Portugal, Romania, Spain (but common in practice).

427. In Estonia, France, Germany, Hungary, Poland, Portugal, Slovenia and Sweden, the authority hearing the application for a payment order can make an assessment only as to whether the formal requirements of the application have been satisfied.[780]

428. In Austria, Latvia,[781] and Slovakia, the authority hearing the application for a payment order can make an assessment as to the relevant formal requirements and make an examination *ex officio* of the potential unfairness of relevant contract terms.

429. In Bulgaria, Croatia, Denmark, Italy,[782] and Romania, the authority hearing the application for a payment order can make an assessment as to formal requirements and make an examination *ex officio* of the potential violation of unfairness and other relevant consumer protection norms. In Spain, payment order proceedings are dealt with by court clerks; if the court clerk notices that the dispute arises from a B2C contract, he or she must inform the judge so that the judge can assess if there is an unfair term. Per *Finanmadrid*, the court clerk should not make a payment order but should refer all consumer cases to the court.[783] The judge only has the information contained in the application for a payment order; as such, following the reference from the court clerk, the judge can stay the proceedings for five days to allow the parties to submit written submissions on an unfair term. No legal representation is required; the national reporter thus indicates that it is difficult to imagine that the consumer will be able to submit satisfactory information in all cases.[784]

[780] National Reports, Question 8.4.3 and 11.4.2.

[781] National Report, Questions 8.4.3, 8.4.7 and 11.4.2: Latvia (among other formal considerations, the level of contractual interest/penalty cannot be above a certain amount – at least this consideration in respect of potential unfairness should be examined).

[782] National Report, Question 11.4.2: Italy.

[783] National Report, Question 11.4.1: Spain (Prior to the reform to the LEC in October 2015, these clerks were obliged to make the payment order, having no entitlement to refuse to do so or to refer to the court).

[784] National Report, Question 11.4.1: Spain.

430. In the Czech Republic, Greece, Lithuania,[785] Malta, and Sweden,[786] no *ex officio* examination of the claim is made by the authority hearing the application for a payment order.[787]

431. The rationales underpinning these rules are diverse. In Austria (in respect of unfairness), Bulgaria (in respect of consumer protection generally), Croatia (in respect of mandatory provisions of law), Denmark (in respect of mandatory provisions of consumer protection law), Finland (in respect of unfairness or based on a dispositive rule), Latvia (in respect of unfairness), Luxembourg (in respect of unfairness), Romania (in respect of unfairness), Slovakia (in respect of unfairness), Slovenia (in respect of unfairness), and Spain (in respect of unfairness),[788] there are specific bases for this *ex officio* examination (that is, to the different extents identified above).[789] In Croatia and Slovenia, the *ex officio* examination is based on public morality while in Denmark, the *ex officio* examination is based on illegality.[790]

432. The problem that arises essentially relates to the limited scope of review by judges and other authorities in payment order proceedings. This means that in a majority of cases, there is some review made before the payment order is issued. Normally, this is only an examination of formalities. Only when the case is transferred to ordinary proceedings will a full review of the underlying claim, including compliance EU consumer law, take place. This situation has been recognised by the European Payment Order Procedure; recital 16 of Regulation 1896/2006 states:

    - "…[t]he court should examine the application, including the issue of jurisdiction and the description of evidence, on the basis of the information provided in the application form. This

[785] National Report, Question 11.4.2: Lithuania (It has been highlighted that in Lithuania, while payment order applications are not granted automatically, it is very difficult to engage in practice in an examination of the claim as all the information available is that found on the claim form).

[786] National Reports, Question 8.4.7, Czech Republic, Greece, Malta, Sweden.

[787] National Reports, Question 11.4.2: Czech Republic, Greece and Lithuania.

[788] National Reports, Question 8.4.7 : Finland, Latvia, Luxembourg, Slovenia and Spain.

[789] National Reports, Question 11.4.2.

[790] National Reports, Question 8.4.7: Croatia, Denmark, and Slovenia.

> would allow the court to examine prima facie the merits of the claim and inter alia to exclude clearly unfounded claims or inadmissible applications."[791]

433. Consequently, the review of the case is made at a late stage of the procedure when the consumer objects to the application and the case is transferred to the court competent to hear the proceedings on the merits.

3.2.2.5 Payment order proceedings as ex parte proceedings: When is the defendant consumer informed?

434. A practical problem arises in payment order proceedings where often the consumer is only informed at a late stage of the proceedings. This is because in various Member States payment order proceedings are *ex parte* proceedings.[792] When asked at which point a consumer was informed about a payment order made against a consumer, 27% of the respondents (mixed group – 15 respondents in total) indicated that this was only done after the payment order had been granted and has been served on them. The national reports have confirmed this for the majority of the Member States. This leads to a de facto *inversion of contentieux* for the consumer: he will have to contest the order; if he does not, enforcement will take place.

435. The effect of the ex parte nature of payment order proceedings depends largely on the information available to the authority dealing with payment order proceedings at the time the application is made. This has been discussed above (see supra at paras.418 ff.).

[791] In Case C-215/11 *Szyrocka* EU:C:2012:794, the ECJ held that the information to be given on the form of the application for the payment order (per Art.7 of Regulation 1896/2006) cannot be enlarged by additional requirements of national law and that the application for an EPO must be assessed on the basis of this information. In Case C-618/10 *Banco Espagnol* EU:C:2012:349, the referring judge asked the ECJ whether the limited control under Arts.7 and 11 of Regulation 1896/2006 was in line with Art.6 of the UCTD. The ECJ did not answer this question as it was not relevant to the case under consideration (see paras.76 - 78).

[792] National Report, Question 8.4.4: Greece and Italy.

3.2.2.6 The Transfer to Ordinary Proceedings

436. Where a payment order procedure exists in the Member States, it is generally possible to advance an objection or a statement of opposition; this is the case in Austria, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Slovakia, Slovenia, and Sweden.[793] The periods within which an objection or statement of opposition can be advanced vary considerably.[794]

437. If an objection is lodged, a distinction should be made between those Member States in which: 1) proceedings are automatically transferred to small claim or ordinary proceedings when the authority hearing the payment order proceedings refuses to grant the order; and 2) when an application must be made to the court to commence small claim ordinary proceedings when the authority hearing the payment order proceedings refuses to grant the order.

438. In Austria, Bulgaria, Croatia, Czech Republic, Estonia,[795] France, Italy, Luxembourg, Poland, Portugal, Slovenia, and Spain,[796] the claim is transferred automatically to ordinary proceedings, wherein the payment order is either set aside automatically or a discussion is undertaken on the merits of the case and the court decides whether the payment order should remain in force, either completely or partially, or be annulled (and depending on its decision, provides that the order forms part of its ruling). In Denmark, Greece,[797] Malta and Sweden, the transfer to ordinary proceedings is not automatic; the court will either dismiss the payment order

[793] National Reports, Question 8.4.5: Austria, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Slovakia, Slovenia, and Sweden.

[794] National Reports, Question 11.4.4

[795] National Report, Question 8.4.5: Estonia (In Estonia, the claimant can request in his application that the payment order proceedings are terminated in case an objection is advanced. Otherwise, the claim continues in ordinary proceedings).

[796] National Reports, Question 8.4.5: Austria, Bulgaria, Croatia, Czech Republic, France, Italy, Luxembourg, Poland, Portugal, Slovenia, and Spain.

[797] National Report, Question 11.4.4: Greece.

application (interrupting any executive force that the order might have) or if requested by the claimant, refer the case to the small claim or ordinary proceedings.[798]

439. In Bulgaria, if the debtor has not responded to a payment order within the required time limits, there is an opportunity for the debtor to raise an issue (within one year) based on circumstances that have recently changed or on the submission of new written evidence; moreover, he can file a declaration at the court of second instance if he was not served properly or because of circumstances beyond his control.[799] In Germany, if an opposition is launched by the defendant debtor, and if a party (generally the claimant) applies for a determination of whether his claim is justified, the court that issued the payment order will transfer the claim to the court that has been designated in the payment order.[800] In Latvia, the defendant debtor must be notified before the application for a payment order is made; thereafter, the judge completes the standard form. If the debtor denies the claim, the judge dismisses it; otherwise, the order becomes enforceable immediately.[801] In Lithuania, if the defendant debtor files an objection, the payment order has no effect and the creditor claimant must file a claim in ordinary proceedings.[802] In Romania, it is worth noting that payment order proceedings are adversarial; the judge summons the parties and the defendant should submit a statement of opposition before the hearing. The lack of defence is understood to be an admittance of the debt.[803]

440. In a majority of Member States, if the payment order is not contested, it will automatically become enforceable and can be used to initiate enforcement

[798] National Reports, Question 8.4.5: Denmark, Malta and Sweden.

[799] National Report, Question 8.4.6: Bulgaria.

[800] National Report, Question 8.4.5: Germany.

[801] National Report, Question 8.4.5: Latvia.

[802] National Report, Question 8.4.5: Lithuania.

[803] National Report, Question 8.4.5: Romania.

proceedings.[804] In the other Member States, it is necessary that the party relying on the payment order make an application for a declaration of enforceability.[805]

3.2.2.7 Defences against a Payment Order at the Enforcement Stage

441. When the consumer fails to object to the payment order within the appropriate time period, the payment order becomes enforceable without a proper review of the underlying claim.[806] This may, in combination with the absence of any control of consumer law during the procedure for a payment order[807], entail a risk that EU consumer law will never be assessed in proceedings that nevertheless have a direct impact on the consumer.

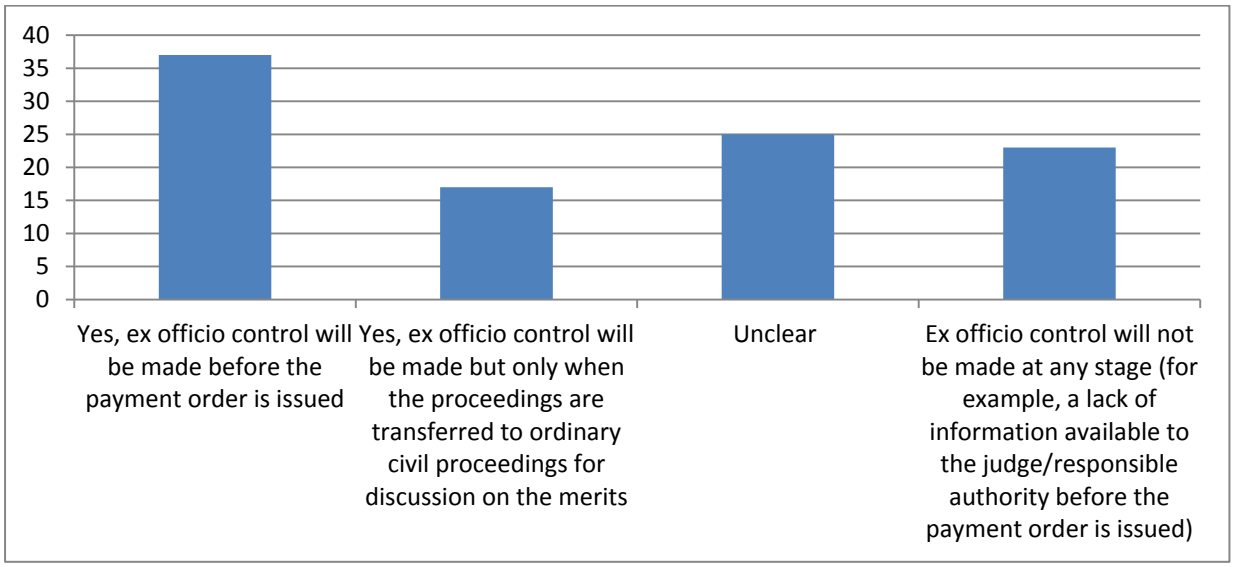
442. However, when the following question was asked: In practice, if the claim for the issuance of a payment order is uncontested, would the court – according to your experience – exercise *ex officio* control of consumer protection law? Respondents indicated that *ex officio* control of consumer protection law does take place:

[804] National Report, Questions 8.4.6 and 8.4.8: Austria, Bulgaria (for claims of any value), Croatia, Czech Republic, Denmark, Finland, Greece, Italy, Lithuania, Luxembourg (for ordonnance de paiement), Portugal, Romania, Slovakia, Slovenia, and Spain.

[805] National Reports, Question 8.4.8: Bulgaria (for claims up to 25000 leva), Estonia, France, Germany, Italy, Luxembourg (for provision sur requête), Malta, and Poland. National Report, Question 8.4.6: Germany (a writ of execution must be applied for, which becomes final and binding if not challenged).

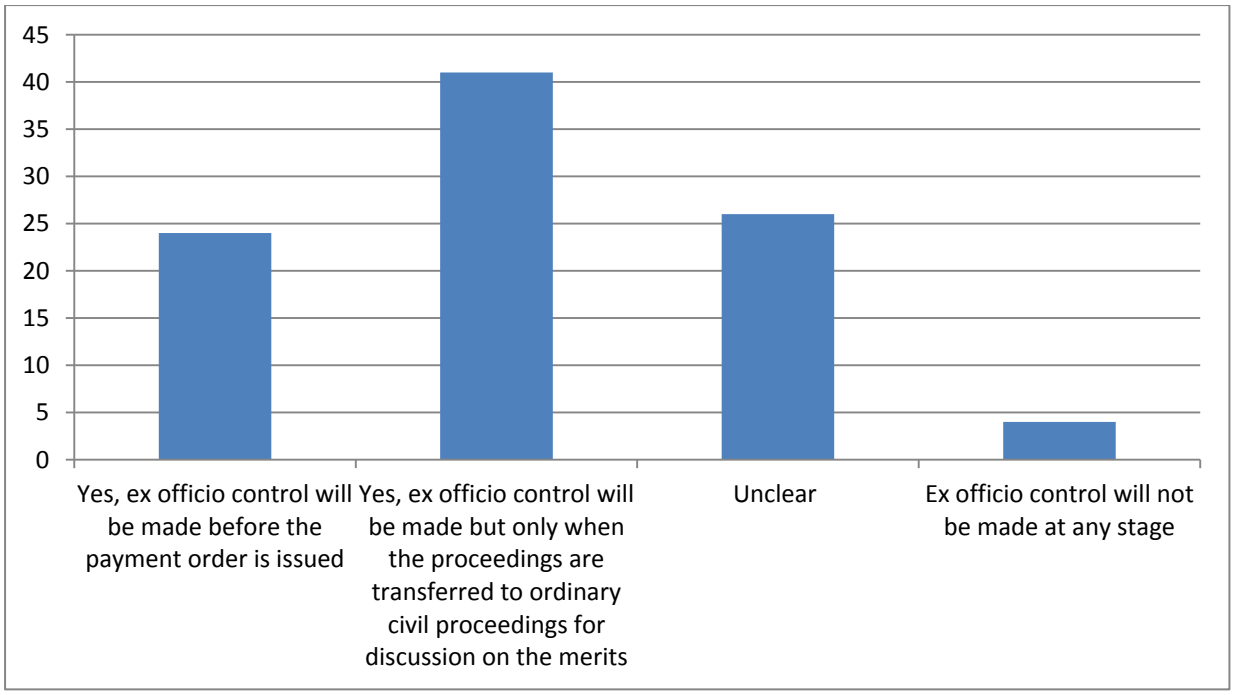
[806] National Reports: Austria, Bulgaria, Croatia, Sweden, Greece, Italy (indicating that most payment orders are not opposed), Latvia, Lithuania, Malta, Poland, the Netherlands, Slovakia, and Sweden. Some Member States provide for separate enforcement proceedings in which the defendant can still object to enforcement: In Germany, Portugal, Spain and the UK, the claimant must apply for a default judgment.

[807] *Ex officio* control in payment order proceedings appears to be an issue: see questions 23 and 38 of the online survey, but also the data of the national reports.



Responses to the Online Survey.

443. The results from the interviews show a slightly different perception:



Responses to the Interviews.

444. An analysis of the national reports provides for clarification of the results of the online survey and interviews. The contradiction might be explained by the fact that *ex officio* control of other issues does take place, including whether the requirements to issue a

payment order are met. This does not however, imply that an evaluation of consumer protection law is made in a significant number of Member States.[808] Further to this, it also appears that the *ex officio* application of EU consumer protection law does take place in a more or less equal number of Member States, albeit with a focus on unfair contract terms.[809] However even in these Member States, whether such an examination is actually made often depends on the particular judge hearing the case.[810] Moreover, it appears from the interviews that there is a general lack of clarity on this issue,[811] even within the national systems. For example, it appears from the interviews that in Luxembourg, *ex officio* control will be made before the payment order is issued. However, the national report states that such power is neither provided for by law nor reported in case law, while admitting that it could nevertheless be possible in theory.[812] Furthermore in Portugal, an evaluation of consumer protection law could take place when assessing whether the claim is manifestly ungrounded; this possibility is, however, stated as a theoretical possibility and phrased with hesitation in the national report.[813]

445. Finally, the lack of clarity and confusion about the impact of the CJEU case law within the national legal order may be responsible for the contradictory results of the two graphics. In any event, it also appears from national reports that embedding the obligations flowing from the CJEU case law in the national payment order procedure is all but evident.[814]

446. The great variety of national solutions is demonstrated from the answers we received from the national reports concerning the possibilities for the debtor (consumer) to

[808] National Reports, Question 8.4.7: Austria, Bulgaria, Germany, Greece, Hungary, Lithuania, Luxembourg, Malta, and Sweden.

[809] National Reports: Croatia, Italy, Latvia (unfair contract terms), the Netherlands (limited), Romania (unfair contract terms), Slovakia (unfair contract terms), Slovenia (unfair contract terms), and Spain (unfair contract terms – since 2015).

[810] National Report, Question 8.4.7: Romania.

[811] Interview with Polish lawyers.

[812] National Report, Question 8.4.7: Luxembourg

[813] National Report, Question 8.4.7: Portugal. Similarly, National Report, Question 11.4.2: Denmark.

[814] National Reports, Question 8.4.7: Austria and Bulgaria,

take further action once a payment order has been declared enforceable or once enforcement proceedings have been initiated. For example:

447. In Austria, it is in principle necessary to lodge an objection to the payment order; however, it is also possible for the party against whom the payment order is made to apply within fourteen days for the restoration of the status quo ante (if they could not raise an objection due to an unforeseeable or unavoidable event). Moreover, it might be possible to cancel the confirmation of enforceability.[815]

448. In Bulgaria, there is no possibility to challenge further a decision other than the appeal filed to the court of second instance. In Croatia, an objection can be made to the execution of a payment order award under Art.57 of the Enforcement Act. In the Czech Republic, there is no possibility to appeal against a payment order; the only remedy is to object once it has been issued. In Denmark, it is possible to appeal to the bailiff's court to reopen the case on application within four weeks of the endorsement of the payment order, and in special circumstances, within one year. In Estonia, the debtor can appeal against the payment order within fifteen days (or for service abroad, or by public announcement, within thirty days).

449. In Finland, the payment order cannot be appealed by normal appeal proceedings; there is a special proceeding for appeal (within thirty days), which arises only on the basis of an issue that could have been raised at the time the claim was decided. In France, there is no appeal. In Germany, the defendant can protest the writ of execution however if he or she fails to appear at the hearing or make himself heard on his protection, there is no further opportunity to protest; the defendant must then appeal (which might only be successful if there was no negligence or intentional failure to comply with procedure requirements. In Greece, if the defendant fails to oppose the payment order post-service (for which the time limit is fifteen days), he or she can file an opposition (in line with Art.633(2) CCP) within a further fifteen days having been served for a second time by the claimant. In Italy, if the defendant does not advance an opposition within forty days of the payment order being issued, or fails to appear before the court following an opposition, there is a possibility for a late opposition to be made if he can show that he had not been informed in sufficient time or if he was unable to file an opposition because of a force majeure event (only within

[815] National Report, Question 8.4.9: Austria.

ten days of the first enforcement act). Following a declaration of enforceability, a payment order may be challenged by the filing of new proceedings where there has been fraud facilitated on the part of the claimant, where a payment order goes against an existing binding judgment, or by challenge raised by a third party. In Latvia, within three months of receiving the payment order, the defendant can raise a revolutionary claim (not an appeal but the initiation of new proceedings before the court).

450. In Lithuania, proceedings can only be reopened on special grounds following a final decision. In Malta, there is no possibility for appeal; however an executive title can be rescinded and declared null and void by a court if the defendant makes a claim within 20 days of service of an executive warrant or other type of judicial act (if the court identifies that the debtor was not duly made aware of the judicial letter or if the judicial letter did not satisfy the procedural formalities). A hearing will then take place. In Poland, if no appeal is made against a payment order, the order will have the same effect as a final judgment.

451. In Portugal, a payment order is not a judicial decision; as such, there is no scope for appeal. In Portugal, if enforcement proceedings are initiated, the debtor can advance a defence during these proceedings; this is done by means of an objection.[816] Rather, the payment order might be converted into an action for declaratory relief for performance of pecuniary obligations; if this happens, a judicial ruling will be issued, which will be subject to appeal. In Romania, the defendant can appeal the payment order within 10 days from receiving/being made aware of it; this must be done in line with Art.1024 NCPC (the limited grounds for appeal include: non-compliance with the requirements to be satisfied for the issuance of the order, or the payment of the debt prior to the issuance of the payment order).

452. In Slovakia, there is no opportunity for an appeal to be brought against a payment order; a claim for a (re)trial might be sought by the defendant however. In Slovenia, once a payment order has been issued, it is treated per the small claims rules. The appeal can only be brought on extraordinary legal remedy grounds. Per Art.458 Civil Procedure Act, there is no appeal on points of law in respect of small claims (and thus neither in respect of payment order proceedings). Reopening proceedings

[816] National Report, Question 8.4.6: Portugal.

cannot be made on *ius novorum* (only, per Art.394 Civil Procedure Act, on procedural grounds). In Spain, the determination of the court clerk that the payment order proceeding should be terminated, is deemed to amount to a final decision; in principle, in accordance with general rules for civil proceedings, the debtor defendant can file an appeal before the court (Art.453 LEC).[817]

3.2.2.8 Practical Implications

453. The order for payment procedure in a significant number of Member States may lead to a situation in which a consumer is forced to pay a sum of money on the basis of a contract which has never been reviewed by a judge for compliance with EU consumer protection law. This is not a theoretical possibility: practice shows that payment orders are rarely contested. The use of payment order proceedings may therefore essentially lead to a circumvention of the protection conferred upon consumers by EU law, and especially by the UCTD.

454. The issue exists throughout the European Union: it cannot be confined to a particular set of Member States or a particular legal tradition. Even in those Member States in which the data collected suggests that *ex officio* control might take place, this approach is by no means well-established; many questions remain open. The application of EU consumer protection law in payment order proceedings is a systemic problem and may therefore warrant an initiative at the EU level.

3.3 Enforcement Procedures

3.3.1. The General Situation

455. As a matter of principle, enforcement proceedings do not permit any re-assessment of the judgment or other enforceable title on which the enforcement sought is based. Thus, enforcement organs are usually not empowered to review the title on its merits,

[817] National Reports, Question 8.4.9: All Member States.

especially when a judgment has become res judicata.[818] However, the situation with regard to other enforceable titles might be different: in many national systems it is possible to refer the case for re-assessment by the civil court, especially when the underlying claim has not yet been verified by a judge.[819] This is especially the case when the enforceable title was drawn up by a notary,[820] relates to a mortgage or was issued by a judicial officer without the debtor having been heard. As far as payment orders are concerned, the opening up of review procedures depends on whether the (unchallenged) payment order has become *res judicata* or not.[821]

456. In some Member States, there is little scope for consumers to intervene at the stage of enforcement; judges are reluctant to allow it, even where parallel (normally declaratory) proceedings (e.g. concerning the validity of a loan contract) are ongoing.[822] In others, it has been highlighted that if an issue of consumer protection finds its way before the court, i.e. if consumer objects and advances an opposition before the court, notarial deeds, mortgage enforcement out of court, and arbitral awards, are reviewed by the court in terms of consumer protection if there is no enforcement title with res judicata force.[823] In others still, an examination can be undertaken as long as this does not affect the res judicata force of the decision.[824] However, it has also been noted that it is often unclear whether a decision where the

[818] German procedural law is explicit in this respect see § 767 (1) ZPO which permit the debtor to challenge the judgment by substantive grounds – but only insofar as the facts occurred after the last hearing where substantive defences could be brought in the proceedings leading to the judgment, see § 767 (2) ZPO.

[819] In Germany, enforceable titles (especially notarial deeds) without res judicata effect are subject to full review under § 767 and § 797 (4) ZPO. The competent court applies the proceedings on litigation at the first instance – therefore, the general powers of the court with regard to the (*ex officio*) review of consumer law are fully applicable.

[820] This problem arises especially in Croatia, Germany, Hungary and Spain.

[821] This is the case in Austria and in Germany, see section 700 ZPO, Bundesgerichtshof, 9/20/1987, BGHZ 101,380.

[822] Interview with a Croatian lawyer.

[823] Interview with a Slovakian academic and Slovakian lawyer.

[824] National Report, Question 8.6.1: Austria.

debtors contests enforcement has res judicata effect.[825] Moreover, many consumers do not object to enforcement because they do not realise that they are entitled to legal aid in order to do so.[826]

457. At the enforcement stage, in some Member States, specific types of cases are managed with particular caution, e.g. where consumer over-indebtedness is related to the home of the consumer.[827] In Italy, for example, where parties are not represented, agreements reached via mediation must firstly be approved by the court in order to be declared as enforceable titles. The court must determine whether the agreement complies with mandatory rules and public policy, including consumer protection norms.[828] In other Member States, at the stage of enforcement, the consumer is treated like any other debtor; examining the merits of the case will be possible only if the principle of res judicata allows for it.[829] In Spain, the system has undergone considerable reform: it is now provided that before commencing enforcement proceedings on the basis of non-judicial enforceable deeds (notarial deeds, including mortgages) the court is obliged to examine if any of the contract terms are unfair (Art.552.1 LEC). However beyond these specific types of proceedings, the situation is very unclear; the courts will apply strictly the principle of the party disposition (Arts.216 and 218 LEC) such that *ex officio* control is understood to be exceptional[830] (in both ordinary proceedings and at other stages of

[825] Interview with a Spanish lawyer.

[826] Interview with a Spanish lawyer.

[827] Interview with a Luxembourgish judge; it seems to be the case however, it is not clear if such an approach also applies at the stage of enforcement.

[828] National Report, Question 8.6.1: Italy (Art.12 d. leg. no. 28 of 2010).

[829] Interview with a Greek lawyer. For example if the debt was certified by a notarial deed which – after providing it with an enforceable clause – allows for judicial proceedings to be launched; interviews with a Polish lawyer and a Polish academic.

[830] National Report, Question 11.1.1: Spain (That is, the nullity of contract terms can only be established *ex officio* by the courts in exceptional circumstances, i.e., in cases of criminal facts or where the contract provision is notoriously illegal or contrary to moral or public policy [see Judgments of the Civil Chamber of the Supreme Court of 22 April 2015 (núm. 265/2015; ECLI:ES:TS:2015:1723), of 30 April 2012 (núm. 260/2012; ECLI:ES:TS:2012:2869) or of 5 May 2008 (núm. 317/2008; ECLI:ES:TS:2008:1726)).

the proceedings). Problems continue to arise, particularly with regard to out-of-court proceedings[831] and the staying of enforcement proceedings (discussed below). However, the national reporters and interviewees have indicated that the attitudes of the courts are beginning to change; this is an issue of legal and procedural culture.

3.3.2. Interim protection at the stage of enforcement

458. It might be assumed that if a national court makes an *ex officio* control of consumer protection law during enforcement proceedings, it would also be logical to stay the enforcement of the judgment in question pending the court's assessment. The difficulty for all stakeholders, and particularly judges and lawyers, is that the situation lacks clarity.

459. In the national reports and online survey, the following question was asked: Does national procedural law provide that interim measures can be adopted while this examination is undertaken (e.g. allowing in declaratory proceedings linked to enforcement proceedings, for the latter to be stayed), in order to ensure that the court's final decision will have full effect?

460. In some Member States, there is little scope for parties to intervene at all at the stage of enforcement; judges are reluctant to allow for such intervention, even where parallel proceedings are ongoing (e.g. concerning the validity of a loan contract).[832] Similarly, the problem of a lack of regulation between different sets of proceedings (e.g. mortgage enforcement and the nullity of (part of) the related loan contract) has been identified as problematic because enforcement proceedings cannot be stayed by the judge hearing them.[833] This is an issue which has given rise to references to the CJEU but is evidently still unclear.

[831] See the recent AG Opinion in Case C-503/15 *Margarit Panicello* on the *jura de cuentas*, a procedure undertaken from the outset by *Secretarios Judiciales* in Spain, with regard to enforcement at paras.136-137.

[832] Interview with a Croatian CPA.

[833] Interviews with Spanish judge of 14 years' experience and Spanish lawyer of 20 years' experience.

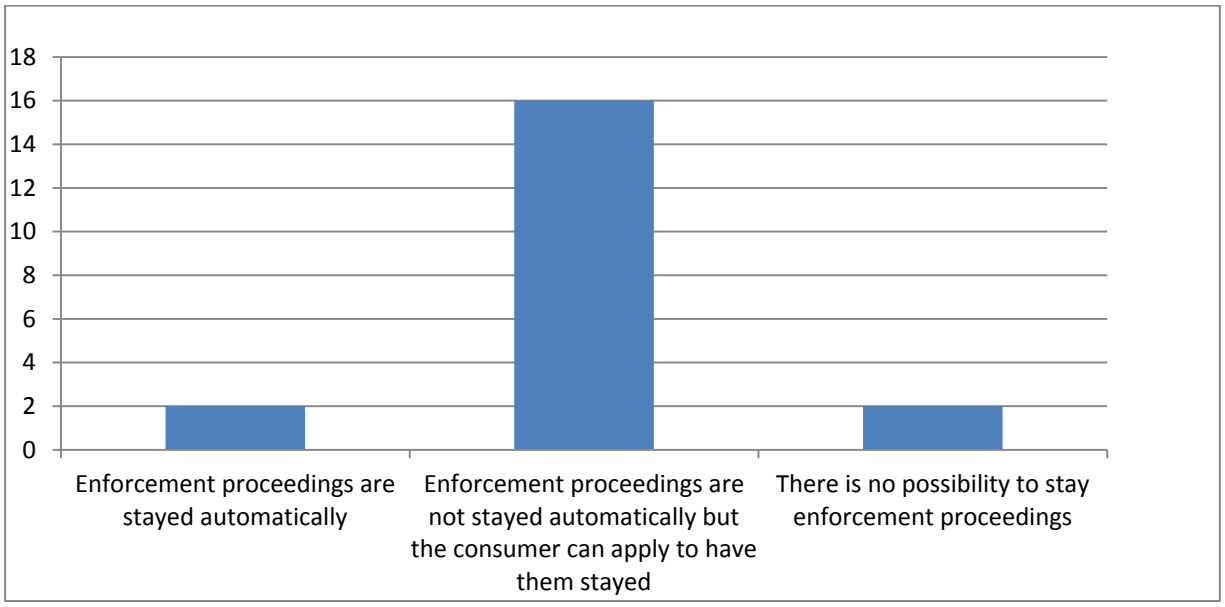
461. It is possible in most Member States for interim measures to be adopted, namely, by allowing – when a payment order is challenged or opposed – for enforcement proceedings to be stayed, in order to ensure that the decision of the court hearing the declaratory proceedings will have full effect.[834] This problem was identified before the ECJ in the *Aziz* case.[835] It is generally necessary that an application will be made in order for enforcement proceedings to be stayed.[836] However, as the Spanish national reporter indicates, there might still exist a problem in practice; now if the consumer debtor challenges the enforcement of a non-judicial enforceable title, the enforcement proceedings will be stayed until the issue raised has been decided. As such, it is not necessary to provide for any additional interim measures in Spanish procedure law. The problem arising in the *Aziz* case stemmed from the fact that at the time, it was not possible to challenge the enforcement of mortgages (or a non-judicial enforceable title or enforcement) on the basis of the unfairness of contract terms. As such, it was necessary for the debtor to commence a parallel declaratory procedure; however, this procedure did not result in the enforcement proceedings being stayed. The reform to the LEC (Art.557(2) and Art.695(2) for mortgages) now provides that unfairness constitutes a basis for enforcement to be challenged. The Spanish national reporter indicates that in practice, debtors might still bring declaratory proceedings parallel to enforcement proceedings where they seek to obtain a decision which invalids the loan or the unfair terms. There continues to be a lack of coordination between the proceedings.

462. In the Online Survey, the following question was asked: Does national procedural law provide that interim measures can be adopted while this examination is undertaken (e.g. allowing in declaratory proceedings linked to enforcement proceedings, for the latter to be stayed), in order to ensure that the court's final decision will have full effect?

[834] I.e. a challenge to the order made against the consumer defendant on the basis of an alleged violation of consumer law.

[835] Case C-415/11 *Aziz* EU:C:2013:164.

[836] National Reports, Question 8.6.2: Austria; Croatia; Czech Republic; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Italy; Lithuania; Luxembourg; Malta (by the Director General of Consumer Affairs, who can issue interim measures, while investigations are made); The Netherlands; Poland; Romania; Slovakia; Slovenia; Spain; Sweden; England and Wales and Scotland.



Responses to the Online Survey.

3.4 Jurisdiction and Arbitration Clauses

463. With regard to jurisdiction clauses, several alternatives could be envisaged. The most far reaching would be to generally prohibit jurisdiction clauses in consumer contracts.[837] Alternatively, it might be advisable to extend the protective regime of Arts.17 to 19 of the Brussels I bis Regulation to domestic contexts (venue) in the EU Member States. Furthermore, each of the proposed changes should be aligned by a safeguard provision which dictates that the consumer is informed about the legal consequences when entering an appearance before an incompetent court (see Art.26(2) of the Brussels I bis Regulation).

464. Regarding arbitration clauses, Art.10 of the Directive on Consumer Alternative Dispute Resolution precludes any arbitration clause with the consumer before the materialization of the dispute. Furthermore, Art.11 of the Consumer ADR Directive should be clarified in the sense that consumer arbitration tribunals – in addition to national courts – must apply mandatory EU consumer protection law. In addition, the EU law maker should ensure that consumer arbitration implies that the financial risk

[837] A similar prohibition is found in Art.10 (1) of the Directive on Consumer ADR 2013/11/EU.

and/or additional costs associated with this type of litigation shall not discourage the consumer from using these remedies.

4. Assessment

465. On balance, the guidance given by the ECJ regarding the *ex officio* application of consumer law appears to be limited. At its core, it obliges the national judge to raise factual and legal issues of mandatory EU consumer law of his or her own motion. Although the court must not actively start its own investigations, a sense for the possibility of conflicts to arise is required on the part of the judge. In the context of the UCTD, the court may deduce from the contract before it that there is an issue concerning standard terms. In this constellation, the court is obliged to investigate whether the UCTD is applicable. It may ask the parties[838] for additional statements regarding the application of the Directive (or indeed, the transposing national law). A similar situation arises when the judge is confronted with a context concerning the sale of goods and he might infer from the status of the parties (a trader and an individual) that the Sales Directive is applicable. Here, the court has to take a more active role and must ask the parties – of its own motion – whether the sale was for private or commercial purposes.[839]

466. With regard to the ambit of *ex officio*, the ECJ mainly refers to the applicable civil procedures of EU Member States. Courts are required to use the existing powers under their procedural laws broadly in order to assess the facts and to enable them to apply relevant EU law of their own motion. From the perspective of the procedural laws of many Member States, this empowerment might go further than the usual obligation of the judge to simply assess the facts submitted by the parties. On the other hand, modern procedural law encourages the judge to "guide" and to assist parties in the course of the litigation.[840] From this perspective, *ex officio* obligations

[838] Especially by asking the party bearing the burden of proof.

[839] Case C-497/13 *Faber* EU:C:2015:357.

[840] In some cases, the ECJ also urged the national judge to actively support the consumer when formulating his claim, cf. Case C-32/12 *Duarte Hueros* EU:C:2013:637. Although national procedures usually do not provide for such a role of the judge (as there a problem of impartiality might arise), the

do not appear to constitute a significant departure from traditional procedural law which might encourage the court to take a more active role.[841]

467. Against this background, it might be advisable to state explicitly the active role of the judge in consumer disputes as a common procedural standard in all EU Member States. This could be done by virtue of a specific provision in an EU directive, which states that the Member States are obliged to positively implement the obligation in their procedural laws. If a Member State already provides for a positive obligation in its procedural law, no legislative change will be needed. However, those Member States that do not already provide for an explicit rule in their procedural codes will have to change their legislative framework in order to ensure that the power of the judge is both visible and explicit.

468. In the context of payment orders and enforcement procedures, the application of the *ex officio* principle entails additional consequences, especially with regard to enforceable titles which have been made without any involvement of the judge (namely, notarial deeds and mortgages). Here, the ECJ has stated that there must be an effective remedy within the civil procedural systems of the EU Member States whereby the judge must verify whether the claim underlying the title was given in compliance with EU consumer law.[842] Consequently, the procedural remedy must be designed in an efficient way which empowers the court to make an assessment of mandatory EU law of its own motion. The protection of the consumer as the structurally weaker party is important in these accelerated procedures which

active role does not seem to be irreconcilable with provisions as Section 139 ZPO; National Report, Question 11.1.3: Germany.

[841] A pertinent example is Art.22 of the Dutch Code of Civil Procedure: “De rechter kan in alle gevallen en in elke stand van de procedure partijen of een van hen bevelen bepaalde stellingen toe te lichten of bepaalde, op de zaak betrekking hebbende bescheiden over te leggen. Partijen kunnen dit weigeren indien daarvoor gewichtige redenen zijn. De rechter beslist of de weigering gerechtvaardigd is, bij gebreke waarvan hij daaruit de gevolgtrekking kan maken die hij geraden acht.” (English translation: The judge may at any stage of the proceedings order the parties or one of them to clarify certain positions, or to submit certain documents related to the case (or to the matter in dispute). Parties may refuse to obey this order for compelling reasons. The judge will decide whether the refusal was justified, failing which the judge can make the inference he considers righteous).

[842] See supra at paras.413 *et seq*.

disadvantage the consumer who must actively take legal action in order to defend his rights (on the basis of EU consumer protection law).[843] Yet, the main legal consequences of this case group mainly focus on the national lawmakers. Again, an EU directive providing for minimum standards of *ex officio* control within the payment procedures and at the enforcement stage is warranted. However, the national judge has to step in when the national procedures do not permit for a minimum protection to be afforded to the consumer.

469. Finally, jurisdiction and arbitration clauses which entail that the consumer is factually prevented from bringing his claim before the civil courts are generally considered to be invalid. In this context, the national judge must assess the validity of the clause under the UCTD of his or her own motion. Regarding the activities of the EU lawmaker it might be advisable to implement this case law by explicit provisions aligning local jurisdiction in the Member States with Arts.17 and 18 of the Brussels I bis Regulation.

[843] Similarly, unreasonably short limitation periods of national law shall not preclude courts from examining *ex officio* the validity of a given unfair term: Case C-473/00 *Cofidis* EU:C:2002:705.

5. Recommendations to the European Commission

Problems identified	Need for action?	What action? If no action recommended, why?
Clarification of the active role of the national judge	Yes	A provision in an EU directive could state explicitly the active role of the judge in consumer disputes as a common procedural standard in all EU Member States. The UCTD could be amended in order for the text of Article 6 to reflect the ECJ's interpretation of that provision. Alternatively, the Commission could issue a recommendation regarding the application of the UCT Directive.
Clarification of requirement of ex officio control in specific procedures/stages of proceedings	Yes	In payment order proceedings and at the stage of enforcement, the need for ex officio control should be made explicit; a directive could provide for minimum standards of control in these types of proceedings, in those Member States in which payment order proceedings or similar procedures exist.
Jurisdiction and arbitration clauses	Yes	A directive could include a provision which makes clear that jurisdiction and arbitration clauses that preclude the consumer from bringing a claim before the civil courts are invalid. Moreover, such a directive could provide that the CJEU's case law is set out explicitly, aligning local jurisdiction in the Member States with Arts.17 and 18 of the Brussels I bis Regulation.

Chapter 4: Actions for Collective Redress

STEFAAN VOET[844]

1. Introduction to the Chapter

470. Collective redress is high on the European political agenda. In June 2013, the European Commission published its Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.[845] The Commission recommends that all Member States should have collective redress mechanisms in those areas where Union law grants rights to citizens and companies, including consumer protection. The goal is not to harmonise the national systems or to establish a uniform model, but rather to identify general, common and non-binding principles relating both to judicial (compensatory and injunctive) and out-of-court

[844] I would like to thank Dr. Stephanie Law and Janek Nowak (both from the MPI Luxembourg) for the excellent Interim Report they wrote in September 2016 and on which this section of the general report is based.

[845] Recommendation 2013/396 of the European Commission of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L206/60. Together with the Recommendation, the Commission published a Communication Towards a European Horizontal Framework for Collective Redress in which the history of the collective redress issue is recounted and in which the Commission elucidates and justifies the enumerated common principles (COM (2013) 401 final). See Christopher Hodges, 'Collective Redress: A Breakthrough or a Damp Sqibb?' (2014) 37 J. Consum. Policy 67; Csongor István Nagy, 'The European Collective Redress Debate after the European Commission's Recommendation: One Step Forward, Two Steps Back?' (2015) 9 MJ 530; Astrid Stadler, 'The Commission's Recommendation on Common Principles of Collective Redress and Private International Law Issues' (2013) 3 NIPR 483; Elisabetta Silvestri, 'Towards a Common Framework of Collective Redress in Europe? An Update on the Latest Initiatives of the European Commission' (2013) 1 RLJ 47; John Sorabji, 'Reflections on the Commission Communication on Collective Redress' (2014) 17 IJEL 62; Stefaan Voet, 'European Collective Redress: A Status Quaestionis' (2014) 4 IJPL 97 and Stefaan Voet, ''Where the Wild Things Are': Reflexions about the State and Future of European Collective Redress' (forthcoming) (on file with author).

collective redress that Member States should take into account when crafting such mechanisms. The mechanisms should be fair, equitable, timely and not prohibitively expensive.[846] By setting minimum standards, the Commission aims to facilitate access to justice and enable victims of mass cases to obtain compensation, and at the same time provide appropriate procedural safeguards to avoid abusive litigation.[847] The Member States had to implement the principles set out in the Recommendation by the 26th of July 2015.[848] The Commission will assess the implementation of the Recommendation by the 26th of July 2017.[849]

471. In the meantime, various European Member States have implemented[850] or are in the process of implementing collective redress mechanisms.[851] These regimes differ regarding scope (some are of a universal or trans-substantive nature, others are sectorial), standing (in most cases only associations or foundations have standing), opt-in vs. opt-out (the default is opt-in, but more and more Member States allow opt-out) and remedies (injunctive, declaratory and compensatory relief is allowed). In some jurisdictions the use of collective redress actions is limited to consumer law, as is for example the case in Belgium and France.[852]

[846] EC Recommendation, Art. 2.

[847] EC Recommendation, Art. 1 and recitals (10) and (13).

[848] EC Recommendation, Art. 38.

[849] EC Recommendation, Art. 41.

[850] National Reports, Question 9: Belgium (Art. XVII.38, XVII.39, XVII.63 and XVII.65 of the Code of Economic Law); Bulgaria (Art. 229 para 1 Nr. 4 of the Code of Civil Procedure); Denmark (Section 345 of the Danish Administration of Justice Act); Finland (CJP 14:4); France; Italy (Art. 140-bis Consumer Code); Lithuania (Art.441.9 of CPC); the Netherlands (Art. 3:305a DCCP); Poland; Spain; Sweden (Group Action Act (2002:599); UK (Group Litigation Order is possible; proceedings can be grouped and a proposal has been advanced but there is no collective redress in Scotland).

[851] National Report, Question 9: Hungary (HCC; Act CLV of 1997 on Consumer Protection; Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition; Act CXXXIX of 2013 on the National Bank of Hungary); the Netherlands (Art. 3:305a DCCP); Slovenia (Art.74 of the Consumer Protection Act.). See also, Eva Lein, Duncan Fairgrieve, Marta Otero Crespo and Vincent Smith, Collective Redress in Europe – Why and How? (BIICL 2015).

[852] Stefaan Voet, 'Consumer Collective Redress in Belgium: Class Actions to the Rescue?' (2015) 16 EBOR 121. In France, the action de groupe can also be used in competition law, but only as a

472. With the exception of a brief outline in section 2, this chapter of the general report will not provide a comprehensive overview of all European collective redress developments. It will focus on, and be limited to, the relationship that exists between collective and individual proceedings, and more particularly, the procedural juxtaposition between pending individual proceedings and the effect of related collective proceedings started at a later point in time.

473. One example that can be engaged to illustrate the relevance of this relationship is the Belgian consumer class action act. The act provides that upon the certification decision, all proceedings pending between an individual class member and the defendant having the same object and cause will become without object, while all new proceedings started by an individual class member against the defendant having the same object and cause will be inadmissible.[853] Given that Belgian class actions can work both under an opt-in and an opt-out regime,[854] this may lead to consumers having their individual case being rejected when they have inadvertently failed to opt out of a class action against the same defendant and with the same object and cause.

474. Moreover, while one may argue that the outcome of individual and collective proceedings will in the end be the same, such a course of action may nevertheless have an impact on the immediacy of individual consumer protection, especially since collective action proceedings are complicated and tend to last for a long time. As it appears from the online survey and the interviews, the duration of proceedings is

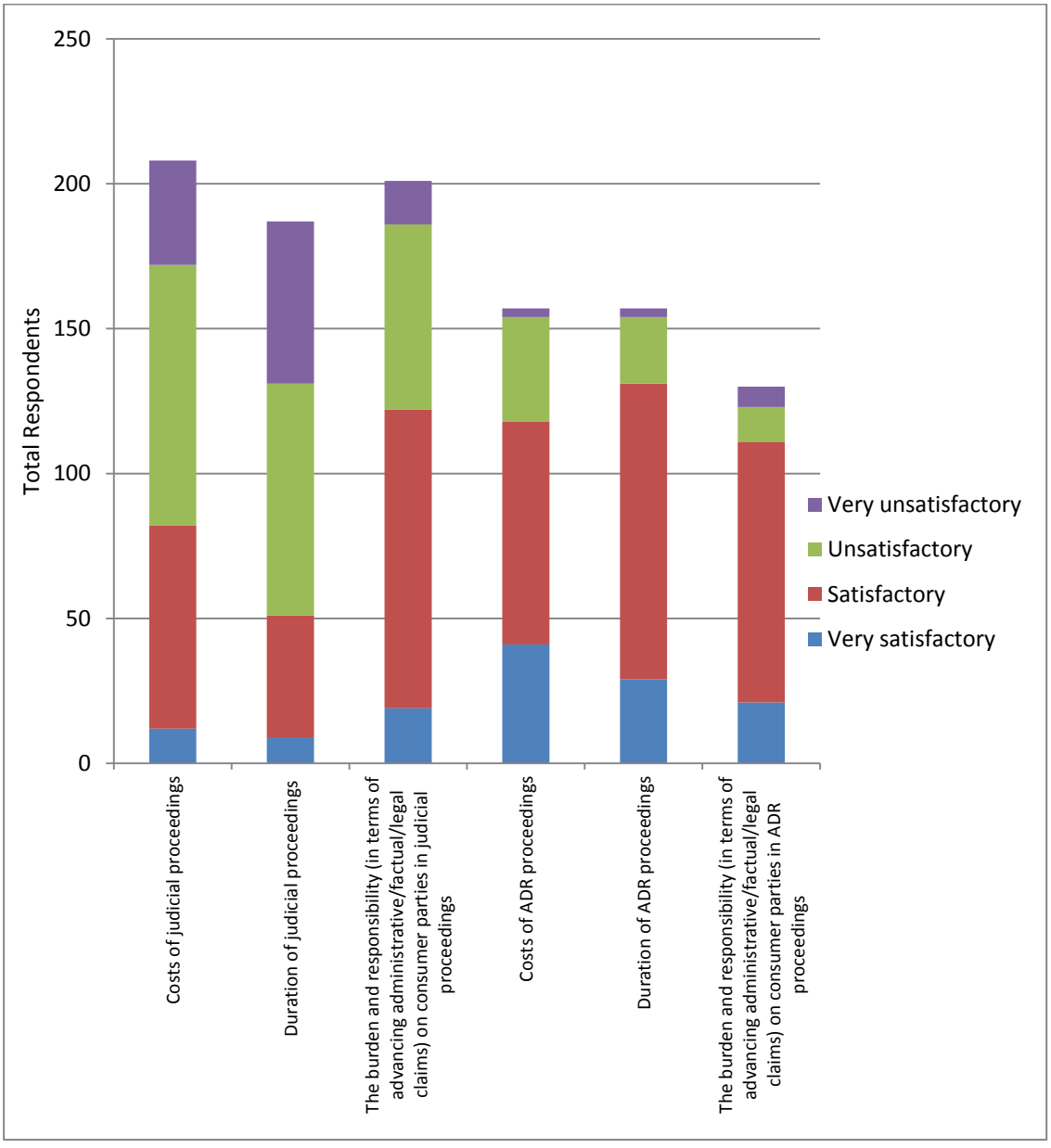
collective follow-on action. See Alexandre Biard, 'Class Action Developments in France (August 2016)' <http://globalclassactions.stanford.edu/content/class-action-developments-france> accessed 10 January 2017 and Frédérique Ferrand, 'Collective Litigation in France: From Distrust to Cautious Admission' in Viktória Harsági and Remco van Rhee (eds.), Multi-Party Redress Mechanisms in Europe: Squeaking Mice? (Cambridge 2014). Since 2016, class actions for health-related cases are also possible. In November 2016, the class action mechanism was expanded to privacy and data protection, environmental and discrimination cases. Additionally, a general framework providing for horizontal rules for class actions filed before civil and commercial courts was introduced.

[853] National Report, Question 9: Belgium (Belgian Code of Economic Law, Art. XVII.69).

[854] Stefaan Voet, 'Consumer Collective Redress in Belgium: Class Actions to the Rescue?' (2015) 16 EBOR 121, 132-133.

indeed a source for frustration when it comes to consumer protection litigation, even more so than costs.

475. In both the online survey[855] and the interviews, the following question was asked: What is your general opinion on procedural consumer protection law?



Responses to the Online Survey and Interviews.[856]

[855] See SurveyMonkey Online Questionnaire, Questions 39, 68, 99, 127, 159, 191 and 214 (Questions asked to all respondents).

[856] The respondents to the online questionnaire and interviews are – while not exactly the same individuals – from the same group of respondents, including lawyers, judges, CPAs, consumers and ADR entities. Given that the same questions were asked (and in those cases in which the data

476. A number of cases have come before the CJEU dealing with problems related to the relationship between collective and individual proceedings. Two topics will be explored in detail:

the first, whether proceedings in individual cases are suspended pending the outcome of collective proceedings (section 3.1.) and

the second, what the impact is of the decision in the collective proceedings upon the stayed individual proceedings (section 3.2.).

2. Injunctive/Compensatory Relief and Collective Actions

2.1 Summary of the Status Quo

2.1.1 Terminology

477. According to the 2013 European Commission Recommendation on collective redress mechanisms, collective redress means:[857]

> (i) a legal mechanism that ensures a possibility to claim cessation of illegal behaviour collectively by two or more natural or legal persons or by an entity entitled to bring a representative action (injunctive collective redress);
>
> (ii) a legal mechanism that ensures a possibility to claim compensation collectively by two or more natural or legal persons claiming to have been harmed in a mass harm situation or by an entity entitled to bring a representative action (compensatory collective redress).

478. Injunctive collective redress typically refers to the situation where an entity (or association) entrusted with the task of protecting the interests of a certain group of people or of a specific cause, seeks a court order forcing the defendant to do something or to refrain from doing something. A typical example of an action for injunctive collective redress is an action brought by a consumer protection association seeking the cessation of an illegal commercial practice.

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collected has been collated), the same "closed" responses presented, and in light of the small number of answers received to certain questions, we have collated the responses.

[857] EC Recommendation collective redress mechanisms, Art.3(a).

479. Compensatory collective redress proceedings generally have as their object the compensation of a large group of (un)known parties through an action brought by a group representative. An example is an action brought by a consumer protection association or a public body seeking compensation from a trader for having charged consumers a too high a price.

480. It is important to make this distinction because collective redress (or 'class actions'[858]) is usually associated with the second type of proceedings. For example, when asked about the impact of collective proceedings on individual proceedings, a number of national reports predominantly refer to compensatory collective proceedings, despite the existence of injunctive collective redress in their legal system.[859] Apparently, they associate collective redress with compensatory relief, not with injunctive relief. Other national reports do not make a distinction at all.[860]

481. However, injunctive collective redress may play an important and distinct role in consumer protection. This can be illustrated by the ECJ's judgment in *Invitel*, where the Court held that:[861]

> Where the unfair nature of a term included in the [general business conditions] of consumer contracts has been recognised in an action for an injunction, such as that here at issue in the main proceedings, the national courts are required, of their own motion, and also as regards the future, to draw all the consequences provided for by national law in order to ensure that consumers who have concluded a contract to which those [general business conditions] apply will not be bound by that term.

[858] The term 'class action' is usually avoided in European policy documents. It seems to be automatically linked to 'US class actions' which are perceived as abusive.

[859] National Reports, Question 9: Belgium (rt. XVII.38, XVII.39, XVII.63 and XVII.65 of the Code of Economic Law); Bulgaria (Code of Civil Procedure); Croatia (Consumer Protection Act, Arts.120 and 106(1))); Cyprus (Civil Procedure Rules); Latvia (Civil Procedure Law and Art.23 of the Consumer Rights Protection Law); Lithuania (CPC).

[860] National Reports, Question 9: Denmark; Greece (Art.10 Consumer Protection Act); Italy (Art. 140-bis Consumer Code); Malta (Collective Proceedings Act).

[861] Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* EU:C:2012:242, para 43.

2.1.2 Collective Actions for Injunctive Relief

482. Injunctive collective redress is available in all Member States. The key directive in this regard is the Injunctions Directive,[862] which ensures the defence of the collective interests of consumers in the internal market. The Directive provides the means to bring an action for the cessation of infringements of consumer rights granted by EU law as enumerated in the Annex to the Directive and transposed into national law. The Injunctions Directive was evaluated in 2012. The Commission concluded that:[863]

> Despite its limitations, injunctive actions constitute a useful tool for the protection of the collective interests of consumers. Qualified entities are gradually becoming aware of the possibilities offered to them by the Directive and gaining experience with its use. However, important disparities exist among Member States in its level of use and effectiveness. In any event, even in those Member States where injunctions are considered quite effective and are widely used, their potential is not fully exploited due to a number of shortcomings identified in this report. The most important are: the high costs linked to the proceedings, the length of the proceedings, the complexity of the procedures, the relatively limited effects of the rulings on injunctions and the difficulty of enforcing them. These difficulties are even more present in injunctions with a cross-border dimension.

483. Another example can be found in the Unfair Contract Terms Directive,[864] which is of relevance for the analysis below. According to the case law of the ECJ, a consumer association must be able to obtain a declaration that specific terms are unfair and take action to have them prohibited.[865] As mentioned above,[866] where a term is

[862] Directive of the European Parliament and of the Council 2009/22/EC of 23 April 2009 on injunctions for the protection of consumers' interests [2009] OJ L110/30.

[863] Report from the Commission to the European Parliament and the Council concerning the application of Directive 2009/22/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interest, COM (2012) 635 final, 16.

[864] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29. See Art.7. For a recent overview see Marco Loos, 'New International Perspectives in Standard Terms Legislation, an Introduction' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2847551> accessed 29 November 2016.

[865] Case C-372/99 *Commission of the European Communities v Italian Republic* EU:C:2002:42, para 14 and Case C-472/10 *Invitel* EU:C:2012:242, para.36.

[866] See Case C-472/10 *Invitel* EU:C:2012:242.

deemed to be unfair in such a procedure, it is considered to be unfair also in all existing and future contracts between the trader and consumers.[867]

484. Proceedings for injunctive relief can have an impact on individual consumer redress proceedings, as evidenced by the judgment of the ECJ in the case of *Sales Sinués*,[868] from which it appears that a collective claim for injunctive relief in Spain, had the effect of automatically suspending all related individual claims, resulting in a delay in the outcome of the proceedings of an individual consumer, without the court hearing the individual case having the possibility to provide a form of interim protection. This resulted in the continuation of a temporary violation of EU consumer law, as the relevant court was unable to afford immediate protection to the consumer. Similar issues appear in other Member States, as discussed below.

2.1.3 Collective Actions for Compensatory Relief

485. Compensatory relief as a form of collective consumer redress does not exist in all Member States. Three situations can be distinguished. First, there is a group of Member States that have a mechanism for compensatory collective redress specifically designed for consumer disputes.[869] Second, there is a group of Member States that have a universal (or trans-substantive) procedure for compensatory collective redress that consumers also can use.[870] Third, a number of Member States, which have no formal compensatory collective redress procedure; provide for procedural mechanisms allowing for the aggregation of claims; this resembles compensatory collective proceedings, notwithstanding the existence of considerable differences in legal design and consequences.[871] This third situation appears to be present in all systems that do not have a specific form of compensatory collective redress through a representative action or other mechanism.

[867] Case C-472/10 *Invitel* EU:C:2012:242, paras.38 and 43 and Case C-191/15 *Verein für Konsumenteninformation v Amazon EU Sàrl* EU:C:2016:612, para.56.

[868] Joined Cases C-381/14 and 385/14 *Jorge Sales Sinués v Caixabank SA* EU:C:2016:252.

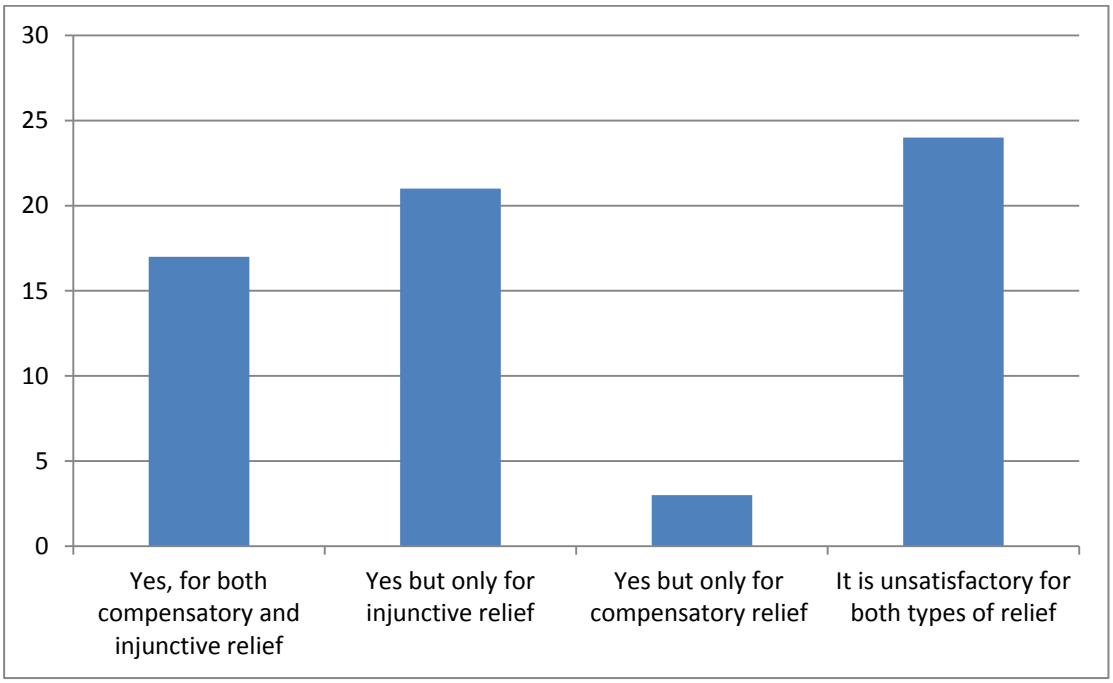
[869] National Reports, Question 9: Belgium; France; UK.

[870] National Reports, Question 9: Bulgaria; Lithuania; the Netherlands; Slovakia.

[871] National Reports, Question 9: Austria; Cyprus; Slovenia.

2.2 Problems Identified in the National Legal Systems

486. The question arises as to whether injunctive and/or compensatory collective redress mechanisms are perceived to be *satisfactory* in the Member States. Asked whether the collective redress mechanisms available in their legal order are satisfactory, various interviewees have expressed some concern, as this graph shows.



Responses to the Online Survey and Interviews.[872]

487. Various reasons are advanced. First, it appears that the limited class of persons entitled to bring collective proceedings may have an impact on the effectiveness of collective proceedings. Second, there is the issue of costs within the context of collective redress, especially the question of who has to pay in the event of unsuccessful collective proceedings. A third concern appears to be the enforcement of collective redress, and especially injunctive collective redress.

[872] The respondents to the online questionnaire and interviews are – while not exactly the same individuals – from the same group of respondents, including lawyers, judges, CPAs, consumers and ADR entities. Given that the same questions were asked (and in those cases in which the data collected has been collated), the same "closed" responses presented, and in light of the small number of answers received to certain questions, we have collated the responses. All interviewees were asked this question although evidently not all responded. Rather, 65 responded in total, with each making one response as indicated above.

488. It is noteworthy that various interviewees in Germany and Austria are strongly opposed to the introduction of a compensatory collective redress mechanism. They find the current system to be sufficient. Moreover, they indicate that a compensatory collective redress mechanism would not fit within their legal system.[873] Conversely, other interviewees are in favour of the introduction of a compensatory collective redress mechanism in their legal order.[874] These opposite views are evidence of the complex (and sometimes heated) debate on the introduction of compensatory collective redress. For example, the interviewees in Austria have highlighted that the Austrian Economic Chamber blocks negotiations with regard to the introduction of class actions and test cases into the Austrian Code of Civil Procedure.[875]

3. Injunctive Relief, Individual Redress and Collective Actions

489. As provided in section 1, two topics will be explored in detail:

the first, whether proceedings in individual cases are suspended pending the outcome of collective proceedings (section 3.1.) and

the second, what the impact is of the decision in the collective proceedings upon the stayed individual proceedings (section 3.2.).

3.1 Staying of an Individual Claim Until Collective Proceedings Have Finished

490. This section of the chapter focuses on the procedural juxtaposition between pending individual proceedings and the effect of related collective proceedings. Two scenarios are possible. In the first, individual proceedings are already ongoing and the collective proceedings are started at a later moment in time. In the second, collective proceedings are ongoing when an individual procedure is initiated. This chapter focuses only on the first scenario, namely the effect of subsequent collective

[873] Interviews with 2 Austrian judges, 2 Austrian lawyers, an Austrian academic, Austrian trade association and 3 German academics, German consumer association, and a German lawyer.

[874] Interviews with an Austrian judge, Austrian consumer association and Austrian lawyer and 3 German academics and a German lawyer.

[875] Interview with an Austrian consumer association.

proceedings on individual actions that have already been initiated. It was this scenario that led to the ECJ's judgment in *Sales Sinués*[876] and it is precisely this case that triggered the questions on collective redress in this study. We are not dealing with the effect of a collective action on a consumer's future possibilities to bring a judicial claim; the traditional opt-in/opt-out discussion is not part of this analysis.

491. However, that being said, the choice for an opt-out system in collective redress proceedings can also have an impact on ongoing individual proceedings. As demonstrated by the aforementioned Belgian example, the failure of a party to opt out of collective proceedings when they are already involved in individual proceedings, may lead to the consequence that the latter proceedings become without object once the deadline to opt out has expired. While this is not the same as having individual proceedings stayed, the consequences are the same: namely, a delay in the immediacy of consumer protection. With the introduction of compensatory collective redress mechanisms in all Member States, this issue might become pressing once such mechanisms become more popular.

3.1.1 Summary of the Status Quo: Sales Sinués

492. According to the ECJ in the *Sales Sinués* case, a collective action procedure against a trader, under the Unfair Contracts Terms Directive, may not have the result that, as long as that procedure is pending, individual procedures are suspended; it was considered that this would result in the consumer no longer having all circumstances of the case taken into account, such as negotiations that may have taken part between the parties, and further, would not be able to waive the non-application of the unfair term.[877] A national rule requiring a court to suspend an individual action brought before it by a consumer until such a time as a final judgment in a parallel collective action brought by an association is rendered, does not constitute an

[876] Joined Cases C-381/14 and 385/14 *Jorge Sales Sinués v Caixabank SA* EU:C:2016:252.

[877] Joined Cases C-381/14 and 385/14 *Jorge Sales Sinués v Caixabank SA* EU:C:2016:252, para 37.

adequate or effective means of bringing to an end the continued use of unfair clauses.[878]

493. One point which is interesting in this regard is the view of the Spanish reporter on the *Sales Sinués* case, which was a Spanish case.[879] The reporter notes that in his eyes it is doubtful that the applicable Spanish rule (i.e. Art.43 LEC[880]) really requires the staying of the individual procedure until the collective one is adjudicated. Besides the fact that the parties are not the same, the standing of the consumer association to file the collective claim seeking the granting of the injunction does not stem from Art.11 LEC[881] (which would be required for an extension of res judicata effects, according to

[878] Joined Cases C-381/14 and 385/14 *Jorge Sales Sinués v Caixabank SA* EU:C:2016:252, para 39. As an aside, another, more recent, decision of the CJEU should be mentioned. In the *Fernández Oliva* case (again a Spanish case) the court ruled that Art. 7(1) of the Unfair Contract Terms Directive must be interpreted as precluding a provision of national law which does not permit a court seized of an individual action brought by a consumer seeking a declaration that a term of a contract binding him to a seller or supplier is unfair to adopt interim relief of its own motion, for as long as it considers appropriate, pending a final judgment in an ongoing collective action, the outcome of which may be applied to the individual action, when such relief is necessary in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed by the consumer under the Unfair Contract Terms Directive (Joined Cases C-568/14 to 570/14 *Ismael Fernández Oliva v Caixabank SA* EU:C:2016:828).

[879] National Report: Spain, Question 9.1.1.

[880] National Report: Spain (Spanish Code of Civil Procedure, Art. 43: 'Where, in order to give a ruling on the subject-matter of a dispute, it is necessary to decide an issue which itself constitutes the main subject-matter of other proceedings pending before the same or a different civil court, and where it is not possible for the two actions to be joined, the court may, on the application of both parties or on the application of one of them and after hearing the other party, order the proceedings to be stayed as they currently stand, until such time as the proceedings concerning the preliminary issue are concluded').

[881] National Report: Spain (Spanish Code of Civil Procedure, Art. 11: '1. Notwithstanding the individual standing of those damaged, the legally constituted associations of consumers and users shall be legitimised to defend the rights and interests of their members and of the association in court, as well as the general interests of consumers and users. 2. When those damaged by an event are a group of consumers or users whose components are perfectly determined or may be easily determined, the standing to apply for the protection of these collective interests corresponds to the associations of consumers and users, to the entities legally constituted whose purpose is the defence or protection of these, and the groups affected. 3. When those damaged by an event are an undetermined number of

article 222.3 LEC[882]), but from the 1998 Act on General Contract Terms (and this is also confirmed by Art.15.4 LEC, excluding the application of the rules on announcement and intervention in collective proceedings seeking injunctive relief). If the collective claim is a compensatory one, an ongoing individual claim, relating to the individual dimension of the dispute, shall not necessarily be stayed. However if an individual claim is brought separately to a collective one, then Art.222.3 LEC should not apply to the single consumer that decided to proceed alone; and, therefore, the judgment rendered on the collective claim could not have binding effects on his claim, and this, on turn, excludes any need to stay the individual proceeding.

494. This is echoed by the answers given by Spanish lawyers to the online survey. They have qualified the existence in Spain of a general obligation to stay proceedings, which appears from the judgment in *Sales Sinués*, as being a regional and isolated practice,[883] as one that depends on the criterion the judge applies,[884] or even as one

consumers or users or a number difficult to determine, the standing to lodge a claim in court in defence of these diffuse interests shall correspond exclusively to the associations of consumers and users which, in accordance with the law, are representative. 4. Furthermore, the Public Prosecution Service and the authorised entities referred to in Article 6.1.8. shall be legitimised to exercise the cessation of the defence of the collective interests and the diffuse interests of the consumers and users').

[882] National Report: Spain (Spanish Code of Civil Procedure, Art. 222.3: '3. Res judicata shall affect the parties to the proceedings in which it is ruled, as well as their heirs and successors and any non-litigants holding rights upon which the parties' capacity to act is grounded in accordance with the provisions set forth in Article 11 herein. In the judgements on marital status, matrimony, kinship, paternity, maternity or incapacity and the recovery of capacity, res judicata shall take effect from the moment such judgements are duly registered or entered in the Civil Registry. Any judgements issued on claims contesting corporate decisions shall affect all partners, including those not involved in the litigation').

[883] SurveyMonkey Online Questionnaire, Question 32: 'Solo en Barcelona, gerona y de modo aislado en algún juzgado se ha suspendido según nuestra experiencia'.

[884] SurveyMonkey Online Questionnaire, Question 32: 'La suspensión depende del criterio del tribunal que conoce de la acción individual'.

which is deemed to be erroneous in some cases.[885] Other Spanish interviewees have stated that there is no stay of proceedings made.[886] The Spanish national reporter interviewed a Spanish academic who said:[887]

> The legal rule on the matter (article 43 LEC) does not oblige to stay proceedings, and it does not say anything on binding effects. In her view, the court shall be granted discretion to assess: (i) if the individual proceeding should be stayed; and (ii) if the outcome of the collective proceeding should be binding on the individual one (if the collective claim is dismissed, the decision should not have binding effect; however if the collective claim is successful, e.g. a contract term is considered unfair, then it should not be disregarded).

495. In other words, the responses from within the Spanish legal order suggest that the Spanish court that made the reference for a preliminary ruling might have misinterpreted the law.

496. As noted, the *Sales Sinués* case was a Spanish case. The question arises as to whether similar national rules, on the basis of which individual claims are stayed until parallel collective proceedings have come to end, actually exist. In the further analysis, the notion of "collective proceedings" is interpreted broadly. It entails compensatory and injunctive collective redress. As mentioned above, some national reporters did not make a clear distinction between these two procedures.

3.1.2 Problems Identified in the National Legal Systems

3.1.2.1 Online Survey and Interviews

497. It appears from the online survey that while in some cases individual proceedings are stayed when a collective procedure has been instigated, this does not happen across the board.[888] Admittedly, the number of relevant answers to the question was rather limited. However, it is a trend that is confirmed by the interviews: the effects of

[885] SurveyMonkey Online Questionnaire, Question 32: 'No obstante, tengo conocimiento de la existencia de resoluciones erradas de suspensión a otros compañeros'.

[886] Interview with Spanish academic (who states there is no stay of proceedings) and with Spanish academic (who states there should not be a stay of proceedings).

[887] Interview with a Spanish academic.

[888] See SurveyMonkey Online Questionnaire, Question 32.

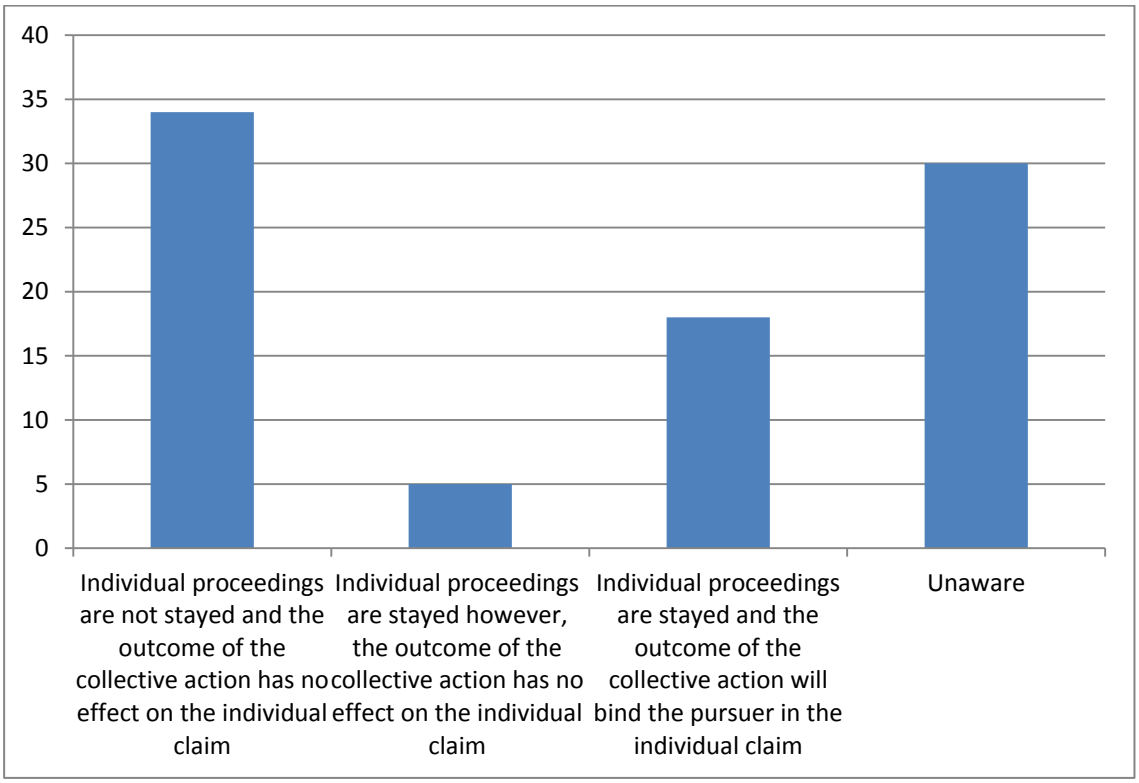
collective proceedings on individual proceedings differ from Member State to Member State. While the majority of the interviewees indicates that individual proceedings are not stayed, interviewees from Greece,[889] Poland,[890] and Slovenia[891] indicate that proceedings are stayed pending the outcome of collective action proceedings. Whereas in case of Greece and Poland this is only a minor opinion, contradicted by other interviewees and the national report in question, a majority of Slovenian interviewees states that individual proceedings are stayed pending the outcome of collective proceedings.

498. In the interviews and online survey, the following question was asked: If collective proceedings are launched before the national court, in your experience would a judge hold that ongoing individual claims, relating to the same dispute, should be stayed until the collective proceedings are brought to an end? If individual proceedings are stayed in practice, what are the effects of the court's decision in the collective action?

[889] Interview with a Greek lawyer.

[890] Interview with a Polish lawyer and academic.

[891] Interviews with a Slovenian academic, 2 Slovenian judges, Slovenian business and Slovenian academic.



Responses to the Online Survey and Interviews.[892]

499. When looking at the national reports, the differences appear to be subtle. Much has to do with the notions of "discretion" and "binding effect". This also appears from the data collected in the interviews and the online survey: respondents who have indicated "other" (a distinction which is not reflected in graph) all referred to the exercise of discretion by a judge and the value of precedent. They did not refer to an automatic stay or an automatic binding effect. The high level of respondents answering "unaware" indicates that perhaps there is no issue, the issue is not perceived to be problematic or that there is an issue which has not yet "caught the eye" of the respondents.

[892] The respondents to the online questionnaire and interviews are – while not exactly the same individuals – from the same group of respondents, including lawyers, judges, CPAs, consumers and ADR entities. Given that the same questions were asked (and in those cases in which the data collected has been collated), the same "closed" responses presented, and in light of the small number of answers received to certain questions, we have collated the responses.

3.1.2.2 Jurisdictions with a Specific National Procedural Rule Ordering the Stay of Individual Proceedings in Case Parallel Collective Proceedings are Ongoing

500. In most Member States, there is no specific national procedural rule ordering the stay of individual proceedings in case parallel collective proceedings are ongoing. In other jurisdictions such a rule exists.

501. In some of these jurisdictions, the law orders such a stay. In Germany, the Capital Markets Model Case Act provides for the staying of the individual procedures until the model case is decided.[893] Under the Dutch Collective Settlements Act individual proceedings are, in principle, stayed.[894] However, it should be noted that these are not examples resembling the *Sales Sinués* scenario (individual (compensatory) claim vs collective (injunctive) claim).

502. In most jurisdictions, the court has the discretionary power to stay proceedings until the collective proceedings are brought to an end. This is for example the case in Finland.[895] The Maltese Collective Proceedings Act provides that the court, on its own initiative or on the application of a party or a class member, may stay any proceeding related to the collective proceedings before it, on such terms as it considers appropriate.[896] In Portugal, consumers who have opted out of the collective proceedings may however be subject to the stay of their individual proceedings if the court believes that there are good grounds for awaiting a decision from the collective proceedings, for example because this depends on the assessment of the same legal issues.[897] Again, these are examples of jurisdictions with a specific (compensatory) collective redress (and even, a representative) regime.

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[893] National Report: Germany (German Capital Markets Model Case Act, Art. 5); Interviews with a German lawyer and German judge.

[894] National Report, Question 9.1.1: the Netherlands.

[895] National Report, Question 9.1.1: Finland.

[896] National Report, Question 9.1.1: Malta. The reporter notes that “for an individual to be represented as a class member and participate in a collective action, such individual would have no option but to request the stay of any proceedings previously filed which raise common issues with such collective action”.

[897] National Report, Question 9.1.1: Portugal (CPC).

503. In Hungary, if collective (public interest) proceedings are launched, ongoing individual claims, relating to the same dispute, are stayed until the collective proceedings are brought to an end. The general rule is that in case the outcome of a civil case depends on the adjudication of a prior matter for which another civil case falling within the court's jurisdiction is already pending, the court can stay the former until the final conclusion of such other proceedings. Moreover, if these proceedings have not yet been initiated, the court can set a time limit for the opening of the proceedings as appropriate. It should be stated that the court *can*, but is not obliged to stay the case. The court's decision to stay the proceedings can be challenged. The court also has the powers to reverse such a decision on its own initiative.[898]

3.1.2.3 Jurisdictions with a General National Procedural Rule Allowing the Court to Stay Proceedings

504. In most jurisdictions there is a general national procedural rule allowing the court to stay proceedings on the basis of its discretion, in part or as a whole, when other parallel (civil, criminal or administrative) proceedings, relating to the same or similar issues of fact or law, are pending. This is the case in most Member States.[899] In some jurisdictions particularities exist.

505. In Austria, the court can only stay the proceedings when it is bound by the decision in the other parallel proceedings. As the decision in a collective procedure (for injunctive relief) has no binding effect on the decision in the individual procedure, the rule is *de facto* never applied.[900] The proceedings can only be stayed if both parties agree. The same is true in Germany. According to the German Federal Court, the general national procedural rule does *not* apply when a consumer association (*Verbraucherzentrale*) launches a parallel collective action for injunctive relief.[901] Consequently, the court does not have to stay the individual procedure. It only has to

[898] National Report, Question 9.1.1: Hungary.

[899] National Report: Austria, Bulgaria, Denmark, Germany and Lithuania.

[900] National Report, Question 9.1.1.: Austria.

[901] National Report, Question 9.1.1: Germany (The German Federal Court decision dates from 30 March 2005 (X ZB 26/04, NJW 2005, 1947-1948)).

do so when both parties so request and if it can be assumed that such a stay is appropriate in light of pending settlement negotiations or on the basis of other sound reasons.

506. In Bulgaria, there is a conditionality test: if the decision in a procedure is *conditional* upon the outcome of another parallel procedure, the court stays the procedure.[902] In 2015 there was a Supreme Court decision resembling the facts in the *Sales Sinués* case.[903] Parallel to an individual action, more specifically a claim for payment between a trader and a consumer, there was a collective action initiated by the Commission for Consumer Protection against the same trader dealing with the validity of a number of clauses in the general terms and conditions of the same trader. The consumer participated in the collective action. The appellate court had stayed the individual procedure because the decision was conditional upon the outcome of the collective procedure. The Supreme Court affirmed this decision.

507. According to Romanian civil procedure, various individual claims dealing with the same question of law *have* to be suspended when the High Court for Cassation and Justice is requested to issue a decision interpreting that question of law. The court *can* suspend an individual claim when the outcome of the case depends, in part or whole, on the existence of a right that is subject to a different proceeding. If a violation of a consumer right was established in a procedure initiated by the National Authority for Consumer Protection or a consumer association, the consumer can subsequently initiate a new individual procedure in which he can claim damages or even ask for a review of the previous individual decision dismissing his individual claim.[904]

508. In Slovakia, there is no obligation to stay individual proceedings if a consumer association has started a parallel collective action for injunctive relief.[905] The situation changes once there is a decision on the violation of consumer law. For example, the

[902] National Report: Bulgaria (Code of Civil Procedure, Art. 229, para 1, n° 4).

[903] National Report: National Report (The Supreme Court decision dates from 13 January 2015 (case n° 7392/2014)).

[904] National Report: Romania, Question 9.1.1; Interview with a Romanian lawyer.

[905] National Report: Slovakia, Question 9.1.1; Interview with a Slovakian academic.

decision of the Slovak Trade Inspectorate (the competent consumer authority) establishing a violation of consumer law is binding on the court because it concerns a public offence. The same is true for a court decision establishing a violation of consumer law. Such decisions have an *erga omnes res judicata* effect. A specific provision deals with the effect of a court decision regarding unfair contract terms in individual proceedings.[906] If the court declares a contract term unfair or denies the applicant payment on the base of the unfair term or orders that money is paid back or that damages are paid, the user of the unfair contract term is obliged to refrain from its use. The Slovak legislator compensates the lack of collective actions by enhancing the effects of court decisions in individual proceedings. From a procedural point of view, such a provision does not extend the effect of the judgment to third parties, but only imposes a substantive obligation (i.e. requiring the cessation of the use of unfair contract terms), which can be engaged in other proceedings.

3.2 Binding or Non-binding Effect of the Decision in the Collective Proceedings

3.2.1 Summary of the Status Quo: Invitel

509. This section deals with the effect that the outcome of collective proceedings may have on individual proceedings. Given the fact that in some instances individual proceedings are stayed because they are connected to collective proceedings, it seems logical that the outcome of the collective proceedings will have an impact on the outcome of the individual proceedings, and that the judge hearing the individual proceedings is bound by the decision rendered in the collective proceedings. From a procedural point of view, the question arises as to whether the outcome of the collective procedure has an *erga omnes* binding effect or not.

510. In this context, the *Invitel* decision comes into play. The CJEU decided that where a term is found to be unfair in a collective procedure for injunctive relief, it must also be considered to be unfair in all other existing and future contracts between the trader

[906] National Report, Question 9.1.1: Slovakia (Slovak Civil Code, § 53a).

and consumers.[907] As such, the effect of a finding of invalidity should be extended to proceedings concerning individual claims.[908]

3.2.2 Problems Identified in the National Legal Systems

3.2.2.1 Jurisdictions Where the Outcome of Collective Proceedings has an erga omnes res judicata Effect

511. In a limited number of jurisdictions, the outcome of a collective procedure has an *erga omnes res judicata* effect in an individual procedure.

[907] Case C-472/10 *Invitel* EU:C:2012:242, paras.38 and 43.

[908] It is worth noting that a case which extends and develops the Invitel judgment has recently been decided by the ECJ (Case C-119/15 *Biuro* EU:C:2016:987). *Biuro* was a case referred from the Polish Court of Appeal; the national court engaged Invitel explicitly in its reference in asking whether Arts.6(1) and Art.7 UCTD, in line with Arts.1 and 2 of the Injunctions Directive can provide that the use of standard terms with "content identical to that of terms which have been declared unlawful by a judicial decision" and subsequently included in a register of unfair terms (per Art.479 of the Code of Civil Procedure), be regarded, in respect of an entity not party to the judicial proceedings, as a unlawful act which harms the collective interests of consumers and thus provided the basis for the imposition of an administrative fine. The ECJ firstly recognised that the right to an effective judicial remedy established in Art.47 Charter of Fundamental Rights applied also to a business party who claims that his use of clauses previously found to be abusive in respect of other traders is not unlawful, and that, in respect of an *in abstracto* review of unfair terms, there should be a possibility for businesses to challenge the finding of unfairness, the decision to impose an administrative fine and the proportionality of that fine. The ECJ held that if these requirements of Art.47 were satisfied, the Polish system could not be said to be unlawful. The *Biuro* judgment develops the concept of the *in abstracto* control of consumer contract clauses, as established initially in *Invitel*, extending the effects of a finding of unfairness – provided the Art.47 CFR requirements are satisfied – to business parties using "materially identical" terms. It is worth noting further that at the national level – in the Polish system – the regime of *in abstracto* review was reformed in April 2016 (via Arts.23a – 23d of the Act on Competition and Consumer Protection), which has replaced judicial review, previously made by the Court of Protection of Competition and Consumers, with administrative control, undertaken by the President of the Office of Competition and Consumer Protection. Under the new regime, there is a general prohibition on the use of unfair terms, the President of the Office can render a declaration of unfairness *in abstracto* (which will apply to the business against whom the unfair term has been declared, and all consumers who have concluded a contract including such terms) and can impose fines for use of terms previously deemed to be unfair.

512. In Lithuania, the decision in the collective action is binding in the individual case and 'ascertained circumstances will not be re-examined in the individual case'.[909] In Slovakia, a judgment finding a violation of consumer law has an *erga omnes res judicata* effect.[910] Croatian law contains provisions on the binding effect of the outcome of a collective action procedure for injunctive relief in procedures initiated by individual consumers relating to compensation of damage caused by the same defendants.[911] Such a decision has an *erga omnes* effect, thereby allowing every consumer to request the enforcement of a decision ordering a defendant to refrain from the same or similar illegal behaviour in relation to all consumers.[912]

3.2.2.2 Jurisdictions Where the Outcome of Collective Proceedings has no erga omnes res judicata Effect

513. In the vast majority of Member States, the outcome of the collective proceedings is non-binding, or has no *erga omnes res judicata* effect in individual proceedings. This is also the case in jurisdictions where individual proceedings have been stayed in relation to collective proceedings.[913]

514. However, the *Invitel* judgment provides for a particular *erga omnes* effect of injunctive collective redress proceedings. While the *Invitel* judgment should be placed in the context of the Hungarian legal system, various legal systems provide for a similar kind of *erga omnes* effect.

515. Austrian law does not provide for an *erga omnes* binding effect of the decision in the collective proceedings.[914] The negative or positive outcome in the collective proceedings does not (legally) bind the consumer bringing an individual claim. However, in order to meet the *Invitel* doctrine, Austrian law provides for a rule stipulating that an injunction prohibiting the use of certain conditions in contract terms

[909] National Report, Question 9.1.2: Lithuania.

[910] National Report, Question 9.1.1: Slovakia.

[911] National Report: Croatia (Croatian Consumer Protection Act, Art.118 and Croatian Civil Procedure Act, Art.502.c).

[912] National Report: Croatia (Croatian Consumer Protection Act, Art.117).

[913] Interview with a French Consumer Protection Association.

[914] National Report; Question 9.1.2: Austria.

also includes the prohibition to invoke any such condition vis-à-vis the consumer with whom it was inadmissibly agreed.[915] This prohibition can be enforced by the association or body which has obtained the judgment granting the injunction.[916]

516. In Germany,[917] a judgment that has entered into force shall take effect (only) for and against the parties to the dispute (i.e. the decision has no binding effect on third parties by law). However, there is a strong binding effect on a factual basis regarding the legal reasoning, in particular by a decision of the German Federal Court. Only in very narrow cases is there a binding effect on individual proceedings. In proceedings concerning unfair standard terms and conditions, there is a binding effect if, on the one hand, the consumer association (*Verbraucherzentrale*) won the case and, on the other, the consumer explicitly refers to this decision.[918]

517. The Romanian reporter notes that the practice of the courts is not clear.[919] It should be possible to subsequently invoke the successful outcome of the collective action in individual proceedings that follow, especially when the consumer seeks to obtain damages, reimbursement of sums unduly paid or a modification of the contract by the elimination of the unfair terms. The court should take into consideration the judgment issued in the collective action in assessing the individual request. Nevertheless, it might be difficult for the consumer to have access to the judgment having *erga omnes* effect in order to invoke it. The court may also have a duty to consider it *ex officio* in view of the consumer's weaker position and in light of the public interest in guaranteeing consumers' rights. However, there is no clear practice. The consumer is protected from the effects of the collective action and will be able to invoke the

[915] National Report: Austria (Austrian Consumer Protection Act, § 28 para 1).

[916] National Report: Austria (Supreme Court Decision of 18 September 2013, 7 Ob 44/13s, RdW 2014/90 ECLI:AT:OGH0002:2013:0070OB00044.13S.0918.000).

[917] National Report, Question 9.1.2: Germany.

[918] National Report: Germany (German Act on Injunctive Relief, Art. 11. However, in capital markets cases, the decision of the model case binds all other courts (German Capital Markets Model Case Act, Art.22)).

[919] National Report: Romania (Romanian Law No. 193/2000, Art.12(4)).

nullity of the unfair contractual term by initiating an individual action or by defending himself in an action filed against him by the trader.[920]

518. In Slovakia, a trader who was found to be in breach of the applicable rules on unfair contract terms in a particular case, is obliged to refrain from applying the same contractual provisions vis-à-vis other consumers. Such an obligation can be relied upon in other proceedings between the trader and other consumers.[921]

519. In Slovenia, a declaratory judgment applied for by a consumer protection association for a contract term to be declared null and void, can be invoked by consumers.[922] An interviewee pointed out the insufficiency of such a system, since an individual consumer would still have to initiate individual proceedings in order to obtain monetary redress as a follow-up to such injunctive collective redress.[923]

520. In Hungary, a distinction according to the object of the claim is made. If the court declares the contract to be invalid in the collective (public interest) case, and at the same time, in the individual case, the plaintiff (or consumer) litigates for exactly the same (i.e. for a declaration of invalidity), the latter proceedings shall be dismissed. If the court declares the contract to be invalid in the collective (public interest) case, and in the individual case the plaintiff litigates for the application of the consequences of invalidity (e.g. for restitution), the court shall continue the individual case. The outcome of the collective case will be taken into account.[924]

3.2.2.3 Jurisdictions with Representative Collective Actions

521. In some jurisdictions, there is a representative collective action (or class action) in which the collective interests of the class members are adjudicated in one procedure leading to a decision that is binding for the class members who have opted in or who have not opted out. In the situation where these class members have not opted in or have opted out, and have initiated separate individual proceedings, the outcome of

[920] National Report, Question 9.1.2: Romania.

[921] National Report, Question 9.1.1: Slovakia.

[922] Interview with a Slovenian business.

[923] Interview with a Slovenian academic.

[924] National Report, Question 9.1.2: Hungary.

the collective action is non-binding in respect of the individual proceedings. This is for example the case in Belgium,[925] Bulgaria,[926] Italy,[927] and Portugal.[928] In Spain, this also seems to be the case, although it is not explicitly regulated in the law.[929]

522. In Germany, under the Capital Markets Model Case Act, the decision of the model case is binding in all individual (and previously suspended) proceedings.[930] Under the English GLO rule,[931] a judgment in the GLO case is binding on all claimants in the GLO register at the time of the judgment and when the GLO was issued. The court may direct that a judgment is binding in respect of claims entered onto the register subsequent to the granting of the GLO.[932]

4. Proposals and Improvements

4.1 Staying of an Individual Claim until Collective Proceedings Have Finished

523. The general conclusion is that in most Member States the court has the discretionary power to stay individual proceedings if parallel collective proceedings have been initiated. This is the case in Member States with a *specific* national procedural rule ordering the stay of individual proceedings in case parallel collective proceedings are

[925] National Report, Question 9.1.2: Belgium.

[926] National Report, Question 9.1.2: Bulgaria.

[927] National Report, Question 9.1.2: Italy.

[928] National Report, Question 9.1.2: Portugal.

[929] National Report, Question 9.1.2: Spain. The national reporter notes "What LEC has not regulated, however, is the way (if any), to activate the opting-out possibility for consumers wishing not to be bound by the procedure nor by its judgment. In my view, this is implicitly accepted by Article 15 LEC: opting-out should be seen as a way to assert individual rights… Nevertheless, there is legal uncertainty and the fact is that consumers are not given the explicit possibility to opt-out, nor are the claimant entities obliged to announce the way to proceed to it. This could prevent them from commencing individual proceedings after a collective action has been filed and after the collective procedure has come to an end".

[930] National Report, Question 9.1.2: Germany.

[931] National Report: UK (Group Litigation Order procedure).

[932] National Report: UK (Group Litigation Order procedure).

ongoing and in Member States with a *general* national procedural rule allowing the court to stay proceedings. This even seems to be the case in Spain where the *Sales Sinués* case originated. Regarding this decision, it should be emphasised that the Spanish legal order is of the general opinion that it is very doubtful that the applicable Spanish rule really requires the staying of the individual procedure until the collective one is adjudicated.

524. As the general rule seems to work well, no legislative action is needed. Usually, the court makes an individual assessment based on the circumstances concerned. For example, a Bulgarian judge will need to assess if the decision in the individual procedure is conditional upon the outcome of the collective procedure. In some Member States, such as Austria and Germany, the proceedings can be stayed, upon the agreement of the parties. Other Member States may exclude the stay of individual proceedings on the basis that collective proceedings on a related issue are initiated,[933] either generally or in specific circumstances. For example, Germany excludes the possibility to stay individual proceedings when a consumer protection association launches corresponding collective proceedings. While these examples illustrate that this assessment is not always easy, it is best to leave the matter to the discretion of the courts.

4.2 Binding or Non-binding Effect of the Decision in the Collective Proceedings

525. In most jurisdictions, even those where individual proceedings have been stayed in relation to collective proceedings, the outcome of the latter is non-binding, or has no *erga omnes res judicata* effect. Nevertheless, various jurisdictions provide for a similar kind of *erga omnes* effect, in order to meet the *Invitel* doctrine. Despite the great procedural variations, they have in common the notion that the consumer has to rely himself on the decision before he can make use of it. This may limit the impact of the collective proceedings, as consumers may sometimes not be aware of a decision previously given in a collective procedure. Furthermore, one interviewee has

[933] National Reports: Croatia; Greece; Poland; Sweden; England & Wales. See also Interview with Italian lawyers and Consumer Protection Association.

lamented the lack of immediate effect on individual situations of such injunctive collective proceedings: companies may continue to ignore the problem, forcing consumers to bring individual proceedings again and again.[934] Consequently, in order to enhance the level of consumer protection in this field and to tackle these divergent procedural structures, legislative action could be proposed.

526. Moreover, two additional motives for legislative action can be discerned. First, there is the effect of compensatory collective redress proceedings with an opt-out system on pending individual proceedings. Various Member States have included the possibility of an opt-out system in their compensatory collective redress proceedings.[935] This entails the risk that consumers not opting out in a timely manner from a subsequent compensatory collective redress procedure will see their individual procedure end up being deemed to be without object, unless they can show that they were not notified of the collective redress proceedings. Second, there is a problem concerning the enforcement of decisions given in injunctive collective redress proceedings in relation to potential, subsequent individual claims.[936] Consumers will still have to act in individual proceedings as a follow-up to the injunctive collective procedure brought, for example, by a consumer protection association.[937] This may entail the risk of devaluing the mechanism of consumer protection via injunctive relief. Indeed, and particularly in the case of unfair contract terms, injunctive relief must be supported by robust "enforcement" measures – i.e. to ensure that the consumer can rely on the finding of an infringement in his or her individual action, as identified in the injunctive collective procedure – to ensure the

[934] Interview with a Croatian Consumer Protection Association.

[935] National Reports, Question 9: Belgium; Germany; the Netherlands; Portugal; Spain; UK.

[936] Our data gives specific evidence in the following National Reports, Question 8.6: Austria; Germany; Hungary; Slovakia; Slovenia. See also the aforementioned 2012 evaluation of the Injunctions Directive.

[937] By follow-up proceedings, we refer to those situations where individuals actions are brought for individual remedies (e.g. actions for damages caused by the infringement or actions for specific performance); these follow-up proceedings may also include those actions where individual consumers need to bring legal action to stop the infringement where the trader continues with it, notwithstanding the injunctive order (however, this type of action was not dealt with explicitly in the national reports).

system of injunctive relief works in practice. Thus, once a court has held that a particular action constitutes an infringement of consumer law and the trader has been prohibited from using it by injunctive relief, the consumer should be relieved in this respect automatically and it should not be necessary that he or she takes additional action him or herself.

5. Recommendations to the European Commission

Problems identified	Need for action?	What action should be taken? If no action recommended, why?
The relationship between individual and collective proceedings	No	The general rule (the discretion of the court) seems to work well, no legislative action is needed. Usually, the court makes an individual assessment based on the circumstances concerned. Best to leave the matter to the discretion of the national courts. The area in which we consider this relationship to be problematic, is examined immediately below.
Effect of the decision in the collective proceedings	Yes	The rules across the Member States vary considerably. Despite these procedural variations, the common factors is the notion that the consumer has to rely himself on the decision before he can make use of it; to enhance level of consumer protection in this field and to tackle these divergent procedural structures, legislative action could be proposed. This could be to clarify the effect of the decision in the collective proceedings on the consumer's individual action, without him having to engage and establish the infringement again himself. Moreover, if consumers have to act individually to actually enforce or give effect to injunctive collective relief proceedings, the level of protection is undermined. This is a matter of enforcement of the latter.

Chapter 5: Consumer Alternative Dispute Resolution

CHRIS HODGES

1. Introduction to the Chapter

527. This section examines the developing *relationship* between courts and 'Alternative Dispute Resolution' (ADR) in relation to consumer disputes. It does not seek to be a general examination of the state of ADR. The state of ADR and particularly consumer ADR in Europe is not static but is undergoing significant development.

528. ADR systems vary significantly between Member States, and national arrangements are developing in different ways and at different speeds.[938] In some Member States, 'consumer ADR' operates through sophisticated models, has existed for many years, is well known and functions well. In those Member States, parts of the 'ADR landscape' should not rightly be considered to be 'alternative/ADR' at all. In those situations, the relationship between, for example, sophisticated sectoral ombudsmen or dispute resolution services in some sectoral regulators and the courts may give rise to limited or negligible difficulties.

529. In other Member States, 'ADR' is relatively new, undeveloped and not well-known, may be limited in its application in trading sectors, may be limited in techniques used (either mediation or arbitration-type models), and may have 'teething problems'. CDR is highly effective in some Member States domestically, whilst almost non-existent in others.

530. So, it is difficult to generalise, but concerns do exist in some Member States. Given this diversity, the analysis here must inevitably be somewhat preliminary. However, it

[938] Christopher Hodges, Iris Benöhr and Naomi Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing, 2012); Felix Steffek and Hannes Unberath, *regulating Dispute Resolution. ADR and Access to Justice at the Crossroads* (Hart Publishing 2013); Christopher Hodges and Naomi Creutzfeldt, 'Transformations in Public and Private Enforcement' in Hans-Woldfgang Micklitz and Andrea Wechsler (eds), *The Transformation of Enforcement* (Hart, 2016); Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016).

is possible to identify certain issues in relation to the developing *interfaces between* ADR and court proceedings, especially ones that deserve to be investigated further.

1.1 Different Meanings of ADR

531. The scope of this inquiry is the interface between courts and ADR. The existence of different types of ADR schemes and processes makes generalising on this subject a real challenge. The answer to so many questions is 'It depends what type of ADR you are talking about'. To provide some clarity and context to the inquiry, this section will explain some major distinctions and phenomena.

532. First, ADR for *consumer protection* disputes (i.e. consumer-trader disputes) has *two meanings*.[939]

533. ADR (usually mediation) in the context of a court claim, where the ADR service provided could relate to any type of disputes, not just a consumer-trader dispute (model 1).

534. Specific mechanisms that provide Consumer Dispute Resolution (CDR), i.e. designed exclusively for consumer-trader disputes (model 2).

535. It is important not to confuse these two meanings. In relation to model 1, the possibility of using ADR (specifically mediation, and sometimes other techniques) before or during a civil court procedure generally exists in every Member State, at least since the Mediation Directive,[940] for virtually all types of claims. Hence, in terms of procedure, there is nothing particularly unusual in this respect about ADR for *consumer* claims. However, in practice, since consumer-trader claims involve small issues and sums of money, both court procedures and associated ADR procedures might be unattractive and rarely used in many Member States, especially if a more specific CDR pathway exists for consumer claims. But in other Member States, it may be that the court/ADR pathway is currently all that exists, or all that is believed to

[939] Types and meanings of ADR in relation to business-to-business, family, labour, intellectual property or other types of disputes can be different.

[940] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3.

exist. That belief might be wrong in fact, but correct in practice, if the system is undeveloped.

536. In many Member States, CDR now has its own architecture of CDR bodies, separate from courts (model 2). Although the EU's Consumer ADR Directive[941] requires consumer ADR functionality, and imposes regulatory requirements on national ADR entities, it does not affect the design or status quo of national landscapes or systems for consumer ADR. For cross-border consumer disputes, the Commission has created its ODR platform.[942]

537. CDR systems demonstrate considerable differences in their domestic architectures and modes of operation. The national differences between the Member States produce the following broad variations in practice:

538. In some Member States, consumers might take a complaint against a trader to court. So model 1 might be relevant. But this appears to be statistically not a major phenomenon, and is diminishing.

539. In every Member State, model 2 should be available since implementation of the Consumer ADR Directive in July 2015. Indeed, in some States CDR is very well established, and is the mainstream procedure for C2B disputes, whilst courts are basically not used for consumer-trader disputes. However, in other States, CDR is hardly available, schemes have not yet developed, and are almost unknown, so only the courts and possibly option 1 might exist, although option 1 might not exist in practice at all. A harmonised EU approach to CDR is only just beginning to be created.

540. In practice, the statistics indicate that civil procedures are little used for *cross-border* consumer-trader claims. There is evidence that CDR is an increasing phenomenon. The number of contacts and complaints to ECC-NET offices has risen steadily in the

[941] Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) [2013] OJ L165.

[942] Regulation (EC) No 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes (Regulation on consumer ODR) [2013] OJ L165/1.

ten years to 2015.[943] In 2015, they received 37,609 complaints and 93,741 contacts. Numbers for financial cases dealt with by FIN-NET are much lower, but increasing.

1.2 Differences in Architectures

541. The divergence in national architectures and practice can be illustrated by the following examples. In Italy, the courts are very slow, so highly unattractive for consumer-trader claims. A form of consumer representation developed, *conciliazione paritetico*, in which usually unpaid representatives nominated by consumer associations negotiate on behalf of a consumer with a trader who has agreed to join a relevant scheme. If a solution is identified, the consumer is free to agree it or not: in the former case it becomes a settlement contract. This methodology is fairly widespread in Italy, and considered there to be effective, although it is arguably not classifiable as ADR. Within the past few years, a number of regulatory authorities (such as for communications, energy, and financial services) have operated complaint resolution schemes for consumer-trader disputes. These are considered to be ADR (and CDR) entities, and their use is spreading. In most Central and Eastern European states, consumer-trader complaints are made to the public regulatory consumer authority or sectoral authorities. In contrast, in each of the Nordic states separate CDR entities were created up to 40 years ago.

542. The Nordic model typically has a central body with national coverage for all types of consumer-trader disputes (and hence functioning as a residual body), together with some separate bodies that cover specialist types of disputes (financial services, communications, energy, insurance, utilities, and so on).[944] The reporter for Denmark notes: the 'long-standing tradition for providing easy access to justice through complaints boards and tribunals, including in consumer protection disputes' where

[943] European Commission, 'The European Consumer Centres Network: Anniversary Report 2005-2015', 2015, 8.

[944] National Report, Question 10: Denmark. Although not noted so clearly in the answers from Sweden and Finland, the same position exists in those countries (as well as in Norway); National Reports, Question 10: Finland and Sweden.

'Generally, the Danish ADR system for consumer complaints is well-functioning and very attractive for consumers and most disputes are resolved in the ADR system instead of before the ordinary courts'.[945] In Sweden, for example, various consumer complaint boards exist, and operate to some extent under the shadow of the National Board for Consumer Disputes (*Allmänna reklamationsnämnden*).[946]

543. In other Member States, specific CDR schemes or procedures have been developed, whether based on mediation and/or arbitration (the *geschillencommissie* system in the Netherlands,[947] and consumer arbitration-type schemes in UK, Spain, Portugal)[948] or on a model involving sectoral ombudsmen (UK, Belgium, Ireland, Germany, limited in France).[949] The predominant model in France has been mediation by in-house personnel, but that is slowly likely to change towards sectoral ombudsmen. In some states, pre-existing generalist ADR entities (i.e. those that typically handle multiple commercial disputes through mediation and/or arbitration) have developed specific CDR schemes or procedures.

544. The diversity illustrated here is far from a complete picture of what currently exists. Further, different types of ADR/CDR models can sometimes be found within a single state. However, the position is changing in almost every country, not least as ideas on best practice become recognised and are shared.

545. At EU level, the initiation of attempts at regulation and harmonisation are also new, and CDR entities are now partly regulated by the EU under Directive 2013/11/EU. Since implementation of that Directive, every Member States should have a 'consumer ADR' network, which includes the capacity to handle any types of C2B dispute, even if only through a residual CDR body.

546. The ODR platform connects the national networks. However, it is well understood that CDR is, as a cross-border mechanism, new and undeveloped, even if it may have considerable advantages for the future. In theory, the EU ADR/ODR framework

[945] National Report, Question 10: Denmark.

[946] National Report, Question 10: Sweden.

[947] National Report, Question 10: The Netherlands.

[948] National Reports, Question 10: Portugal; Spain; UK.

[949] National Reports, Question 10: Belgium; French; Germany; Ireland; UK.

should facilitate cross-border CDR. In practice, it is somewhat early to say how quickly this will develop into a fully functioning system. Problems may be anticipated with:

1. levels of consumer awareness of CDR, either nationally or internationally, which will be significantly influenced by the state of maturity of effective national CDR systems;
2. internal landscape problems, not least with coverage, gaps and performance of CDR bodies;
3. concern over the complexities and differences in national CDR entities and landscapes; and
4. the extent to which traders agree to ADR/ODR, or are required to.

547. In addition, different polarities apply for consumer-trader and trader-consumer disputes, for which there can be different approaches and mechanisms. The core focus of this Study is disputes initiated by consumers against traders, but some responses to the Questionnaire have been made in the context of the opposite polarity (notably, traders who seek to recover debts from consumers, for the unpaid price of goods delivered or for unpaid credit). This illustrates the existence of some confusion and therefore the need for further clarity.

1.3 Variations in Knowledge of Consumer ADR, Tied to its Stage of Development

548. In some Member States, consumer ADR, and CDR bodies, have operated for over 40 years, are well-known and highly respected. This might be true in all Nordic states, the Netherlands[950] and in some sectors in the United Kingdom and Ireland.[951] It is at least partially true in Spain and Portugal,[952] where consumer arbitration has a long history but might not be as popular as it would be if a more modern system operated. In contrast, ADR (of any type) is relatively new in other Member States, notably across Central, Eastern and Southern Europe,[953] so levels of operational

[950] Interview with a Dutch academic, who said that "the quality of the consumer complaint boards is good' And another said 'generally they deliver good work."

[951] National Report, Question 10: UK.

[952] National Reports, Question 10: Portugal and Spain.

[953] Interview with a Romanian lawyer, who responded: 'these alternative means are either very little known or the parties do not trust them very much. Anyway, they are less used then the classic court actions.'

quality and of knowledge of its availability are low. In between the two extremes, some forms of ADR or CDR can be found that are impressive but relatively new, such as in some market sectors in Germany or Italy.[954]

549. A number of the National Reports identify a lack of general knowledge in their countries of both ADR and ODR,[955] especially in respect of the implementation of legislation.[956] Similarly, Question 10 in this Study referred to 'consumer disputes before ADR fora'. That Question was, therefore, strictly about the specific world of CDR entities, i.e. model 2 above, and not model 2. It is, however, apparent that some National Reports and answers to questionnaires and interviewees have referred to one or both of those two models and in most cases refer to rules on the model 1 only. Thus, comments and answers to Questionnaires on this subject need to be treated with some caution.

550. The widespread lack of knowledge of consumer ADR is an important finding. Significant confusion exists over the meaning of 'ADR' and how it interrelates with courts. It may be unsurprising that those who are familiar with civil procedure should be familiar with ADR/mediation that is used before or alongside court claims, but they may be less familiar with what is sometimes a completely separate world of CDR entities.

551. The general variations in knowledge of consumer ADR, and of operational quality, can be linked with three factors: firstly, how new ADR/mediation is in a country and the length of time that a country or sector has had an effective consumer ADR scheme; secondly, the number of ADR/CDR mechanisms that exist and; thirdly, the type of ADR/CDR mechanisms. In relation to the latter point, an evolution has been noted that has two dimensions. First, whether mediation has been adopted, ideally as an initial step before some investigatory and evaluative mechanism. Second, there has been an evolution from arbitration-like mechanisms (with panels of arbitrators, most of whom are not full-time) toward ombudsman systems, that process cases

[954] National Reports, Question 10: Germany and Italy.

[955] Interviews with a Dutch academic of 23 years' experience; Polish academic; Romanian lawyer of 19 years' experience.

[956] Interview with a Romanian lawyer of 4 years' experience.

through several stages (advice, triage, mediation, decision, aggregation of data, publication of anonymised aggregated data), involving different permanent staff, who bring to bear expertise relevant to each stage.

2. Character of Consumer ADR

2.1 Mandatory/Non-Mandatory Nature of Consumer ADR

2.1.1 Summary of the Status Quo

552. As noted above, the national CDR systems have significant differences in the dispute resolution techniques that they adopt. Some are mandatory and some are not. The paradigm of dispute resolution by courts adopts well-known procedures under rules of civil procedure, ending in a decision by the court that is binding on all parties. Once the court process has been initiated by one party, and accepted by the court, both the outcome and the process will be binding on both parties.

553. However, the parties may agree a settlement of the case at any stage, and this might be facilitated by involving an intermediary who facilitates mediation or some other ADR technique. Some cases may be resolved by arbitration, where the parties agree that arbitrator(s) instead of a judge will make the final decision.

554. In a number of CDR systems (i.e. model 2: Spain, Portugal, Nordics, Netherlands)[957], the model is essentially arbitration, but the decision might not be legally binding on one or both parties, and merely be a recommendation, even if it is usually followed. In other CDR systems, the procedure may be restricted to mediation, or may involve a number of ADR techniques and end in a non-binding recommendation or binding decision. In most countries that have consumer ombudsmen (UK, Belgium, Ireland, Germany),[958] such systems typically deploy techniques in sequence, such as triage, mediation/conciliation, and decision (binding or not). Hence, there are significant variations in both the models and procedures of national CDR schemes. It is risky to generalise on this issue.

[957] National Reports, Question 10: Denmark; Finland; the Netherlands, Portugal Spain; Sweden.

[958] National Reports, Question 10: Belgium; Germany; Ireland; UK.

2.1.2 Problems Identified in the National Legal Systems

555. Given the different approaches in Member States on whether ADR systems should be binding or non-binding, the consumer ADR Directive refrains from mandating either approach as standard, and merely imposes generic regulatory requirements and provides specific requirements for those systems that impose a solution on consumers.[959] The national reports indicate that national legislation implementing the Consumer ADR Directive, and any other legislation, correctly gives effect to that position.

2.1.3 Assessment of the Current Situation

556. Two issues need to be distinguished in considering this question. The first point is whether a consumer or a trader must *use* an ADR procedure, and is barred from using a court or any other type of procedure. The second point is whether one or both parties must use an ADR procedure *before* using some other procedure, such as court proceedings.

557. The predominant position across Member States is that ADR is currently not mandatory for consumers, and often not mandatory for traders, either at all or before accessing a court. Where CDR schemes are well-developed, their use is often encouraged, and they may be widely used in preference to court proceedings, such that they are *de facto* binding on traders, but it is usually not a legal requirement for a consumer to use them. This preserves the right of access to a court in Art.6 ECHR. But some significant exceptions exist to that predominant position.

558. First, many ADR schemes are only accessible to consumers who have first attempted to contact the trader and resolve matters, typically within a reasonable or stated time period. Such a rule is included in the national legislation in Belgium and Hungary.[960] It applies in England & Wales under many rules of individual ADR schemes, and also *de* facto in court rules on pre-action protocols and costs rules.[961]

[959] Directive 2013/11/EU, Art.11.1.

[960] National Reports, Question 10: Belgium and Hungary.

[961] National Report, Question 10: UK.

Italy is experimenting with 'mandatory mediation', limited to an exploratory meeting between parties and mediator, before court proceedings can be initiated.[962] There is evidence that a prioritisation rule that ADR should be the first stage promotes ADR and assists in directing consumers not only to use ADR but also towards identifying the relevant ADR for their case.

559. Second, it is established EU law that a contractual clause that is concluded before the contract was entered into that purports to bind a consumer to arbitration is not binding and the continued use of such clauses shall be prevented.[963]

560. Third, some states place some form of barrier or discouragement for one or both parties to start court proceedings until they have attempted to use an ADR mechanism or procedure. In Germany, eleven regional States have legislation that requires certain types of disputes to be submitted to conciliation procedures as a prerequisite for a court case.[964] The matters covered by this provision include neighbour disputes and other disputes before local courts in which the value of the claim does not exceed the sum of 750 EUR. In UK, more indirect barriers can include requiring an attempt at ADR in a pre-action protocol, and rules that a party who has not reasonably attempted ADR might not be awarded costs if he wins, or may even be ordered to pay opponent's or extra costs.

[962] National Report, Question 10 : Italy. Recently, the ECJ has held, following Case C-317/08 to C-320/08 *Alassini and Others* EU:C:2010:146, that mandatory mediation as a condition for the admissibility of proceedings before a court can be compatible with the principle of effective judicial protection, providing the result is not binding, does "not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs — or gives rise to very low costs — for the parties, and only if electronic means are not the only means by which the settlement procedure may be accessed" (Case C-75/16 *Rampanelli* EU:C:2017:457, para.61). Moreover, the directive be understood to preclude rules which require that in such mediation consumers must be assisted by a lawyer.

[963] Directive 93/13/EC on unfair contract terms, Arts.3.1, 6 and 7 and Annex point (q); Case C-168/05 *Mostaza Claro* [2006] ECR I-10421 and Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodriguez Nogueira* [2009] ECR I-9579. Some States have provisions that the consumer must raise the issue of the invalidity of such a term: the legality of such a rule is now questionable in the light of case law on *ex officio* application of EU law.

[964] National Report, Question 10: Germany.

561. Fourth, some traders are required to belong to an ADR scheme under national legislation in some states and sectors (leading examples are lawyers, civil aviation providers and energy providers in Germany, and financial services providers in a significant number of states, such as the UK and Ireland). The general position for many UK sectoral ombudsmen is that the law requires that if the consumer accepts the recommendation of the ombudsman then the trader is bound by the result, as is the consumer.[965]

562. Fifth, some national CDR systems operate on the basis that *traders* agree to use an ADR scheme, or agree to observe the outcome, either as a matter of contract under the rules of membership of a trade association, or a non-binding public commitment. This is the position in a number of Member States that have well-established CDR systems, such as the Nordic states, the Netherlands, and UK.[966] Some respondents from those states argue that there is no need for CDR to be mandatory as a matter of regulatory law, and that requiring it to be mandatory would undermine confidence and practice in the strong existing schemes. Further, some business sectors fear that the extension of binding arrangements would lead to an increase in fraudulent or poorly-based claims.[967]

563. The fact that certain traders do not agree to have disputes against them resolved by a CDR body means that they ignore consumers' preference to use this method of dispute resolution, and may, therefore, in practice defeat consumers' effective access to justice and the rule of law. As might be anticipated, some respondents, especially consumers but also some traders who wish to see a level playing field, have urged that CDR should be mandatory for traders to engage in, and that the outcomes should be binding on them. The former reform would support the use of CDR and the extension and reform by Member States of their national CDR landscapes and systems. The latter reform might raise legal issues in relation to ECHR, Art.6.

[965] National Report, Question 10: UK.

[966] National Reports, Question 10: Denmark; Finland; the Netherlands; Sweden; UK.

[967] Christopher Hodges, Iris Benöhr and Naomi Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing 2012), 416.

3. Procedural Rules on Standing and Representation Requirements before ADR Fora

3.1 Summary of the Status Quo

564. The issue is whether ADR schemes impose requirements that might, on the one hand, improve the legal accuracy of outcomes but, on the other hand, increase cost and delay and decrease accessibility and usage.

3.2 Problems Identified in the National Legal Systems

565. Many ADR or CDR schemes do not have specific rules on standing or representation. The National Reports provide a great deal of detail on individual limitations, rules and exceptions, which should not necessarily be regarded as complete in covering all national provisions.[968] They indicate that there does not seem to be much divergence from the rules of the Directive.

3.3 Assessment of the Current Situation

566. All the Member States that have implemented the Consumer ADR Directive (some have not yet done so) in theory permit consumer-trader disputes as defined under that Directive to be submitted to CDR entities. The Directive states various exceptions, notably disputes about healthcare and education, which mirror national rules in most Member States. The provisions of the Member States appear to raise nothing particularly unusual in relation to this issue.

567. The Directive also permits CDR entities to refuse to accept unjustified or vexatious cases, and this provision appears in national implementing legislation (even if not reported in relation to every state).

568. Some systems require consumers to pay a fee to access the system, or apply a loser-pays rule, whereas some do not (and are fully funded by businesses or sometimes with state contributions) and these factors again represent barriers to

[968] National Reports, Question 7.3.

justice. The fact that some CDR systems work on full adhesion by traders and no cost to consumers demonstrates an ideal that is realisable and extendable.

569. A requirement that consumers should be represented in ADR systems could be argued to undermine or defeat the rationale of easy access to low cost ADR. An argument for representation of parties is that consumers may be weaker in being able to understand, argue or determine their rights. On the other hand, some CDR systems would argue that adequate expertise exists in their independent officers and that ensures a level playing field and fair outcomes. That may be true of a number of well-developed CDR schemes, but the evidence points to a potential problem in relation to other more general ADR schemes.

4. Application by ADR Bodies of Mandatory EU Consumer Law

4.1 Summary of the Status Quo

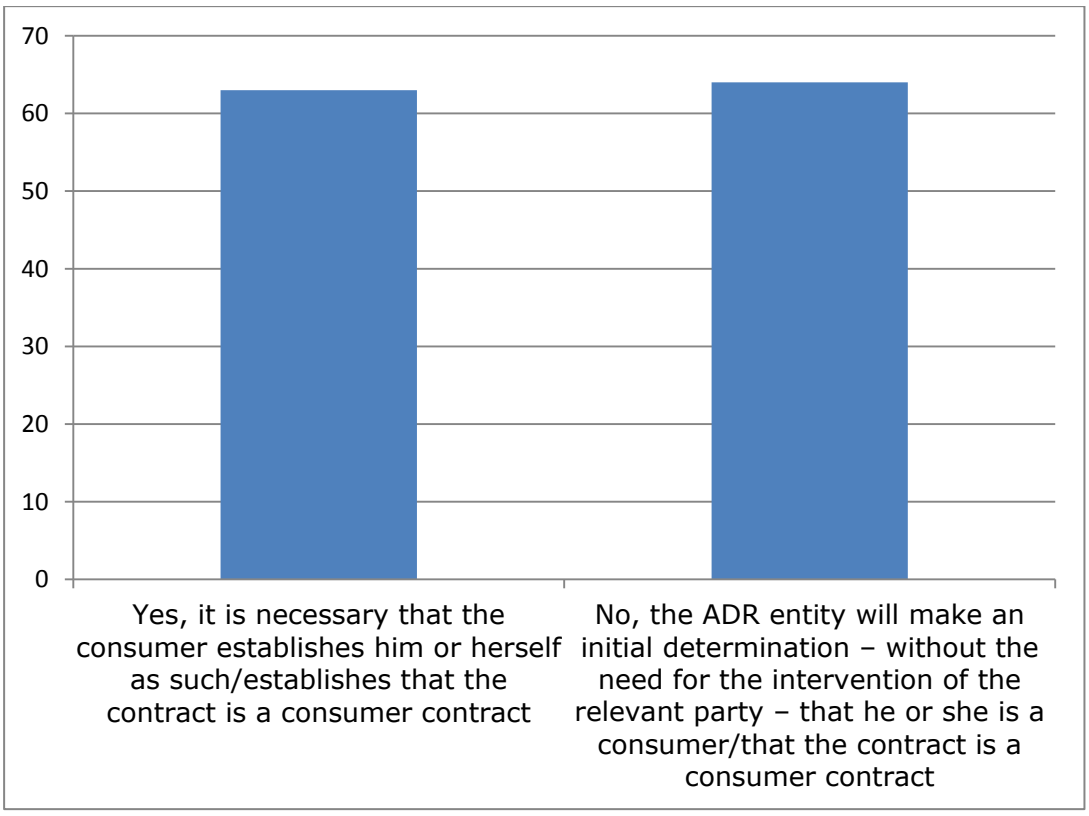
570. It is well-established in EU law that consumers should not be bound by unfair contact terms. However, concern has been expressed that some ADR schemes are poor at identifying unfair contract terms—or other consumer protection law—and that the tasks of identifying such illegality and applying the law correctly can only be undertaken by the involvement of trained lawyers and judges.[969] Indeed, the point is illustrated by two celebrated Court of Justice cases in which arbitrators in Spain upheld unfair clauses involving minimum subscription periods for mobile telephone contracts that were subsequently declared unto be unfair when the matters were considered by courts.[970] No empirical evidence has been produced on this potential phenomenon, and the academic debate has been polarised and inconclusive. It is not, therefore, known to what extent the situation may be of concern, or of how great a concern, and whether it arises in relation (only or mainly) to particular types of ADR, or particular countries, or even also in some courts.

[969] Hörst Eidenmüller and Martin Engel, 'Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe' (2014) 29(3) *Ohio State Journal on Dispute Resolution* 261.

[970] Case C-168/05 *Elisa María Mostaza Claro v Claro Móvil Milenium SL*; Case C-40/08 *Asturcom Telecommunicationes SL v Cristina Rodriguez Nogueirs*. Spanish National Report, Question 11. See also the analysis in Chapter 3, 'Consumer Actions before National Courts' of the report.

4.2 Problems Identified in the National Legal Systems

571. In the interviews, the following question was asked: According to your experience, is it necessary that the relevant party establishes before the ADR entity, and by him or herself that he or she is a consumer (and therefore that consumer law applies to the dispute)? This question is a preliminary one. The respondents to the interviews answered either yes, it is necessary that the consumer establishes him or herself as a consumer or established that the contract is a consumer contract, or no, the ADR entity will make an initial determination as to whether the relevant party is a consumer or whether the contract is a consumer one. As is clear from the graph below, there was almost a 50/50 response.



Responses to the Interviews.

572. An important point made by the Belgian Energy Ombudsman in his interview was that where a case has been referred to his system and the trader proposes a

settlement, the ombudsman checks the merits/validity of the settlement. In this respect, he is providing a legal validity and quality check, and would object if outcomes appear to be illegal (with energy, consumer protection or prescription law) or unbalanced. A comment from another interviewee (an official of a trade association) was 'In Belgium most ADR entities that treat consumer cases have been created specifically for consumer disputes, so their main objective is to apply consumer law. … it is not uncommon that a consumer gets a better solution via an ADR entity than he or she would get via court proceedings.'[971]

573. Similarly, an Estonian judge responded: 'ADR entities usually pay more attention to consumer protection than courts. This is so because ADR entities specifically deal with consumer protection matters, whereas at courts a dispute which involves consumers is still considered to be ordinary civil procedure.' This was echoed by a consumer association in Finland: 'The Consumer Dispute Resolution Boards have very knowledgeable members, who know the law (national and European) and apply it *ex officio*. They are experts in consumer law. Their expertise is similar or even exceeds that of District Courts.'[972]

4.3 Assessment of the Current Situation

574. Some commentators have argued that certain types of consumer protection should be reserved for courts alone, or even for ADR (primarily or alone). Whether any such distinction should be drawn is certainly an intriguing and important issue. However, there is little empirical evidence that can identify the extent of any problem on accurate application of law. Such evidence would be necessary so as to identify whether any deficit might spontaneously improve over time, or whether particular actions should be taken.

575. The empirical analysis from the 2012 Oxford study indicated that the vast majority of consumer-to-trader disputes involved simple facts or mis-application of clear law by traders, without complex or unclear questions of law arising, and were resolved

[971] Interview with a Belgian trade association of 7 years' experience.

[972] Interview with an Estonian judge of 14 years' experience.

swiftly by ADR bodies.[973] It may be speculated that a distinction might arise in practice between, on the one hand, general ADR bodies or individual mediators or arbitrators and, on the other hand, expert sectoral ADR or ombudsmen schemes.

576. In many Member States, decisions or recommendations involve legally qualified personnel:[974]

577. 'As with traditional arbitration, [arbitration-style complaint board] panels typically involve a legally-qualified chair (who is often a judge). The Dutch Geschillencommissie, and Nordic, Spanish and Portuguese CDRs, which are all essentially arbitration-based, function upon the basis of every Board applying all relevant law. Similarly, many ombudsmen, notably those in Germany, are distinguished judges. Sectoral ombudsmen, even if not judges, are appointed because they possess detailed knowledge of the relevant sectoral legislation and rules, codes or guidance. Such technical matters can be extremely complex and detailed, for example, in relation to financial services or telecoms regulatory provisions. The author's interviews for the Oxford study noted that the level of knowledge and expertise by sectoral CDR personnel can far exceed that of many judges. For example, a complaint made in Portugal some years ago was that judges sitting as arbitrators were familiar with the civil code but almost totally unaware of the consumer code.'

578. In the Netherlands, the *geschillencommissie* and (for financial services) *KiFiD* CDR systems apply sectoral standard terms and conditions, which apply standard terms and conditions that are never lower than the level of protection afforded by the law and are usually higher, since they are negotiated every few years between trade and consumer representatives under the auspices of the State Council. This system produces a high degree of wide understanding on the relevant standards (and law) by traders and CDR decision-makers, and it also drives higher trading standards.

[973] Christopher Hodges, Iris Benöhr and Naomi Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing 2012).

[974] Christopher Hodges, 'Unlocking Justice and Markets: The Promise of Consumer ADR' in Joachim Zekoll, Moritz Bälz and Iwo Amelung (ed), *Dispute Resolution: Alternatives to Formalization – Formalization of Alternatives?* (Brill, 2014).

579. There would be practical difficulties in a regime in which, for example, cases involving unfair contract terms could only be decided by a judge. The concern that has been raised is that some ADR personnel would not recognise an unfair contract term, so how would such a case be identified and referred to a court?

580. It is important to consider more than decisions in individual cases. A complaint by consumer (or small trader) might identify *an individual instance* of an unfair contract term, or unfair advertising, or unfair competition. But it is the aggregation of information from multiple instances that clearly identifies systemic practice. Systems in which aggregation of consumer requests for advice, and inquiries, and what they are about, as well as individual and aggregated decisions have proved to be highly effective in some Member States (e.g. in the United Kingdom). Such an aggregation of data appears to be best practice for consumer ombudsman systems but to be more difficult for individual ADR or court systems.[975] It may well be desirable to invest in shifting ADR models to integrated ombudsman schemes.

581. The remaining concern is that *individual* mediators or arbitrators working within ADR schemes might not identify breaches of consumer protection market law. It appears that the way forward may lie in improving the quality of ADR personnel, and one way of achieving that would be to move from multiple types of consumer ADR to more restricted CDR schemes, such as consumer ombudsmen, where quality can be better controlled and verified.

5. Nature of the ADR Decision and Enforcement

5.1 Summary of the Status Quo

582. The first issue here is whether ADR entities can or should issue binding decisions, and whether they can enforce them themselves. The second issue is whether a claimant is prejudiced by starting an ADR process if the limitation period continues to run, or if it is suspended.

[975] Christopher Hodges, 'Consumer Ombudsmen: Better regulation and dispute resolution' (2014) 15(4) *ERA Forum* 593-608.

583. As noted above, different ADR/CDR schemes adopt different solutions on whether the outcome of the 'decisions' by the entity is legally binding or not. The ADR outcome will be legally binding in three circumstances: if there is a settlement agreement between the parties, if a binding arbitration award is issued, or if statutory law provides that the result will be binding on one or both parties.

584. If the mechanism is mediation, any agreement that the parties agree will be a contract reached between them, enforceable in court (some countries allow this to be subject to a simplified procedure). If the mechanism is binding arbitration, the parties are bound by the arbitration award since they contracted that that would be the result of the process.

585. If the mechanism is not binding arbitration, the result of a decision/recommendation by the CDR entity may either not be legally binding (and only a recommendation) or may be binding by law (although this only applies in some Member States for some sectoral systems).

586. Where the result is binding by legislation, one model is that the result will bind the parties only if the consumer accepts the recommendation (some ombudsmen in UK and Ireland).[976]

587. CDR entities do not themselves enforce their decisions. That power is reserved to the courts.

5.2 Problems Identified in the National Legal Systems

5.2.1 Binding and Enforcement

588. The responses identify some interesting approaches. In some Nordic States, such as Denmark, the trader is bound unless he objects within 30 days[977] (Lithuania has a similar 30 day rule that applies to both parties,[978] and a 15 day rule applies in

[976] National Report, Question 10: UK.

[977] National Report, Question 10: Denmark.

[978] National Report, Question 10: Lithuania.

Romania)[979]. However, this is not consistent across the Nordic states: in Finland, a 'decision' is not enforceable, and the unsatisfied consumer must start fresh court proceedings.[980] Some enforcement shortcuts are available in some countries: In Greece, a decision by the Hellenic Consumer Ombudsman is an enforceable title.[981]

589. The Netherlands has a somewhat complex hybrid position known as 'binding advice', under which traders have committed in advance to observe the recommendations, through their membership of a trade association, and may be enforced in court.[982] However, the arrangement is supplemented by an attractive arrangement under which the trade association guarantees to pay any recommendation that is not honoured by an individual trader. The Portuguese Centro Nacional de Informação e Arbitragem de Conflitos de Consumo has a similar rule by which a trader who fails to comply with the decision reached by the arbitrator can be barred from using the Centre's symbol and be excluded from lists of entities subscribing to its services.[983]

590. It should be noted that national practice plays a significant role on whether traders observe decisions/recommendations against them *irrespective of whether they are legally binding or not*. Thus, non-legally binding recommendations in all Nordic states and the Netherlands[984] have a very high adherence rate, sometimes supported by effective national 'name and shame' publicity. There is evidence that adherence to decisions is high where traders have undertaken as a matter of business reputation to belong to a CDR scheme and observe its recommendations, or as a result of membership of a trade association.[985] The absence of these reputation and structural pressure appears to produce low adherence to ADR decisions in cross-border situations.

[979] National Report, Question 10: Romania.

[980] National Report, Question 10: Finland.

[981] National Report, Question 10: Greece.

[982] National Report, Question 10: the Netherlands.

[983] National Report, Question 10: Portugal.

[984] National Report, Question 10: the Netherlands.

[985] Interview with a Dutch academic of 23 years' experience.

5.2.2 Suspension of Limitation

591. The limitation period is suspended in Austria, Belgium, Bulgaria, Germany, Greece, Italy, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Spain, Sweden and UK.[986] It appears that the limitation period is not suspended in Cyprus and Finland.[987] In Hungary, suspension appears to be at the discretion of the court in subsequent proceedings.

592. Some unusual provisions are found. In Slovenia, the civil procedure rules provide that the court may interrupt civil proceedings for up to three months if the parties agree to try ADR.[988] In Croatia, initiation of a mediation procedure shall interrupt the limitation period (Art. 17(2)), but if it ends without a settlement, it shall be considered that limitation period has not been interrupted (Art. 17(3)).[989] There is an exception to this rule in Art. 17(4), that if, within 15 days of finalizing of the mediation, the parties lodge an action or initiate some other activity before court or other competent authority, for the purpose of determination, securing or realization of their claim, the period of limitation will be considered interrupted as of the date of commencement of the mediation procedure. If a special regulation prescribes a period for filing an action, this period shall be suspended for the duration of the mediation, and will restart after expiry of 15th day after finalizing the mediation (Art. 17(5)). Ordinances of Courts of Honour of the Croatian Chamber of Economy and of the Croatian Chamber of Trades and Crafts do *not* provide similar provisions.[990]

593. An interviewee from the Czech Republic made an interesting point: ‘The ADR procedure is generally quite ineffective, as there is no power of the competent authority to enforce rights in individual disputes.’ That would argue for enforcement of CDR decisions to be a matter of public/administrative process on traders rather than

[986] National Reports, Question 10: Austria; Belgium; Bulgaria; Germany; Greece; Italy; Lithuania; Luxembourg; Malta; the Netherlands; Poland; Portugal; Romania; Slovakia; Spain; Sweden; UK.

[987] National Report, Question 10: Cyprus and Hungary.

[988] National Report, Question 10: Slovenia.

[989] National Report, Question 10: Croatia.

[990] National Report, Question 10: Croatia.

requiring further private action. Such a mechanism might be highly persuasive, and lead to traders' voluntary compliance so as to avoid public action.[991]

5.2.3 Assessment of the Current Situation

594. The major finding is, once again, the diversity of different approaches across Member States, and the potential this raises for confusion and lack of consistency. The extent to which different models are unsatisfactory, or certain procedures may be worthy of wider adoption, should be the subject of further analysis and empirical research.

6. Review of ADR Decisions

6.1 Scope For and Limits of Recourse to Judicial Dispute Resolution

6.1.1 Summary of the Status Quo

595. The first issue here is the extent to which ADR arrangements preclude access to courts, and determination of parties' rights by a judge, which is regarded as a European fundamental right under Art.6 ECHR, and the associated Art.47 of the EU Charter of Fundamental Rights.[992] There may be rules or arrangements that purport to restrict a party's access to the courts by requiring disputes to be processed by an ADR mechanism, either before or after apparent resolution of a case by the ADR mechanism, or seeming to do so.

596. The Consumer ADR Directive specifies two key points here (Art.10):

[991] Interview with a Czech CPA of 24 years' experience. See also, interviews with a Slovakian academic; Slovakian lawyer and arbitrator.

[992] The European Convention on Human Rights, Art.6 requires the right of access to justice and to a fair trial; Charter of Fundamental Rights of the European Union, Art.47, specifies the right to an effective remedy and to a fair trial. Directive 2013/11/EU therefore provides (Arts.9(b) and (c)), that, before agreeing or following a proposed CDR solution, the parties are informed that participation in the procedure does not preclude the possibility of seeking redress through court proceedings, that they are informed of the legal effect of agreeing to or following such a proposed solution, and that, before expressing their consent to a proposed solution or amicable settlement, they are allowed a reasonable period of time to reflect.

> 1. Member States shall ensure that an agreement between a consumer and a trader to submit complaints to an ADR entity is not binding on the consumer if it was concluded before the dispute has materialised and if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute.
> 2. Member States shall ensure that in ADR procedures which aim at resolving the dispute by imposing a solution the solution imposed may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this. Specific acceptance by the trader is not required if national rules provide that solutions are binding on traders.

597. It has long been general law that an agreement may be reached *after* a dispute arises to refer a case to binding arbitration is a valid legal choice, and does thereby generally preclude the right to submit the case to court. The same approach would apply to a *post facto* agreement to refer a case to ADR, but that would not preclude a case being subsequently submitted to a court, depending on the terms of the agreement, or if the outcome of the ADR process was that no agreement was reached or a 'determination' by the third party was not legally binding.

6.1.2 Problems Identified in the National Legal Systems

598. In ADR or CDR systems based on mediation or not on binding arbitration, it appears that the position is not usually stated in national law, but the answer exists as a matter of practice, and the general situation appears to be satisfactory. If no settlement is reached by agreement, or a recommendation by the CDR entity is not observed, parties are free, subject to limitation, to institute court proceedings. Spanish law provides specifically that if, for any reason, the consumer arbitration concludes without a decision (e.g. the arbitrators decide that the case falls out of the scope of RD 231/2008) then judicial action will be open to the parties.

6.1.3 Assessment of the Current Situation

599. The position under EU law (Art.10 of the Consumer ADR Directive) quoted above is widely supported in Europe. It appears that national law is satisfactory in providing the right rules.

600. However, there is some evidence of concern that consumers or small businesses (SMEs) may not be fully aware of their rights, and might not have sufficient

bargaining leverage in asserting them, such that there is a risk in practice that rights are not being fully observed. This issue is discussed further below. Deeper analysis of different models and empirical evidence is needed to consider the risks further.

601. In the USA, the Supreme Court has permitted contact terms imposed by traders on consumers at the time of contact that preclude access to courts and require resolution of disputes by arbitration. That result would be contrary to EU law. It may be the case that some such unfair terms exist in the European market, but empirical evidence is lacking on how extensive such a problem might be. If the existence of such unfair terms needs to be addressed, it is a problem that might be addressed by either public enforcement on a systemic basis, or by decisions in individual disputes, as long as the intermediary is aware of the illegality. This is an issue that should be monitored, and further empirical evidence would be needed. If it is seen to be a problem, consideration should be given to whether the most effective means of responding would be through public or private enforcement or some other approach (such as self- or co-regulation).

6.2 Judicial Review of ADR Decisions

6.2.1 Summary of the Status Quo

602. The second issue under the broad heading of review of ADR decisions is the extent to which courts may review decisions taken by ADR bodies, or outcomes reached as a result of an ADR process. This issue raises a difficult problem of balancing two issues. On the one hand, the policy is to uphold strict application of the law in every case and hence uphold the rule of law, and social and commercial predictability. On the other hand, the principle is to give effect to rights of individual self-determination and hence respect the freedom of individuals and businesses to make agreements in respect of their rights as they see fit. Thus, parties may wish to settle their disputes in ways that are not fully consistent with the strict analysis of legal rights that might be made by an expert judge, and they may wish to adopt processes (negotiation, mediation, and other forms of ADR) rather than a judicial process. The essential concern here is whether parties are fully aware of their legal rights before they make agreements that might affect them (e.g. at an under value), and are fully aware of the

advantages and disadvantages in selecting between different dispute resolution options.

603. This balancing issue has given rise to heated but complex and unresolved debates. Empirical evidence on the extent of a problem in practice, and the particular circumstances that may give rise to a problem (e.g. particular techniques, such as mediation, or particular mediators, or jurisdictions) has not been available.

604. There is obviously no problem in court involvement were the ADR process results in no outcome that is not legally binding, such as where a mediation fails to result in agreement of the parties, or where the ADR body issues a ‘decision’ that is legally a non-binding recommendation, and it is not accepted by the parties.

605. The concern that arises is that mediators or arbitrators may not have adequate legal expertise, or may otherwise tend to pay inadequate regard to the law. This is a concern about the level of training of individuals, rather than a criticism of procedures as such. Different considerations arise as between mediators and arbitrators, given their training and modes of operation.

606. In those CDR systems that involve mediation or non-binding recommendations, no ‘decision’ has been made by the CDR entity so none can be considered by a court. As discussed in the previous section, there would normally be no impediment to a party then instituting a judicial process.

607. Where a decision is binding, as a matter of settlement contract or arbitration or legislation, the scope for judicial reconsideration is generally governed by well-established rules. Annulment proceedings based on review of unfair procedure or bias or manifest irregularity of law or procedure is regulated for arbitration under the New York Convention and similar national legislation. The general result is that decisions by properly constituted bodies adopting fair and predictable procedures cannot be reopened on the merits by a court.

608. A terminological confusion needs to be identified. The term ‘judicial review’ is ambiguous, since it refers, at least in common law jurisdictions, to a procedure by which a court may review certain aspects of an administrative decision, typically on the basis either that proper procedure has not been followed or that the substance of the decision is so obviously incorrect that no reasonable authority could reach it. The

result would be that the decision by an ADR entity may be overturned by the courts (and usually remitted to the ADR entity). Those grounds for 'judicial review' are considerably less intrusive than a full review of the facts of a case and the merits of a decision, akin to an appeal. Some commentators have suggested that that second approach should apply to some ADR decisions. This suggestion raises some difficult issues. Once again, adequate empirical evidence that would illuminate the issue is lacking.

6.2.2 Problems Identified in the National Legal Systems

609. Many CDR systems, including some of the most sophisticated systems, provide that decisions should be taken not just on the basis of law, but also on the basis of equity or fairness.[993] For example, the legislation governing the financial ombudsman in the UK and Ireland provides that the ombudsman shall make decisions on what seems to be fair to them in the circumstances. Equity as a basis for decision is also found in ADR systems in Portugal.

610. Many national reports confirmed the application of the New York Convention, as mentioned above.

611. Possible exceptions apply in a couple of States. In Spain, annulment of arbitration awards appears to be more active than in many States.[994]

612. The position in the Netherlands[995] under its 'binding advice' regime appears to be unique. Binding advice given by a dispute board may be brought before the district court to be subject to dissolution, which will be granted if a severe error has been made during the ADR procedure. Examples included in case law are:

    a. Unfair hearing of either party.[996]
    b. Not all evidence has been presented to either party.[997]

[993] This fact appears from separate research of the editor of this section, mostly as yet unpublished.

[994] National Report, Question 10: Spain.

[995] National Report, Question 10: the Netherlands.

[996] HR 24 September 1993 RvdW 1993/182.

[997] HR 18 juni 1993 RvdW 1993/137.

c. Witnesses have been heard without either party present.
d. An expert witness has not (fully) carried out their dedicated research.

613. An interesting mechanism exists in some states. In Lithuania,[998] after an ADR hearing it is possible to apply to the court with a claim within 30 days after the decision and it is not considered to be an appeal to the decision of ADR decision.[999] (Also, if an ADR institution does not accept a request to start ADR proceedings, such decision can be appealed to the court and its decision is binding.) The same mechanism has been noted above (section 4) in relation to Denmark and Romania.

614. In all countries, if a party refuses to pay under an award, the creditor must institute enforcement proceedings through the court. In some Member States, settlements must be registered with the court in any event. Either of these mechanisms interposes the court into the process. In Slovakia, a court may examine the outcome of mediation or the content of the settlement that must be approved by the court.[1000]

6.2.3 Assessment of the Current Situation

615. More empirical evidence is needed of different models to establish to what extent a problem exists in practice with the quality of decisions. It should be remembered that the issue of quality may apply to judicial decisions as well as to ADR decisions. The answer to solving any quality issue with ADR decisions might not be to require a subsequent decision by a court. Issues of cost and delay also arise.

616. However, certain interesting national procedures have been identified in this study, which deserve further investigation. The first option that might be considered would be for judicial reconsideration of any or all ADR decisions by a court. That option would inevitably raise some major problems of cost and delay, and largely undermine the advantages of the ADR system as a whole. A second option might be to require certain types of ADR cases or decisions to be reviewed by a judge, but there is currently no empirical evidence that would clarify how the criteria or boundaries would be set, or would permit an adequate Impact Assessment for such a proposal.

[998] National Report, Question 10: Lithuania.

[999] Art.29 of Law on consumer protection.

[1000] National Report, Question 10: Slovakia.

617. A third option might be to permit one party to refer a case to court, either within a fixed period (Lithuania)[1001] or under strict criteria (the Netherlands)[1002]. That approach has attractions in relation to the ADR situation in some Member States but would be a retrograde step in relation to high quality CDR schemes in other Member States, undermining some of their strong attractions and effectiveness. A fourth option might be to require the court to assess the merits of an ADR decision or settlement before registering it as legally enforceable (Slovakia).[1003] The disadvantage of this is that if it applies in every case, it would incentivise traders to delay paying out under awards. Many Member States do not require every ADR outcome to be registered with the court; they only require this if the trader does not pay and the creditor needs to take enforcement action. Some have argued that ADR decisions should be automatically registerable and/or enforceable, and this debate therefore raises some conflicting viewpoints.

618. The conclusion is that there is at present no clearly identifiable way forward on this issue: that it deserves further investigation. As with other issues raised here, the answer might lie in encouraging the maturity of national CDR systems and landscapes.

7. Proposals and Improvements

7.1 Regarding Difficulties Arising from the EU Instruments

619. No specific difficulties are identified with the provisions of Directive 2013/11/EU on consumer ADR or operation of national provisions. Concerns exist with points that are not covered by that Directive, such as whether CDR should be mandatory for traders. That Directive includes the requirement that persons in charge of ADR possess the necessary expertise and are independent and impartial.[1004] The is evidence of concern that *some* (but not all) personnel do not have adequate

[1001] National Report, Question 10: Lithuania.

[1002] National Report, Question 10: the Netherlands.

[1003] National Report, Question 10: Slovakia.

[1004] Art.6.1.

expertise, and that that failing may be more prevalent in certain types of ADR or CDR systems, or in some Member States, but not in others. The same concern arises in relation to some mediators acting under the Mediation Directive. There is evidence that some people confuse those two Directives, or confuse different ADR schemes that might be subject to one or the other (or both).

620. The consumer ADR Directive remains relatively new and national CDR arrangements are well-established in some Member States and new in others. The evidence base in relation to this issue is inadequate to found positive recommendations for action. The recommendation is that the issue is potentially serious, and could undermine the effective operation of the Union's consumer ADR system, and confidence in it. Accordingly, further study of different schemes, and collection of empirical evidence, is needed.

7.2 Regarding Difficulties Arising from Divergent National Procedural Laws

621. Similarly, the difficulties that arise with consumer ADR, and the relationship between ADR/CDR and courts, are more to do with the architecture and operation of national systems, rather than with legal rules. The critical point is to recognise the difference between the variations in national *contexts* rather than the existence of different *rules*. The answer to almost all the questions asked in this Study is 'it depends on the particular ADR/CDR scheme'.

622. Given the differences in national contexts and systems, and their different stages of evolution, an attempt to create similar rules may simply fail, since differences in practice will remain. The important issue in achieving harmonisation of CDR in practice, whether domestically or cross-border, is to identify those *systems, mechanisms and national landscapes* that satisfy models of best practice, and encourage Member States to evolve their systems towards such models.

7.3 General Proposals

623. The civil justice systems across the Member States have much longer histories than their ADR systems, and the former are more developed, coherent and unified than

the latter. It is to be expected that, as found in this Study, CDR systems cannot at present be said to have a coherent approach or model across Europe, but are dynamic and evolving. Accordingly, the relationship between courts and ADR/CDR poses some problems. This Study has identified some concerns with ADR/CDR that need to be considered further, recognising that at least some of the answers are likely to materialise as CDR systems obtain further maturity and coherence.

624. Concern exists over the state of 'ADR', at least in some Member States, and that concern includes the relationship between ADR entities and courts. The results of this Study indicate clearly that ADR is insufficiently understood, and has confusing diversity. The potential advantages of ADR are not being realised. Having said that, CDR systems in some Member States are highly effective and efficient, and do not appear to give rise to problems in relation to their relationship with courts, but to offer accessible, free or low cost, swift and effective access to dispute resolution for consumers and traders. The best models also provide considerable support to maintaining a fair, legal, competitive and vibrant market.

625. It is recommended that the sequence in which future steps are taken will be important in achieving an effective pan-EU CDR system and effective relationships between that and courts. Some differences should be addressed before others. The first step is to create national networks of CDR entities (ideally all operating on the same model, to reduce confusion between different ADR/CDR schemes, and enable consumers to identify clearly where to take their questions and complaints). Specialist expertise must be arranged in relation to types of disputes that may raise complex regulatory law, such as financial services, communications, energy, transport. Only then can the step of making CDR coverage mandatory for some or all sectors be imposed. It has been suggested that, for various reasons, the consumer ombudsman model is superior to the older-style arbitration ADR models.[1005] Belgium and the United Kingdom are the innovators here.

626. The issue of decisions that are legally not binding has attracted criticism, but reliable empirical evidence is lacking. There is an emerging need to address (a) the ability of

[1005] Further analysis is contained in Christopher Hodges, 'Consumer Redress: Implementing the Vision', in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016).

traders to refuse to agree to referring a complaint to ADR, and also (b) refusing to abide by the outcome. The logical response to such issues would be to make (a) and possibly (b) mandatory. However, some care may be needed, as this would be a retrograde step in some Member States, where CDR is already normal and well respected. It does appear that issue (b) is in practice not a problem in those Member States that have well-developed CDR systems. The experience of those Member States is that that issue can be addressed by non-legal means rather than by imposing legal rules. That point is important in relation to the over-riding need to proceed in a systematic evolutionary manner without creating unnecessary damage to existing systems that function well. It is possible that the best interests of the internal market might be achieved by encouraging *evolution* of national DDR arrangements, since imposing dramatic change on some systems might be premature and risky, and well as illegal under subsidiarity rules. One possible way forward may be to encourage national requirements on making CDR mandatory in key sectors. The conundrum is that the ideal for cross-border cases is that CDR should be mandatory, but introducing such a rule too soon may be too difficult and might cause undesirable disruption.

627. There appears to be mounting evidence that court processes are not attractive to users for small consumer-trader claims in an increasing number of Member States, and certainly in the cross-border situation. If that is so, attempts to address shortcomings in issues such as legal aid, civil procedure, small claims procedures, or variations in national mediation and court schemes might not be important and might be a waste of effort. In contrast, since there is evidence that CDR systems are attractive to consumers, offer benefits for traders, and can also deliver advantages for market regulatory control, focusing on improving national CDR systems would be a high priority. The successful functioning of national CDR systems is essential to successful cross-border dispute resolution through the ODR platform.

628. Research has also identified that regulators can achieve highly effective and efficient redress, especially if combined with consumer ombudsmen systems, which result in both individual and collective redress.[1006] However, such techniques are widely used

[1006] Christopher Hodges, 'Mass Collective Redress: Consumer ADR and Regulatory Techniques' (2015) *European Review of Private Law* 829.

in some States and unknown in others. An absence of harmonisation in relation to the powers, resources and approaches of national regulatory and enforcement authorities is an urgent issue, and should achieve dramatic results. The update to the CPC Regulation proposed in 2016 should bring a degree of harmonisation in relation to *consumer protection* authorities, but sectoral regulators may still operate differently (e.g. financial services, insurance, energy, communications, civil aviation and many others). Significantly, the proposed revision of the CPC Regulation *does* include a power to order redress.[1007] An important observation was made by an interviewee from Lithuania: According to her experience 'ADR entities are very active because most ADR entities are at the same time market surveillance authorities.' That is typically true of ADR schemes in CEE states, but in other Member States, effective CDR entities are separate from public authorities (and a good case can be made that that is ultimately the better model) but the two functions work closely together, and it is that functional cooperation that is the critical point.

629. Returning to the relationship between ADR/CDR entities and courts, various ombudsmen systems in the UK and Ireland already provide that ombudsmen may refer legal issues to courts for determination.[1008] That solution could address some wider concerns, and is recommended.

8. Recommendations to the European Commission

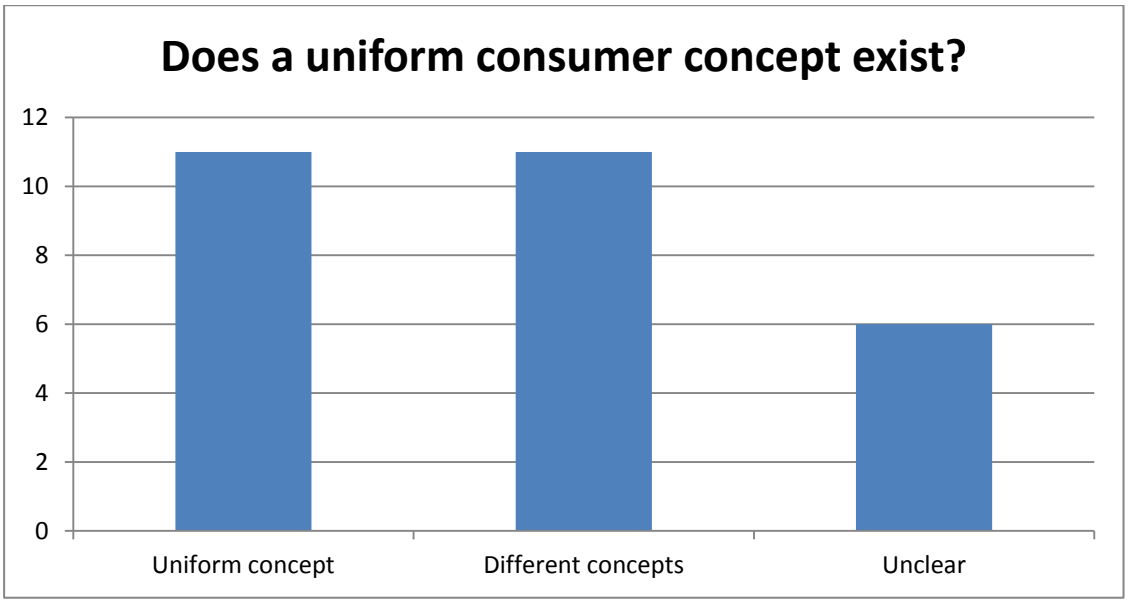
Problems identified	Need for action?	What action? If no action recommended, why?
General issue: divergent meanings and architectures of	Yes	CDR systems cannot at present be said to have a coherent approach or model across Europe, but are dynamic and evolving. Lack of understanding of ADR and of its potential

[1007] Proposal for a Regulation of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws, COM(2016) 283 final, 25.5.2016.

[1008] See Christopher Hodges, 'Consumer Redress: Implementing the Vision', in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016). UK National Report, Question 10.

ADR		advantages? (even by lawyers and judges). National networks of CDR entities should be created; specialist expertise should be organized in relation to certain types of disputes. Only in this case would it be possible to arrange mandatory CDR.
Decisions arising from ADR processes	Yes	There is an emerging need to address (a) the ability of traders to refuse to agree to referring a complaint to ADR, and also (b) refusing to abide by the outcome. The logical response to such issues would be to make (a) and possibly (b) mandatory. Issue (b) is in practice not a problem in those Member States that have well-developed CDR systems. It is important to ensure that best practices already existing are not disturbed by any changes.
Cooperation between ADR entities and regulatory authorities	Possibly	Ombudsmen also play a role in hearing consumer claims but while they are very well-established in certain states, they are generally unknown in others – and indeed, in certain sectors more than others. The CPC Regulation proposed in 2016 should bring a degree of harmonisation in relation to *consumer protection* authorities, but sectoral regulators may still operate differently. Further research is necessary to identify if a higher level of harmonisation with regards to the governing of the relationship between different ADR entities and regulatory authorities is necessary.
Cooperation between ADR entities and courts	Yes	A best practice can be identified in the UK, re the relationship between ADR/CDR entities and courts, various ombudsmen systems provide that ombudsmen may refer legal issues to courts for determination.

Annex: Selected Data from the National Reports



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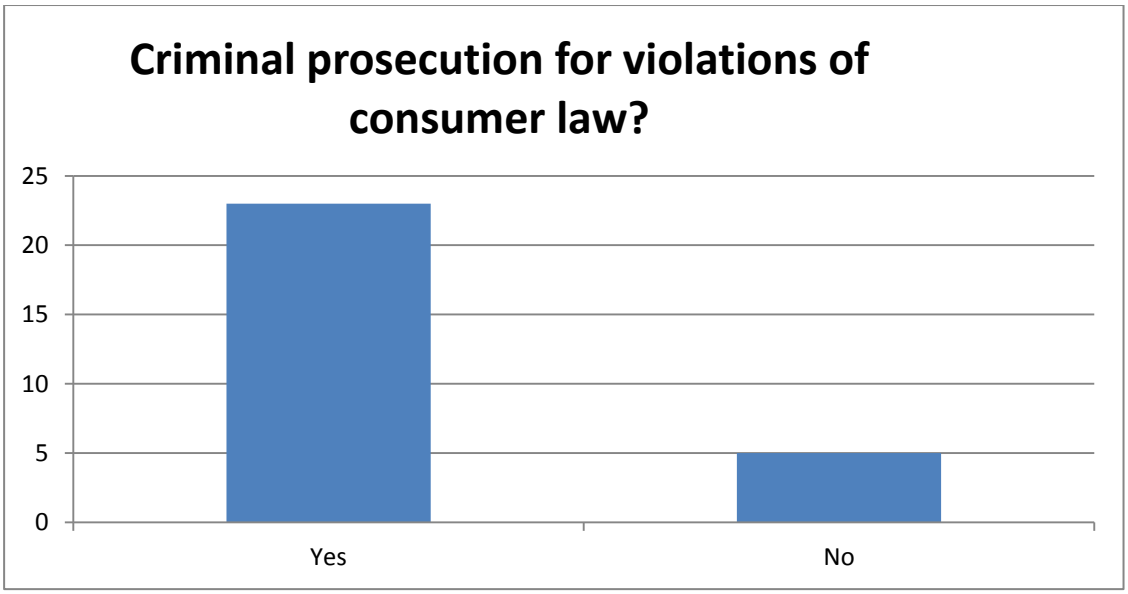

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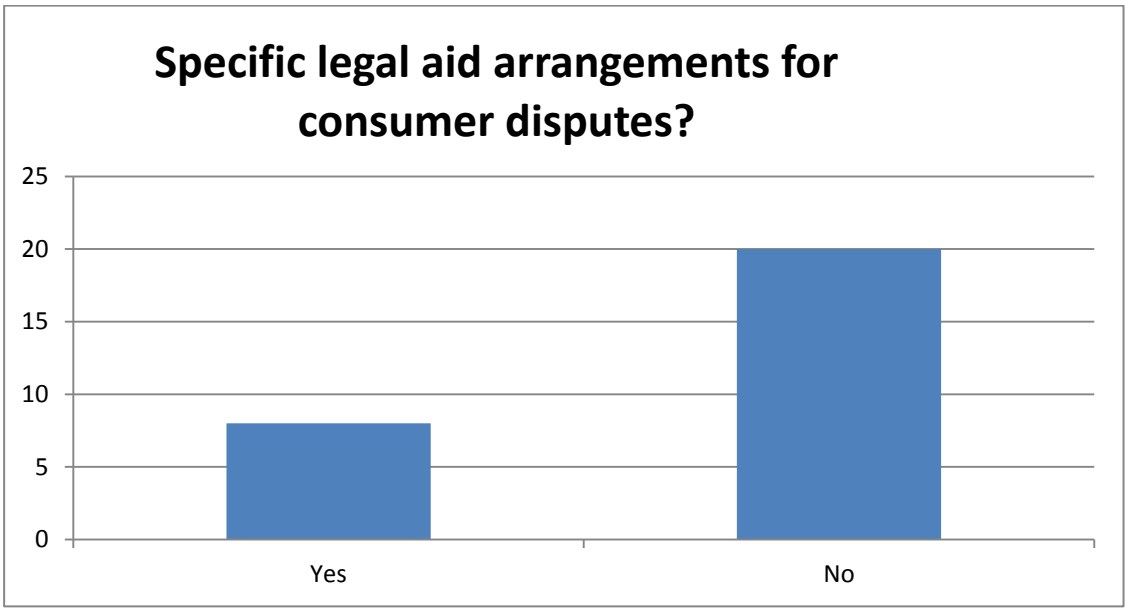

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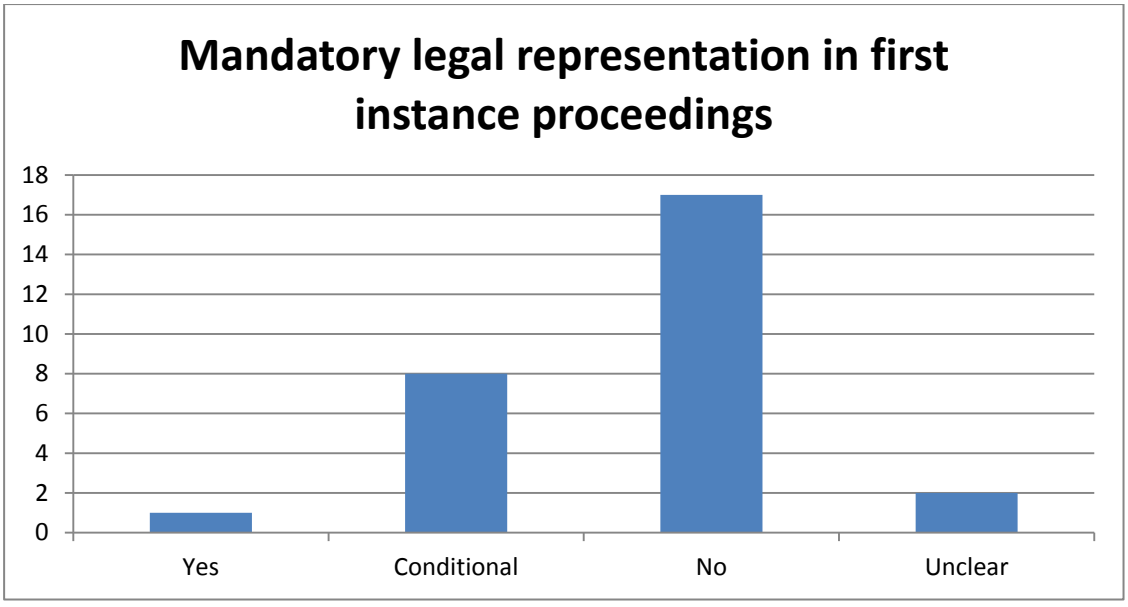

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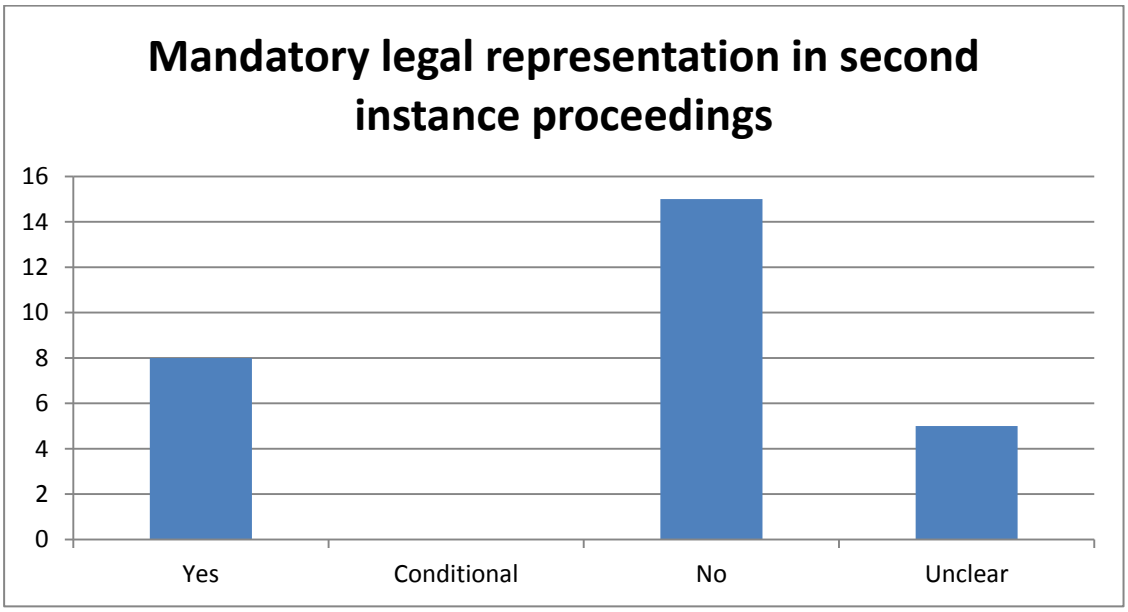

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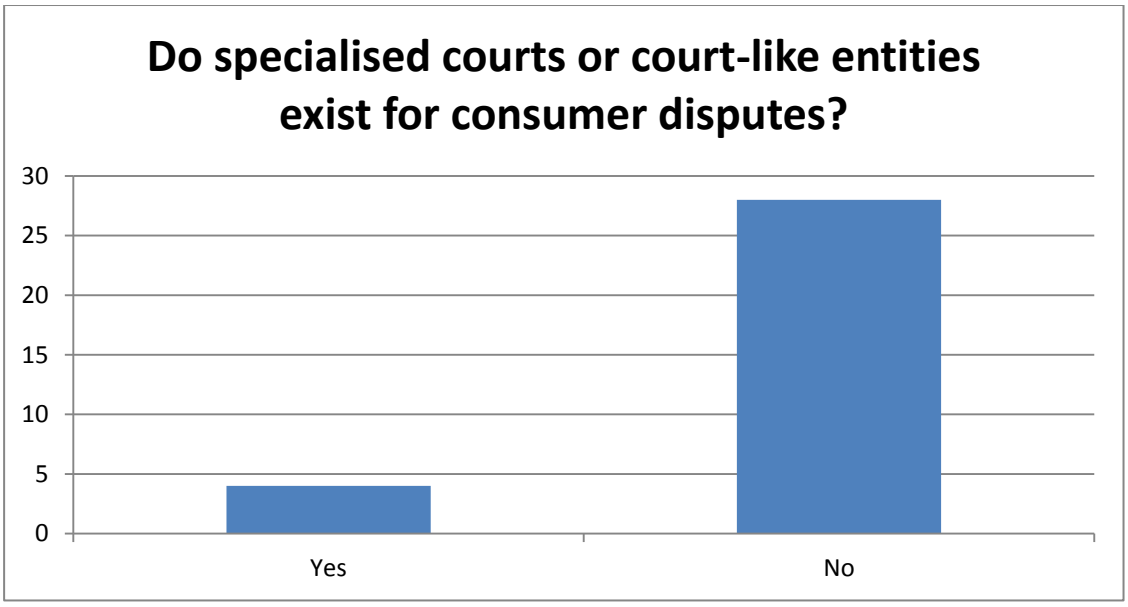

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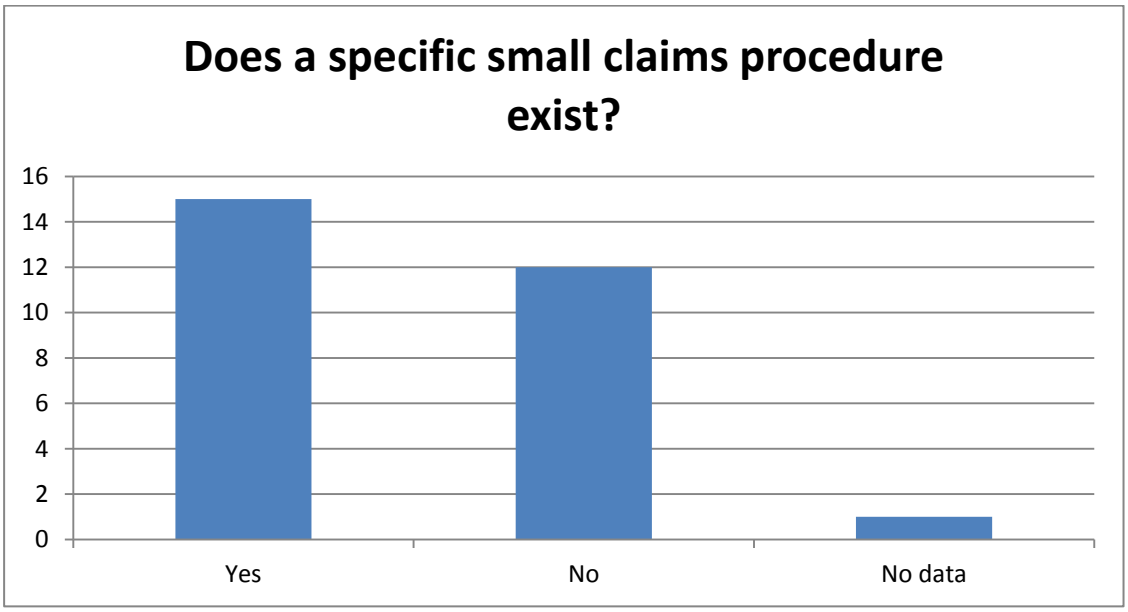

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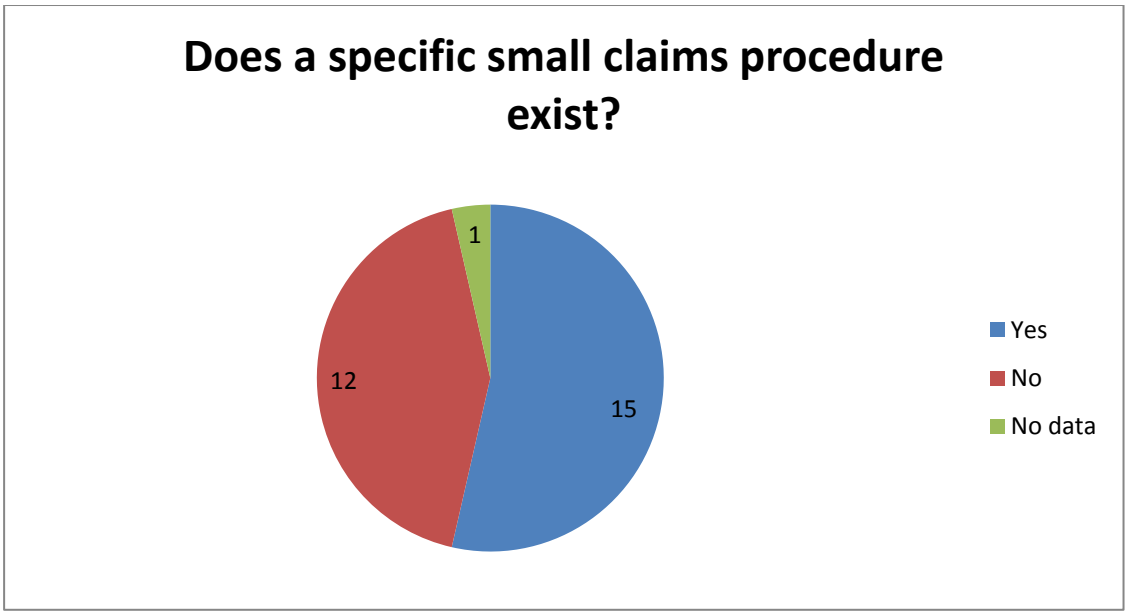

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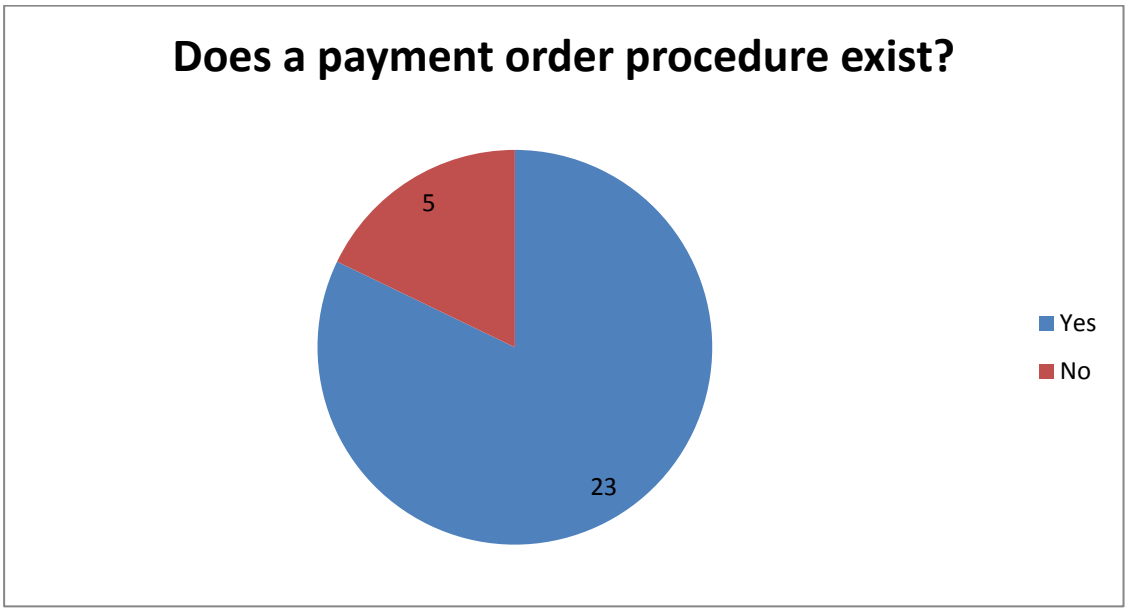

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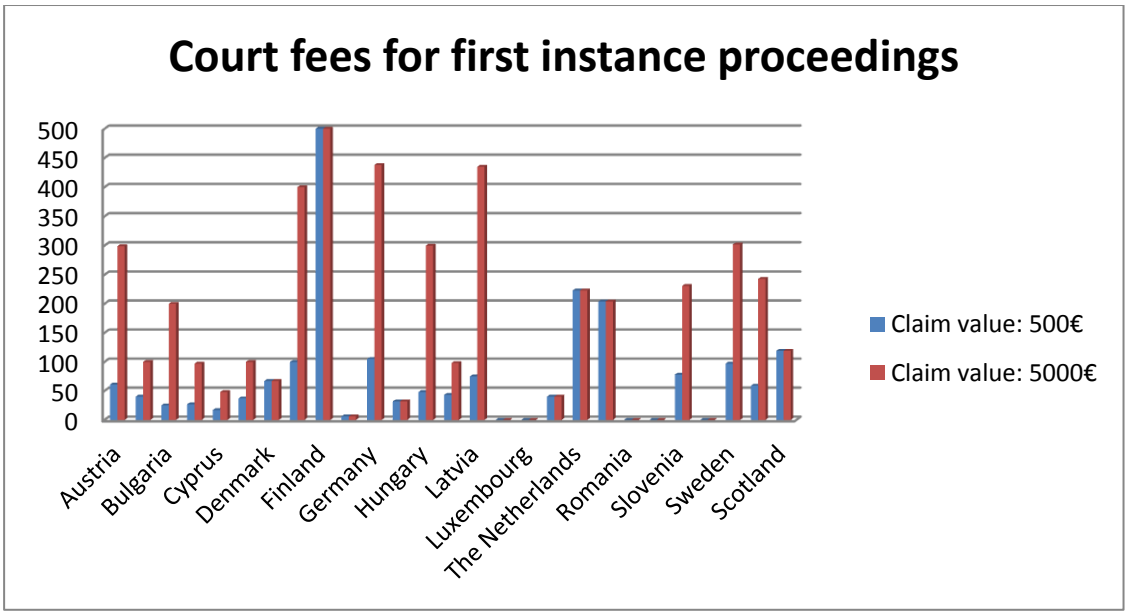

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