European Commission

An evaluation study of the impact of national procedural laws and practices on the equivalence and effectiveness of the procedural protection of consumers under EU law

JUST/2014/RCON/PR/CIVI/0082

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National Report – Consumer Protection Strand

Austria

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AUSTRIA: LEGAL ANALYSIS

1. NATIONAL LEGISLATION IMPLEMENTING EU CONSUMER PROTECTION INSTRUMENTS

EU legislation	Transposing national legislation	Additional notes (e.g. if there is an overlap in application of legislation etc.)
Doorstep Selling Directive 1985/577/EEC	§§ 3,4 **KSchG** (Consumer Protection Act)	
Package Travel Directive 90/314/EEC	§§ 31b-31f **KSchG** (Consumer Protection Act)	
Unfair Contract Terms Directive 1993/13/EEC	§ 6 **KSchG** (Consumer Protection Act)	
Distance Selling Directive 1997/7/EC	§§ 1,3,4,7,11,12,14,15,18 **FAGG** (Distance and Off-Premises Contracts Act) §§ 5b, 7a **KSchG** (Consumer Protection Act)	Until the implementation of directive 2011/83/EU the content of directive 1997/7/EC was implemented in §§ 5a-5j KSchG (Consumer Protection Act)

Consumer Sales and Guarantees Directive 1999/44/EC	§§ 8-9b **KSchG** (Consumer Protection Act)	
Unfair Commercial Practices Directive 2005/29/EC	§ 1 - 2a **UWG** (Unfair Competition Act)	In accordance with Art 11 of the Unfair Commercial Practice Directive and Art 5 of the Misleading and Comparative Advertising Directive § 14 UWG provides rules for a mechanism Of private enforcement by competitors and certain organisations.
Misleading and Comparative Advertising Directive 2006/114/EC		
Consumer Credit Agreement Directive 2008/48/EC	**VKrG** (Consumer Credit Act)	
Timeshare Protection Directive 2008/122/EC	**TNG** (Timeshare Act)	
Consumer Injunctions Directive 2009/22/EC	§ 28a **KSchG** (Consumer Protection Act) §§ 28, 29 **KSchG** and § 14 UWG	§§ 28, 29 KSchG and § 14 UWG also serve to implement directive 2009/22/EC, but were in force before the directive 2009/22/EC had been passed.
Consumer Rights Directive 2011/83/EU	**VRUG** (Consumer Rights Implementation Act); Implementation of (1) **FAGG** (Distance and Off-Premises Contracts Act); (2) §§ 3/1, 3/4, 3/5, 5a, 5b, 6b, 6c, 7a, 7b **KSchG** (Consumer protection Act)	
ADR for Consumer Disputes Directive 2013/11/EU	Alternative-Streitbeilegung-Gesetz **AStG** (Alternative Disputes Resolution Act)	The implemented act is in force since August 14th 2015 (some parts since January 9th 2016)

1. CONCEPT OF THE CONSUMER

1.1 Please outline the concept of the consumer in national law, indicating whether it is intended to be a uniform concept, whether it has been legislated for and where it can found (i.e. in a legislative provision, governmental guidelines, case law etc.).

Austrian consumer protection law merely provides a negative definition of the term "consumer". Pursuant to § 1 para. 1 KSchG (Konsumentenschutzgesetz) (Consumer Protection Act), a consumer is a person to whom the definition of entrepreneur does not apply. "Entrepreneur" is defined in § 1 KschG as "a person who makes the transaction in the course of carrying on his business". Consequently, "consumer" can be defined as a person for whom a transaction lies outside the scope of their business (cf. Apathy in Schwimann/Kodek, ABGB Praxiskommentar[4] § 1 KSchG margin note 8). Other consumer protection laws, such as the Austrian Consumer Credit Act (Verbraucherkreditgesetz) or the Federal Act on Distance Contracts and Off-Premises Contracts of 2014 (Fern- und Auswärtsgeschäfte-Gesetz), also refer to the definition in the KschG.

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.

Source(s):
An (outdated) English translation of the KSchG is available at: https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Erv&Dokumentnummer=ERV_1979_140 (last accessed: 9th May, 2016). This translation has been used when provisions of the KSchG have been cited.
Apathy in Schwimann/Kodek, ABGB Praxiskommentar[4] § 1 KSchG margin note 8.

2. REGULATORY AUTHORITIES COMPETENT FOR CONSUMER PROTECTION ISSUES

2.1 What regulatory authorities, if any, are competent for enforcing consumer protection law? Please identify them, their nature (i.e. whether they are public or private or mixed) and the nature of enforcement.

According to Austrian law, it is possible for certain organizations such as the Austrian Economic Chamber, Austrian Federal Chamber of Labour, Austrian Agricultural Workers Chamber, Presidential Conference of the Agricultural Chambers of Austria, Austrian Trade Union Federation, Association for Consumer Information and the Austrian Council of Senior Citizens to file for injunctive relief (example: CJEU 01.10.2002, C-167/00, Henkel, ECLI:EU:C:2002:555). This right to claim is granted for proceedings concerning violations of the national implementation of the Unfair Contract Terms Directive.
With the exception of the Association for Consumer Information, which is a private association, all organizations are of a public nature (Körperschaften öffentlichen Rechts). However, the Association for Consumer Information is not entirely "private", as its members are the associations governed by public law and the Republic of Austria. (Schoibl, Die Verbandsklage als Instrument zur Wahrung "öffentlicher" oder "überindividueller" Interessen im österreichischen Zivilverfahrensrecht, ZfRV 1990, 21)

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These above mentioned organizations can seek injunctive relief in other cases concerning violations against the regulations on doorstep selling, off premises contracts, information obligations towards consumers, consumer credit agreements, package travel contracts, timeshare protection agreements, distance selling contracts, the agreement on unfair terms. (§ 28, § 28a and 29 KSchG) These organizations have a similar competence to seek injunctive relief in cases concerning violations of the rules for fair competition. (§ 460 UGB)

2.2 Is there a specific venue for this type of enforcement and does this limit the jurisdiction of courts/ADR fora (even if only initially)?

There is no specific venue; cases of consumer protection are litigated in front of civil courts.

2.3 Can criminal prosecutions be initiated for violations of consumer protection rules? How serious must the infringement be? What are the penalties and sanctions? And might these prosecutions lead to criminal penalties or sanctions? Can individual consumers piggy back on these claims (e.g. via a partie civile method)?

Under Austrian law it is not possible to initiate criminal prosecutions for violations of consumer protection rules. However, there is a possibility to initiate administrative penal proceedings in cases concerning violations against certain national consumer protection rules according to § 32 para.1 KSchG. This is enforceable by the district administrative authorities (Bezirksverwaltungsbehörden) according to § 26 para. 1 VStG (Verwaltungsstrafgesetz) (Administrative Penal Act) and/or the regional police headquarters according to § 26 para. 2 VStG.

2.4 Is there judicial review of decisions of consumer regulatory authorities? If so, by which court is this judicial oversight made? Is the forum an ordinary or a specialised court or tribunal?

There is no judicial review of any decision made by consumer regulatory authorities, as they only have the authority to bring claims for injunctive relief in front of a court and cannot to decide on matters on their own.

2.5 Does the national legal system provide for a mechanism of cooperation between its national regulatory authorities and those of other Member States?

No there is no mechanism of cooperation between the national organizations and national regulatory authorities of other member states.

3. LEGAL AID

3.1 Is legal aid available to consumers in: a) bringing a claim and b) defending a claim before a court?

Yes, legal aid is available to consumers for both the claimant and the defendant in accordance with the general procedural rules (cf. §§ 63 et seqq. ZPO).

3.2 For what kinds of disputes and actions is legal aid available? (NB: legal aid might not be available for consumer or contractual disputes but be available instead for a related action, e.g. actions relating to debt, mortgage arrears, eviction etc.)

Legal aid is, in principle, available for all types of civil disputes and actions. There is no specific distinction with respect to different kinds of claims.

3.3 What requirements must be satisfied for the consumer to be entitled to legal aid? Please specify if there are any additional limitations to its availability.

In order to be entitled to legal aid under Austrian law, applicants 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. Legal aid is not available if initiating proceedings or defending a case would be patently vexatious or if the case would be unlikely to succeed. An issue is deemed vexatious in cases where, after expert assessment of all circumstances relating to the case, and notably the circumstances relating to the prospect of success, a party who is not legally aided would withdraw from the proceedings or attempt to pursue only part of the claim (cf. § 63 ZPO). Therefore, the applicant's position must be legally tenable. If a claim is manifestly unfounded or not brought in good faith, legal aid has to be denied.

3.4 What does legal aid encompass? (i.e. (only) general advice, (only) assistance in preparing the case, (only) assistance with negotiation of settlements, (also) representation).

According to § 64 ZPO para. 1 legal aid may include:

- the provisional **exemption from the payment of fees and costs** customarily incurred in connection with legal proceedings (e.g. court fees, fees for witnesses, experts and interpreters, travel expenses, or costs for a guardian for the other party appointed by the court).

- the **exemption from providing security for the costs of the trial**;

- the **representation by a lawyer** provisionally free of charge. However, free legal representation is only provided in cases where the law requires the applicant to be represented by a lawyer or where the nature of the case suggests that this is necessary (due to the complexity of the case). If legal representation is granted, legal aid encompasses not only general advice and assistance in preparing the case but also pre-trial advice with a view to an out-of-court settlement. Austrian lawyers are assigned to provide free legal assistance in a certain number of cases and may not refuse a case without good cause.

NB: The individual legal aid lawyer does not get any remuneration for their service. The state only pays a regular contribution to the bar association's pension fund in exchange for the legal profession's obligation to represent people free of charge. The weakness of this system is that it does not guarantee persons, who depend on legal aid, access to an equal quality of legal representation (see Oberhammer, Kollektiver Rechtsschutz bei Anlegerklagen, in Kalss/Oberhammer, Anlegeransprüche – kapitalmarktrechtliche und prozessuale Fragen: Gutachten zum neunzehnten österreichischen Juristentag, Vienna: Manz [2015] 81).

Source(s):
An (outdated) English translation of the ZPO provisions on legal aid is available at: http://ec.europa.eu/justice_home/judicialatlascivil/html/pdf/national_law_la_aus_en.pdf
(last accessed: 9th May, 2016).
Rechberger, Austria, in Taelman (ed.), International Encyclopaedia for Civil Procedure (2011) margin note 151 et seq.

4. COSTS

4.1 What are the costs of different types of procedures before courts? Are there exemptions to the payment of fees and expenses? How can costs be paid?

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Court fees	Up to 299 €	Up to 707 €	Up to 1,2 % of the amount in dispute plus 2,987 €			
Court expenses	cash expenditure depending on the individual case	cash expenditure depending on the individual case	cash expenditure depending on the individual case			
Exemptions	Possibly legal aid	Possibly legal aid	Possibly legal aid			

As Austrian law does not provide for a specific class action procedure, these general rules are also applicable to collective claims.
In Austria, court fees are calculated in accordance with the GGG (Gerichtsgebührengesetz) (Court Fees Act), which provides flat-rate court fees depending on the amount in dispute. Those fees are calculated on the basis of graduated scales, which stipulate e.g. that in cases involving an amount in dispute of up to 350,000 € a specified lump sum

(max. 6,949 € if the amount in dispute is between 280,000 € and 350,000 €) is to be paid in civil proceedings at first instance. In cases where this threshold of 350,000 € is exceeded the fee is calculated at 1.2 per cent of the amount in dispute, plus 2,987 €. The amount of the court fee is not subject to a cap of any kind. This results for example in a fee of 122.987 € for the first instance proceedings when the value in dispute is 10,000,000 €. Not surprisingly, Austrian court fees are among the highest in the world (Oberhammer, Kollektiver Rechtsschutz bei Anlegerklagen, in Kalss/Oberhammer, Anlegeransprüche – kapitalmarktrechtliche und prozessuale Fragen: Gutachten zum neunzehnten österreichischen Juristentag, Vienna: Manz [2015] 81).

The fee only has to be paid once and covers the costs for the entire proceedings at the respective instance (cf. § 3 GGG). Payment must be made at the time of filing the legal action and may be effected via bank cards, credit cards, bank transfer, direct debit authorisation or in cash at the competent court (cf. § 4 GGG). Additional costs for witnesses, experts, interpreters or the translation of documents, which may arise during the proceedings and differ from case to case, are calculated in accordance with the GebAG (Gebührenanspruchsgesetz) (Austrian Law on Entitlement of Fees)

As mentioned under question 3.4, a court can grant provisional exemption from the payment of fees and costs, if the conditions for legal aid are met. Further exemptions are provided by § 10 GGG in specific cases, e.g. for the public prosecutor's office or the courts.

Source(s):
Rechberger, Austria, in Taelman (ed.), International Encyclopaedia for Civil Procedure (2011) margin note 153 et seqq.
Roth, Litigating in Austria - Are Costs and Fees Worth It?, in Reimann (ed.), Cost and Fee Allocation in Civil Procedure. A Comparative Study. (2012) 69 et seqq.
Spiegelfeld, Country Report Austria, in Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union (2007), available at: https://e-justice.europa.eu/fileDownload.do?id=5adb3721-5399-487d-8d1d-d160af04d51c (last accessed: 6th October, 2017).

5. STANDING AND REPRESENTATION IN CONSUMER DISPUTES

5.1 Does national law limit the standing of the individual consumer in respect of the claim that can be made and the forum before which it can be brought?

There are no limitations to the standing of consumers in respect of individual claims, both in judicial proceedings and before consumer ADR boards.
However, the individual consumer does not have standing to bring an action for an injunction aimed at the protection of the collective interests of consumers (cf. Art 1 of the Consumer Injunctions Directive 2009/22/EC).

5.2 Other than individual consumers, who or which bodies have standing in consumer protection disputes and for what types of claim? If the action is not brought by the individual consumer, what requirements of representation must be satisfied?

In principle, only the consumer has standing in respect to their individual claims. Nevertheless, it is common practice that consumers assign their claims to a consumer protection association or a similar body and the latter subsequently brings an action in their own name (cf. Supreme Court 17.12.2009, 6Ob247/08d ECLI:AT:OGH0002:2009:0060OB00247.08D.1217.000). The ZPO even provides specific rules for such situations: § 502 para. 5 subpara. 3 ZPO holds that in proceedings based on a claim by a consumer association as assignee, the decision of the second instance court can be appealed by means of Revision to the Supreme Court, irrespective of the value in dispute. Pursuant to § 27 para. 1, representation by a lawyer is mandatory for all parties in such cases, irrespective of the dispute value (for the general rule see infra 7.3.). Since Austrian Law does not provide for an actual class action, the mechanism described above is used as means of collective redress in mass damage cases: instead of pursuing their individual claims for damages, a large number of consumers (or other individuals) assign their claims to a consumer association, which usually cooperates with a third party who provides litigation funding. In this way, said association can file all the claims in one single action against the injuring party (Sammelklage Österreichischer Prägung). In the cross-border context however, it should be noted that an action brought by the consumer association does not fall within the scope of the rules for jurisdiction in consumer disputes of the Brussels I or I bis regulation (cf. Austrian Supreme Court 04.03.2005, 9Nc4/05wECLI:AT:OGH0002:2005:0090NC00004.05W.0304.000).

§ 29 of the KSchG lists those bodies and associations which have standing to bring actions for an injunction against the use of unlawful general terms and conditions (§ 28 ZPO) or other commercial practices that infringe upon general interest of consumers (§ 28a ZPO). These provisions, however, do not provide for collective actions for damages or any other compensatory relief.

According to § 14 para. 1 of the UWG (Gesetz gegen den unlauteren Wettbewerb) (Act Against Unfair Competition), the Association for Consumer Information (Verein für Konsumenteninformation) can bring an actions for an injunction against the use of aggressive or misleading commercial practices.

5.3 If a consumer wants to bring or defend an action relating to a consumer protection dispute, is there a legal (or otherwise formal) requirement that he or she has legal representation? Please specify for both judicial and ADR fora and the bodies, associations or authorities that can provide this representation.

For judicial proceedings there are no specific rules on representation for claims brought by or against consumers, thus, the general rules in § 27 ZPO apply: Representation by a lawyer is mandatory in second and third instance proceedings and in first instance proceedings before regional courts (in general, regional courts are competent to hear cases where the value in dispute does exceed 15,000 €, cf. the answer to question 8.1.2). In first instance proceedings before district courts, representation by a lawyer is usually mandatory in cases where the value in dispute exceeds 5,000 €.

In consumer ADR proceedings, representation by a lawyer or any other person is admissible at any stage of the proceedings, but not mandatory (§ 12 para. 3 AStG [Alternative-Streitbeilegung-Gesetz][Law on Alternative Dispute Resolution])

6. ACTIONS BEFORE COURTS

6.1 Jurisdiction and competence of the courts in consumer disputes: General structure and special procedures aimed at protecting consumers

6.1.1 Are ordinary courts competent to hear such claims? Is there also a specialised tribunal for consumer protection disputes?

There is no specialised tribunal for consumer protection disputes. Such cases are litigated before ordinary civil courts.
However, there are specialized panels (in Vienna even specialized courts) for commercial matters. (cf. § 51 JN et seq.) Disputes concerning a transaction related to the defendant's business in which the defendant is an entrepreneur who is listed in the commercial register fall within this special jurisdiction for commercial matters (Handelsgerichtsbarkeit).

6.1.2 Which courts are competent to hear consumer protection disputes at first instance and in appeals? Please specify the court, in light of the value of the claim (and identify any other factors that are relevant in allocation jurisdiction).

In principle, the general rules on jurisdiction also apply to consumer protection disputes. The JN (Jurisdiktionsnorm) (Austrian Judicature Act) distinguishes in this regard between subject-matter jurisdiction (sachlicher Zuständigkeit, §§ 49 JN et seqq.) and territorial jurisdiction (örtlicher Zuständigkeit, §§ 65 JN et seqq.).

Subject-matter jurisdiction: In domestic Austrian law, consumer protection disputes at first instance can fall under the jurisdiction of District Courts (Bezirksgerichte) or Regional Courts (Landesgerichte), depending on the subject matter of the dispute (Eigenzuständigkeit) and the amount in dispute (Wertzuständigkeit).

As a general rule, District Courts have at first instance jurisdiction in cases involving an amount in dispute of 15,000 € or less. Additionally, they are competent to hear disputes in the matters listed in § 49 para. 2 JN, such as most family law or tenancy law disputes, irrespective of the amount in dispute. The Regional Courts are at first instance competent for cases in which the amount in dispute exceeds the threshold of 15,000 €.

At second instance, Regional Courts are competent to review decisions of District Courts. If the court of first instance was already a Regional Court, appeals are to be heard by a Higher Regional Court (Oberlandesgericht). The Supreme Court (Oberster Gerichtshof) acts as third and last instance.

Territorial Jurisdiction: As regards the rationae loci, the JN distinguishes between the place of general jurisdiction (allgemeiner Gerichtsstand) and numerous places of special jurisdiction (besondere Gerichtsstände). For natural persons, the place of general jurisdiction (§ 65 JN) is either their place of domicile or their place of habitual residence. Where no place of special jurisdiction according to § 76 JN et seqq. (e.g. maintenance claims, claims in tort etc.) has been established, this determines the competent court.

Special rules on jurisdiction for consumer protection disputes in national procedural law can be found in § 14 KSchG, which basically provides that an agreement on jurisdiction, entered into before the dispute has arisen, is only valid if it establishes the jurisdiction of the District Court at the consumers' place of domicile, place of habitual residence or place of employment.

See also:
Grill, Civil Procedure: A Q&A Guide to Litigation in Austria (2013) 5 et seqq.
Rechberger, Austria, in Taelman (ed.), International Encyclopaedia for Civil Procedure (2011) margin note 60 et seqq.

6.1.3 What is the nature of the procedure at first instance, e.g. is it a simplified or a summary procedure, and is there an assessment of the merits? Please specify in light of the value of the claim (and identify any other factors that are relevant in allocating jurisdiction).

The ZPO provides for obligatory summary proceedings for orders to pay debts (Mahnverfahren, see the answers to the questions under 8.4.), where the value in dispute is less than 75,000 €. Additionally, a similar type of summary procedure is used with regard to particular tenancy disputes (Auftragsverfahren).

Apart from these cases, ordinary proceedings at first instance do, of course, include an assessment of the merits. There are, however, a number of simplifications for first instance proceedings before District Courts - see the answer to question 8.3.1. For the factors that are relevant in allocating jurisdiction between District and Regional Courts, see the answer to question 8.1.2.

6.1.4 Please identify the formal requirements that must be satisfied for a consumer dispute to be heard before a court. These might include time limits applicable to the filing of the action/defence, representation requirements etc.

There are no special formal requirements which only apply to consumer disputes. In general, civil proceedings are initiated by the filing of a statement of claim. Procedural law does not provide any time limits for this submission, but statutes of limitations, which are to be found in substantive law, can be invoked by the defendant.

Representation by an attorney is required if the action is filed at the Regional Court or if it is filed at the District Court and the amount in dispute exceeds 5,000 € (cf. the answer to question 7.3). This, however, does not apply to cases in which the District Court is competent irrespective of the amount in dispute (see the answer to question 8.1.2). Pursuant to § 75 ZPO, the statement of claim must specify the competent court, the particulars of the parties and the subject-matter of the dispute. Furthermore, the statement must include a substantiated request for a decision, the assertion of the facts being the basis of the request and the necessary information to determine the court’s jurisdiction.

After the action is filed, the court has to ensure that the necessary procedural requirements are met. These include, inter alia, the international jurisdiction (inländische Gerichtsbarkeit), the jurisdiction of the addressed court

(Zuständigkeit des Gerichts; cf. the answer to question 8.1.2), and the claimant's capacity to be a party in a lawsuit and to act before a court of law (Partei- und Prozessfähigkeit). In addition, a claim has to be dismissed without a hearing, if there is already pending litigation on the same subject-matter (Streitanhängigkeit), the party has withdrawn the action and waived the claim (Klagsrücknahme unter Anspruchsverzicht), or if the res judicata principle applies (Rechtskraft).

If all procedural requirements are met, the court notifies the defendant of the lawsuit and at the same time issues an order to file a statement of defence (Klagebeantwortung) within four weeks. If the statement is filed in due time, the court schedules a first preparatory hearing (Vorbereitende Tagsatzung). In proceedings before the District Court, a statement of defence is not required.

See also:
Grill, Civil Procedure: A Q&A Guide to Litigation in Austria (2013) 42 et seq.
Rechberger, Austria, in Taelman (ed.), International Encyclopaedia for Civil Procedure (2011) margin note 80 et seqq.

6.1.5 In respect of the claims and relevant procedures available in the national legal system, what kind of relief might be available in consumer protection disputes? (monetary remedies, injunctions, skimming off etc.)?

An individual consumer may obtain relief by bringing an action for damages under general civil law.

In addition, Austrian law offers various forms of non-monetary relief, such as declaratory judgments or judgments ordering a party to cease and desist. Interim injunctions (Einstweilige Verfügungen) can be granted, in accordance with the EO (Exekutionsordnung) (Austrian Enforcement Act), in order to secure the future enforceability of claims and to provide provisional relief.

Since it is often inefficient for an individual to start expensive and time-consuming proceedings in consumer protection disputes, the KschG grants certain bodies and associations the right to bring representative actions (cf. the answers to question 7.2.).

6.1.6 Please provide a brief overview of the role of parties and judges in civil proceedings generally (e.g. with reference to the principle of party disposition, the obligation of parties to make and prove factual allegations and to make and provide legal arguments, the possible role of the court). This overview should be brief; these issues will be dealt with in more detail in the questions that follow.

Under Austrian civil procedure law, the parties are entitled to freely dispose over the subject matter of the proceedings. The principle of party disposition (Dispositionsgrundsatz) entails that the parties are free to initiate a procedure by filing an action, to determine the subject-matter of the procedure and to end the procedure at any stage by acknowledgement or abandonment of the claim.

As regards the establishment of the factual basis of the action, the ZPO provides for a differentiated approach – the so-called extenuated principle of judicial investigation (abgeschwächter Untersuchungsgrundsatz); cf. Wall, Austria & Germany: A History of Successful Reforms, in van Rhee/Yulin [eds.], Civil Litigation in China and Europe [2014]

155). According to this principle, it is primarily the responsibility of the parties to provide the factual allegations on which the claim is based and to bring forward appropriate evidence to substantiate these allegations. The parties are therefore required to present the relevant facts of the case truthfully and comprehensively (cf. § 178 ZPO). The judge, on the other hand, is under a duty to ask appropriate questions and give the necessary instructions to the parties (cf. § 182 ZPO), which gives the possibility to direct the course of procedural fact-finding. Additionally, the judge has, in principle, the power to take evidence ex officio.

Source(s):
Koller, Civil Justice in Austrian-German Tradition - The Franz Klein Heritage and Beyond, in Uzelac (ed.), Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems (2014) 44 et seq.;
Rechberger, Austria, in Taelman (ed.), International Encyclopaedia for Civil Procedure (2011) margin note 22 et seqq.
Wall, Austria & Germany: A History of Successful Reforms, in van Rhee/Yulin (eds.), Civil Litigation in China and Europe (2014) 154 et seqq.

6.2 Small claims

6.2.1 Does a small claims procedure exist in the Member State? If yes, is it a specialised or simplified procedure?

There is no actual small claims procedure under Austrian law. For the procedural simplifications before district court see the answer to question 8.3.1.

6.2.2 What are the value thresholds for claims brought under the small claims procedure? Moreover, are there any other factors that shape the use of the small claims procedure (including the nature of the claim, the area of consumer protection law into which the claim falls etc.)?

See the answer to question 8.2.1.

6.2.3 What forms must be completed to raise the application? Who assists the consumer in completing these forms?

See the answer to question 8.2.1.

6.2.4 How can an application for a small claim be made (e.g. online, by post or in person)?

See the answer to question 8.2.1.

6.2.5 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

See the answer to question 8.2.1.

6.2.6 Are the costs of the successful party reimbursed?

See the answer to question 8.2.1.

6.3 Claims other than small claims

6.3.1 If a consumer protection dispute does not qualify as a small claim, what other procedures are available? What are the value thresholds and other factors determining the use of such procedures?

Apart from the possibility to initiate summary proceedings for orders to pay debts, (cf. the answers to the questions under 8.4.), the general rules on ordinary proceedings also apply to consumer protection disputes. However, a distinction can be made between proceedings before the Regional Courts and those before the District Courts. Whereas proceedings before the Regional Court are regarded as the norm and are therefore regulated in detail, the ZPO also contains a number of specific procedural rules with the aim of simplifying District Court proceedings. (Rechberger/Simotta, Zivilprozessrecht[8] margin note 940) These simplifications are set out in the §§ 431 – 460 ZPO and include, inter alia, that representation by an attorney is not required before the District Court if the amount in dispute is below 5,000 €, or that there is no requirement to file a statement of defence. Additionally, the judge's duty to give instructions and guide the parties (§ 182 para. 1 ZPO) is enhanced where parties have no legal representation (cf. § 432 para. 1 ZPO).

With regard to the question whether a consumer protection dispute has to be brought before the District or the Regional Court, see the answer to question 8.1.2.

6.3.2 How can such claims be made? Please specify if the applications can be made online, or by post or in person.

Applications can be sent by mail to the court’s address for correspondence. In District Court proceedings where representation by an attorney is not mandatory and in labour and social law disputes, it is also possible to file an oral application which is put on record by the court (Erklärung zu gerichtlichem Protokoll, cf. § 434 ZPO).

However, most applications are submitted electronically via the Austrian online legal communication system (web-basierte Elektronische Rechtsverkehr, WebERV). Prerequisites for the use of WebERV are the registration with an authorised transmitting agency and the use of special software for lawyers. For attorneys and notaries it is even mandatory to submit their applications using this system (§ 89c para. 5 GOG). The submission of applications by e-mail or fax is not possible under Austrian law.

6.3.3 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

In principle, each party has to bring forward all necessary factual allegations and the appropriate evidence in support of their claim (cf. §§ 226 para. 1 and 239 para. 1 ZPO). Thus, the burden of proof is usually on the claimant, who has to establish the facts as required by the rule favourable to their position. There are, however, some substantive provisions which provide for a reversal of the burden of proof (especially in consumer protection law and tort law; cf. §§ 6 and 12 KSchG or § 1298 ABGB).

At the preparatory hearing, a program for the proceedings (Prozessprogramm), which includes a provisional list of means of evidence and the order of their presentation in court, is drawn up jointly by the court and the parties. The principles of orality and directness require that the taking of evidence is – as a rule – conducted during the oral hearings by the judge who will decide on the matter. However, Austrian procedural law provides for some exceptions to these general principles, such as the rule on usage of evidence from previous proceedings (§ 281a ZPO) or the possibility of mutual judicial assistance in the taking of evidence assistance (cf. § 37 JN or Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence).

If one of the parties fails to appear at the preparatory hearing, the court may, at the request of the party not in default, render a default judgment. Such a judgement will typically be in favour of the party not in default, because its factual allegations are deemed to be true unless evidence to the contrary has already been produced before the Court (cf. § 396 ZPO).

See also:
Grill, Civil Procedure: A Q&A Guide to Litigation in Austria (2013) 55 et seqq.
Nunner-Krautgasser/Anzenberger, Evidence in Civil Law - Austria (2015) available at: https://static.uni-graz.at/fileadmin/rewi-institute/Zivilverfahrensrecht/Institut/24-99Z_Book_Manuscript-88-1-10-20150920-1.pdf (last accessed: 9th May, 2016).

6.3.4 Are the costs of the successful party reimbursed?

Yes, the costs of a fully successful party are, in principle, reimbursed by the unsuccessful party, but only as far as these costs were reasonable and necessary for the purposeful pursuit or defense of the party's rights (cf. § 41 ZPO).

6.4 Claims for the issuance of a payment order

6.4.1 Does an order for payment procedure exist in the national system? Is it a simplified procedure?

As already pointed out in connection with question 8.1.3, the ZPO does provide an order for payment procedure (Mahnverfahren). This summary procedure for orders to pay debts is mandatory if the amount in dispute is below 75,000 €. Since the aim of this procedure is to offer an especially quick and efficient way of obtaining an enforceable title for pecuniary claims which are expected to remain uncontested, the claimant only has to provide the relevant details in a standardised form. If the court comes to the conclusion that all procedural requirements (cf. § 244 ZPO) are met, it will issue an order for payment solely on the basis of the application. Therefore, the procedure for orders to pay debts does not provide an assessment of the merits of the complaint. However, the defendant has the

possibility to submit an objection within four weeks after receiving the order for payment, with the consequence that the order is suspended and ordinary proceedings are initiated (cf. § 249 ZPO).

6.4.2 Which authorities or courts are competent to hear claims for the issuance of payment orders?

There are no special rules on jurisdiction for the issuance of national payment orders. For the general rules on jurisdiction see the answer to question 8.1.2.

6.4.3 Are there any formal requirements that must be satisfied for the application for the issuance of a payment order to be made (e.g. standard forms, representation by a lawyer, the detail of description required, the need to provide written evidence etc.)?

Applications for the issuance of a payment order require the use of standardised forms. These forms can be found on the website of the Federal Ministry of Justice (available in German, Slovenian, Hungarian and Burgenland Croatian at https://webportal.justiz.gv.at/formulare/Justiz/geldleistung.html). In practice, the vast majority of these applications are filed electronically via webERV (see the answer to question 8.3.2). If, according to the general procedural rules described in the answer to question 8.1.4., representation by an attorney is mandatory, it is also necessary that the form is submitted by an attorney. Furthermore, the application has to be rejected if the amount in dispute is above 75,000 €, if the claim is not exclusively for money, if the court has no jurisdiction or if the defendants' place of residence is unknown or abroad (cf. § 244 ZPO).

As regards the contents of the application, the claimant has to enter all the information necessary to ensure that the application is conclusive (Schlüssigkeit). This requirement is met if the factual allegations are sufficient to derive a specific demand from the applicable legal provisions and if this demand corresponds with the claim. There is, however, no need to provide any written evidence.

6.4.4 What information is generally available to the authority or court when a claim for the issuance of a payment order is made?

The claimant has to provide all the information required by the standardised form mentioned above, such as the particulars of the parties, the specified claim, the amount of interest and costs, the necessary information to determine the court's jurisdiction and information regarding evidence which could be used to support the claim (but the evidence itself needs not to be submitted).

6.4.5 What opportunity is available for a defence/statement of opposition to be advanced? How should this be done and what is its effect? Please specify if the means of advancing a defence differ depending on the value of the claim and the court dealing with it.

The defendant has the opportunity to lodge an objection against the payment order within a period of four weeks after being served with a written copy of the order. If the claim falls within the jurisdiction of the Regional Court, the objection must take the form of a formal statement of defence. In proceedings before the District Court, an unsubstantiated objection suffices. If an objection is raised in time, the payment order ceases to be effective and the

court automatically initiates ordinary proceedings on the same subject matter, regardless of the value of the claim and the court dealing with it (cf. § 249 ZPO).

6.4.6 What is the effect if the claim is uncontested, i.e. if there is a lack of defence/statement of opposition?

If the payment order remains uncontested, it becomes legally binding and enforceable without the necessity of further action.

6.4.7 If the defendant is a consumer, and he or she does not respond to or raise an objection to the issuance of the payment order, does the authority dealing with the claim for payment order proceedings have the power to examine any issue of consumer protection law of its own motion before treating the action as usual?

There are no special rules with regard to consumer protection which would authorise the competent authorities to derogate from the payment order procedure established in the ZPO.

6.4.8 What steps must the pursuer take in order to obtain an enforceable decision?

If no objection is raised in time, the payment order becomes automatically enforceable and can be used to initiate enforcement proceedings (cf. § 1 No 3 EO).

6.4.9 Is this decision final, or can the defendant appeal against it?

In principle, the lodging of an objection is the only ordinary means of appeal against payment orders. There are, however, some other legal remedies which can be of use for defendants who face a legally binding payment order. The defendant has, for example, the possibility to submit an application for reinstatement in the status quo ante within fourteen days, if they were prevented from raising an objection in time by an unforeseeable or unavoidable event (cf. § 146 ZPO). In addition, under certain circumstances (cf. §§39 and 40 EO; e.g. irregularities in the service of the document) it is also possible to have the confirmation of enforceability cancelled (Einstellungsantrag, cf. Rechberger/Oberhammer, Exekutionsrecht[5], margin note 84).

See also:
Grill, Civil Procedure: A Q&A Guide to Litigation in Austria (2013) 96 et seqq.
Rechberger, Austria, in Taelman (ed.), International Encyclopaedia for Civil Procedure (2011) margin note 126 et seq.

6.5 Appeals in consumer disputes

6.5.1 Are appeals possible in all consumer disputes? Please specify for small claims and other types of claims.

	Individual claim of value € 0 –	Individual claim of value €	Individual claim of value €	Collective claim of value € 0 –	Collective claim of value €	Collective claim of value €

	€ 5000	5001 – € 20.000	20.001+	5000	5001-- € 20.000	20.001+
Nature of the procedure at 1st instance	District Court proceedings (possibly payment order procedure)	District Court proceedings or Regional Court proceedings, if the amount in dispute exceeds 15,000 € (possibly payment order procedure)	Regional Court proceedings (possibly payment order procedure)			
2nd instance – appeal to?	Regional Court	Regional Court or Higher Regional Court	Higher Regional Court			
3rd instance – appeal to?	In general no third instance, for relevant exceptions see § 502 para. 5 ZPO	Possibly Supreme Court	Possibly Supreme Court			

As Austrian law does not provide for a specific class action procedure, the general rules are also applicable to collective claims.
In principle, appeals are possible in all consumer disputes. For further details on the national appeal procedure, see the answer to question 8.5.2.

6.5.2 Please briefly specify the national appeal procedure, including any requirements to be satisfied for appeals. These might include, but are not limited to, conditions of admissibility, value thresholds, time-limits, the scope of review, and the impact of the appeal on enforcement (provisional enforcement). Please refer to any rules specifically applicable in respect of the claims and relevant procedures outlined above.

There are three main types of legal remedies under Austrian law which allow for a review of a court decision by a superior court: appeals against judgments of the first instance (Berufung), appeals against judgments of the second instance (Revision), and appeals against other decisions of the court (i.e. decisions which are not "on the merits") (Rekurs). (Grill, Civil Procedure: A Q&A Guide to Litigation in Austria (2013) 80) As regards formal requirements, all legal remedies have to contain a declaration as to whether the decision of the court is contested in whole or in part (Rechtsmittelerklärung), the grounds the remedy is based upon (Rechtsmittelgründe), and a statement as to whether the decision should be amended or rescinded by the appellate court (Rechtsmittelantrag).

The appeal against first instance judgments (on the merits of the case) is called Berufung. If the judgment is only served upon the parties in writing (which, in practice, is the usual case) appeal can be brought within four weeks after the decision was served upon the respective party or their representative (cf. § 464 ZPO). Only when the judgment is pronounced orally in presence of the parties or their representatives, a party who wishes to bring an appeal has to file a notice of appeal (Berufungsanmeldung) immediately after the judgment is rendered or within two weeks after the party has been served with the written record of the proceedings. (cf. Rechberger, Austria, in Taelman [ed.], International Encyclopaedia for Civil Procedure [2011] margin note 135). The appeal must be filed with the court of first instance, which has to examine if the appeal was submitted in time and if the formal requirements are met.

The grounds on which an appeal can be brought include procedural errors (nullity and other severe procedural errors) and errors of law (wrong legal evaluation or an incorrect determination of the facts). The ZPO does not contain an exhaustive enumeration of the grounds for appeal. In cases where the amount in dispute is below 2,700 €, an appeal may only be lodged on grounds of nullity (cf. § 477 ZPO) and incorrect legal evaluation (§ 501 ZPO). This restriction does not apply in the matters listed in § 501 ZPO, including collective actions brought under § 29 of the KSchG.

Second-instance judgments can only be reviewed by the Supreme Court and only on points of law. This form of an appeal is only admissible if the amount in dispute exceeds 5,000 €. (§ 502 para 2 ZPO). However, there are some exceptions to this value limit (§ 502 para. 4 and 5 ZPO). The admissibility of Revision is limited to cases where the decision depends upon the solution of an issue of substantive law or of procedural law which is of 'considerable relevance' for the uniformity of the law, legal certainty or the development of the law (§ 502 para. 1 ZPO). If the court of second instance grants leave to appeal (because it affirms the existence of such a question of law), the party can file an "ordinary" Revision which suspends not only the res judicata effect but also the enforceability of the judgment (§ 505 para. 3 ZPO). If leave to appeal is denied, the party can only file an "extraordinary" appeal if the value in dispute exceeds 30,000 € (for exception to this value limit see § 502 para. 5 ZPO). Such an appeal does not suspend the enforceability of the judgment.
Revision has to be filed with the first instance court within four weeks after service of the appellate decision (§ 505 para. 1 and 2 ZPO; this time limit cannot be extended). It has to be filed by an attorney.

See also:
Rechberger, Austria, in Taelman (ed.), International Encyclopaedia for Civil Procedure (2011) margin note 130 et seqq.
Rechberger/Simotta, Zivilprozessrecht[8] margin note 980 et seqq.

Cf. also Sect. 2.2 of the mutual trust part of this national report.

6.6 Enforcement in consumer disputes

The CJEU has identified a number of situations concerning the enforcement stage of consumer protection disputes in which the effective and equivalent protection of EU consumer rights may be affected by national procedural rules. These include – in relation to the effectiveness and equivalency of the protection afforded by the Unfair Contract Terms Directive, for example – the enforcement of arbitration awards, the enforcement stage in the recovery of consumer credit and the enforcement of mortgages, which often links together declaratory and enforcement proceedings. As such, we focus on these situations below. However, other problematic situations exist. Please indicate if additional (and potentially problematic) situations are identifiable in your national legal system.

Moreover, if possible, please provide the reference/citation of an article that provides an overview of the way in which enforcement operates in relation to consumer protection disputes within your national legal system.

6.6.1 If the assessment of a consumer protection issue has not been possible at an earlier stage of the proceedings, is it always possible – either ex officio (see section 10 below) or if the consumer raises a possible violation of consumer protection law – for this assessment to be undertaken during enforcement proceedings?

The assessment of consumer protection issues during enforcement proceedings is possible as long as it does not affect the preclusive effects of res iudicata. Accordingly, (consumer protection) issues of law or fact can be assessed during enforcement proceedings only if they occurred after the point of time up until which such issues could have been brought forward by the parties in the main court proceedings (Jakusch in Angst/Oberhammer, EO^3 § 35 EO margin note 52 et seqq.). For the assessment of issues which occurred prior to this time, an action for reopening the case (Wiederaufnahmeklage) must be filed.
In case the enforcement does not take place on the basis of a judicial decision, (consumer protection) issues may be assessed during enforcement proceedings, if they arose after the enforcement order in question was issued. For example, if the enforcement takes place on the basis of a notarial act, objections in regard to points of fact or law which occurred before the act was issued cannot be brought forward (Supreme Court 09.07.1997, 3 Ob 20/97f, ECLI:AT:OGH0002:1997:0030OB00020.97F.0709.000, ecolex 1997, 919 = JBl 1997, 791; Supreme Court 11.11.1998, 3 Ob 266/98h, ECLI:AT:OGH0002:1998:0030OB00266.98H.1111.000). It is, however, always possible to challenge a notarial act before court and have it declared invalid (Art XVII. EGEO [Einführungsgesetz zur Exekutionsordnung] [Introductory Statute to the Enforcement Act]).

6.6.2 In the particular case of consumer protection, if a court examines consumer protection law (either ex officio or on the basis of an argument advanced by the consumer), does national procedural law provide that interim measures should 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 final decision will have full effect?

Pursuant to § 42 EO, the enforcement court may, upon application, order the stay of enforcement proceedings if an action to declare the enforcement order invalid is brought before the court, if an action to reopen the case is filed, or if objections in relation to contentious questions of law or fact which arose after the main proceedings are raised.

7. ACTIONS FOR COLLECTIVE REDRESS

7.0 General remarks

As already pointed out in 7.2., Austrian law doesn't provide a class action or any other specific mechanism for collective redress in regard to damages. Austrian practice, however, has found a way to pursue such claims collectively, by assigning many individual claims to one entity or individual, who then pursues all the claims in their own name. This mechanism has also been described in 7.2.

The problems addressed in the following two questions cannot arise in regard to such actions, since the claim, once it has been assigned to somebody else, cannot be pursued by the individual consumer any longer. Thus, the answer to 9.1 only takes regard to actions for injunctive relief.

It should also be mentioned in this context, that actions for injunctive relief pursuant to directive 2009/22/EC are not qualified as "collective" according to Austrian doctrine, since the respective association brings the claim in their own right and not as proxy or representative for the individual consumer.

7.1 Injunctive relief, linking individual and collective actions

7.1.1 If collective proceedings are launched, does national procedural law provide that ongoing individual claims, relating to the same dispute, should be stayed until the collective proceedings are brought to an end? Please specify if this constitutes an obligation on the part of the national judge or if it is at his or her discretion.

There is no specific provision in Austrian procedural law that provides for such a stay in consumer disputes. Moreover, there seems to be no case law on that question.

§ 190 ZPO provides for a discretional stay of proceedings when the decision of a case depends, in part or as a whole, on the existence or non-existence of a legal position that is currently subject to pending proceedings before another court, or to administrative proceedings. However according to the prevailing opinion in Austria, a judge can only stay the proceedings under this provision when they would be bound by the decision in the other proceedings (cf. Schragel in Fasching/Konecny[2] § 190 ZPO margin note 24). Since the judgment in the collective proceedings pursuant to § 28 et seq. KSchG does not have binding effect on the decision of the individual case (cf. the answer to question 9.1.2) it seems unlikely that § 190 ZPO could be applied in such a case. Nevertheless, proceedings can be stayed on agreement by the parties (Ruhen des Verfahrens, cf. Rechberger/Simotta, Zivilprozessrecht[8] margin note 486).

7.1.2 If individual proceedings are stayed, please indicate what the effect of the court or ADR entity's decision in the collective action on those individual proceedings would be, i.e. whether the outcome of the collective action binds the consumer bringing an individual action.

Austrian law does not provide for an erga omnes binding effect of the decision in the collective proceedings (cf. Apathy in Schwimann/Kodek [eds.] ABGB Praxiskommentar[4] § 30 KSchG, margin note 2). Therefore a negative outcome in the collective proceedings does not (legally) bind the consumer bringing an individual claim. On the other hand, the judge in the individual proceedings is also not bound by a judgment finding on behalf of the claimant in collective proceedings. Nevertheless, the requirement established by the CJEU in the Case C-472/10 Invitel (CJEU 26.04.2012, C-472/10 Invitel ECLI:EU:C:2012:242) that the effect of an invalidity should be extended to proceedings on individual claims is supposedly met by means of § 28 para. 1 KSchG. This provision stipulates that an injunction prohibiting the use of certain conditions in contract terms does also include the prohibition to invoke any such condition vis a vis a consumer with whom it was inadmissibly agreed (Geroldinger, Österreichisches Bankarchiv [2013] 40). This prohibition can be enforced by the association or body which has obtained the judgment granting the injunction (cf. Supreme Court, judgment of 18.9.2013**,** 7 Ob 44/13s, RdW 2014/90 ECLI:AT:OGH0002:2013:0070OB00044.13S.0918.000).

Source(s):
On the effects of C-472/10 Invitel on Austrian law: Geroldinger, Ergänzende Auslegung von Verbraucherverträgen trotz Verbots der geltungserhaltenden Reduktion? Anmerkungen zu EuGH C-453/10 (Pereničová und Perenič), C-472/10 (Invitel) und C-618/10 (Banco Español de Crédito), Österreichisches Bank Archiv 2013, 27 (40 et. seq.)

On collective redress in consumer disputes in general: Oberhammer, Kollektiver Rechtsschutz bei Anlegerklagen, in Kalss/Oberhammer, Anlegeransprüche – kapitalmarktrechtliche und prozessuale Fragen: Gutachten zum neunzehnten österreichischen Juristentag, Vienna: Manz (2015); Rechberger, Verbandsklagen, Musterprozesse und „Sammeklagen“ – Möglichkeiten kollektiven Rechtsschutzes im österreichischen Zivilprozess, in Festschrift für Rudolf Welser (2004) 871.

8. CONSUMER ALTERNATIVE DISPUTE RESOLUTION

8.0 Consumer disputes before ADR fora

8.0.1 Is ADR mandatory for all parties bringing a claim related to a consumer protection dispute?

For consumers ADR is never mandatory. The participation of the other party to the dispute in ADR is in most cases also voluntary. However, there are exceptions in some sectors (e.g. disputes about passenger rights or the railway law etc.). (Ulrike Frauenberger-Pfeiler, Das neu institutionalisierte Schlichtungsverfahren in Verbrauchersachen, JAP 2015/2016/18, 167)

8.0.2 Please specify if there are limitations to the use of ADR. These might include the nature of the claim (i.e. whether both individual and collective claims are possible), requirements of representation, time limits, value thresholds, etc.

Pursuant to § 1 para. 2 of the AStG (Alternative-Streitbeilegung-Gesetz) (ADR Act), disputes about immovable property, health services, services of public providers of further or higher education and non-economic services of general interest are explicitly excluded from its scope.

Pursuant to § 6 para. 6 AStG, an ADR entity may refuse to start proceedings if the motion for ADR is vexatious, if the same motion is pending or has been dealt with before another ADR entity or before court, if the value of the dispute either exceeds of falls short of the defined value thresholds, or if the dispute resolution before the ADR entity would seriously compromise its effective operation.

8.0.3 Can ADR entities issue binding decisions and can they enforce those decisions? If not, please explain how they are enforced.

ADR entities cannot issue binding decisions; they can only propose a solution to which the parties are free to agree. If the parties reach a settlement as a result of ADR, this can only be enforced by making this agreement enforceable (by notarial deed, arbitral award on agreed terms or an action before court). (Ulrike Frauenberger-Pfeiler, Das neu institutionalisierte Schlichtungsverfahren in Verbrauchersachen, JAP 2015/2016/18, 170)

8.0.4 Does national law provide that limitation periods applicable to judicial actions should be suspended while ADR is ongoing?[1]

Yes, this is provided for by § 18 AStG.

8.0.5 Please specify if national law establishes rules providing for recourse to judicial action following an (unsuccessful) ADR hearing[2].

As ADR is voluntary for consumers, the dispute may either after or at any point during the ADR proceedings be referred to the court.

8.0.6 Is there judicial review of decisions and awards made by ADR entities? If so, by which court or tribunal is this oversight made? Is it ordinary or specialised?

No, as ADR entities do not render awards or decisions; they are only allowed to make a solution proposal which the parties are free to agree to.

See also:
Ulrike Frauenberger-Pfeiler, Das neu institutionalisierte Schlichtungsverfahren in Verbrauchersachen, JAP 2015/2016/18

[1] The Directive on Consumer ADR provides that "the existence of an effective system for collective claims and easy recourse to ADR should be complementary". Consumer ADR is relevant not only for individual claims but also for collective ones; it can provide consumer with a means to reduce costs and save time.

[2] Per Arts.10-12, Directive on Consumer ADR.

9. THE EXAMINATION OF CONSUMER PROTECTION LAW IN NATIONAL PROCEDURAL LAW: RESPECT FOR THE PRINCIPLES OF THE EFFECTIVENESS AND EQUIVALENCE OF CONSUMER PROTECTION LAW AND EX OFFICIO CONTROL

9.0 The basis of ex officio control of consumer protection law in national law

9.0.1 Is it clear in the national legal system when consumer protection law should be applied ex officio? Is the ex officio control of consumer protection law established as an obligation or as a (discretionary) power of the judge in national procedural law?

Being a country with civil law background, Austrian law follows the iura novit curia approach. Hence, if the factual information for an existing consumer dispute is given – which means that the dispute concerns a contractual relationship between a person for which the transaction forms part of its business activities on the one hand (the "entrepreneur" according to § 1 para. 1 subpara. 2 KSchG) and a person to whom this does not apply on the other hand (the "consumer" according to § 1 para. 1 subpara. 2 KSchG), consumer protection law will be applied by the courts ex officio. The consumer (and entrepreneur) status has, however – generally – to be established by the parties, see the answer to question 11.1.3.

9.0.2 If there is an understanding of ex officio control of consumer protection law in the national legal, what is this control understood to encompass/not cover?

As has been stated above, the general principle that applies in Austrian civil proceedings is iura novit curia. The KSchG itself, however, contains provisions that have to be applied by the court ex officio whereas others can only be taken into consideration if the argument has been brought forward by the party (for examples regarding this distinction see Bollenberger in Koziol/Bydlinski/Bollenberger, ABGB[4] § 879 ABGB para. 27 et seqq. with further references). The most prominent example is the examination of contractual clauses (in particular pre-drafted terms and conditions) in consumer contracts. In this regard, EU law, especially the CJEU case law on the Unfair Contract Terms Directive, required/requires a change of the traditional approach towards the (non-) ex officio examination of such unfair clauses. See in detail the answer to question 11.2.1.

9.0.3 Is the party who claims to be a consumer required to establish his or her consumer status, the existence of a consumer contract and that consumer law applies to the dispute? Is this required even if the consumer has no legal representation?

According to the Supreme Court's established case law (RIS-Justiz RS0065264 ECLI:AT:OGH0002:1982:RS0065264; recently, e.g. Supreme Court 29.1.2015, 9 Ob 61/14g ECLI:AT:OGH0002:2015:0090OB00061.14G.0129.000) and the prevailing view in Austrian literature (see only Krejci in Rummel ABGB³ § 1 KSchG margin note 44), the party that claims protection by the Austrian Consumer Protection Act has to establish and prove that the preconditions for its application are given. In other words, the party (i.e. the consumer) has to prove that the dispute concerns a legal relationship that was concluded between a person in the course of carrying out their business activities and another person to whom this does not apply (§ 1 para. 1 KSchG). Hence, the burden of proof initially lies on the shoulders of the consumer. With regard to the entrepreneur status of its opposing party, the consumer is, however, only required to provide a prima facie proof (see only Krejci

in Rummel ABGB³ § 1 KSchG margin note 45). The entrepreneur, consequently, has to prove that the transaction in question did not derive from its business activities, since this is legally presumed by § 344 of the UGB (Unternehmensgesetzbuch) (Austrian Commercial Code) (for details see, e.g., Kramer/Rauter in Straube/Ratka/Rauter, UGB I[4] §§ 343 and 344 margin note 69 et seqq.; see also Supreme Court 5.6.2008, 9 Ob 22/07m ECLI:AT:OGH0002:2008:0090OB00022.07M.0605.000).

An exception is made by the Supreme Court for those cases where the existence of a consumer dispute is evident (RIS-Justiz RS0065264 ECLI:AT:OGH0002:1982:RS0065264). Some scholars argue that a general principle of in dubio pro consumatore deriving from Art 2(1) of the Directive 93/13/EEC should be established – this, however, is rejected by the majority of scholars, arguing that it would contradict the general principles for the allocation of burden of proof (see only Apathy in Schwimann/Kodek, ABGB Praxiskommentar[4] § 1 KSchG margin note 3, with further references to both opinions).

9.0.4 What information is available to judges and dispute resolution facilitators hearing consumer protection disputes? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a consumer protection dispute to be heard and b) for the court to engage in ex officio control?

There are no specific provisions as to how much factual information must be provided for a consumer dispute to be heard. The general rule of § 226 ZPO provides that a claim has to encompass the request for relief as well as the essential factual elements on which the claim is based. If the latter is incomplete, inconsistent or if the claim lacks any formal requirements, the party needs to be given the opportunity to improve their submission (§ 84 et seq. ZPO).

Where the dispute (partially) concerns a contractual clause – either a forum selection clause, an arbitration agreement or a substantive clause in terms and conditions – Austrian law only allows for ex officio control in “extreme” cases (such as immorality [Sittenwidrigkeit]). Following the CJEU’s case law on the interpretation of the Directive 93/13/EEC, the Supreme Court has held that for consumer contracts, however, an ex officio control of such clauses is required (see in detail answer to questions 11.2.1 and 11.2.2). This ex officio control, however, can and must only be exercised once the “legal and factual elements necessary for that task” (CJEU 14.06.2012, C-618/10, Banco Español de Crédito, ECLI:EU:C:2012:349 para. 43) are already available to the court.

9.0.5 Who is responsible for providing this information? If the necessary information is not available to the court (or dispute resolution facilitator), is he or she under an obligation to investigate in order to be able to respond to a relevant consumer protection dimension of the case?

With regard to the facts of a case, generally, the parties are responsible for presenting all necessary elements to establish their case (Verhandlungsgrundsatz). This holds true especially for contentious proceedings, whereas in non-contentious proceedings the judge is provided with larger inquisitorial powers and duties concerning the relevant facts of the case (Untersuchungsgrundsatz). In contentious proceedings as well, however, the Verhandlungsgrundsatz is not an absolute one; the judge may depart from this principle if they have reason to suppose that certain facts are missing, i.e. if the submission is incomplete or not conclusive (see §§ 84 et seq. and 182 et seq. ZPO; on the latter more in detail the answer to question 11.1.6; for detailed information on these principles in general see Konecny in Fasching/Konecny[3] II/1 Einleitung margin note 12 et seqq.).

9.0.6 Will the court provide the consumer with any assistance in gathering factual information or advancing his legal arguments before the court? Please respond for the situation where: a) the consumer has legal representation and b) the consumer has no legal representation.

During the oral hearings, the judge has to work towards ensuring that the parties bring forward all factual information relevant for the decision. By asking questions, the judge has to elicit further information from the parties where their submissions are incomplete and to designate evidence accordingly, and to urge the parties to provide all relevant information (§ 182 para. 1 ZPO, materielle Prozessleitungspflicht; see in detail, e.g. Rassi in Fasching/Konecny³ § 182, 182a ZPO margin note 40 et seqq.). This rule applies to all parties regardless of their (potential) consumer status and regardless of whether they benefit from legal representation or not (see, e.g. Fucik, in Rechberger [ed.] ZPO [2014] § 182 margin note 1).

Where the party is not represented by counsel in Austrian civil proceedings (which is, in general, possible in district court proceedings with an amount in dispute up to 5,000 €; § 27 ZPO) and the party itself is also not legally trained, the assistance provided by the judge goes even further. Pursuant to § 432 para. 1 ZPO the court is required to assist the party – 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 (Fucik, in Rechberger [ed.] ZPO [2014] § 342 margin note 2). Under certain circumstances, the party can be instructed to consult an appropriate representative (if necessary a lawyer) in order to re-file the brief submitted (§ 432 para. 3 ZPO).

In short, there is a distinction in Austrian procedural law as to how far judicial assistance to the parties is required. This distinction, however, is made between parties represented by counsel on the one hand and those that do not have legal representation and lack sufficient legal knowledge (unvertretene, rechtsunkundige Partei) on the other hand. Consumers can thereby fall within the first as well as the second group – so can entrepreneurs. Hence, also entrepreneurs are given a higher degree of judicial assistance where the criteria of § 432 ZPO (as set out above) are fulfilled.

Source(s):
Geroldinger, Ergänzende Auslegung von Verbraucherverträgen trotz Verbots der geltungserhaltenden Reduktion? Anmerkungen zu EuGH C-453/10 (Pereničová und Perenič), C-472/10 (Invitel) und C-618/10 (Banco Español de Crédito), ÖBA 2013, 27
Schumacher, Richterliche Anleitungspflichten (2000)

9.1 The possibility for ex officio control of EU consumer protection law in dispute resolution proceedings

9.1.1 Is ex officio control of consumer protection law always possible when the procedure involves a full assessment of the claim on its merits?

As mentioned above, the most prominent example for a gap between non-existing ex officio control in Austrian legal tradition and the requirements set by EU law, especially following the CJEU's case law on the Unfair Contract Terms Directive, concerns the examination of contractual clauses (in particular pre-drafted terms and conditions) in consumer contracts.

Traditionally, the nullity of such clauses has been qualified as a "relative" one (relative Nichtigkeit) which means that their invalidity can only be taken into consideration by the court if this has been put forward by one of the parties (for the Supreme Court's established case law see RIS-Justiz RS0016450 ECLI:AT:OGH0002:1988:RS0016450; for literature, e.g., Apathy in Schwimann/Kodek, ABGB Praxiskommentar[4] § 6 KSchG margin note 1 with further references). In the light of the CJEU case law (in particular the decision CJEU 14.6.2012, C-618/10, Banco Español de Crédito, ECLI:EU:C:2012:349), however, the national court is obliged to examine a clause that is potentially void according to the Unfair Contract Terms Directive ex officio, "where it has available to it the legal and factual elements necessary for that task" (CJEU C-618/10 para. 43). The Supreme Court took up the CJEU's decision in a case in 2012 (Supreme Court 16.11.2012, 6 Ob 240/11d, ECLI:AT:OGH0002:2012:0060OB00240.11D.1116.000) and concluded that, in contrast to the previous jurisprudential line, Austrian courts from now onwards indeed have to examine a potentially unfair clause in a consumer contract on their own motion. The Supreme Court, however, expressly limited this notion to those cases where the Directive 93/13/EEC applies. In the present case, it considered the Directive not to be applicable, since the claimant was a private foundation and, thus, does not fall under the definition of consumers – that covering natural persons only – as it has been established by the CJEU's case law (reference was made to CJEU 22.11.2001, C-541/99 and C-542/99, Cape Snc/Idealservice ECLI:EU:C:2001:625). In another recent case, the Supreme Court likewise expressly referred to the duty to examine contractual clauses ex officio, following the CJEU's case law in this regard (Supreme Court 10.12.2014, 7 Ob 168/14b, ECLI:AT:OGH0002:2014:0070OB00168.14B.1210.000).

Some Austrian scholars argue that the ex officio control for question of nullity of clauses in consumer contracts should also apply to cases that do not necessarily fall under the scope of the Directive 93/13/EEC (Apathy in Schwimann/Kodek, ABGB Praxiskommentar[4] § 6 KSchG margin note 1). Furthermore, it is argued that an exception should be made if the consumer him/herself insists on the application of the rule (Geroldinger, ÖBA 2013, 27 [38]).

Another change in the line of Austrian jurisprudence that was required after the CJEU's decision C-618/10 was the abolishment of the established practice to "reduce" unfair contractual provisions to a level at which they are still legally valid (geltungserhaltende Reduktion). Due to the impact of EU law and its interpretation by the CJEU, the Supreme Court expressly abandoned this practice also for individual disputes between consumers and entrepreneurs (as opposed to collective redress actions) (see RIS-Justiz RS0128735 ECLI:AT:OGH0002:2013:RS0128735; recently Supreme Court 22.09.2015, 4 Ob 252/14h, ECLI:AT:OGH0002:2015:0040OB00252.14H.0922.000).

9.1.2 Can ex officio control be exercised even when the procedure does not involve an assessment on the merits?

With regard to forum selection clauses, Austrian law provides for a rule that protects consumers by limiting the possibilities to conclude such clauses between entrepreneurs and consumers (§ 14 KSchG). Similar to the mechanism within the Brussels I bis Regulation regime, this provision should, however, generally not be applied ex officio (see only Supreme Court 21.4.1982, 1 Ob 778/81, ECLI:AT:OGH0002:1982:0010OB00778.81.0421.000).

However, following the CJEU decision 27.6.2000, C-240/98, Ozéano Grupo/Quintero et al, ECLI:EU:C:2000:346, the Supreme Court held that ex officio control may already be necessary at the very first stage of the proceedings and

can, thus, lead to a rejection a limine without having to provide the opposing party (i.e. the consumer) with the possibility to enter an appearance (according to Art 26 Brussels I bis Regulation). It did, however, hold that this does not apply to cases where the consumer is the claimant in the proceedings, since the entrepreneur should not be protected by this mechanism (Supreme Court 31.8.2015, 6 Ob 122/15g, ECLI:AT:OGH0002:2015:0060OB00122.15G.0831.000).

For arbitration clauses between entrepreneurs and consumers (partly even for clauses C2C), the Austrian Arbitration Act 2006 (Schiedsrechtsänderungsgesetz 2006) has introduced rigid requirements for their validity (see § 617 ZPO). There is no explicit provision saying that these requirements have to be examined by the arbitral tribunal on its own motion. Moreover, the Supreme Court seems to be of the opinion that a violation of § 617 ZPO would be "cured" if the consumer appears before the tribunal without referring to the flaw (rügelose Einlassung; see Supreme Court 22.7.2009, 3 Ob 144/09m, ECLI:AT:OGH0002:2009:0030OB00144.09M.0722.000 [obiter dictum]). In this decision, the Supreme Court, however, did not make reference to CJEU 26.10.2006, C-168/05, Elisa Maria Mostaza Claro/Centro Móvil Millenium SL, ECLI:EU:C:2006:675. See on this topic also Q 11.3.1.

9.1.3 Please indicate if, per national procedural law, ex officio control can be exercised at the following stages of the procedure:

	Courts		Other dispute resolution facilitators	
	Possible to exercise ex officio control	Not possible to exercise ex officio control	Possible to exercise ex officio control	Not possible to exercise ex officio control
Ordinary proceedings	(x)		(x)	
Small claims	(x)		(x)	
Payment order	(x)		-	-
Provisional measures	(x)		(x)	
Proceedings linked to enforcement	(x)			
Enforcement proceedings			-	-
- Enforcement of payment order		x	-	-
- Enforcement of arbitration award	x		-	-
- Enforcement of mortgage		x	-	-
- Enforcement of notarial deed		x	-	-
Appeal proceedings (please specify:) One of the major characteristics of Austrian appeal proceedings is that it is strictly prohibited to bring up new facts ("Neuerungsverbot"). Hence, where consumer protection requires the assessment of new facts, no (ex officio) control is possible anymore. If it is only a question of law or if it somehow relates to a				

grave procedural deficiency (“Nichtigkeitsgrund”), it can, however, be considered by courts also on the appeal level.				

9.1.4 What does ex officio control encompass in national procedural law?

In case of formal deficiencies, the court has to order the party on its own motion to improve its submission (§ 84 para. 1 ZPO). During the oral proceedings, the judge has to encourage the parties to clarify/amend their arguments where they appear to be incomplete, inconsistent or not conclusive (§ 182 et seq. ZPO; see the answer to question 11.1.6). Unrepresented and legally untrained parties benefit from further guidance by the court (see the answer to question 11.1.6). Furthermore, some procedural deficiencies, such as a lack of procedural capacity (Prozessunfähigkeit; § 6 ZPO) or a lack of representation (§ 37 para. 1 ZPO) are to be considered by the court ex officio. These safeguards do, however, apply to all parties regardless of their (potential) consumer status.

Following the CJEU’s case law on contractual provisions in consumer contracts, the Supreme Court has partially changed its line of jurisprudence with regard to the examination of contractual clauses that fall under the scope of the Unfair Contract Terms Directive. In contrast to the national rules of law and the previous case law, such clauses have to be examined ex officio and may even lead to a rejection a limine (see in detail the answer to questions 11.2.1 and 11.2.2).

Source(s):
Czernich, EuGVÜ: Die Rückkehr der a-limine Zurückweisung bei Verbrauchersachen, margin note 2001, 139
Geroldinger, Ergänzende Auslegung von Verbraucherverträgen trotz Verbots der geltungserhaltenden Reduktion? Anmerkungen zu EuGH C-453/10 (Pereničová und Perenič), C-472/10 (Invitel) und C-618/10 (Banco Español de Crédito), ÖBA 2013, 27

9.2 Other procedural mechanisms for the equivalent and effective protection of EU consumer law

9.2.1 Does national procedural law provide that rules of EU consumer law (as well as rules that aim to satisfy EU consumer law objectives) should be understood as having equal standing to national rules of public policy (which is to say, that for the purposes of domestic law, the consumer protection provision is understood to have equal standing to a rule that must be raised ex officio by the national court)?

There are no explicit provisions in Austrian law in this regard. The Austrian Courts do, however, have to respect and take into consideration the CJEU’s case law on the determination of European public policy when it comes to EU consumer law.

In the CJEU’s decision on 26.10.2006, C-168/05, Elisa Maria Mostaza Claro/Centro Móvil Millenium SL, ECLI:EU:C:2006:675, it was held that in setting aside proceedings of an arbitral award the national court should take a violation of the Directive 93/13 into consideration, in its decision on 6.10.2009, C-40/08, Asturcom/Rodríguez, ECLI:EU:C:2009:615, the CJEU expressly referred to the requirement of an examination ex officio. It has, however, been left open whether the CJEU referred to the ground for setting aside (refusing enforcement) due to a violation of public policy or whether it considered the arbitration agreement to be void (and this to be recognised by the national

court). Furthermore, even if a violation of the Unfair Contract Terms Directive were regarded as a violation of public policy, it is still unclear whether this would apply also to a violation of national (procedural) safeguards for consumers in arbitration. According to the prevailing view in Austria, a violation of the specific national requirements for arbitration clauses in consumer contracts (§ 617 ZPO) cannot not be regarded as a violation of public policy (see only Koller, Schiedsvereinbarungen in Allgemeinen Geschäftsbedingungen, in Knyrim/Leitner/Perner/Riss, Aktuelles AGB-Recht [2008] 155 [190]; see also Supreme Court 22.7.2009, 3 Ob 144/09m, ECLI:AT:OGH0002:2009:0030OB00144.09M.0722.000 [obiter dictum]).

9.2.2 If ex officio control is not possible in certain types of proceedings or at a certain stage of proceedings (or for any other reason), does national procedural law provide for an alternative way of assessing consumer protection law?

Once a decision has gained res judicata effect, the means of challenging this decision (by invoking consumer protection law) are very limited. There are possibilities for a retrial (Wiederaufnahme) of the proceedings – those do, however, not contain any grounds specifically designed for consumers or weaker parties (see § 530 ZPO).

As regards the challenge of arbitral awards, Austrian law contains further grounds for consumers to request the setting aside of an arbitral decision (§ 617 para. 6 ZPO). Those can be invoked if mandatory provisions of law were violated, the application of which could not have been waived by choice of law of the parties even in a case with an international element, or the prerequisites for a retrial under § 530 para. 1 subpara. 6 or 7 of the ZPO are satisfied (for more details see Zeiler, Schiedsverfahren² [2014] § 617 para. 9 et seqq.). Along similar lines, the enforcement of provisional measures ordered by an arbitral tribunal has to be rejected by the national court if one of these grounds is to be applied (§ 593 para. 4 subpara. 1 ZPO).

Source(s):
Hausmaninger in Fasching/Konecny^{2} (2007) § 617 ZPO paras. 12 et seqq.
Koller, Schiedsvereinbarungen in Allgemeinen Geschäftsbedingungen, in Knyrim/Leitner/Perner/Riss, Aktuelles AGB-Recht (2008) 155

9.3 Ex officio control in payment order procedures

9.3.1 What information is available to the judge when a claim for the issuance of a payment order is made? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a claim for the issuance of a payment order to be granted and b) for the court to engage in ex officio control before a payment order is issued?

The Austrian payment order procedure – which is also regarded as a model for the European debt collection procedure – is characterized by the use of forms that are either to be submitted electronically via the Austrian webERV system or to be submitted via ordinary mail service (§ 250 ZPO; see also ADV-Form-Veordnung by the Federal Ministry of Justice, BGBl II 2002/510, current version BGBl II 2013/45). These forms naturally contain less information than a written brief. On the other hand, the use of forms allows for a standardization of the information required in an application for a payment order. Looking at the CJEU's decision of 14 June 2012, C-618/10, Banco Español de Crédito, ECLI:EU:C:2012:349, according to which there has to be some form of ex officio control before

issuing a payment order where consumers are involved in the dispute, one concludes that Austrian law does not seem to have problems complying with this notion. There is a range of issues that have to be examined ex officio by the national court prior to the issuance of a payment order (see in detail answer to question 11.4.2). In the context of the CJEU's decision, scholars frequently invoke the examination conducted by the national court whether the claim is conclusive (Schlüssigkeitsprüfung) in order to support the claim that Austrian provisions on debt collection proceedings comply with the CJEU case law on consumer protection (see only Slonina, case note on CJEU C-618/10, ecolex 2012, 697; see also the answer to question 11.4.2.).

De lege ferenda it is suggested by some scholars to change the forms for application of a payment order by requesting more information to be provided by the applicant in order to fully enable the ex officio examination as required by the CJEU's case law on the Unfair Contract Terms Directive (see, e.g., Garber/Neumayr in Jahrbuch Europarecht 2013, 211 [262]).

9.3.2 What considerations will be assessed ex officio by the court (or other competent authority) before a payment order is issued?

Before issuing the payment order, the court has to assess whether the claim has to be rejected for formal reasons (§ 244 para. 2 subpara. 1 ZPO), whether, according to the factual information given in the request, the claim is evidently not yet due or depending on an action by the opponent or the respondent's residence is unknown (§ 244 para. 2 subpara. 2 ZPO), whether the respondent's residence is outside Austria (§ 244 para. 2 subpara. 3 ZPO) or whether the claim is not conclusive (unschlüssig § 244 para. 2 subpara. 4 ZPO). If one of these grounds applies, the court will not issue the payment order. Where a clause appears to be unfair according to the Unfair Contract Terms Directive, the court has, in the light of the CJEU's decision C-618/10, to apply § 244 para. 2 subpara. 4 ZPO and, consequently, commence ordinary proceedings according to § 230 para.1 ZPO, since a mere rejection of the claim due to inconclusiveness is not covered by the law (Geroldinger, ÖBA 2013, 27 [39]; see also Higher Regional Court Innsbruck 4.7.2003, 4 R 159/03v ECLI:AT:OLG0819:2003:00400R00159.03V.0704.000).

Another procedural "safeguard" derives from the fact that the actions described above lie within the competence of the judge and cannot be exercised by the judicial officer (Rechtspfleger), who generally is responsible for debt collection proceedings (Garber/Neumayr in Jahrbuch Europarecht 2013, 211 [262]).

9.3.3 How is the consumer informed about the claim to issue a payment order against him or her? Does national procedural law make any provision for steps to be taken to ensure that consumers are informed of the claim for the issuance of a payment order so that he or she can contest it?

The payment order is served to the respondent according to the national provisions on the service of documents (Zustellgesetz). Pursuant to § 246 ZPO, the payment order also has to contain information as to how and within which time periods the respondent can contest the order. There are, however, no specific information requirements for payment orders issued against consumers.

9.3.4 If the consumer objects to the claim, what is the next step? Do the proceedings continue, in the context of which ex officio control can be exercised? Or are the proceedings transferred to ordinary proceedings for analysis on the merits of the claim?

If the respondent – regardless of whether they are a consumer or not – contests the payment order (Einspruchserhebung), the payment order automatically loses its legal effect (tritt außer Kraft; § 249 para. 1 ZPO). Ordinary court proceedings are initiated (§ 257 et seqq. ZPO). In this context, ex officio control can apply according to the above mentioned criteria (see in particular the answer to questions 11.2.1 and 11.2.2).

Source(s):

Geroldinger, Ergänzende Auslegung von Verbraucherverträgen trotz Verbots der geltungserhaltenden Reduktion? Anmerkungen zu EuGH C-453/10 (Pereničová und Perenič), C-472/10 (Invitel) und C-618/10 (Banco Español de Crédito), ÖBA 2013, 27

Garber/Neumayr, Der Verbraucher im europäischen Zivilverfahrensrecht - aktuelle Entwicklungen und Entscheidungen Rechtswissenschaft, in Jahrbuch Zivilverfahrensrecht 2011, 148

European Commission
An evaluation study of the impact of national procedural laws and practices on the equivalence and effectiveness of the procedural protection of consumers under EU law

JUST/2014/RCON/PR/CIVI/0082

National Report – Consumer Protection Strand

Belgium

Piet Taelman, Stefaan Voet and Janek Tomasz Nowak

BELGIUM: LEGAL ANALYSIS

1. NATIONAL LEGISLATION IMPLEMENTING EU CONSUMER PROTECTION INSTRUMENTS

EU legislation	Transposing national legislation	Additional notes (e.g. if there is an overlap in application of legislation etc.)
Doorstep Selling Directive 1985/577/EEC repealed by Directive 2011/83/EU of 25 October 2011 on consumer rights, amending Directive 93/13/EEC and Directive	Articles VI.64-VI.74 and XIV.38-47 (Belgian) Code of Economic Law (Book VI, Title 3, Chapter 3 (Off-premises contracts)). [source: http://economie.fgov.be/fr/binaries/Code_de_droit_economique_tcm326-232243.pdf]	

1999/44/EC and repealing Directive 85/577/EEC and Directive 97/7/EC		
Package Travel Directive 90/314/EEC repealed by Directive (EU) 2015/2302 of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU and repealing Directive 90/314/EEC	There is no transposing Belgian legislation to date. The Directive (EU) 2015/2302 has to be transposed before 1 January 2018.	
Unfair Contract Terms Directive 1993/13/EEC	Enterprises Articles VI.82-VI.87 (Belgian) Code of Economic Law (Book VI, Title 3, Chapter 6 (Unfair Contract Terms)). Liberal Professions Articles XIV.49-XIV.54 (Belgian) Code of Economic Law (Book XIV, Title 3, Chapter 5 (Unfair Contract Terms) (Clauses Abusives)). [source: http://economie.fgov.be/fr/binaries/Code_de_droit_economique_tcm326-232243.pdf]	
Distance Selling Directive 1997/7/EC replaced by Directive 2011/83/EU of 25 October 2011 on consumer rights	Articles VI.45-VI.63 (Belgian) Code of Economic Law (Book VI, Title 3, Chapter 2 (Distance contracts)). [source: http://economie.fgov.be/fr/binaries/Code_de_droit_economique_tcm326-232243.pdf]	
Consumer Sales and Guarantees Directive 1999/44/EC	Articles 1649bis-1649octies (Belgian) Civil Code, enacted by the Act of 1 September 2004 relating to the protection of consumers in case of the sale of consumer goods	

	(Belgian State Gazette 21 September 2004, p. 68384).	
Unfair Commercial Practices Directive 2005/29/EC	Articles VI.92-VI.103 (Belgian) Code of Economic Law (Book VI, Title 4, Chapter 1 (Unfair Business to Consumer Practices)). Note: only the provisions relating to consumer protection, i.e. B2C-practices are included. [source: http://economie.fgov.be/fr/binaries/Code_de_droit_economique_tcm326-232243.pdf]	
Misleading and Comparative Advertising Directive 2006/114/EC	Articles VI.17 and VI.105,3° (Belgian) Code of Economic Law (Art VI.17: Book VI, Title 2, Chapter 5 (Comparative Publicity); Art VI.105,3°: Book VI, Title 4, Chapter 2 (Unfair Practices in B2B-relations)). [source: http://economie.fgov.be/fr/binaries/Code_de_droit_economique_tcm326-232243.pdf]	
Consumer Credit Agreement Directive 2008/48/EC	Articles VII.64-VII.83 (Belgian) Code of Economic Law (Book 8, Title 4, Chapter 1 (Consumer Credit Agreements)) [source: http://economie.fgov.be/fr/binaries/Code_de_droit_economique_tcm326-232243.pdf]	
Timeshare Protection Directive 2008/122/EC	Act of 28 August 2011 relating to the protection of consumers in the matter of time-sharing, long-term holiday-products, resale and exchange contracts (Belgian State Gazette 16 September 2011, p. 59985)	
Consumer Injunctions Directive 2009/22/EC	Articles XVII.1-XVII.9 (Belgian) Code of Economic Law (Book XVII, Title 1, Chapter	

	1 (General Provisions)) Articles XVII.26-XVII.34 (Belgian) Code of Economic Law (Book XVII, Title 1, Chapter 6 (Intra-European injunctions relating to the protection of consumer interests)) [source: http://economie.fgov.be/fr/binaries/Code_de_droit_economique_tcm326-232243.pdf]	
Consumer Rights Directive 2011/83/EU	Enterprises Articles VI.37-VI.91 (Belgian) Code of Economic Law (Book VI, Title 3 (Contracts with consumers)). Liberal Professions Articles XII.6-XII.11 (Belgian) Code of Economic Law (Book XII, Title 1, Chapter 3 (Information and transparency)). [source: http://economie.fgov.be/fr/binaries/Code_de_droit_economique_tcm326-232243.pdf]	
ADR for Consumer Disputes Directive 2013/11/EU	Articles XVI.1-XVI28 (Belgian) Code of Economic Law (Book XVI (Out of court resolution of consumer disputes)). [source: http://economie.fgov.be/fr/binaries/Code_de_droit_economique_tcm326-232243.pdf]	

Source(s):

- http://www.ejustice.just.fgov.be/cgi_loi/loi.pl (last accessed on 25 March 2016)
- http://economie.fgov.be/fr/modules/publications/general/code_de_droit_economique.jsp (last accessed on 25 March 2016)

1. CONCEPT OF THE CONSUMER

1.1 Please outline the concept of the consumer in national law, indicating whether it is intended to be a uniform concept, whether it has been legislated for and where it can found (i.e. in a legislative provision, governmental guidelines, case law etc.).

The notion of consumer is not uniform in Belgium. Two of the above instruments contain a definition of consumer. On the one hand, there is the definition in Art. 3, §2, 1° of the act of 1 September 2004 relating to the protection of consumers in case of the sale of consumer goods, and on the other hand the definition provided for in 1.I.2° of the Code of Economic Law. However, both definitions are largely identical.

Indeed, the Code of Economic Law defines consumer as "any natural person acting for purposes outside of the framework of his trade, business, craftsmanship activities or liberal profession undertakings" (French: "consommateur : toute personne physique qui agit à des fins qui n'entrent pas dans le cadre de son activité commerciale, industrielle, artisanale ou libérale"). Art. 3, §2, 1° of the act of 1 September 2004 defines consumer as "any natural person acting for purposes outside of the framework of his commercial or business undertakings" (French: "toute personne qui agit à des fins qui n'entrent pas dans le cadre de son activité professionelle ou commerciale"). This can be explained by the fact that the Code of Economic Law has a broader general scope of application and covers consumers in relation to liberal professions as well, which are not covered by the Act of 1 September 2004. The basic idea to retain is that a consumer is any person acting outside the framework of his professional activities.

Source(s):

- Act of 1 September 2004 relating to the protection of consumers in case of the sale of consumer goods / Loi du 1er septembre relative à la protection des consommateurs en cas de vente de biens de consummation, http://www.ejustice.just.fgov.be/cgi_loi/loi.pl (last accessed on 25 March 2016)
  Code of Economic Law/ Code de Droit Economique http://economie.fgov.be/fr/modules/publications/general/code_de_droit_economique.jsp

2. REGULATORY AUTHORITIES COMPETENT FOR CONSUMER PROTECTION ISSUES

2.1 What regulatory authorities, if any, are competent for enforcing consumer protection law? Please identify them, their nature (i.e. whether they are public or private or mixed) and the nature of enforcement.

It is important to stress that in Belgium, there are only public regulatory authorities competent for enforcing consumer protection law. The main public enforcer in the field of general consumer policy is the Federal Public Service (FPS) Economy, Small and Medium Enterprises (SMEs), Self-Employed and Energy (http://economie.fgov.be/fr/). The most important directorate general (DG) is the DG Enforcement and Mediation (DG-EM), which acts as a kind of "economic police". It contributes to the proper functioning of the goods and services market through its inspections and checks compliance with economic legislation.

In a Belgian, European and international context experiencing rapid change, the FPS Economy's mission is to:

- promote the competitiveness of the federal economic union

- guarantee the competitive and balanced nature of the market for goods and services
- ensure the sustainability of the developments in this market.

Within this perspective, the DG Enforcement and mediation FPS is responsible for supervising this market efficiently, while favouring quality relationships with all of the economic actors as well as perfect knowledge of the economic fabric, the compilation of relevant and reliable statistics and an in-depth analysis of the macro-economic data available.

The FPS thus contributes to the creation of conditions for the competitive, durable and balanced operation of the market for goods and services in Belgium. It contributes to consumer protection and safety, the promotion of honest and fair competition, the elimination of fraud, the protection of intellectual rights, and economic development. Furthermore, it inspects the organization of the EU market and develops an ADR function.

The DG acts as an economic police. Thanks to its mission, it contributes to the respect of the economic law and an equitable working of the goods and services market. Under the supervision of public prosecutors, they dispose of large investigation powers. In that respect, they are entitled to:

- start an investigation and hear a witness
- issue minutes that have evidential power
- control every possible vehicle
- take samples
- seize documents and goods
- apply seals
- exercise claims
- request assistance of public order agencies
- exercise house searches
- testify in court procedures

Those are the possibilities and the types of actions the DG can undertake. Official court procedures will however always be led by the courts and tribunals. The DG doesn't replace public prosecutor's function. The public prosecutor has prosecutorial discretion, which means that he decides freely and discretionarily whether or not to initiate criminal prosecutions. The public prosecutor can however decide to take into account the findings by the officials of the DG.

Apart from the aforementioned DG, there are many other regulators in our country that are relevant for consumers. We will give an overview of some of the most important entities in Belgium.

First, there is the Federal Agency for Medicines and health products (FAMHP, http://www.fagg-afmps.be/en) that is the Belgian regulator responsible for the quality and safety of medicines and health products.

Second, the Financial Service and Markets Authority (FSMA, http://www.fsma.be/en.aspx) and the National Bank of Belgium organize the regulatory supervision of various players in the financial market. The FSMA is competent in 6 domains, i.e. the supervision of financial markets and listed companies, supervision of rules of conduct, product supervision, supervision of financial service providers and of supplementary pensions, and contribution to improving financial education. In carrying out its supervisory tasks, the FSMA can take wide range of actions. A sanction committee is established to determine the imposition of administrative sanctions. It consists of 10 members: six magistrates and 4 others.

The federal telecommunications regulator is the Belgian Institution for Postal Services and Telecommunications (BIPT, http://www.bipt.be/en). On the one hand, the BIPT is the supreme authority in specific technical fields, such as sharing, regulating and monitoring the use of electromagnetic spectrum. On the other hand, the BIPT makes necessary arrangements in order that the regulatory framework is observed, competition can develop fully and fairly, certain tasks of public interest are carried out and consumer interests are protected.

In the energy sector, there are four regulators, one federal one and three regional ones. We will only mention the federal and the Flemish one. On the one hand, the Commission for Regulation of Energy and Gas (CREG, http://www.creg.be/fr/index.html) is the federal regulator entrusted with the supervision of the transparency and competition in the electricity and gas market. On the other hand, in Flanders the Flemish regulator of the Electricity and Gas market is the VREG (http://www.vreg.be/en, FR: http://www.vreg.be/fr), responsible for the efficient organization and working of the deregulated Flemish electricity and gas market.

2.2 Is there a specific venue for this type of enforcement and does this limit the jurisdiction of courts/ADR fora (even if only initially)?

Without prejudice to the competences of the police/public prosecutor, the officials of the DG are competent to ascertain infringements on the provisions of the Code of Economic law. The officials are only competent to exercise their powers to detect and ascertain infringements, on the basis of Art. XV.2 of the Code of Economic Law. For their competences in doing so, see question 4.1 and Art. XV.3 and following of the Code of Economic Law. Indeed, without prejudice to the competences of the police authorities, the officials of the DG are competent to investigate and ascertain infractions on the Code of Economic Law. In order to ascertain potential infractions, the DG officials dispose of a wide range of powers, including the power to search houses or premises.

The officials of the DG, when ascertaining an infringement upon a provision of the Code of Economic Law, can dress a minute (process-verbal) that is authentic (font foi jusqu'à prevue du contraire). That minute will be transferred to the public prosecutor, who can decide as to initiate or not further criminal proceedings.

Please note that the FPS Economy can issue fines, but only in case of violation of a provision of book V of the Code Economic Law concerning competition law and price evaluation. The FPS cannot impose criminal or civil sanctions on its own, but it can cooperate with the prosecutor in order for the prosecutor to demand application of the sanction.

2.3 Can criminal prosecutions be initiated for violations of consumer protection rules? How serious must the infringement be? What are the penalties and sanctions? And might these prosecutions lead to criminal penalties or sanctions? Can individual consumers piggy back on these claims (e.g. via a partie civile method)?

The provisions of the Code of Economic Law whereof infringement can lead to criminal prosecutions are listed in Art. XV.75 of the Code of Economic Law.

The sanctions (Art. XV.70 of the Code of Economic Law) are levelled from 1-6 on a scale of 6, going from fines for level one to four violations, to fines and sanctions of imprisonment for level five and six violations.
- the sanction for level 1 violations consists of a criminal fine between € 26 and € 5000
- the sanction for level 2 violations consists of a criminal fine between € 26 and € 10.000
- the sanction for level 3 violations consists of a criminal fine between € 26 and € 25.000
- the sanction of level 4 violations consists of a criminal fine between € 26 and € 50.000
- the sanctions for a level 5 violation consists of a criminal fine between € 250 and € 100.000 and an imprisonment of one month until one year applied separately or together
- the sanctions for a level 6 violation consists of a criminal fine between € 500 and € 100.000 and an imprisonment of one month until one year applied separately or together

The public prosecutor has the following role. He can actively search for consumer law violations. He can also act when a complaint has been made. If he thinks an infringement has been committed, he can ask the court to impose sanctions. He can however not apply the sanctions ex officio. He can also be seized by the DG when it has ascertained infringements upon the Code of Economic Law.

Furthermore, it is important to stress that the public prosecutor cooperates with other entities in order to be as effective as possible and apply the right provisions, such as with the aforementioned DG. We can state here that the FPS Economy can issue fines, but only in case of violation of a provision of book V of the Code of Economic Law.

In case of recidivism within 5 years after the definitive judgement on the first violation(s), these penalties are doubled (Art. XV.72 of the Belgian Code of Economic Law). These are criminal sanctions. The violations are listed per book of the Code of Economic Law and are divided into the above levels. Each level indicates which violations correspond to it.

Moreover, the possibility is accorded to victims to claim damages from the defendant in the criminal procedure, the infringer. The criminal courts have competence in applying these sanctions, but as stated before, the DG enforcement and mediation holds investigation powers.

Individual consumers can piggyback on these claims. In the recent years, both the Council of Europe and the European Union have increasingly paid attention to the role of the victim in criminal cases, and more specifically the possibility for a victim to claim compensation from a defendant in a criminal procedure, or in some cases from the State. On the EU level, there is the 2012 Directive establishing minimum standards

on the rights, support and protection of victims of crime. Art. 16 concerns the right to a decision on compensation from the offender in the course of criminal proceedings stipulates.

This legislation is implemented in Belgium in a very liberal way in Art. 4 of the Preliminary Title to the Code of Criminal Procedure/ Code de la Procédure Pénale. In Belgium, in contrast to some other Member States of the Union, the victim is a formal party to the criminal proceedings, with the Public Prosecutor and the defendant. In most cases, the victim can bring his or her civil claim before or during the criminal proceedings. This is the so called "partie civile". After having ruled on the criminal aspect of the claim, the judge must rule on the civil claim. When the judge acquits the defendant, he will not on the civil claim but the victim can initiate a follow-on civil case based on another cause of action. By bringing his or her claim before the criminal judge, the gain for the victim is that he or she can piggyback the evidence brought forward by the Public Prosecutor. To establish civil liability, the victim has to demonstrate a fault, i.e. law violation, damages and causation. A piggybacking civil claimant only has to prove damages and causation. It is up to the Public Prosecutor to demonstrate a law violation. If a victim does not initiate his or her civil case before the criminal court but before a civil jurisdiction, he or she cannot piggyback.

2.4 Is there judicial review of decisions of consumer regulatory authorities? If so, by which court is this judicial oversight made? Is the forum an ordinary or a specialised court or tribunal?

See 4.2

2.5 Does the national legal system provide for a mechanism of cooperation between its national regulatory authorities and those of other Member States?

Not that we know of. We tried to find out, but we did not receive an answer to this question.

Source(s):

- VOET, S., "Public enforcement and A(O)DR as mechanisms for resolving mass problems: a Belgian perspective", in HODGES, C., & STADLER, A., Resolving Mass Disputes, Cheltenham, Edwin Elgar, 2013, pp. 270-292
- http://economie.fgov.be/nl/binaries/Annual_report_E7_2010_tcm325-199430.pdf (last accessed on 16 April 2016)

3. LEGAL AID

See also strand A (chapter II.A., subchapter 2.1.1)

Before answering these questions, a preliminary remark has to be made. There is no special legislation applicable to legal aid for consumers. Ordinary law applies and the answers provided hereafter contain the solutions of ordinary law as set out in the Belgian Judicial Code.

3.1 Is legal aid available to consumers in: a) bringing a claim and b) defending a claim before a court?

Civil proceedings can be funded through legal aid. The Belgian Constitution in its article 23 guarantees everyone the right to legal aid. This can take the form of an exemption from paying litigation costs, or judicial assistance. Regarding the latter, a distinction is made.

Legal aid can be defined as any means made available to a person allowing him/her effective access to a court where he does not have the resources needed to cover the costs of the procedure. The Judicial Code provides for two systems of legal aid applicable in both civil and criminal matters: primary and secondary legal assistance (Art. 446bis and 508/1 to 508/23 of the Belgian Judicial Code and Royal Decrees implementing them) and exemption of paying litigation costs (Art. 664 to 699 of the Belgian Judicial Code).

First line judicial assistance or primary legal assistance means the offering of a free and first legal advice, including the referral to a specialised body or organisation (e.g., a lawyer or a tenants' organisation). Primary legal assistance is available for individuals, corporations and other bodies corporate. It means that everyone who wishes, can seek primary legal advice from a lawyer. That advice is free. Its purpose is to provide everyone with a free first legal advice (Art. 580/1 of the Belgian Judicial Code). When one desires to obtain the assistance of a lawyer appointed by the bar, one needs to prove that certain conditions are fulfilled. One needs to meet certain conditions of eligibility (infra). That is called second line judicial assistance. Second line judicial assistance or secondary legal assistance, organised by Legal Aid Bureaus (BjB), means the free assistance of a lawyer in the form of an elaborate legal advice, legal assistance or legal representation. (Art. 580/1 of the Belgian Judicial Code). The lawyer, who is appointed by the local bar, is paid by the State. The goal of this kind of legal aid is to allow everyone to exercise his or her rights before a court.

Exemption from paying litigation costs consists of full or partial exemption from stamp duties and registration charges and other costs of proceedings and is available to litigants who do not have adequate income to cover the costs of judicial or extra judicial proceedings (Art. 665 of the Belgian Judicial Code). Exemption from paying litigation costs can be obtained for all procedural steps relating to applications referred to or pending before an ordinary or administrative court or panel of arbitrators, procedural steps relating to the enforcement of judgments and decisions, appellate proceedings, procedural steps which rest with a member of the judiciary or entail action by a professional or official and family mediation proceedings.

Primary legal assistance is available to all litigants, whether they are individuals, corporations and other bodies corporate.

Secondary legal assistance is available to all litigants (individuals but not corporations and other bodies corporate) with low income engaging in proceedings in Belgium.

The availability of free primary legal assistance and fully or partly free secondary legal assistance and exemption of paying litigation costs depends on meeting certain conditions. Anyone whose income is considered insufficient is eligible for free primary legal assistance and fully or partly free secondary legal assistance and legal aid.

3.2 For what kinds of disputes and actions is legal aid available? (NB: legal aid might not be available for consumer or contractual disputes but be available instead for a related action, e.g. actions relating to debt, mortgage arrears, eviction etc.)

Legal assistance can be obtained in all procedures.

Exemption from paying litigation costs can be obtained, pursuant to Art. 665 of the Belgian Judicial Code for all procedural steps relating to applications referred to or pending before an ordinary or administrative court or panel of arbitrators, procedural steps relating to the enforcement of judgments and decisions, appellate proceedings and procedural decisions and steps.

3.3 What requirements must be satisfied for the consumer to be entitled to legal aid? Please specify if there are any additional limitations to its availability.

Exemption from paying litigation costs is available to the following, provided they have an apparently well-founded claim and can prove that their income is low (Art. 667 and 668 of the Judicial Code): persons of Belgian nationality, foreign nationals in accordance with international treaties, all nationals of Member States of the Council of Europe, foreign nationals lawfully residing in Belgium, foreign nationals in proceedings provided for by the Act on access to the territory, residence, establishment and removal of foreigners.

The availability of free primary legal assistance and fully or partly free secondary legal assistance and legal aid depends on meeting certain conditions.

Anyone whose income is considered insufficient is eligible for free primary legal assistance and fully or partly free secondary legal assistance and legal aid.

Free primary legal assistance and fully or partly free secondary legal assistance and legal aid are therefore available to the following: either on subject to proof of resources or automatically:

- those receiving minimum income support (minimex) or welfare assistance;
- those receiving the old person' guaranteed income
- those receiving income substitution allowances for disabled people not receiving the integration allowance
- those with dependent children receiving family benefits
- tenants of social housing who in the Flanders and Brussels Capital Regions pay rent at half the basic rate or who in the Wallonia Region pay a minimum rent
- minors
- foreign nationals presenting an application for regularization of residence status or appealing against an expulsion order
- asylum seekers and applicants for displaced person status.

Fully or partly free secondary legal assistance and exemption from paying costs can be given to persons who prove insufficient income (Royal Decree of 18 December 2003, Belgian State Gazette 24 December 2003). The amounts mentioned in the royal decree are subject to indexation.

Legal assistance is fully freely available to:

- single persons with an income of less than € 953 per month
- single persons living with dependents (Fr: personnes à charge) and an income of less than € 1224 per month (+ € 166,74 per person at charge)
- families (marriage or legal cohabitation) with an income of less than € 1224 per month (+ € 170,08 per person at charge)
- persons earning a living wage
- persons enjoying an income guarantee for the elderly (IGO)
- persons receiving an income guarantee for handicapped persons without integration guarantee
- persons having a child at charge and receiving a child welfare income
- persons renting a social habitation in Flanders or Brussels for a price that equals half of the basic rental price or in Wallonia renting a house for which they pay the minimum rent
- minors
- foreigners wishing to apply for asylum or who wish to fight a decision of expulsion from the territory of Belgium
- asylum seekers or other persons that apply for the statute of political refugee or displaced person
- imprisoned persons or inculpated persons as referred to in the law on immediate appearance in court who are supposed to have a non-sufficient revenue, unless otherwise provided
- demented persons that have already enjoyed measures under the law on demented persons

The assistance is partial for:

- single persons with a monthly revenue between € 953 and 1224
- single persons with dependents and an income between € 1224 and 1493 (+ € 170,08 per person at charge).
- families (marriage or legal cohabitation) with an income between € 1224 and 1493 (+ € 170,08 per person at charge).

Partial assistance refers to the fact that the lawyer can ask for a limited lump sum payment for his services.

3.4 What does legal aid encompass? (i.e. (only) general advice, (only) assistance in preparing the case, (only) assistance with negotiation of settlements, (also) representation).

As stated under 5.1 and set out in Art. 580/1 and 664 of the Belgian Judicial Code first line judicial assistance or primary legal assistance means the offering of a free and first legal advice. Second line judicial assistance or secondary legal assistance means the free assistance of a lawyer in the form of an elaborate legal advice, assistance or legal representation. In that respect, for the determination of what legal aid

entails, with respect to legal assistance, a distinction has to be made between primary and secondary legal assistance. See that question for further explanation.

Exemption to pay litigation costs applies to stamp duties and other procedural costs, and thus excludes the costs made under judicial assistance.

Source(s):
- http://ec.europa.eu/civiljustice/legal_aid/legal_aid_bel_en.htm#4 (last accessed on 16 April 2015)
- Belgian Judicial Code, http://www.droitbelge.be/codes.asp.
- http://www.belgium.be/nl/justitie/slachtoffer/rechtsbijstand/kosten#sthash.sUMBAdQy.dpuf (last accessed on 16 April 2016)

4. COSTS

4.1 What are the costs of different types of procedures before courts? Are there exemptions to the payment of fees and expenses? How can costs be paid?

Court fees are structured differently in Belgium because of a recent reform that entered into force on 1 June 2015. Court fees are no longer dependant on the type of act performed before the court, but rather on the court where the action or procedural act is performed. The following table with expenses was published on the official website of the Belgian Government. We have translated this table into English, so that an appropriate overview of the costs is provided for the jurisdictions competent in consumer protection matters.

Furthermore, it has to be stated that there exists no difference between individual and collective claims. The same fees apply for both individual and collective claims.

Jurisdiction/Competent Court	**Value of the Claim**	**Court fee (docket fee, petition, petition for interlocutory proceedings)**
Justice of the Peace/Justice de Paix	Claims up to 2.500€ and non-monetary claims	€ 40
	Claims over € 2500 (rare, involves special competence rules)	€ 80

Court of First Instance/Tribunal de Première Instance	Claims up to €25.000 and non-monetary claims	€ 100
	Claims from € 25.000,01-€250000	€ 200
	Claims from € 250.000,01 - € 500.000	€ 300
	Claims over € 500.000	€ 500
Labour Tribunal/Tribunal du Travail and fiscal litigations concerning a claim that has a value of € 250.000	Claims from € 250.000 - € 500.000	€ 300
	Claims over € 500.000	€ 500
Court of Appeal/Cour d'Appel	Claims up to €25.000 and non-monetary claims	€ 210
	Claims from € 25.000,01-€250000	€ 400
Labor Court/Cour du Travail and fiscal litigations concerning a claim that has a value of € 250.000	Claims from € 250.000,01 - € 500.000	€ 600
	Claims over € 500.000	€ 800
Court of Cassation, except for cassation instances against decisions of the labor jurisdictions or against decisions in fiscal matters	Claims up to €25.000 and non-monetary claims	€ 375
	Claims from € 25.000,01-€250000	€ 500

	Claims from € 250.000,01 - € 500.000	€ 800
	Claims over € 500.000	€ 1200
Court of Cassation/ Cour de Cassation against decisions from labor jurisdictions or in fiscal matters, if the value of the claim exceeds € 250.000	Claims from € 250.000,01 - € 500.000	€ 800
	Claims over € 500.000	€ 1200

There are many exemptions from paying court fees. For example: cases that have been transferred to the competent court in light of the law on languages in court proceedings, in case of declination of jurisdiction, or in case of acts relating to the Belgian State or Foreign States.

Source(s):

- http://justice.belgium.be/sites/default/files/downloads/tableau%20comparatif%20droits%20de%20greffe.pdf (last accessed on 4 and 16 April 2016)
- Act of 28 April 2015 amending the Code of registration duties, mortgage taxes and court fees, Belgian State Gazette 26 May 2015, p. 29667/ Loi du 28 avril 2015 modifiant le Code des droits d'enregistrement, d'hypothèque et de greffe, Publiée au MB 26 mai 2015, p. 29667.

5. STANDING AND REPRESENTATION IN CONSUMER DISPUTES

5.1 Does national law limit the standing of the individual consumer in respect of the claim that can be made and the forum before which it can be brought?

No.

5.2 Other than individual consumers, who or which bodies have standing in consumer protection disputes and for what types of claim? If the action is not brought by the individual consumer, what requirements of representation must be satisfied?

Two distinct proceedings can be identified in this respect.

1. On the one hand, the Code of Economic Law contains a so called “Class Action” in its book XVII, introduced in the Code of Economic Law by the act of 28 March 2014 introducing Title 2 “On the

collective reparation procedure” in Book XVII “Special Jurisdictional Procedures” of the Code of Economic Law (Loi du 28 mars 2014 portant insertion d'un titre 2 "De l'action en réparation collective" au livre XVII "Procédures juridictionnelles particulières" du Code de droit économique et portant insertion des définitions propres au livre XVII dans le livre 1er du Code de droit économique). Standing is given to (public or private) associations or organisations that satisfy certain legal criteria (e.g., having had legal personality for a number of years). These actions can only be brought in case of consumer law violations.

The first class action certification criterion is that the cause of action must be a possible infraction by the defendant of his contractual obligations or of one of the 31 European or Belgian consumer regulations or acts that are specifically enumerated in the Act. These regulations and acts relate to some provisions regarding competition law and banking, market practices, consumer protection, payment and credit services, product safety, intellectual property, privacy, electronic signature, prices, insurance and professional liability, travels, energy and transport of passengers. The class representative has to base his claim on one or more of these regulations or acts. The Belgian class action procedure only applies to C2B (consumer-to-business) disputes. Amendments to expand the scope of the procedure, for example, to shareholder disputes, were rejected.

The second certification prerequisite is that the class action can only be brought by an adequate class representative. Only authorized consumer associations and authorized non-profit organizations whose statutory aim corresponds with the collective harm have standing to bring a class action. The Consumer Ombudsman Service only has standing to initiate a class action and to negotiate a collective settlement. If a settlement cannot be reached, and the court has to decide the merits of the case, a consumer association has to step into continue the procedure. The fact that only authorized associations and organizations have standing was criticized because this could mean too much government dependency. The possibility to initiate a class action would de facto depend on ministerial authorization. The Minister replied that there are legal conditions he has to obey and that in case of arbitrariness his decision could be annulled by the Belgian Council of State.

Belgian law explicitly, and correctly, states that the representative also has to be adequate.

The third and final condition is that the class action should be more suitable than (or superior to) an individual civil action. In assessing this condition, the court may take into account the following elements: the potential group size, the existence of individual damages in connection with the collective harm, the complexity and judicial efficiency of the class action mechanism, and the legal certainty for the group of consumers on whose behalf the action is brought. The size of the individual damages cannot be a decisive factor, in the sense that a judge cannot deny certification simply because the damages suffered by the class members differ while they all face the same or similar factual or legal issues.

2. On the other hand, a special injunction procedure exists, les actions en cessation. In the case of these special injunctions, the president of the Commercial Court can order an injunction to stop infringements, even criminally sanctioned, under the reserve of other special procedures in Book XVII of the Code of Economic Law (Art. XVII. 1 of the Code of Economic Law). If the action is directed towards a person exercising a liberal profession, the President of the Court of First instance is competent.

The President can evaluate the existence of the infringement and order an injunction to stop the infringements listed in Art. XVII.2 of the Code of Economic law. The list of infringements is too long to be reproduced here, but the infringements concern mainly infringements of labour law provisions or provisions of tax law. It is however possible to leave the infringer a reasonable period to stop his actions (Art. XVII.3 of the Code of Economic Law). The procedure is a procedure that holds the same characteristics of an interlocutory procedure, but that nevertheless decides on the merits.

5.3 If a consumer wants to bring or defend an action relating to a consumer protection dispute, is there a legal (or otherwise formal) requirement that he or she has legal representation? Please specify for both judicial and ADR fora and the bodies, associations or authorities that can provide this representation.

No, the ordinary rules apply: Art. 728 of the Belgian Judicial Code. There are no specific rules for consumers as concerns their representation before a tribunal or a court.

In principle, the parties must appear in person or must be represented by a lawyer, pursuant to Art. 728(1) of the Belgian Judicial Code. With the exception of proceedings before the Court of Cassation (Art. 478 and 1080 of the Judicial Code), parties can therefore appear in person before the ordinary courts and submit their statement and defence themselves. However, the court is permitted to take away this option if it finds that they cannot discuss their case properly or completely as a result of their temper or inexperience (Art. 758 of the Judicial Code). Parties who decide not to bring proceedings before the court in person can engage the services of a lawyer.

The Judicial Code reserves the representation of the parties before courts in principle for lawyers. Art. 440 of the Judicial Code stipulates that the prerogatives of the representation monopoly relate to the right to address the court, to appear and to be defend their clients. The members of the bar also have a monopoly to sign ex parte petitions unless otherwise determined by law (Art. 1026(5) of the Belgian Judicial Code).

At the Court of Cassation, the intervention of a lawyer having the title of advocate of the Court of Cassation is a legal requirement. This requirement does not apply to the civil party in criminal matters (Art. 478 of the Judicial Code).

However, the law does provide a number of exceptions to the principle of Art. 728 of the Judicial Code, which stipulates that parties shall appear in person or shall be represented by a lawyer upon commencement of the proceedings and thereafter (Art. 728(1) and (2) of the Judicial Code).

In the case of the Justice of the Peace, the commercial court and the labour courts, the parties can be represented not only by a lawyer but also by their spouse or by a blood relative or a relative by marriage that has written power of attorney and is accepted by the court (Art. 728(2) of the Judicial Code).

Art. 728(3) of the Judicial Code provides other exceptions concerning labour courts. Indeed, for the appearance before a labour court, parties can be represented by a labor organization or handicapped persons can be represented by a trustee.

No specific rules exist for ADR-entities. There are no rules limiting the standing of consumers or determine other bodies having standing in consumer protection disputes.

Source(s):

- http://ec.europa.eu/civiljustice/legal_aid/legal_aid_bel_en.htm (Accessed on 5 May 2016)
- Belgian Judicial Code/Code Judiciaire, http://www.droitbelge.be/codes.asp
- Code of Economic Law/ Code de droit économique, http://economie.fgov.be/fr/modules/publications/general/code_de_droit_economique.jsp (last accessed on 4 April 2016)

6. ACTIONS BEFORE COURTS

6.1 Jurisdiction and competence of the courts in consumer disputes: General structure and special procedures aimed at protecting consumers

6.1.1 Are ordinary courts competent to hear such claims? Is there also a specialised tribunal for consumer protection disputes?

Ordinary courts are competent to hear such claims, as the ordinary rules of competence apply. There is no specialized tribunal for consumer protection disputes nor any special law applicable to the competence of the ordinary courts.

6.1.2 Which courts are competent to hear consumer protection disputes at first instance and in appeals? Please specify the court, in light of the value of the claim (and identify any other factors that are relevant in allocation jurisdiction).

Consumer protection disputes at first instance are of the competence of the Justice of the Peace or the Court of First Instance. Jurisdiction is determined in light of the value of the claim. Claims in first instance up to € 2.500 are brought before the Justice of the Peace (Art. 590 of the Judicial Code). This is the general jurisdiction of the Justice of the Peace. Claims in first instance of a value of more than € 2.500 are brought before the Court of First Instance.

Apart from its general jurisdiction, the Justice of the Peace, in its capacity as small claims court or 'proximity court,' also has some specific competences, irrespective of the value of the claim. The following are the most important: disputes regarding immovable property (e.g., lease), neighbour disputes, disputes concerning the goods and the person of a mentally disabled person, consumer credit disputes, etc. (Art. 591 of the Belgian Judicial Code) It is regarded as a small claims court and an easily accessible court, in the sense that a petition can be used to bring a claim (instead of a more formal and expensive writ of summons) and pro se litigants are common and allowed.

The Courts of First Instance have specific jurisdiction over certain family law cases, succession cases, tax disputes, etc.

It is important to underline that competences in Belgium are allocated towards the court that is the "natural judge" of the procedure. This means that an effort is made so that consumer disputes are brought before the court that is the closest to the consumer. In 2014, a new law entered into force, the law of 1 March 2014, that incorporates this idea and shifts some of the competences of the courts in order to allocate them to their "natural judge", i.e. the judge who is best placed to adjudicate the dispute and who is closest to the parties. This implies that small commercial disputes are now treated by the commercial court (before, they belonged to the jurisdiction of the Justice of the Peace (as long as the claim was lower than € 1860)).

Appeals against decisions of the Justice of the Peace are brought before the Civil Court in the Court of First Instance (Art. 577 of the Judicial Code). The Court of Appeal has jurisdiction to hear appeals against judgments of the Court of First Instance (Art. 602 of the Judicial Code). An appeal is only possible when the (civil) claim exceeds € 2.500 (Art. 617 of the Judicial Code) for procedures in first instance held before the Court of First Instance and € 1860 for procedures in first instance held before the Justice of the Peace.

6.1.3 What is the nature of the procedure at first instance, e.g. is it a simplified or a summary procedure, and is there an assessment of the merits? Please specify in light of the value of the claim (and identify any other factors that are relevant in allocating jurisdiction).

The procedure at first instance is an ordinary procedure. There is an assessment of the merits. This does not differ as to the value of the claim.

6.1.4 Please identify the formal requirements that must be satisfied for a consumer dispute to be heard before a court. These might include time limits applicable to the filing of the action/defence, representation requirements etc.

Again, the ordinary rules apply. These can be summarized as follows. As a rule, proceedings are initiated by serving a writ of summons (Art. 700 of the Judicial Code), which is an official document that is served on the defendant by a bailiff.

They can also be initiated by filing a petition but only when the law allows it (Art. 1034bis-1034sexies Judicial Code), or by voluntary appearance of the parties before the court (Art. 706 Judicial Code). The former is a written request directly addressed to the court by the plaintiff. The clerk of the court notifies it to the defendant. The idea behind it is that the weaker party finds a way to engage in a court procedure with more facility and thus to lower his or her burden to act. Apart from its form, the petition has the same legal effects as the writ of summons: it commences adversary proceedings between the parties.

Furthermore, Art. 17 and 18 of the Belgian Judicial Code) state that the party initiating a claim, must demonstrate a legitimate and personal interest.

As set out above, representation in court in consumer disputes by a lawyer is not mandatory, exceptions set aside.

6.1.5 In respect of the claims and relevant procedures available in the national legal system, what kind of relief might be available in consumer protection disputes? (monetary remedies, injunctions, skimming off etc.)?

Several kinds of relief are available to consumers in consumer protection disputes:

On the basis of Art. VI.38 of the Code of Economic Law, the following sanctions are available.

Restitution by the defendant of the sum paid by the consumer without restitution of the product paid, following the conclusion of a contract on the basis of Art. VI.100, 12°, 16° et 17° and VI.103, 1°, 2° et 8° of the Code of Economic Law.

Restitution by the defendant of the sum paid by the consumer and with availability of the sanctions of ordinary law (following the conclusion of a contract on the basis of Art. VI.93 à VI.95, VI.100, 1° à 11°, 13° à 15°, 18° à 23° and VI.103, 3°, 7° of the Code of Economic Law).

If the consumer has received a good without his consent (VI.103, 6° of the Code of Economic Law), he is in no case liable for the payment of the value of the good.

In case of infringements of consumer protection law listed in Art. XVII.2 of the Code of Economic Law, the president of the Court of First Instance can order an injunction. An important condition (Art. XVII.4 of the Code of Economic Law) is that the infringements against which an injunction is claimed, have to be ongoing.

Besides these specific sanctions, courts can, in a procedure of ordinary law, impose sanctions of ordinary law on the infringers of provisions of the Code of Economic Law. Indeed, ordinary sanctions such as injunctions and damages awards can be granted by the Justice of the Peace, the Court of First Instance or the Court of Appeal.

Complementary Remark: this answer refers to articles of the Code of Economic Law. This Code of Economic Law contains the sanctions available when an economic actor, the defendant in court cases, breaches provisions of the Code of Economic Law.

6.1.6 Please provide a brief overview of the role of parties and judges in civil proceedings generally (e.g. with reference to the principle of party disposition, the obligation of parties to make and prove factual allegations and to make and provide legal arguments, the possible role of the court). This overview should be brief; these issues will be dealt with in more detail in the questions that follow.

One of the basic principles of Belgian civil procedure is that the parties autonomously set the limits of the dispute. They decide (a) if proceedings are initiated, (b) who will be the parties and (c) the cause and the object of the claims. The cause of the claim are the underlying (legal) facts. The plaintiff has to determine

these facts (Art. 702, 3° Belgian Judicial Code). The object of the claim is what is claimed by the parties, the advantage they want to obtain. Within this framework the court decides the case. For example, it is not allowed for the court to involve ex officio other parties in the proceedings than the ones designated by the plaintiff and the defendant (Art. 811 Judicial Code). Another example is that the court cannot grant a claim that was not expressed, nor can it grant more than what was claimed (Art. 1138, 2° Judicial Code).

The question arises what the role of the court is. First, the court plays an active role with respect to the procedure. It sees to the orderly evolution of the proceedings, meaning that the procedural rules should be respected and that a judgement should be rendered within a reasonable time. Second, in case the parties do not succeed in producing sufficient evidence, the court is obliged to order a complementary inquiry consisting of for example the submission of certain documents, witness depositions, an official visit to the scene of the facts, the personal appearance of the parties in court, etc. Third and finally, the court can ex officio complete and/or substitute the legal grounds that the parties have invoked. In other words, the court is obliged to examine the judicial character of the facts irrespective of their qualification by the parties (da mihi factum, dabo tibi ius). However, the following conditions apply: (a) the court cannot raise a dispute that not has been raised by the parties, (b) the court can only rely on facts or documents properly submitted to the court, (c) the court cannot change/modify the cause and the object of the claims and finally (d) the court has to respect the rights of defence. The latter means that the court has to give both parties the opportunity to give their point of view. In that respect, he court can even reopen the debates (Art. 774 Judicial Code).

Source(s): https://e-justice.europa.eu/content_going_to_court-32-en.do (last accessed on 3 April 2016) and Belgian Judicial Code.

6.2 Small claims

6.2.1 Does a small claims procedure exist in the Member State? If yes, is it a specialised or simplified procedure?

There exists a procedure for small claims under Belgian Law. It is a specialized and voluntary procedure.

6.2.2 What are the value thresholds for claims brought under the small claims procedure? Moreover, are there any other factors that shape the use of the small claims procedure (including the nature of the claim, the area of consumer protection law into which the claim falls etc.)?

The procedure, which is entirely voluntary, only applies to claims falling under the jurisdiction of the Justice of the Peace, the Police Court or the Commercial Court. The claim must relate to an established debt of an amount not exceeding € 1.860. Only pecuniary claims are eligible. The amount must be certain, fixed and have fallen due. According to the Justice of the Peace of Roeselare, an established debt is a debt that is prima facie not disputable. Any appearance (or doubt) about the disputable character should lead to a rejection of the claim (Justice of the Peace of Roeselare, 7 November 1996, Rechtskundig Weekblad 192 (1997-1998)). If only a part of the claim relates to an established debt the

procedure cannot be used (Justice of the Peace of Borgerhout, 28 December 1970, Rechtskundig Weekblad 1895 (1971-1972)).

On the other hand, the claim must be substantiated by a written document drawn up by the debtor. This does not have to be an admission or acknowledgement of debt (Art. 1338 of the Judicial Code). This condition is usually broadly interpreted: an ordering slip, a receipt of delivery signed by the debtor or an accepted invoice all have been accepted as a written document from the debtor. Most case law requires a document that is (explicitly) signed or accepted by the debtor and that directly relates to the product or service that has been bought. Have not been accepted as a written document from the debtor: a simple (not explicitly accepted) invoice or a financing/rental/insurance contract.

Finally, the procedure only applies when the debtor has his domicile or habitual residence in Belgium.

6.2.3 What forms must be completed to raise the application? Who assists the consumer in completing these forms?

There is no standard form that has to be used to initiate the procedure. The Belgian Judicial Code only lays down a number of conditions regarding the information that has to be stated in the prior demand for payment and in the petition initiating the procedure. From this demand for payment on, a fifteen day period starts to run. Within 15 days, the summary order for payment procedure has to be initiated.

Before initiating the procedure, the creditor/plaintiff must send the debtor a final demand for payment (Art. 1339 of the Judicial Code). This formal notice may take the form either of a bailiff's writ that is served upon the debtor, or of a registered letter (with proof of reception). A writ is more expensive than a registered letter. However, a writ offers more certainty regarding the reception by the debtor.

The writ or the letter have to contain the following information:

- a reproduction of the relevant articles of the Belgian Judicial Code regarding the summary order for payment procedure; if this is forgotten, the claim introducing a summary order for payment procedure will be declared inadmissible
- a demand requiring payment within fifteen days
- the exact amount being claimed
- the court that will handle the claim in case the debtor refuses to pay.

A failure to include this information renders the demand null and void.

The signature of a lawyer on the application is mandatory. Art. 1342 of the Judicial Code also stipulates that a copy of the decision by the court will be sent to the claimant's lawyer by ordinary mail.

6.2.4 How can an application for a small claim be made (e.g. online, by post or in person)?

With fifteen days of the date on which the fifteen day period stated in the demand for payment expires, the summary order for payment procedure has to be initiated. There is no sanction if the term of fifteen days is not respected. This is done by way of ex parte petition (Art. 1340 of the Judicial Code). The petition has to contains the following information:

- day, month and year
- first and last name, profession and place of residence of the plaintiff, and, if applicable, the first and last name, place of residence and capacity of his/her legal representatives
- the object of the claim and a detailed statement of the amount being claimed, including a detailed overview of the different parts of the claim and the legal grounds on which the claim is based
- the court that has jurisdiction
- the signature of the plaintiff's lawyer.

The last condition means that the plaintiff must use a lawyer to initiate the procedure. He or she cannot act pro se (see previous question)

The plaintiff may also indicate, at his or discretion, the reasons why he or she opposes the granting of a deferment of payment.

Finally, the petition must be accompanied by a photocopy of the written document drawn up by the debtor or a copy of the bailiff's writ or a copy of the registered letter or the original letter, accompanied by evidence that the recipient refused the letter or failed to collect it from the post office, together with a declaration stating that the debtor is registered at the address listed in the civil register. It is sufficient that the plaintiff shows that all has been done to notify the debtor. He or she does not have to prove that the debtor effectively received the demand for payment.

The petition is submitted to the clerk of the court who registers the claim (Art. 1341 of the Judicial Code). The procedure is of a unilateral or ex parte nature. The debtor does not receive a copy of the petition. It is not possible for the debtor to voluntarily intervene in the procedure.

Within fifteen days of the date on which the application is submitted, the court grants or rejects the claim (Art. 1342 of the Judicial Code). Rejection is possible either on the merits or because the forms were not respected. The court may grant a deferment of payment or partially uphold the claim. A copy of the decision is sent to the plaintiff's lawyer.

When the court upholds the claim either wholly or in part, the decision has the same effect as a default judgment (Art. 1343, §1 Judicial Code).

The memorandum of service has to contain the following information:

- a copy of the petition
- a statement of the period within which the debtor can lodge an opposition against the decision

- details of the court to which that opposition must be submitted, together with the formalities to be fulfilled in that regard
- a warning that if the debtor does not act by the stated deadline, all available legal remedies may be used by the creditor/plaintiff in order to require the debtor to pay; a failure to include such a warning renders the memorandum of service null and void.

6.2.5 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

There are no special rules on the taking of the evidence.

As mentioned above, the claim has to be substantiated by a written document drawn up by the debtor. This does not have to be an admission or acknowledgement of debt (Art. 1338 of the Judicial Code). This condition is usually broadly interpreted, and easily accepted.

6.2.6 Are the costs of the successful party reimbursed?

The successful party can apply for reimbursement of the docket fees.

Source(s): Belgian Judicial Code

6.3 Claims other than small claims

6.3.1 If a consumer protection dispute does not qualify as a small claim, what other procedures are available? What are the value thresholds and other factors determining the use of such procedures?

There is one procedure for claims other than small claims, i.e. the procedure of payment facilities for consumer credits. This procedure is foreseen in Art. 1337bis-1337octies of the Belgian Judicial Code. It allows consumers to ask the court for a facilitation or certain conditions for the repayment of their consumer credit.

As determined in Art. 1337bis of the Belgian Judicial Code, the procedure can only be initiated when the creditor has refused to grant payment facilities to the consumer, debtor, who has requested so by registered mail containing the reasons for the request of facilities.

6.3.2 How can such claims be made? Please specify if the applications can be made online, or by post or in person.

The claim to obtain payment facilities can be made before the Justice of the Peace, via registered mail to the court clerk, unless a similar claim is pending before the court who will decide on the merits of the case.

If after one month the creditor has not responded to the request, this will be seen as an implicit decision of refusal.

The application cannot be made online, but can be made in person by appearance in court.

6.3.3 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

There are no specific rules in this respect, as the ordinary rules apply. There are no specific rules on the taking of evidence, nor are there rules about when the defender or pursuer have to appear in court.

6.3.4 Are the costs of the successful party reimbursed?

The successful party but can apply for reimbursement of the docket fees.

Source(s): Belgian Judicial Code

6.4 Claims for the issuance of a payment order

This procedure is only applicable in B2B-litigations. Therefore, we will only discuss this system briefly.

6.4.1 Does an order for payment procedure exist in the national system? Is it a simplified procedure?

By law of 19 October 2015, the Belgian legislator introduced a new procedure of recovery of uncontested monetary debts. This procedure is laid down in the articles 1394/20-1394/27 of the Belgian Judicial Code.

It is more simplified than the small claims procedure, against which many criticisms have been raised. It can be seen as simplified in the sense that it aims at avoiding the intervention of courts as much as possible, without excluding it.

6.4.2 Which authorities or courts are competent to hear claims for the issuance of payment orders?

The procedure of recovery of uncontested monetary debts is an administrative procedure and aims at excluding any intervention from the judiciary. The competence is exclusively attributed to bailiffs, who exercise an office of public service, and thus offer the necessary guarantees regarding their independence.

6.4.3 Are there any formal requirements that must be satisfied for the application for the issuance of a payment order to be made (e.g. standard forms, representation by a lawyer, the detail of description required, the need to provide written evidence etc.)?

1° In the first step, the bailiff sends an order to pay to the debtor with a copy of the relevant pieces of evidence (showing the unchallenged nature of the claim) and an answer form. The order has to contain,

among others, a clear description of the claim and the amounts being claimed from the debtor, a summons to pay within one month and the modalities to pay.

2° In the second step, the debtor has one month to pay or to ask for payment facilities or to challenge the claim (wholly or in part) by using the answer form. In the latter case, the debtor has to state the reasons why he or she challenges the claim. A non-motived challenge is seen as an absence of challenge.

3° As a third step, the procedure is cut short for the debts that are paid or that are challenged. In the latter case, the creditor is free to initiate an ordinary civil procedure. If, in a procedure on the merits of the case, the challenge as formulated by the debtor is clearly unfounded or unreasonable, the debtor can be condemned to a fine for abuse of process.

4° As a fourth step an enforceable title is issued in case the debtor does not react in time or if there is no agreement on payment facilities. At the request of the creditor, the bailiffs draws up a procès-verbal of non-challenge that is declared enforceable by a judge who is part of the management committee that deals with the publication of attachment orders. The enforcement is suspended if the debtor initiates a judicial procedure, which he or she can by using a petition (not a writ of summons).

6.4.4 What information is generally available to the authority or court when a claim for the issuance of a payment order is made?

No specific rules exist, but the debt has to be established. Also, the contestation from the debtor to pay must be made clear.

6.4.5 What opportunity is available for a defence/statement of opposition to be advanced? How should this be done and what is its effect? Please specify if the means of advancing a defence differ depending on the value of the claim and the court dealing with it.

The debtor can contest the claim by using the answer form that is attached to the bailiff's writ to pay. Such a contestation immediately stops the procedure. It is in no means the task of the bailiff to examine the reasons for the contestation of the debtor. After contestation of the debtor, the creditor can initiate a (traditional) judicial procedure, where the responsibility for action is inversed. In that respect, the debtor holds the burden of proof of invalidating the claim.

6.4.6 What is the effect if the claim is uncontested, i.e. if there is a lack of defence/statement of opposition?

If the claim is contested by the debtor, the procedure stops immediately. The creditor can then start a procedure before the court. A lack of contestation can either stem from a payment of the claim or a lack of statement of opposition. In that case, the bailiff will draw up an enforceable title for the claim.

6.4.7 If the defendant is a consumer, and he or she does not respond to or raise an objection to the issuance of the payment order, does the authority dealing with the claim for payment order proceedings have the

power to examine any issue of consumer protection law of its own motion before treating the action as usual?

This is a B2B-procedure. It thus only applies to disputes between businesses, and not between businesses and consumers.

6.4.8 What steps must the pursuer take in order to obtain an enforceable decision?

This answer depends on whether the claim is contested or not by the defendant. If the claim is contested, or he debtor pays, the procedure stops.

When the debtor does not pay but does not contest the claim, the last phase of the procedure will be initiated. In this phase, the creditor can obtain an enforceable decision for uncontested debts. This phase applies to cases where the debtor does not pay in time or contests the payment (including the situation where the debtor does not react to the bailiff's writ, where there is thus an implicit recognition by the debtor). In this light, an official minute will be drafted by the bailiff (Art. 1394/24, §1 of the Belgian Judicial Code). The enforcement of the decision will be accorded and formulated by a bailiff .

6.4.9 Is this decision final, or can the defendant appeal against it?

The defendant can react to this decision of enforceability by introducing a procedure as to the merits of this decision, before the court. This procedure aims at denying the creditor the enforceability of his claim that has been issued under the last phase of the administrative procedure.

Source(s):

- Belgian Judicial Code
- VOET, S., ALLEMEERSCH, B. (2016). Invordering van onbetwiste geldschulden, in P. TAELMAN en B. ALLEMEERSCH (eds.), Potpourri I. Hervorming van de burgerlijke rechtspleging, Brugge, die Keure, 2016, 1-20.
- VOET, S. (2015). Relief in Small and Simple Matters in Belgium. Erasmus Law Review (4), 147-158.

6.5 Appeals in consumer disputes

6.5.1 Are appeals possible in all consumer disputes? Please specify for small claims and other types of claims.

Value of claim	Nature of the	Appeal Instance	3rd Instance

	Procedure		possible?
Justice of the Peace			
Below € 1.860	Ordinary	Appeal not possible	Cassation possible, no assessment of the merits
Above €.1860	Ordinary	Appeal possible; Court of First Instance	Cassation possible, no assessment of the merits
Court of First Instance			
Below € 2.500	Ordinary	Appeal not possible	Cassation possible, no assessment of the merits
Above €2.500	Ordinary	Appeal possible; Court of Appeal	Cassation possible, no assessment of the merits

There is no third instance – appeal in Belgium. The basic principle is that there are only two instances of appeal. There is a third instance available, but that is not an appeal in the strict sense. This instance takes place before the Court of Cassation. This Court does not judge on the facts, but merely controls whether the judge in the first (when appeal was not possible) or second (after the appeal) instance correctly applied the law. If this is not the case, the Court of Cassation will quash the decision and will refer the case to another court of the same level.

6.5.2 Please briefly specify the national appeal procedure, including any requirements to be satisfied for appeals. These might include, but are not limited to, conditions of admissibility, value thresholds, time-limits, the scope of review, and the impact of the appeal on enforcement (provisional enforcement). Please refer to any rules specifically applicable in respect of the claims and relevant procedures outlined above.

The ordinary rules apply to appeals in consumer disputes (Art. 17-18, 616-621, 1042-1046 and 1047-1072 of the Belgian Judicial Code). The possibility to appeal a decision in consumer disputes is subject to the following limitations or requirements:

- The court competent for the appeal differs in light of the value of the claim; in that respect, it has to be of a minimum value of € 2500 to be appealable if the procedure was initiated before the Court of First Instance, and of a minimum value of € 1860 when the procedure was initiated before the Justice of the Peace. See Art. 617 of the Belgian Judicial Code.

- Art. 616 of the Belgian Judicial Code stipulates that an appeal is possible against every judgment, unless the law determines otherwise; appeals are possible in consumer disputes, as no provision to the contrary exists.

- The appeal has to be initiated within one month after the serving of the judgment rendered in first instance (Art. 1051 Belgian Judicial Code).

- The party appealing the decision has to demonstrate a legitimate standing and interest (Art. 17 and 18 Belgian Judicial Court). The Court of Cassation has ruled that this standing is present if the judge has completely or partially rejected his or her claim.

Source(s): Judicial Code

6.6 Enforcement in consumer disputes

6.6.1 If the assessment of a consumer protection issue has not been possible at an earlier stage of the proceedings, is it always possible – either ex officio (see section 10 below) or if the consumer raises a possible violation of consumer protection law – for this assessment to be undertaken during enforcement proceedings?

No. The consumer can raise the argument or statement relating to the violated provision at every moment during the first instance or appellate proceedings. If he does not, the judge has to act accordingly and has to invoke the argument about the violation of consumer law ex officio. However, if the enforcement procedure has already been initiated, the judgment is final and no possibility exists to raise new arguments about the assessment of the issue having led to the judgment that is being executed. The only possibility is Art. 1333 – 1337octies of the Belgian Judicial Code concerning payment facilities or postponement of payment of consumer credit.

6.6.2 In the particular case of consumer protection, if a court examines consumer protection law (either ex officio or on the basis of an argument advanced by the consumer), does national procedural law provide that interim measures should 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 final decision will have full effect?

7. ACTIONS FOR COLLECTIVE REDRESS

7.1 Injunctive relief, linking individual and collective actions

7.1.1 If collective proceedings are launched, does national procedural law provide that ongoing individual claims, relating to the same dispute, should be stayed until the collective proceedings are brought to an end? Please specify if this constitutes an obligation on the part of the national judge or if it is at his or her discretion.

When the consumer class action has been certified by the court, the statute of limitations for the consumer who has opted out is suspended between the certification decision and the opt-out declaration. When the class action procedure is closed because there is no adequate representative anymore, the statute of

limitations for each class member is suspended between the certification decision and the closure of the procedure. See Art. XVII.38, XVII.39, XVII.63 and XVII.65 of the Code of Economic Law.

These are obligations. The court has no discretionary power.

7.1.2 If individual proceedings are stayed, please indicate what the effect of the court or ADR entity's decision in the collective action on those individual proceedings would be, i.e. whether the outcome of the collective action binds the consumer bringing an individual action.

Collective claims relating to consumer disputes are subject to the opt-in or opt-out principle, according to the certification decision of the court (the court can freely choose between both principles). Consumers wanting to bring their own individual claim, can opt out or can choose not to opt in. Class members who have opted out are not bound by the res judicata effect of the class actions decision(s). They can pursue their individual claims. The same is true for class members who have not opted in.

Source(s): Code of Economic Law.

8. CONSUMER ALTERNATIVE DISPUTE RESOLUTION

8.1 Consumer disputes before ADR fora

8.1.1 Is ADR mandatory for all parties bringing a claim related to a consumer protection dispute?

No, ADR is not mandatory. The parties are free to decide whether to engage in ADR. Disputes can be resolved in many ways instead of going to court. The Belgian Judicial Code deals in its Part VI with arbitration, while its most recent Part VII deals with mediation. The same Code provides in its Parts I–V (upon judicial organisation, jurisdiction, judicial proceedings, review proceedings, seizures and enforcement of judgments) a technique to settle a dispute with help of a judge but without an adjudicative process (conciliation).

8.1.2 Please specify if there are limitations to the use of ADR. These might include the nature of the claim (i.e. whether both individual and collective claims are possible), requirements of representation, time limits, value thresholds, etc.

The following answer will focus on the most important ADR-entities in Belgium. A list of all ADR entities competent for consumer protection issues is available on the website of the Federal Public Service (FPS) Economy, Small and Medium Enterprises (SMEs), Self-Employed and Energy (http://economie.fgov.be/fr/).

When not specified, there is no representation requirement. Lawyers are often involved, but representation is often not compulsory.

Consumer Mediation Service

The Consumer Mediation Service is an independent public service which:

- informs consumers and companies about their rights and obligations, particularly about the options available for the extra-judicial settlement of consumer disputes
- receives all requests for the extra-judicial settlement of consumer disputes and, if applicable, either transfers them to another qualified entity competent in the matter, or handles them itself;
- intervenes in all requests for extra-judicial settlements of disputes when no other qualified entity is competent.

If a consumer files a complaint before the Consumer Mediation Service and there is a mediation service or other independent entity competent to handle the complaint, it will be transferred to the competent entity. If there is no competent entity, the Consumer Mediation Service will handle the complaint itself.

In the event of a consumer dispute, the consumer has to, provided that such an organisational structure exists, submit, in first instance, a complaint directly to the company. This constitutes a compulsory condition of admissibility for a complaint filed within the Consumer Mediation Service. Proof of this first contact with the company can be provided for by any legal means.

Source(s):
- http://www.consumerombudsman.be/en/about-us (last accessed on 4 April 2016)
- http://economie.fgov.be/fr/entreprises/reglement_extrajudiciaire_des_litiges_de_consommation/#.VwM7i2P_dAY (last accessed on 4 April 2016)
- Consumer Ombudsman's Office, Rules of Procedures, version of 27/03/2015, available at http://www.consumerombudsman.be/sites/5182/files/content/SMCDocuments/anglais_-_smc_-_reglement_de_procedure.pdf (last accessed on 4 April 2016)

ARBITRATION

ENTITY	COMPETENCE: Matters in which arbitration can be held	REQUIREMENTS/LIMITS	COSTS
Real Estate Conciliation, Arbitration and Mediation Board/ Chambre de Conciliation, d'Arbitrage et de Médiation en matière Immobilière	This board is competent for any problem dealing with real estate such as a dispute with a contractor, architect, surveyor, property developer; a dispute dealing with a new building, renovation works, co-ownership, right of way, town planning, common ownership, construction flaw, renting, leasing, real estate sales, real estate agent contracts, environment or salubrity problems…	There are two requirements or limits: One must have tried to solve the dispute directly with the company, to no avail. Furthermore, one must formally (by letter) entrust the Board with an arbitration mission (standard clauses are available).	€ 400 of advances payment per party € 140 per hour for the arbiter
Furniture Dispute Commission/ Commission des litiges meubles	Applies to all the conditions surrounding the sales of furniture.	The store must be a member of NAVEM and the standard contract must have been used. One must have tried to solve the dispute directly with the company, to no avail and the damage must have taken place a month ago minimum.	€ 100 if the guarantee is member of Test-Achats or Navem; € 150 no member of Test-Achats or Navem; If the intervention of an expert is needed, a deposit will have to be made. The losing party will have to pay for the expertise costs.

Travel Dispute Commission/ Commission des litiges voyages	For disputes opposing a consumer to an intermediary or tour operators concerning the program and unwinding of the journey.	The procedure is only available to claims opposing the consumers to intermediaries or tour operators making use of the general conditions listed on the website of the CLV. If not, the parties have to sign an arbitrage convention for the procedure to be available. The procedure has to be introduced within the month upon return from the holiday or the predicted departure date if the holiday was cancelled.	10% of the value of the claim with a minimum of € 100
Arbitration Commission for Consumers and Textile Carers/ Commission d'Arbitrage Consommateurs - Secteur de l'entretien du textile	Procedures relating to textile item (clothes: jacket, coat, dress, skirt, shirt, blouse, sweater; carpet; soft furnishings; household linen: sheets, blankets, pillowcase, cover; curtains; hanging; leather, suede, satin, lace or woolen goods) was damaged at the launderette, wash house, dry cleaner's… A college made up of professional and consumer representatives will analyze the damage to see whether the professional is to blame and, if such is the case, to determine the compensation granted to the customer.	The initiator must have tried to solve the dispute directly with the company, to no avail; The damage must have taken place 3 months ago MAXIMUM The company (launderette, dry cleaner's…) must be a member of the Belgian federation of textile care	If the prejudice's estimated value is under € 620: - € 20 - € 40 if the initiator is not a member of Test-Achats, Arcopar or ACV-CSC Metea If the prejudice's estimated value is superior to € 620 - € 40 - € 60 if the initiator is not a member of Test-Achats, Arcopar or ACV-CSC Metea

Source(s) :
- Real Estate Conciliation, Arbitration and Mediation Board: http://www.ccai.be/index.html
- Furniture Dispute Commission; http://www.navem.be/?action=onderdeel&onderdeel=8&titel=commission+de+litiges+meubles
- Travel Dispute Commission: http://www.clv-gr.be
- Arbitration Commission for Consumers and Textile Carers: www.fbt-online.be

CONCILIATION

ENTITY	COMPETENCE: Matters in which conciliation can be held	REQUIREMENTS/LIMITS	COSTS
Real Estate Conciliation, Arbitration and Mediation Board/ Chambre de Conciliation, d'Arbitrage et de Médiation en matière Immobilière	This board is competent for any problem dealing with real estate such as a dispute with a contractor, architect, surveyor, property developer; a dispute dealing with a new building, renovation works, co-ownership, right of way, town planning, common ownership, construction flaw, renting, leasing, real estate sales, real estate agent contracts, environment or salubrity problems…	There are two requirements or limits: One must have tried to solve the dispute directly with the company, to no avail. Furthermore, one must formally (by letter) entrust the Board with a conciliation mission (standard clauses are available).	€ 400 of advances payment per party € 95 per hour for the conciliator (VAT excluded)
Furniture Dispute Commission/ Commission des litiges meubles	Applies to all the conditions surrounding the sales of furniture.	The store must be a member of NAVEM and the standard contract must have been used. One must have tried to solve the dispute directly with the company, to no avail and the damage must have taken place a month ago minimum.	€ 100 if the guarantee is member of Test-Achats or Navem; € 150 if he's no member of Test-Achats or Navem; If the intervention of an expert is needed, a deposit will have to be made. The losing party will have to pay for the expertise costs.

Travel Dispute Commission/ Commission des litiges voyages	For disputes opposing a consumer to an intermediary or tour operators concerning the program and unwinding of the journey.	The procedure is only available claims opposing the consumers to intermediaries or tour operators making use of the general conditions listed on the website of the CLV. If not, the parties have to sign an arbitrage convention for the procedure to be available. The procedure has to be introduced within the month upon return from the holiday or the predicted departure date if the holiday was cancelled.	€ 50 per party
Conciliation Commission for second-hand Vehicles/ Commission de conciliation pour les véhicules d'occasion	Disputes relating to the sale of second-hand vehicles		No data available Parties can select a mediator from a list. There is no provision for remuneration of mediators, unless they are official experts.

Construction Reconciliation Commission/ Commission de conciliation construction	For any technical dispute during the construction or renovation of a building (roofing, humidity, isolation and ventilation, central heating, flooring, window frames, veranda, stairs…).	The initiator must have tried to solve the dispute directly with the company, to no avail. One must have filled in and signed the standard clause making the Commission competent in the case (to ask from the Commission or to download), either when you signed the contracts or when the dispute arose.	Set price of € 200 (excluding VAT), equally divided between the parties. It covers the expert's first visit of the location as well as the writing of the conciliation report or of the binding technical report. For any additional tax, an estimate is made up: the party that asked the expertise approves the estimate (if they want to) and pays forward. Any additional action includes: - professional fees at € 75 per hour (excluding VAT), - travel allowance € 1 per Km (excluding VAT) - travel time is included - administrative costs at € 31 per hour (excluding VAT).

Source(s):

- Real Estate Conciliation, Arbitration and Mediation Board: http://www.ccai.be/index.html
- Travel Dispute Commission: http://www.clv-gr.be
- Conciliation Dispute Commission : http://economie.fgov.be/en/disputes/consumer_disputes/Belmed/success_stories/Consumer_goods/Second-hand_cars/#.VwFSQ2P_dAY
- Construction Reconciliation Commission: http://www.constructionconciliation.be

MEDIATION[3]

ENTITY	COMPETENCE: Matters in which mediation procedures can be initiated	REQUIREMENTS/LIMITS	COSTS
Real Estate Conciliation, Arbitration and Mediation Board/ Chambre de Conciliation, d'Arbitrage et de Médiation en matière Immobilière	This board is competent for any problem dealing with real estate such as a dispute with a contractor, architect, surveyor, property developer; a dispute dealing with a new building, renovation works, co-ownership, right of way, town planning, common ownership, construction flaw, renting, leasing, real estate sales, real estate agent contracts, environment or salubrity problems…	There are two requirements or limits: One must have tried to solve the dispute directly with the company, to no avail. Furthermore, one must formally (by letter) entrust the Board with a mediation mission (standard clauses are available).	€ 400 of advances payment per party € 85 per hour for the mediator. (VAT excluded)
Belgian Conflict Management Centre (CEBEGECO)/ Centre Belge de Gestion de Conflits (en abrégé CEBEGECO)	Any commercial dispute dealing with consumer goods or general services to consumers.	One must have tried to solve the dispute directly with the private individual or the company, to no avail. One can act as a private individual or as a professional (legal or natural person).	Fees and charges to be shared between the parties (equal parts or otherwise, in agreement with art. 1731, §1 Belgian Judicial Code): € 100/h (VAT excluded). Possibility of receiving financial aid by way of legal aid.

[3] There are many private mediators, but we chose to single out these because they are the most commonly consulted.

Mediation Platform Bemiddelingsplatform (available in Dutch only)	Any dispute relating to: consumer goods, general consumer services, post services and electronic communications, transportation, leisure services, energy and water supply, health, education, financial services.	Be actively involved in the dispute and personally take part in the mediation process.	Mediation costs € 150 euro (VAT excluded), to be shared between the parties. If applicable, transportation costs are € 0.5 per Km, transportation time included. Possibility of receiving financial aid by way of legal aid.

Source(s):

- Real Estate Conciliation, Arbitration and Mediation Board/ Chambre de Conciliation : http://www.ccai.be/index.html
- Belgian Conflict Management Centre (CEBEGECO): www.cebegeco.be
- Bemiddelingsplatform: http://bemiddelingsplatform.be

OMBUDSDIENST

ENTITY	COMPETENCE: Matters in which the Ombudsdienst is competent	REQUIREMENTS/LIMITS	COSTS
Ombudsman Service for the Postal Sector/ Service de médiation pour le secteur postal	Any problem between a customer and a company from the postal sector dealing with the national and international sending of packages (bpost or any other company delivering mail and packages).	Having tried to solve the dispute directly with the company, to no avail. No specific rules defining the procedure to follow.	None

Insurance Ombudsman/ l'Ombudsman des assurances	For any problem arising between a customer and an insurance company, intermediary (insurances in relation to life; fire; health; car; third-party; work accident; comprehensive; civil liability; family; travel cancellation; guaranteed income; pension scheme) as well as any problem with DATASSUR (= economic interest group which handles databases, and with these databases, an insurer can check whether the information received from the customer is correct and assess the risk profile). Thanks to a network (FIN-NET), the Ombudsman can also transfer any dispute with a foreign insurance company to the appropriate authority abroad.	The dispute has to concern an insurance company or an insurance broker within the context of an existing insurance agreement in Belgium (for cross-border dispute, you can contact the Insurance Ombudsman within the framework of FIN-NET). The Insurance Ombudsman advises to try to solve the dispute directly with the company at first.	None

Financial Ombudsman / Ombudsman en conflits financiers	For any problem related to a bank service, a credit, an investment, assets management, stocks…	You must have tried to solve the dispute directly with the company, to no avail. The financial institution must be a member of the Belgian Banker's Association, the Professional Union of Credit Providers, the Belgian Association of Stock Exchange Members, the Belgian Asset Managers Association - list of financial institutions. It must not deal with a trade decision (rate or credit refusal) or to overindebtedness; Acting as a private individual (physical person). If you are a professional ('legal person'/company), you can appeal to the service if your problem concerns a cross-border payment of € 12.500 maximum within the European Union.	No, except for professional ('legal person'/company) calling on the Mediation Service for a dispute dealing with a cross-border payment: they will have to pay € 50 (refunded in case they win).
Ombudsman Service for Energy/ Service de Médiation de l'Energie	Any problem arising between a customer and a supplier within the framework of the electricity and natural gas market (examples : about invoices, impossibility to obtaining a social	Having tried to solve the dispute directly with the company, to no avail. The dispute cannot be over one year old.	None

	tariff, ...).		
Telecommunication Mediation Service/ Service de Médiations pour les Télécommunications	Any customer who is unhappy with his telecom operator may ask for free the Office of the Ombudsman for Telecommunications to intervene.	It can only act if a customer has been unable to achieve a satisfactory outcome following his contacts with the telecom provider.	None
The Mediator for rail passengers/ Le médiateur pour les voyageurs ferroviaires	For any problem between a customer and the Belgian Railways such as train delays or cancellations, train frequency (number of train to a specific destination by day), transport tickets, customer service quality (information…), number of cars, loss of luggage…	You must have tried to solve the dispute directly with the company, to no avail.	None

Source(s):

- Ombudsman Service for the Postal Sector: http://www.smspo.be
- Insurance Ombudsman: http://www.ombudsman.as
- Ombudsman in financial conflicts: http://www.ombudsfin.be/en/individuals/home
- Ombudsman Service for Energy: http://www.ombudsmanenergie.be//nl
- Telecommunication Mediations Service : http://www.ombudsmantelecom.be/fr/accueil.html?IDC=3
- the Mediator for rail passengers: http://www.ombudsmanrail.be/fr/accueil.html?IDC=6

ADDITIONAL INFORMATION

In 2011, the Federal Public Service Economy, Small and Medium Enterprises, Self- Employed and Energy launched Belmed (an acronym for Belgian Mediation), a digital portal or platform on consumer ADR including mediation and ODR (Online Dispute Resolution). Belmed aims to promote those means of dispute resolution and make them more easily accessible by creating one digital portal or access point for the consumer and tradesman. It consists of two pillars: on the one hand offering information on ADR, and on the other hand providing ODR for consumers and enterprises.

The information part contains a guide on how to settle a dispute in an amicable way. It explains what a formal notice, a consumer dispute, a third party, and alternative dispute resolution are, and offers specific examples of all these notions. On the other hand, the information part gives an overview of all Belgian arbitration, conciliation, mediation, and ombudsmen agencies. All this information is also available per sector (e.g., consumer goods, financial services, energy etc.).

Online applications for arbitration, conciliation or mediation can be made via Belmed. After an application is made, the Belmed system automatically sends it to the competent ADR-entity (e.g., an affiliated mediator). So, the consumer or tradesman does not have to find out in advance which entity is competent to resolve his or her dispute. An application can only be made when the applicant has, to no avail, contacted the other party to report the problem and try to solve it, and when no court proceeding is pending. If so, the applicant receives (very limited) information on how to mediate during a court proceeding. After the application has been sent (automatically) to a competent ADR-entity, it will deal with the case. When this is a mediator, he or she will explain the voluntary mediation process. Belmed only serves as an administrator or serving-hatch. The administrators do not see the identity of the applicant, nor do they read the application, nor do they interfere in the ADR process.

See: http://economie.fgov.be/en/disputes/consumer_disputes/Belmed/#.VytCDT-NLBI (ENG) and http://economie.fgov.be/fr/litiges/litiges_consommation/Belmed/#.Vy1_VmaNIcg (FR)

8.1.3 Can ADR entities issue binding decisions and can they enforce those decisions? If not, please explain how they are enforced.

The question whether ADR entities can issue binding decisions depends on the type of ADR.

A conciliator tries to conciliate the parties but does not take any decisions. He leaves the decision-taking process to the parties. If the parties come to a settlement agreement, this arrangement is binding but it must be stated that it stems from the parties and not from the conciliator.

If the parties do not find the Ombudsman or mediation procedure satisfactory, they can still start an arbitration procedure or take the matter to court.

If the parties reach an agreement during a mediation procedure, the decision is not in se enforceable (however binding), but the parties can go to court to have it homologated if the agreement was reached under the auspices of an accredited mediator. The judgment of the court, that will contain the agreement

reached, will be enforceable (Art. 1731 and 1732 of the Belgian Judicial Code for voluntary mediation and Art. 1735 of the Belgian Judicial Code for judicial mediation). The mediator himself does not take any binding decisions. The most essential feature of mediation is that a mediator does not impose a solution. Contrary to a judge, a mediator does not decide the dispute, but helps the parties to communicate so they can try to settle the dispute themselves. Mediation leaves the control of the outcome with the parties.

The decision of an arbiter is binding on the parties involved in the dispute. However, it is not enforceable at law. To obtain that result, the parties must follow an exequatur procedure. An exequatur decision will allow the arbitral sentence to be authenticated with enforceability (Art. 1719 and 1720 of the Belgian Judicial Code).

8.1.4 Does national law provide that limitation periods applicable to judicial actions should be suspended while ADR is ongoing?[4]

The suspension of limitation periods is regulated as follows: if a dispute falls within the framework of the rules on consumer protection within the Code of Economic Law, the suspension applies for ADR-proceedings regulated in that code, starting when the qualified entity has received a demand for out of court resolution of a consumer dispute (Art. XVI.27 of the Code of Economic Law).

Besides, the provisions of ordinary law apply.

Art. 1730, §1 of the Belgian Judicial Code provides that during mediation, the limitation period is suspended during one month if a mediation proposition is issued by one of the parties involved. Art. 1731, §3 provides the suspension of the limitation period during the entire mediation procedure if the mediation agreement is signed by the parties. A proposal for voluntary mediation made by registered letter initially suspend the statute of limitations for 1 month beginning from the presumed time of reception of the letter.

8.1.5 Please specify if national law establishes rules providing for recourse to judicial action following an (unsuccessful) ADR hearing[5].

If the parties do not find the Ombudsman, mediation or conciliation procedure satisfactory, they can still start an arbitration procedure or take the matter to court even when an agreement has been reached. In any event, the procedure is non-binding.Therefore, judicial recourse is still possible.

Conciliation (Art. 731-734 of the Belgian Judicial Code) is voluntary. In any case, the success of the procedure depends on the willingness of the parties. Indeed, one cannot be forced to participate

[4] The Directive on Consumer ADR provides that "the existence of an effective system for collective claims and easy recourse to ADR should be complementary". Consumer ADR is relevant not only for individual claims but also for collective ones; it can provide consumer with a means to reduce costs and save time.

[5] Per Arts.10-12, Directive on Consumer ADR.

constructively in a conciliation procedure, and the procedure ends when one of the parties or both are not willing to cooperate.

It has to be underscored that, in principle, the judge has no adjudicative power in such a case. The Judicial Code provides that before going to court, a party and/or some of them and/or all the parties can submit voluntary the dispute to the judge exclusively with the view of obtaining a settlement. Parties can simply write a letter to the clerk of the court asking to summon the opposite party or parties. The judge has to draft a procès-verbal of the conciliation session. In practice judges often make use of negotiation or mediation skills in their attempt to bring parties to an agreement. They suggest possible solutions for the dispute and even try to nudge the parties gentle into the direction of a settlement. If an agreement is reached, it will be laid down in the procès-verbal of the conciliation session and will be enforceable as a judgement. Under no circumstances, the agreement can be appealed. In case the conciliation fails, the judge will draft a procès-verbal of non-settlement and each party may consider judicial proceedings.

When the hearing is successful and the parties reach an agreement in the case of mediation (if the mediator was accredited, Art. 1733 of the Belgian Judicial Code) and arbitration (Art. 1719 et s. of the Belgian Judicial Code), parties can have their agreement homologated by court. The courts have no power to review the agreement to its substance. The judge can merely examine whether the agreement does not violate public order or the interest of children, if applicable.

An arbiter takes binding decisions, likes judges do. Therefore, the principle of res iudicata applies to his decisions. Judicial recourse is excluded, except when grounds for annulment exist as determined by Art. 1717 of the Belgian Judicial Code or a marginal control within the exequatur procedure. The latter stated recognition does not go against this principle, as the judge holds only a marginal power of review.

8.1.6 Is there judicial review of decisions and awards made by ADR entities? If so, by which court or tribunal is this oversight made? Is it ordinary or specialised?

As stated in the previous question, if parties reach an agreement within mediation or when the arbiter decides, parties can submit this agreement or decision to court for homologation in order to make it enforceable. This does not imply judicial review but marginal testing. The court of first instance is competent for the arbitral sentence (Art. 1719 of the Belgian Judicial Code) and the relevant competent court holds competence for agreements stemming out of mediation procedures (Art. 1733 of the Belgian Judicial Code).

Source(s): Belgian Judicial Code

9. THE EXAMINATION OF CONSUMER PROTECTION LAW IN NATIONAL PROCEDURAL LAW: RESPECT FOR THE PRINCIPLES OF THE EFFECTIVENESS AND EQUIVALENCE OF CONSUMER PROTECTION LAW AND EX OFFICIO CONTROL

9.1 The basis of ex officio control of consumer protection law in national law

9.1.1 Is it clear in the national legal system when consumer protection law should be applied ex officio? Is the ex officio control of consumer protection law established as an obligation or as a (discretionary) power of the judge in national procedural law?

There exists a general obligation in the Belgian legal order to apply the law ex officio. This was established in a judgment of the Belgian Supreme Court (Cour de Cassation/Hof van Cassatie) in 2005. Following the legal maxims 'iura novit curia' and 'da mihi factum dabo tibi ius', the Court held that a judge is under an obligation to decide upon a claim in conformity with the applicable legal rules and 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, provided that he respects the rights of the defence (Cass. 14 April 2005, n° C.03.0148.F, www.cass.be).

It should be highlighted that the judge can only embark upon an ex officio application of the law on the basis of the facts that the parties have specifically advanced in support of their claim. Facts that are being used but are not really relevant for the claims that the parties have put forward, so-called peripheral facts ('simplement ou incidemment produits') do not activate the obligation of the judge to apply the law ex officio. In such cases, the judge has discretion whether to invoke pleas of law ex officio based on those facts. It is a question of intensity. In a judgment of 2010, the Supreme Court has provided for a clear statement in that regard:

> «…le juge est tenu d'examiner la nature juridique des prétentions formulées devant lui par les parties et, quelle que soit la qualification que celles-ci leur ont donnée, peut suppléer d'office aux motifs invoqués, dès lors qu'il n'élève aucune contestation dont les parties ont exclu l'existence, qu'il se fonde uniquement sur des faits régulièrement soumis à son appréciation et qu'il ne modifie pas l'objet de la demande. Il a en outre l'obligation, en respectant des droits de la défense, de relever d'office les moyens de droit dont l'application est commandée par les faits spécialement invoqueés par les parties au soutien de leurs prétentions. » (Cass. 2 April 2010, n° AR C.09.0204.F, www.cass.be)

The obligation that has been laid down in the judgment of 2005 decides a point that was heavily debated in legal doctrine – obligation/discretion, all rules/public policy rules – and applies to all rules of law, whether of public policy or of supplementary nature. (See for a brief recapitulation of this discussion: G. de Leval, "L'action en justice" in G. de Leval (Ed.), Droit judiciaire, Tome 2 : Manuel de procédure civile (Larcier, 2015), 131-132).

There is no specific rule for consumer protection law.

Prior to that judgment, the general rule was that only rules of public order should be applied ex officio and that consumer protection rules did not fall in that category. They were part of a body of rules called 'protective rules', which had as an object the protection of a specific category of people (the consumers), that could only be invoked by the protected party itself. This distinction 'rules of public order' vs 'protective rules' came from contract law and the theory of the nullity of contracts, whereby only contracts that were contrary to public order were automatically void, and made its way into procedural law. (see for a schematic overview: V. De Wulf, "L'office du juge en matière de contrats destinés aux

consommateurs" in C. Verdure (Ed.), Contrats et protection des consommateurs (Anthemis, 2016), 184). At present, Belgian procedural law is largely detached from its private law origins and contains a clear obligation to apply all law ex officio. Yet, many contract lawyers (and more broadly private lawyers) seem to maintain their division of 'public order' vs 'protective rules' for the purposes of ex officio application, treating the ECJ's case law on ex officio application as exceptionally. This is important to note since many civil law judges have a contract/private law background.

All this does, however, not mean that consumer law was not applied ex officio before the 2005 judgment. Various general obligations that existed in Belgian procedural law (e.g., obligation of the judge to control his territorial competence ex officio in a number of instances) – or specific obligations emanating from consumer law – (e.g., competence of a judge to mitigate penalty clauses in consumer credit contracts) already provided for ex officio control of consumer law before the 2005 judgment.

An important feature in the case law of the Court of Justice regarding the ex officio application of EU consumer law is that of unfair forum clauses, obliging the consumer to bring or defend its case against a trader before a court different from the competent court of the consumer's place of residence (e.g. Case C-137/08, VB Pénzügyi Lízing). Under Belgian law, the consumer is protected against such clauses on the basis of the rules on territorial competence contained in the Belgian Judicial Code . According to Belgian procedural law, the territorial competence of a judge in a number of cases, including a variety of typical consumer cases (consumer credit (see Article 628, 8° of the Belgian Judicial Code), insurance contracts (Article 628, 10° of the Belgian Judicial Code, energy/water bills (Article 628, 25° of the Belgian Judicial Code), and telephone bills (Article 628, 25° of the Belgian Judicial Code)), should be assessed ex officio, providing protection against forum clauses in cases where the consumer is the defendant. There may be discussion as to whether the rules on territorial competence are of public policy or merely have a protective nature, meaning that the protected party has to invoke them. It has been rightly argued that this would somehow annihilate the protective effect of the rules, obliging a protected party to appear before a court solely to contest its competence (see J. Laenens, K. Broeckx, D. Scheers and P. Thiriar, Handboek gerechtelijk recht (Intersentia 2012), p 245-247). Also the case law supports the view that a judge applies these special rules on territorial competence ex officio, regardless of their status. Further to this, it appears from case law that judges assess their territorial competence ex officio in default proceedings or in unilateral proceedings, of which summary proceedings for the payment of a sum of money ('injonction de payer') are most relevant to a consumer.

(see P. Thiriar, "Verstek van de verwerende partij en territoriale bevoegdheid", case note under Justice of the Peace of Zomergem, 6 January 2006, Rechtskundig Weekblad 2008-09, 382; see also Court of the Arrondissement of Liège, 27 May 2010: « Comme pour les procedures mues par défaut, les procedures sur rêquete unilatérale peuvent faire l'objet d'un déclinatoire de competence territoriale soulevé d'office par le juge. Il appartient à ce dernier de soulever tous les moyens, même étrangers à l'ordre public, que la partie adverse aurait pu soulever si elle avait été présente à la cause. » Note that the obligation to invoke pleas of law ex officio in default proceedings is heavily debated. Other judges are of the opinion that only rules of public order should be invoked ex officio. The legislator has decided this debate in favour of the latter, providing in Article 806 of the Belgian Judicial Code that only rules of public order should be invoked ex officio in default proceedings (it remains to be seen which effect this will have on unilateral

proceedings). This makes it particular relevant what kind of standing is attributed to consumer protection rules, which is not entirely clear under Belgian law. See infra, 11.3.1.)

Lastly, it should be pointed out that Article 630 of the Belgian Judicial Code provides that every agreement in violation of Articles 627, 628, 629 and 629bis of the Belgian Judicial Code is automatically void when entered into before the dispute has arisen. It further states that when a defendant defaults, a presumption exists that the defendant disputes the competence of the court before which the dispute is pending.

Since the Justice of the Peace is far more local than any other judge, this system largely protects consumers against unfair forum clauses requiring them to travel to another judicial district to defend themselves. (One may however argue that, in the light of the Court of Justice's judgment in Pannon (Case C-243/08, para. 33), the obligation is too rigid, not allowing a judge to deviate from it after having informed the consumer of the consequences of the clause and the latter not objecting to it.) That being said, no general rule of territorial jurisdiction exists in favour of the Justice of the Peace of the place of residence of a consumer. In case of a forum clause in a typical consumer sales contract, a consumer will need to rely on the unfairness of the forum clause to contend the territorial jurisdiction of a judge located in a different judicial district. This follows from Article 83 of Book VI of the Belgian Code of Economic Law (CEL), which provides that a contractual clause is unfair if it designates another judge than the judge provided for in the general rule on territorial competence of Article 624, 1° (place of the defendant), 2° (place where obligations in the contract have arisen or must be fulfilled) and 4° (in case a person does not have a place of residence in Belgium nor abroad, the place where the bailiff has spoken in person to the defendant) of the Belgian Judicial Code, thereby explicitly excluding the possibility of a forum clause in favour of the judge of 'the place of residence chosen for the purposes of the execution of the contract' contained in Article 624, 1°, 2° and 4° of the Belgian Judicial Code. Such clause is prohibited and void and the judge should invoke the voidness of the clause ex officio (e.g. Justice of the Peace of Grimbergen, 12 September 2012, T. Vred. 2014, afl. 1-2, 83). (The contract continues to exist in case it can continue without the unfair contractual term.) The consumer is not allowed to defer the rights that have been conferred upon him by the section on unfair contractual clauses, which may again be problematic for forum clauses in the light of Pannon. (Article 84 of Book VI CEL) A list of other unfair contractual clauses that a court has to assess ex officio can be found in Article 83 of Book VI CEL.

Also other provisions of consumer protection law give judges the discretion to disapply or mitigate unfair contract clauses. Often they are enacted in the implementation of EU consumer law directives. Concerning consumer credit, Article 199 of Book VII CEL provides that in case a consumer is being penalized or being demanded payment of damages in a way not provided for by the CEL, he is being discharged of that obligation by the law. It can be inferred from this that a judge will have the <u>obligation</u> to apply this rule ex officio. Moreover, when clause provides for penalty payments or damages in case of a failure to honour contractual obligations, while in principle allowed, a judge has the <u>discretion</u> to mitigate or to cancel out these clauses in case they are deemed to be too high. This possibility finds its origin in the 1957 Law concerning hire-purchase and the financing of it (Article 10(2) concerning hire-purchase, article 19(2) concerning normal consumer loans and Article 19octies(2) concerning personal consumer loans) and judges have applied the provisions and their modernized versions frequently (e.g.,

Justice of the Peace of Ath-Lessines, 24 September 2003, Jaarboek Kredietrecht 2003, 125). Concerning contracts for financial services concluding at distance, Article 62 of Book VI CEL provides that a contractual clause reversing the burden of proof regarding the duties imposed upon an undertaking or financial services provider, is prohibited and void. Every clause whereby the consumer renounces a right conferred upon him shall be treated as non-written. It appears from the language of this provision that a court will be obliged to disapply such clauses ex officio.

A number of judges have directly referred to EU law obligations to invoke consumer law ex officio. While this may have been necessary before the judgment of the Supreme Court of 2005 – but even this can be doubted given the various possibilities existing under Belgian law to apply consumer law ex officio – it is no longer necessary to do so. However, judges keep on referring to the case law of the Court of Justice as a basis for the ex officio application of EU law (see, e.g., Justice of the Peace of Antwerp, 29 January 2015, Rechtskundig Weekblad 2015-2016, 157) and it may come nevertheless in handy in cases where Belgian law would not allow the application of consumer law ex officio.

9.1.2 If there is an understanding of ex officio control of consumer protection law in the national legal, what is this control understood to encompass/not cover?

The case law of the Court of Justice generally encompasses three duties: raising points ex officio, a limited duty to gather evidence, and the possibility to alter the petitum.

As to the invocation of consumer law, there exists a duty to invoke the law ex officio, including all rules of consumer protection. This regardless of their status, whether they are being considered as rules of public policy, protective rules or rules of a supplementary nature. The obligation to apply the law ex officio is of course subject to the conditions laid down in the Supreme Court judgment of 14 April 2005, as described under 11.1.1. Note also that in case of default proceedings, the new Article 806 of the Belgian Judicial Code provides that judges are only obliged to raise rules of public order ex officio.

When it comes to the gathering of evidence, the judge has the possibility to support the consumer on the basis of a number of general rules concerning the gathering of evidence. Article 871 of the Belgian Judicial Code provides that a judge can oblige a party to submit evidence that is in their possession. This lies within the discretion of the judge and is not an obligation. For the judge exercising its discretion, a number of definite, serious and converging presumptions must exist that a party or a third person holds evidence proving a relevant fact (Article 877 of the Belgian Judicial Code). The failure to submit a piece of evidence to the judge is sanctioned by way of damages (Article 882 of the Belgian Judicial Code). More generally, the judge can order measures of inquiry ex officio without being asked for by the parties. He must, however, keep track of the ambit of the dispute and take the rights of the defence into account (see J. Laenens, K. Broeckx, D. Scheers and P. Thiriar, Handboek gerechtelijk recht (Intersentia 2012), p 542-543). The possibility for the Belgian judge to take measures of inquiry ex officio is thus certainly present and goes way beyond the obligation contained in Pannon.

When it comes to the petitum, the picture is somewhat nuanced. In general a judge does not have the competence to alter the petitum. However, Article 807 of the Belgian Judicial Code provides that a

pending claim can be expanded or altered as long as new submissions are based upon a fact or act that was contained in the initial application. There is thus always the possibility to adapt claims during the proceedings, provided that they are not based on new facts. While a judge may not ex officio alter the petitum, he may always provoke an alteration of the petitum by inviting parties to debate the ambit of the petitum (See G. de Leval, "L'action en justice" in G. de Leval (Ed.), Droit judiciaire, Tome 2 : Manuel de procédure civile (Larcier, 2015), 124). Next to that, Article 808 of the Belgian Judicial Code allows under certain circumstances even the bringing of additional claims. Further to this, a number of provisions of consumer law and contract law allow a judge to mitigate or disapply clauses containing disproportionate contractual penalties or conventional interests. See, Article 199 of Book VII CEL and Articles 1153, fifth paragraph (conventional interests) and Article 1231(1) (contractual penalties) of the Civil Code. It should also be pointed out that the legal qualification of the object of the claim can be altered ex officio by the judge in case he deems it to be incorrect. For example, a court could requalify a damages claim based on non-contractual liability into a claim based on contractual liability. This is not considered to be an adaptation of the object of a claim (See G. de Leval, "L'action en justice" in G. de Leval (Ed.), Droit judiciaire, Tome 2 : Manuel de procédure civile (Larcier, 2015), 164-165).

9.1.3 Is the party who claims to be a consumer required to establish his or her consumer status, the existence of a consumer contract and that consumer law applies to the dispute? Is this required even if the consumer has no legal representation?

In principle, the burden of proof is on the party who brings a claim. However, given the fact that a judge is obliged to apply the law ex officio on the basis of the facts submitted to him, this means that he will also be under an obligation to establish whether consumer law applies to the dispute. This evidently means that he will have to establish whether he is dealing with a consumer contract, a consumer and a party that is an undertaking bound by consumer law. An example can be found in the judgment of the Court of Appeal of Gent of 4 January 2012 (Nieuw Juridisch Weekblad 2012, 255), upholding a judgment at first instance in which consumer law was applied ex officio in order to declare unfair contractual clauses void. In that first instance judgment, the court had decided by itself that the contract between a hospital and a patient was a consumer contract and that the hospital was an undertaking for the purposes of consumer law, even though the patient had not relied on his consumer status. It would have been somewhat illogical that a consumer would have to establish the application of consumer law by himself before a judge can invoke relevant consumer law provisions ex officio.

9.1.4 What information is available to judges and dispute resolution facilitators hearing consumer protection disputes? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a consumer protection dispute to be heard and b) for the court to engage in ex officio control?

<u>Dispute resolution facilitators: the Consumentenombudsdienst</u>

The Consumentenombudsdienst is an autonomous public service and encompasses a contact point as well as a department for the out-of-court settlement of consumer disputes (Article 5 of Book XVI CEL). The department for the out-of-court settlement of consumer disputes is competent to decide consumer disputes

in case no specifically qualified entity is competent (there are ten of those entities, all with their own rules of procedure: e.g., Ombudsperson for Telecommunications, Ombudsperson for Energy, etc).

Complaints can be submitted online or via post, email, fax or in person. The online platform provides for a link to all specifically qualified ombudspersons as well as a form to file a complaint with the Consumentenombudsman (http://www.consumentenombudsdienst.be/nl/klachtenformulier). The form asks for the following information:

- Personal data
- Name and data of the company involved
- Short description of the complaint
- Any document that could be useful (letters, contracts, bills, etc.)

There are, however, no minimum requirements prescribed by law. Yet, it appears out of the decision practice that a minimum of information is necessary to identify the company about whom the consumer is complaining as well as to identify the nature of the problem. In 2015, of 2921 complaints submitted, 278 were deemed to be inadmissible, of which 153 for being incomplete and 12 for not being identifiable. (see Annual Report of 2015, 5, available at http://www.consumentenombudsdienst.be/sites/default/files/content/download/files/jaarverslag_cod_2015_1.pdf).

Further to this, Article 19 of Book XVI CEL confers upon the Consumentenombudsdienst an ex officio power to go to the premises of the company concerned and to investigate the complaint. It can verify accounts, letters, reports and all documents of the company concerned that have a direct relationship with the complaint. Furthermore, it can demand from the members of the boards, agents and representatives of the company all necessary explanations and information and make all the necessary verifications as required by the investigation. Experts may assist the Consumentenombudsdienst when required by it. (Article 19(1)&(2) of Book XVI CEL). It appears from this that a consumer will be properly assisted in the gathering of extra information when necessary as soon as he has submitted a minimal amount of factual information in support of his complaint.

Judges

The normal rules regarding applications apply in court proceedings. A consumer is not required to provide other information than the information normally provided for in an application. Article 702 of the Belgian Judicial Code requires, apart from the necessary identification of the parties, the application to include 'the subject of the claim and a short summary of the grounds'. These grounds will then be developed further in written submissions, which must expand upon 'the claims of the party as well as the grounds in fact and in law in support of every claim' (Article 744 of the Belgian Judicial Code). These submissions should also include an inventory of all evidence submitted to the court (Article 742 of the Belgian Judicial Code). Only in instances where a case can be decided in 'short debates' immediately at the first hearing, further submissions should in principle not be made. This is relevant from a consumer protection perspective as the procedure is available for only a limited amount of situations, inter alia the recovery of non-contested claims and demands for a payment delay (Article 735(2) of the Belgian

Judicial Code). Given the nature of these proceedings, the necessary information will most likely be available by way of the application. In case information would be lacking, the court can always ask the parties concerned to submit evidence or exercise its discretion to adopt measures of inquiry.

There are no rules on minimal factual requirements for the purposes of ex officio control other than those regarding those connected to filing an application.

When it comes to the summary procedure to order payment contained in Articles 1338 and following of the of the Belgian Judicial Code, a summary procedure for the payment of a sum not surpassing 1860 euros ('injonction de payer'), the application should inter alia mention the object of the claim and a detailed description of the amount demanded, with a specification of the various parts of the claim as well as the grounds on which they are based (Article 1340, first para., 3° of the Belgian Judicial Code). Furthermore, the following should be added to the application: a photocopy of the document on which is claim is based and proof of the fact that the debtor was notified by the creditor (Article 1340, third para. 1° and 2° of the Belgian Judicial Code).

9.1.5 Who is responsible for providing this information? If the necessary information is not available to the court (or dispute resolution facilitator), is he or she under an obligation to investigate in order to be able to respond to a relevant consumer protection dimension of the case?

In principle, the burden of proof is on the party who brings a claim. This means that the information should be contained in the application or, when applicable, in the parties' submissions. Under Belgian law, a judge has the possibility to play an active role in the gathering of information but is not obliged to do so (see 11.1.2).

The same principle applies in regard of the dispute resolution facilitator, in casu the Consumentenombudsdienst. Parties filing a complaint should provide a minimum level of information. In case the Ombudsperson is not satisfied with the information he received, he can play an active role in collecting information (see 11.1.4). He is, however, not obliged to do so.

9.1.6 Will the court provide the consumer with any assistance in gathering factual information or advancing his legal arguments before the court? Please respond for the situation where: a) the consumer has legal representation and b) the consumer has no legal representation.

The court has discretion towards the degree of engagement in the gathering of factual information. The relevant provisions of the of the Belgian Judicial Code give the courts some latitude in this respect. No different rules exist depending on whether a consumer has legal representation or not. That being said, it cannot be excluded that a Justice of the Peace will be more accommodating towards a non-represented consumer.

Source(s):

- G. Closset-Marchal, La compétence en droit judiciaire privé (Larcier, 2016).
- J. Laenens, K. Broeckx, D. Scheers and P. Thiriar, Handboek gerechtelijk recht (Intersentia, 2013).

- G. de Leval (Ed.), Droit judiciaire, Tome 2 : Manuel de procédure civile (Larcier, 2015).
- G. de Leval and F. Georges, Droit Judiciaire, Tome 1: Institutions judiciaires et éléments de compétence (Larcier, 2014).
- http://www.consumerombudsman.be/en

9.2 The possibility for ex officio control of EU consumer protection law in dispute resolution proceedings

Note: For the purposes of 'other dispute resolution facilitators', we have taken the model of the Consumentenombudsdienst.

9.2.1 Is ex officio control of consumer protection law always possible when the procedure involves a full assessment of the claim on its merits?

Yes. On the basis of the judgment of the Supreme Court of 14 April 2005, courts have to apply the law ex officio, including consumer protection law. Problems may arise, however, in default proceedings since the applicable provision, Article 806 of the Belgian Judicial Code, was amended. (See J.-F. van Drooghenbroeck, "Réajustement de la protection du justiciable défaillant" in J.-F. van Drooghenbroeck (Ed.), Le code judiciaire en pot-pourri. Promesses, réalités et perspectives (Larcier, 2016), 197-249.)

Yes, the Consumentenombudsdienst applies all necessary rules in finding a solution. Even guidelines and codes of behaviour are being considered.

9.2.2 Can ex officio control be exercised even when the procedure does not involve an assessment on the merits?

Judges

Proceedings that do not go into the merits of the case are typically proceedings concerning the enforcement of a court decision/arbitral award or simplified proceedings such as an order for payment procedure. Since Belgian has no order for payment procedure that applies to consumers – apart from the European order – and the summary procedure to order payment allows the judge to go into the merits and embark upon ex officio control (see inter alia Justice of the Peace of Zomergem, 6 January 2006, Rechtskundig Weekblad 2008-09, 382; Justice of the Peace of Borgerhout, 18 May 1971, Rechtskundig Weekblad 1971-72, 1895) , I will focus on enforcement proceedings.

Enforcement proceedings are typical proceedings where the competent judge does not go into the merits of the case. Also under Belgian law, the general rule in enforcement proceedings is that the competent judge ('beslagrechter, 'juge des saisies') does not go into the merits of the case. Confronted with a request to enforce a judgment or another act, he will only evaluate the legality and the regularity of the enforcement without going into the merits of the case, apart from instances expressly provided for by the law (Cass. 1 December 2005, n° AR C.03.0030.N, www.cass.be). The only mitigation relates to the interpretation of the judgment or act (e.g., a notarial deed) that has given rise to enforcement proceedings: the juge des saisies is allowed to interpret the underlying decision provided that he does not distort its

goal or scope. (See F. Georges, « Les saisies conservatoires, les voies d'exécution et le règlement collectif des dettes » in G. de Leval (Ed.), Droit judiciaire, Tome 2 : Manuel de procédure civile (Larcier, 2015), 1234-1238 ; see further, G. de Leval, La saisie immobilière (Larcier, 2012), 137-138)

This is different in the case of the execution of arbitral awards. While the judge competent for exequatur proceedings does not have the power to go into the merits of the arbitral award, it has an obligation to apply rules of public policy. The application of consumer protection law will thus depend on how the judge evaluates the standing of consumer protection rules, which is not entirely clear under Belgian law. The same goes for arbitration award annulment proceedings. (See O. Caprasse, "L'arbitrage et la médiation" in G. de Leval (Ed.), Droit judiciaire, Tome 2 : Manuel de procédure civile (Larcier, 2015), 1418-1429)

Dispute resolution facilitators: the Consumentenombudsdienst

When it comes to the Consumentenombudsdienst, a complaint will always be assessed on the merits, unless the complaint was deemed to be inadmissible.

9.2.3 Please indicate if, per national procedural law, ex officio control can be exercised at the following stages of the procedure:

	Courts		Other dispute resolution facilitators	
	Possible to exercise ex officio control	Not possible to exercise ex officio control	Possible to exercise ex officio control	Not possible to exercise ex officio control
Ordinary proceedings	x		x	
Small claims	x		x	
Payment order	x		N/A	N/A
Provisional measures	x		N/A	N/A
Proceedings linked to enforcement	?	?	N/A	N/A
Enforcement proceedings			N/A	N/A
- Enforcement of payment order	N/A	N/A		
- Enforcement of arbitration award	X (see note under 11.2.4			
- Enforcement of mortgage		x		
- Enforcement of notarial deed		x		
Appeal proceedings (please specify:)	X (see note under		N/A	N/A

	11.2.4)			

9.2.4 What does ex officio control encompass in national procedural law?

See answer under 11.1.2.

Appeal proceedings under Belgian law encompass a full review of the decision at first instance. This means that an appeal judge is equally obliged to apply the law ex officio, subject to the same limitations as a first instance judge.

Source(s):
F. Georges, « Les saisies conservatoires, les voies d'exécution et le règlement collectif des dettes » in G. de Leval (Ed.), Droit judiciaire, Tome 2 : Manuel de procédure civile (Larcier, 2015), 1219-1429)

9.3 Other procedural mechanisms for the equivalent and effective protection of EU consumer law

9.3.1 Does national procedural law provide that rules of EU consumer law (as well as rules that aim to satisfy EU consumer law objectives) should be understood as having equal standing to national rules of public policy (which is to say, that for the purposes of domestic law, the consumer protection provision is understood to have equal standing to a rule that must be raised ex officio by the national court)?

Rules in Belgium can have three degrees of standing: public order, protective rules, and supplementary rules. Rules of public order are being defined as "la loi qui touche aux intérêts essentiels de l'Etat ou de la collectivité, ou qui fixe, dans le droit privé, les bases juridiques sur lesquelles repose l'ordre économique ou moral de la société". (Cass. 9 December 1948)

Legal doctrine is not clear about the status of consumer protection rules. In traditional private law theory, rules of consumer protection are not to protect public order but to protect the specific interest of a consumer. This has as a consequence that they have the standing of protective rules, which means that a judge is not obliged to apply them ex officio – the protected party has to invoke those rules himself and he cannot exclude the protection conferred upon him before a dispute has arisen – and that breaches of such rules can only lead to the relative nullity of contracts. Conversely, in case of rules of public order a judge is under an obligation to apply them ex officio and the violation of those rules leads to the absolute nullity of contracts.

As stated above, procedural law has emancipated itself from substantive private law, creating an obligation for a judge to apply the law ex officio regardless of its standing. Private lawyers have not really acknowledged that evolution and continue to apply the distinction. However, under the influence of the case law of the Court of Justice they now consider a number of consumer protection rules to be of public order as they have to be applied ex officio. Otherwise the Court of Justice's case law could not fit within their classic scheme. This is only limited to those rules of which the Court of Justice has ruled that

they have to be applied ex officio, the remainder of consumer law still being considered to be protective rules.

Further to this, it must be stated that a number of consumer law rules have obtained the status of public order rules through the case law or by way of how these rules were formulated in legislation. Also private lawyers consider these rules to be of public order.

That being said, the standing of the law does not make a difference when it comes to ex officio application. Since the judgment of 2005, all rules should be applied ex officio, regardless of their standing.

Two important exceptions exist however.

A first one concerns default proceedings. The recently amended Article 806 of the Belgian Judicial Code provides that in case of default proceedings, a judge is only obliged to control rules of public order ex officio. This is an important novelty, especially in the light of consumer protection. There is a presumption that weaker/poorer consumers tend to default more often for various reasons and therefore need a judge that protects their interests. Ex officio control should thus be available. However, given the fact that the status of consumer protection law is unclear in national law and that in procedural law ex officio control is not necessarily associated with rules of public order, the new Article 806 of the Belgian Judicial Code entails the risk that judges will no longer exercise ex officio control of consumer law. Of course, some consumer protection rules are considered to be of public order and other rules with public order standing may protect the consumer as well. Further to this, a consumer may oppose the judgment given on default, having the case retried on the merits and the judge being obliged to apply consumer law ex officio. Nevertheless, this evolution is to be monitored closely as it may lead to a deterioration of consumer protection in Belgium. (See J.-F. van Drooghenbroeck, "Réajustement de la protection du justiciable défaillant" in J.-F. van Drooghenbroeck (Ed.), Le code judiciaire en pot-pourri. Promesses, réalités et perspectives (Larcier, 2016), 197-249.)

A second concerns the possibility for the Supreme Court to apply consumer protection law ex officio. Whereas all judges are obliged to apply the law ex officio, the Supreme Court considers itself only obliged to apply rules of public order ex officio. Parties may also not raise rules that are not of public order for the first time in proceedings before the Supreme Court. This is somewhat contradictory since a) judges are obliged to apply the law ex officio and b) cassation proceedings can be instituted when a judge has violated the law. It is thus important for this matter that consumer protection rules should be considered as rules of public order. As stated above, the status of consumer protection law is however unclear and only a limited amount of consumer protection rules, albeit important, have explicitly been recognized as rules of public order. Next to that, it must also be pointed out that the Supreme Court's reluctance to apply the law ex officio is under growing criticism in legal doctrine (See J.-F. van Drooghenbroeck, "Voies de recours extraordinaires" in G. de Leval (Ed.), Droit judiciaire, Tome 2 : Manuel de procédure civile (Larcier, 2015), 868-872)

9.3.2 If ex officio control is not possible in certain types of proceedings or at a certain stage of proceedings (or for any other reason), does national procedural law provide for an alternative way of assessing consumer protection law?

Enforcement proceedings under Belgian law are not proceedings on the merits. The competent judge (juge de saisies) is not competent to go into the merits of the case. He merely has to supervise the lawful enforcement of the enforceable title. This means that he will not embark upon an ex officio control of consumer protection law. This may be problematic if the enforceable title was not subject to previous judicial proceedings in which a judge was obliged to raise consumer law ex officio. A good example is a notarial deed. When it comes to arbitral awards, the picture is somewhat different. There the competent judge must verify the application of rules of public policy. The problem here lies in the fact that the standing of consumer protection rules under Belgian law is not entirely clear. Similar remarks apply to annulment proceedings of an arbitral award.

Source(s):
C. Marquet, "Les défenses en droit judiciaire: vers un ordre public procédural" in H. Boularbah and J.-F. van Drooghenbroeck (Eds), Les défenses en droit judiciaire (Larcier, 2010), 15-59.

9.4 Ex officio control in payment order procedures

Note: The Belgian order-for-payment procedure is an out-of-court procedure for non-contested claims and is run by a bailiff after being instructed by the lawyer of the creditor. It only applies in a B2B context and not in a B2C context. Consumers have been deliberately exempted from the scope of the payment procedure as it would provide them with less protection, according to the legislator.

Whereas no payment order procedures concerning consumers as such exist in Belgium, a number of procedures available in the of the Belgian Judicial Code can be used as an alternative to an order for payment procedure ('short debates' in case of uncontested claims and 'summary procedure for the payment of a sum of money' for small amounts of money, contested or not). These are, however, simplified forms of a normal procedure, in which the judge has an obligation to exercise ex officio control.

That being said, this does not mean that Belgian consumers are not subject to order-for-payment procedures. What frequently happens in practice is that creditors sell their claims to Dutch factoring companies, who then make use of the European order-for-payment procedure to obtain payment from Belgian consumers. The power of the Dutch judge to exercise ex officio control will therefore be of great interest to Belgian consumers.

9.4.1 What information is available to the judge when a claim for the issuance of a payment order is made? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a claim for the issuance of a payment order to be granted and b) for the court to engage in ex officio control before a payment order is issued?

NA

9.4.2 What considerations will be assessed ex officio by the court (or other competent authority) before a payment order is issued?

NA

9.4.3 How is the consumer informed about the claim to issue a payment order against him or her? Does national procedural law make any provision for steps to be taken to ensure that consumers are informed of the claim for the issuance of a payment order so that he or she can contest it?

NA

9.4.4 If the consumer objects to the claim, what is the next step? Do the proceedings continue, in the context of which ex officio control can be exercised? Or are the proceedings transferred to ordinary proceedings for analysis on the merits of the claim?

NA

European Commission
An evaluation study of the impact of national procedural laws and practices on the equivalence and effectiveness of the procedural protection of consumers under EU law

JUST/2014/RCON/PR/CIVI/0082

National Report – Consumer Protection Strand

Bulgaria

Polina Pavlova and Kristina Sirakova

BULGARIA: LEGAL ANALYSIS

1. NATIONAL LEGISLATION IMPLEMENTING EU CONSUMER PROTECTION INSTRUMENTS

EU legislation	Transposing national legislation	Additional notes (e.g. if there is an overlap in application of legislation etc.)
Doorstep Selling Directive 1985/577/EEC	Law on Consumer Protection	
Package Travel Directive 90/314/EEC	Tourism Act, Decree on the Licensing of Touristic Services, Law on Consumer Protection, Distance Marketing of Financial Services Act	
Unfair Contract Terms Directive 1993/13/EEC	Law on Consumer Protection, Chapter 6	
Distance Selling Directive 1997/7/EC	Law on Consumer Protection	

Consumer Sales and Guarantees Directive 1999/44/EC	Law on Consumer Protection	
Unfair Commercial Practices Directive 2005/29/EC	Law on Consumer Protection	
Misleading and Comparative Advertising Directive 2006/114/EC	Competition Act	
Consumer Credit Agreement Directive 2008/48/EC	Law on Consumer Protection, Consumer Credit Act	
Timeshare Protection Directive 2008/122/EC	Law on Consumer Protection	
Consumer Injunctions Directive 2009/22/EC	Law on Consumer Protection	
Consumer Rights Directive 2011/83/EU	Law on Consumer Protection	
ADR for Consumer Disputes Directive 2013/11/EU	Law on Consumer Protection	

1. CONCEPT OF THE CONSUMER

1.1 Please outline the concept of the consumer in national law, indicating whether it is intended to be a uniform concept, whether it has been legislated for and where it can found (i.e. in a legislative provision, governmental guidelines, case law etc.).

§ 13 (1) of the Annex to the Law on Consumer Protection contains the following definition: Consumer is every natural person who purchases goods or uses services which are not intended for trade or other professional activity, and every natural person who acts as a contracting party according to this law outside of the frame of their trade or other professional activity.

This definition, however, is only intended for the purposes of this law. It does not codify a uniform concept.

Source(s): Supreme Court of Cassation, Case 173/2010; District Court Sliven, Case 595/2011; District Court Haskovo, Case 81/2013.

2. REGULATORY AUTHORITIES COMPETENT FOR CONSUMER PROTECTION ISSUES

2.1 What regulatory authorities, if any, are competent for enforcing consumer protection law? Please identify them, their nature (i.e. whether they are public or private or mixed) and the nature of enforcement.

The regulatory authority competent for enforcing consumer protection is the Commission for Consumer Protection. It is a public authority with competencies under the Law on Consumer Protection as well as under 10 sectorial pieces of legislation (e.g. the Law on Wine and Alcoholic Beverages; the Law on Consumer Credits etc.). The main activity of the Commission is the supervision of the market for dangerous goods, the control over unfair commercial practices as well as the removal of unfair standard terms in consumer contracts. According to Article 68l of the Law on Consumer Protection, when the Commission finds that certain commercial practice is unfair, the President of the Commission issues an order which prohibits the practice in question. The President may take the necessary measures either ex officio or upon request of a consumer (Article 68l para 4 of the Law on Consumer Protection).

According to Article 186 para 3 of the Code of Civil Procedure, the Commission can also file certain claims under Article 186 para 1 (see Question 7.2).

The Minister of Economy also plays an important role at the regulatory level of consumer protection. He proposes and issues regulations on consumer protection; provides the list of qualified organizations having standing to file claims to protect the collective interest of consumers; provides the list of the representative consumer associations. The Minister of Economy is consulted by the National Council for Consumer Protection which consists of vice-ministers and representatives of consumer associations.

The European Consumer Center in Bulgaria also facilitates the consumer protection. Its function is mainly to provide information to consumers and answer questions of consumers and consumer associations. Furthermore, it provides assistance to consumers in case of problems related to cross-border contracts with undertakings in the Member States.

Source: Zlatka Sukareva, Potrebitelsko pravo, 2015, p. 36 et seq.

2.2 Is there a specific venue for this type of enforcement and does this limit the jurisdiction of courts/ADR fora (even if only initially)?

No, there is no specific venue for this type of enforcement.

2.3 Can criminal prosecutions be initiated for violations of consumer protection rules? How serious must the infringement be? What are the penalties and sanctions? And might these prosecutions lead to criminal penalties or sanctions? Can individual consumers piggy back on these claims (e.g. via a partie civile method)?

There is a so-called administrative criminal procedure – first the violation of consumer protection rules is established (it can be anything, e.g. violation of the rule on labelling of products suffices) and an administrative order is issued; then deadline of 6 months to issue a so-called ‘criminal order’. The sanction is determined according to the seriousness of the violation, any mitigating and aggravating circumstances, the financial situation of the person etc. The criminal order can be appealed against before the regional court. -- Administrative Violations and Sanctions Act (= Закон за административните нарушения и наказания).

According to Art. 33 para. 2 of the Administrative Violations and Sanctions Act, in case the activity that gave rise to the administrative criminal procedure turns out to be a crime, the administrative criminal procedure is stopped and the file is sent to the prosecutor.

In the criminal proceedings the victim can piggy back on the claim (Art. 84 et seq. of the Code of Criminal Procedure).

2.4 Is there judicial review of decisions of consumer regulatory authorities? If so, by which court is this judicial oversight made? Is the forum an ordinary or a specialised court or tribunal?
Yes, there is judicial review under the Code of Administrative Procedure. According to its Article 296 para 1, the administrative courts are competent.

2.5 Does the national legal system provide for a mechanism of cooperation between its national regulatory authorities and those of other Member States?
The European Consumer Centre is a part of the ECC-Net and is cooperating with the Consumer Centres in other Member States.
The Commission for Consumer Protection coordinates and is a contact point on three major systems for exchange of information in the EU regarding food safety.

3. LEGAL AID

3.1 Is legal aid available to consumers in: a) bringing a claim and b) defending a claim before a court?
Legal aid is available to every natural person (Art. 5 of the Law on Legal Aid). There are no special rules for consumers.

3.2 For what kinds of disputes and actions is legal aid available? (NB: legal aid might not be available for consumer or contractual disputes but be available instead for a related action, e.g. actions relating to debt, mortgage arrears, eviction etc.)
Legal aid is available for all civil, administrative and criminal proceedings before all courts (Art. 1 of the Law on Legal Aid).

3.3 What requirements must be satisfied for the consumer to be entitled to legal aid? Please specify if there are any additional limitations to its availability.
Legal aid shall be provided to persons who are eligible for receiving social aid monthly allowances under the Rules on the Application of the Social Aid Act and to persons hosted in specialized institutions for providing social services, Art. 22 of the Law on Legal Aid. In order to decide whether to grant legal aid in form of legal representation, the court will take into consideration all relevant financial and social circumstances of the applicant, Art. 23 Nr. 3 of the Law on Legal Aid.

3.4 What does legal aid encompass? (i.e. (only) general advice, (only) assistance in preparing the case, (only) assistance with negotiation of settlements, (also) representation).
Legal aid encompasses assistance in preparing the case, assistance with negotiation of settlements, representation (Art. 21 of the Law on Legal Aid).
Regarding the possibility of an exemption from court fees, see question 6.1.

4. COSTS

4.1 What are the costs of different types of procedures before courts? Are there exemptions to the payment of fees and expenses? How can costs be paid?

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Court fees						
Court expenses						
Exemptions						

Court fees: The court fees amount in every case to 4% of the claim value, however to not less than 50 leva = ca. 25 EUR (Art. 1, 3 of the Tariff of Court Fees collected according to the Law on Civil Procedure).
Court expenses: They depend on the circumstances of the case.
Exemptions: The claimant can ask the court to exempt him from paying the fees and expenses in case he cannot afford paying. When deciding on the request the court takes into consideration the financial situation of the claimant and his family, his family status, his health condition, his age etc. (Art. 83 para 2 of the Code of Civil Procedure).

5. STANDING AND REPRESENTATION IN CONSUMER DISPUTES

5.1 Does national law limit the standing of the individual consumer in respect of the claim that can be made and the forum before which it can be brought?
No, there is no special rule on standing of individual consumers.

5.2 Other than individual consumers, who or which bodies have standing in consumer protection disputes and for what types of claim? If the action is not brought by the individual consumer, what requirements of representation must be satisfied?
The list of qualified consumer associations prepared by the Minister of Economy lists all associations which have a legal interest to claim termination or prohibition of actions or practices infringing the collective interests of consumers.
According to Art. 186 para 1 of the Law on Consumer Protection, the associations for consumer protection can file a claim for the termination or prohibition of actions or practices infringing the collective interests of consumers. The practice at issue has to be contrary to the laws related to consumer protection (the relevant laws, including EU legislation, are listed in Art. 186 para 2 of the Law on Consumer Protection). The claims are handled according to the collective redress procedure under the Code of Civil Procedure. Qualified consumer organisations of other Member States can also be allowed to bring such claims (Art. 186a of the Law on Consumer Protection).

The associations can also file claims for compensation of the damage caused to the collective interest of the consumers. If compensation is granted, it is received by the association and has to be spent only for the purposes of consumer protection. (Art. 188 of the Law on Consumer Protection).
If at least two consumers have been damaged, the consumer associations can represent them in the court proceedings for compensation, provided that: the consumers can be identified; the damage is of the same nature and caused by the same undertaking; the association has written authorisation for filing the claim for compensation and for procedural representation from at least two consumers (Art. 189).
With regard to the Consumer Protection Commission, see question 4.1.

5.3 If a consumer wants to bring or defend an action relating to a consumer protection dispute, is there a legal (or otherwise formal) requirement that he or she has legal representation? Please specify for both judicial and ADR fora and the bodies, associations or authorities that can provide this representation.
There is no formal requirement that the consumer has legal representation for both judicial and ADR fora. The procedure before the ADR entities is a default procedure (Article 183d para 4 of the Law on Consumer Protection).

6. ACTIONS BEFORE COURTS

6.1 Jurisdiction and competence of the courts in consumer disputes: General structure and special procedures aimed at protecting consumers

6.1.1 Are ordinary courts competent to hear such claims? Is there also a specialised tribunal for consumer protection disputes?
Yes.
There is no specialised tribunal for consumer protection disputes.

6.1.2 Which courts are competent to hear consumer protection disputes at first instance and in appeals? Please specify the court, in light of the value of the claim (and identify any other factors that are relevant in allocation jurisdiction).
With the exception of small modifications, in cases of consumer protection disputes the competent courts are to be determined according to the general rules under the Code of Civil Procedure: The regional court is the court of first instance if the value of the claim does not exceed 25 000 leva. In case of higher value of the claim, the district court will act as court of first instance (Art. 103 et seq. of the Code of Civil Procedure). As a general rule, the local jurisdiction is determined by the place of residence or seat of the defendant, Art. 105. A special rule for consumers provides that a consumer can also file his claim at the court at the place of his current or permanent residence (Art. 113 of the Code of Civil Procedure). The latter rule is applicable only to individual consumer claims and not to collective redress cases (Supreme Court of Cassation, decision from 30.12.2010, case № 4/2010).
- The claims filed by consumer associations under Art. 186 et seq. of the Law on Consumer protection (see question 7.2) are to be filed at the court of the place where the infringement was committed, where the defendant has his residence or seat (Art. 190 of the Law on Consumer Protection).

6.1.3 What is the nature of the procedure at first instance, e.g. is it a simplified or a summary procedure, and is there an assessment of the merits? Please specify in light of the value of the claim (and identify any other factors that are relevant in allocating jurisdiction).

- A fast track procedure is regulated in Art. 310 et seq. of the Code of Civil Procedure and is applicable (among others) to consumer disputes when the subject of the claim is a consumer right protected by Art. 1 of the Law on Consumer Protection. The procedure is only applicable to individual claims and only when the consumer is acting as claimant (Cf. O. Stamboliev in: Stalev, "Bulgarsko grazhdansko procesualno pravo", 2012, p. 760).

This fast procedure is simplified and with shorter time limits both for the court and for the parties of the dispute. Nevertheless, the parties have the possibility to present evidence and there is also an oral hearing. The rules foresee that the judge shall invite the parties to reach a settlement.

6.1.4 Please identify the formal requirements that must be satisfied for a consumer dispute to be heard before a court. These might include time limits applicable to the filing of the action/defence, representation requirements etc.

In this regard, the Code of Civil Procedure does not contain any special rules on consumer disputes.

6.1.5 In respect of the claims and relevant procedures available in the national legal system, what kind of relief might be available in consumer protection disputes? (monetary remedies, injunctions, skimming off etc.)?

Individual claims for compensation (monetary compensation of the damage);

Collective claims for compensation;

Collective claims for cessation of the infringement (injunction).

6.1.6 Please provide a brief overview of the role of parties and judges in civil proceedings generally (e.g. with reference to the principle of party disposition, the obligation of parties to make and prove factual allegations and to make and provide legal arguments, the possible role of the court). This overview should be brief; these issues will be dealt with in more detail in the questions that follow.

The principle of party disposition sets up the general framework for the role of the parties and the judge in the civil proceedings. However, this principle applies together with the inquisitorial principle, according to which the court undertakes all measures necessary for moving forward the course of the proceedings until a decision is reached. During the hearing the judge has to ask questions to the parties in order to clarify the facts of the case and also to explain their relevance for the proceedings to the parties (Art. 145 Code of Civil Procedure). It points out inconsistencies in the allegations of the parties and gives them the possibility to remove them. The court also explains: which facts and circumstances do not need to be proven; the distribution of the burden of proof; which of the alleged facts are not supported by evidence (Art. 146 of the Code of Civil Procedure).

According to the principle of the adversarial process, each party has to make the factual allegations, which, according to it, are relevant for the existence of the disputed regal relationship, and to provide evidence for these facts.

Source: O. Stamboliev, in: Stalev, "Bulgarsko grazhdansko procesualno pravo", 2012, p. 86 ff.

6.2 Small claims

6.2.1 Does a small claims procedure exist in the Member State? If yes, is it a specialised or simplified procedure?
No national small claims procedure exists in Bulgaria – except for the European Small Claims Procedure.

6.2.2 What are the value thresholds for claims brought under the small claims procedure? Moreover, are there any other factors that shape the use of the small claims procedure (including the nature of the claim, the area of consumer protection law into which the claim falls etc.)?
See Question 8.2.1.

6.2.3 What forms must be completed to raise the application? Who assists the consumer in completing these forms?
See Question 8.2.1.

6.2.4 How can an application for a small claim be made (e.g. online, by post or in person)?
See Question 8.2.1.

6.2.5 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?
See Question 8.2.1.

6.2.6 Are the costs of the successful party reimbursed?
See Question 8.2.1.

6.3 Claims other than small claims

6.3.1 If a consumer protection dispute does not qualify as a small claim, what other procedures are available? What are the value thresholds and other factors determining the use of such procedures?
See the answers to Questions 7.2 and 8.1.

6.3.2 How can such claims be made? Please specify if the applications can be made online, or by post or in person.
See the answers to Questions 7.2 and 8.1.

6.3.3 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?
See the answers to Questions 7.2 and 8.1.

6.3.4 Are the costs of the successful party reimbursed?
See the answers to Questions 7.2 and 8.1.

6.4 Claims for the issuance of a payment order

6.4.1 Does an order for payment procedure exist in the national system? Is it a simplified procedure?

Yes. A simplified procedure is provided for in Chapter 37 (Articles 410 et seq.) of the Code of Civil Procedure (for domestic cases).

There are two types, see question 8.4.3.

6.4.2 Which authorities or courts are competent to hear claims for the issuance of payment orders?

Competence lies with the regional court at the permanent address or the seat of the debtor (Art. 411 para 1). Within three days, the court has to examine (ex officio) whether it has local jurisdiction. If it does not, it sends the case to the competent court (Art. 411 para 1).

6.4.3 Are there any formal requirements that must be satisfied for the application for the issuance of a payment order to be made (e.g. standard forms, representation by a lawyer, the detail of description required, the need to provide written evidence etc.)?

There are two types of payment order proceedings.

1) The first one applies to claims up to 25 000 leva (approx. 12,780 EUR) (Art. 104 Nr. 4, Art. 103 of the Code of Civil Procedure)

The application form to be filled by the claimant is provided by the Ministry of Justice in Reg. № 6 from 20.02.2008. In particular, the claim needs to be sufficiently individualised, i.e. the exact amount of the claim and the legal relationship on which it is founded need to be indicated.

A proof of payment of the court fee needs to be attached to the application.

2) The second type applies regardless of the amount of the claim. Again, the application form is provided by Reg. № 6 from 20.02.2008. Unlike the first type of proceedings, here a written proof of the claim is required. The applicant needs to provide a document (a list of admissible documents is provided for in Art. 417) on which the claim is based. If the application is granted, the court issues a writ of enforcement together with the payment order so that enforcement can start immediately.

6.4.4 What information is generally available to the authority or court when a claim for the issuance of a payment order is made?

In general, it is only the information provided by the parties, see question 8.4.3. In second type of proceedings, the court will thoroughly examine the document submitted by the claimant, its regularity and whether the claim is due.

6.4.5 What opportunity is available for a defence/statement of opposition to be advanced? How should this be done and what is its effect? Please specify if the means of advancing a defence differ depending on the value of the claim and the court dealing with it.

Again, it is necessary to differentiate between the two abovementioned types of proceedings, see 8.4.3.

1) If the court has issued a payment order (which, at least according to the legislator, should happen within 3 days, Art. 411 para 1 and 2 of the Code of Civil Procedure), the debtor can oppose in writing the order or a part of it within a time-limit of two weeks which starts with the service of the order, Art. 414. It is not necessary to substantiate the opposition, Art. 414 para 1. Again, a standard form is provided.

If the debtor has opposed, the court informs the creditor that he can initiate declaratory proceedings with regard to the claim within one month, Art. 415. If the court decides in favour of the claimant, the enforcement order enters into force and the court issues a writ of enforcement. In this case, he court indicates on the order that a writ of enforcement has been granted.

2) Also for this case the law foresees the possibility to oppose within a time limit of two weeks. The statement of opposition is filed at the court which has issued the order. The requirements are as in the case above and the creditor has again one month to initiate declaratory proceedings. If the creditor does not react within a month, both the order and the writ of enforcement become invalid (Art. 419, 414, 415).

Together with the statement of opposition, however, the debtor can also challenge the court decision granting the order for payment by filing an appeal at the district court (second instance) (Art. 419).

Normally, neither filing an opposition nor filing an appeal results in an automatic stay of the enforcement (Art. 419, 420). However, if the debtor files a motion to stay the enforcement proceedings supported with convincing written proof, the court may stay the enforcement (Art. 420 para 2).

6.4.6 What is the effect if the claim is uncontested, i.e. if there is a lack of defence/statement of opposition?

Then the payment order and the writ of enforcement remain valid. The law provides for one additional possibility for the debtor who has not reacted within the time limits indicated above. The debtor can contest the existence of a claim in an action procedure in case of newly occurred circumstances or new written evidence (within three months after they became known). This option exists only until one year after the payment (Art. 424).

In case the debtor could not file a statement of opposition in due time either because he was not serviced properly or because of circumstances beyond his control, he can file a declaration of opposition before the court of second instance. The time limit is one month from learning of the payment order (Art. 423).

6.4.7 If the defendant is a consumer, and he or she does not respond to or raise an objection to the issuance of the payment order, does the authority dealing with the claim for payment order proceedings have the power to examine any issue of consumer protection law of its own motion before treating the action as usual?

We are not aware of such practice.

6.4.8 What steps must the pursuer take in order to obtain an enforceable decision?

No further steps, see question 8.4.5.

1) In the first type of proceedings the payment order enters into force if no statement of opposition was filed, if such statement has been withdrawn or after the court decision in the declaratory proceedings which has decided on the existence of the claim has entered into force. Then, based on the payment order, the court issues a writ of enforcement and notes that on the payment order (Art. 416).

2) In the second case, the court which grants the payment order issues an enforcement writ together with the order. In this case enforcement is directly initiated.

6.4.9 Is this decision final, or can the defendant appeal against it?

See 8.4.5. and 8.4.6.

According to the established case-law of the Supreme Court of Cassation, if the court of second instance refuses the appeal filed under Art. 419, there is no possibility to challenge its decision (e.g. Supreme Court of Cassation, decision from 10.01.2011, case № 130/2010).

6.5 Appeals in consumer disputes

6.5.1 Are appeals possible in all consumer disputes? Please specify for small claims and other types of claims.

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Nature of the procedure at 1st instance	Regional Court	Regional Court (up to 25 000 lv = ca. 12 8000 Euro) or District Court (from 25 000 lv on)	District Court			
2nd instance – appeal to?	District Court	District Court or Court of Appeal	Court of Appeal			
3rd instance – appeal to?	Supreme Court of Cassation (if the value of the claim is over 5000 lv = ca. 2500 Euro)	Supreme Court of Cassation	Supreme Court of Cassation			

6.5.2 Please briefly specify the national appeal procedure, including any requirements to be satisfied for appeals. These might include, but are not limited to, conditions of admissibility, value thresholds, time-limits, the scope of review, and the impact of the appeal on enforcement (provisional enforcement). Please refer to any rules specifically applicable in respect of the claims and relevant procedures outlined above.

There is no special appeal procedure for consumer disputes. For the description of the national appeal procedure see Part II, Question 2.2.

6.6 Enforcement in consumer disputes

The CJEU has identified a number of situations concerning the enforcement stage of consumer protection disputes in which the effective and equivalent protection of EU consumer rights may be affected by national procedural rules. These include – in relation to the effectiveness and equivalency of the protection afforded by the Unfair Contract Terms Directive, for example – the enforcement of arbitration awards, the enforcement stage in the recovery of consumer credit and the enforcement of mortgages, which often links together declaratory and enforcement proceedings. As such, we focus on these situations below. However, other problematic situations exist. Please indicate if additional (and potentially problematic) situations are identifiable in your national legal system.

Moreover, if possible, please provide the reference/citation of an article that provides an overview of the way in which enforcement operates in relation to consumer protection disputes within your national legal system.

6.6.1 If the assessment of a consumer protection issue has not been possible at an earlier stage of the proceedings, is it always possible – either ex officio (see section 10 below) or if the consumer raises a possible violation of consumer protection law – for this assessment to be undertaken during enforcement proceedings?

In this regard a problem has been identified in the context of domestic payment order proceedings by D. Filipova. Under certain circumstances, in the context of the domestic payment order proceedings, the Bulgarian Code of Civil Procedure gives creditors the possibility to obtain an order for immediate enforcement (also when the debtor is a consumer). The debtor can file an objection, but it does not stop the enforcement proceedings (see also Questions 8.4.3. and 8.4.5.). If action proceedings on the existence of the claim are initiated, they normally take place after the enforcement has taken place.

Art. 420 of the Code of Civil Procedure is the only rule according to which such enforcement proceedings can be interrupted: either if the debtor provides for security or when he submits convincing written evidence that he does not owe anything. In this latter case there is no collection of evidence as in action proceedings because we are in the stage of enforcement, which is not adversarial and more formalistic. Therefore, it has happened that the court in the enforcement proceedings has refused to stay the enforcement, and only after the enforcement has been finalised, the court in the civil action proceedings has denied the existence of a claim of the alleged creditor. In such cases enforcement can be initiated against the latter. However, it will often not lead to full recovery because only the amount of money received from the sale of the original "debtor's" property (usually under value) can be recovered.

Thus, the protection of the consumer at enforcement stage is not guaranteed.

Source: Opinion of D. Filipova on the Collision of Art. 417 of the Code of Civil Procedure with the Law of the European Union submitted to the Ombudsman of the Republic of Bulgaria, accessible (in Bulgarian) at: http://advokatfilipova.eu/2015/02/%D1%81%D1%82%D0%B0%D0%BD%D0%BE%D0%B2%D0%B8%D1%89%D0%B5-%D0%B4%D0%BE-%D0%B3-%D0%BD-%D0%BE%D0%BC%D0%B1%D1%83%D0%B4%D1%81%D0%BC%D0%B0%D0%BD%D0%B0-%D0%BD%D0%B0-%D1%80%D0%B5%D0%BF%D1%83%D0%B1%D0%BB%D0%B8/

with further details on the complaint filed before the EU Commission in this regard and for the development of the issue.

The practice of the District Court of Varna shows a tendency towards an extensive interpretation of Art. 420 para 2 of the Code of Civil Procedure in order to include the possibility to consider unfair terms in consumer contracts when deciding on the stay of the enforcement proceedings. (District Court of Varna, Decisions from the 27.08.2014 in case Nr. 1498/2014 and from 10.10.2014 in case Nr. 1722/2014; after explaining the possibility of such an interpretation, the court stated that in the specific cases at hand the debtors could not be qualified as consumers).

6.6.2 In the particular case of consumer protection, if a court examines consumer protection law (either ex officio or on the basis of an argument advanced by the consumer), does national procedural law provide that interim measures should 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 final decision will have full effect?
We are not aware of such possibility. No special rules exist for consumer cases in this regard. However, see in particular the answer to Question 8.6.1 and 11.4 which illustrate that the full effect of the final decision and the protection of the consumer are not guaranteed.

7. ACTIONS FOR COLLECTIVE REDRESS

The CJEU has considered that situations in which individual and collective actions are in some way linked are those in which the effective and equivalent protection of EU consumer rights may be affected by national procedural rules. As such, we will focus on these situations. However, other problematic situations exist. Please indicate if additional (and potentially problematic) situations are identifiable in your national legal system.

Moreover, if possible, please provide the reference/citation of an article that provides an overview of the way in which the collective redress mechanism operates within your national legal system.

7.1 Injunctive relief, linking individual and collective actions

The case law of the CJEU requires that a person or organisation with a legitimate interest in consumer protection must be able to bring an action before a national court or tribunal in respect of an alleged violation of consumer rights deriving from Union law, either for compensation or for injunctive relief, to preclude the continued violation of consumer rights[6].

[6] This derives from the EU directives. For example, in respect of the UCTD, Art.6(1), Art.7(1) and (2) UCTD, provide that the Member States must ensure 1) that unfair terms are not binding on the consumer and 2) that adequate and effective means exist to prevent the continued use of unfair terms in consumer contracts. The CJEU has held that effective implementation requires that the consequence of the finding of the violation – in the case of a finding of unfairness under the UCTD – is for the term to be declared invalid, and that the effect of this invalidity extends not only to the parties to the action for an injunction but also to those who have concluded a contract with the seller/supplier to which the same terms apply.

7.1.1 If collective proceedings are launched, does national procedural law provide that ongoing individual claims, relating to the same dispute, should be stayed until the collective proceedings are brought to an end? Please specify if this constitutes an obligation on the part of the national judge or if it is at his or her discretion.

Yes.

According to Art. 229 para 1 Nr. 4 of the Code of Civil Procedure, proceedings are stayed if another case, the outcome of which will be of relevance for the correct resolution of the dispute, is pending before the same or a different court. The stay is not upon the discretion of the judge in the sense that if, according to the assessment of the judge, such relevance is given, the proceedings need to be stayed.

The important factor in the decision whether to stay the proceedings is the conditionality: If the correct decision in the proceedings is conditional upon the outcome of another pending case, the judge stays the proceedings (even if they were initiated first).

In this context, the Court of Cassation (Supreme Court of Cassation, decision from 13.01.2015, case № 7392/2014) upheld the decision of a second instance court which had stayed proceedings between a consumer and an undertaking on the ground of Art. 229 para 1 Nr. 4. Subject of the individual action was a claim for payment of the undertaking against the consumer. The subject of the collective claim (filed by the Commission for Consumer Protection) was the validity of a number of clauses in the general terms and conditions of the same undertaking. The consumer participated also in the collective action. According to the courts, the decision on the claim for payment was conditional upon the outcome of the collective proceedings against the undertaking.

7.1.2 If individual proceedings are stayed, please indicate what the effect of the court or ADR entity's decision in the collective action on those individual proceedings would be, i.e. whether the outcome of the collective action binds the consumer bringing an individual action.

All damaged parties which have participated in the collective proceedings or have remained passive (i.e. if they have neither declared that they want to participate in the collective action nor that they want to pursue a remedy independently) are bound by the judgment in the collective proceedings (Art. 386 para 1 of the Code of Civil Procedure).

8. CONSUMER ALTERNATIVE DISPUTE RESOLUTION

The questions below focus on some key concerns relating to consumer disputes before ADR fora. If possible, please provide the reference/citation of an article that provides a general overview of the way in which consumer alternative dispute resolution operates within your national legal system.

8.1 Consumer disputes before ADR fora

8.1.1 Is ADR mandatory for all parties bringing a claim related to a consumer protection dispute?

The Law on Consumer Protection (Art. 182 et seq.) prescribes the establishment of conciliation boards. According to Art. 184a, taking place of conciliation proceedings is not a requirement for bringing a claim before the courts.

8.1.2 Please specify if there are limitations to the use of ADR. These might include the nature of the claim (i.e. whether both individual and collective claims are possible), requirements of representation, time limits, value thresholds, etc.

Art. 181c of the Law on Consumer Protection defines the scope of the use of ADR. The ADR entity decides national and transnational disputes between consumers and businesses arising out of sales contracts and service contracts including online contracts as well as contracts on the sale of digital content.

8.1.3 Can ADR entities issue binding decisions and can they enforce those decisions? If not, please explain how they are enforced.

The conciliation board elaborates a settlement proposal which becomes a binding agreement between the parties only if both parties accept it. The parties can make this agreement enforceable by filing it for approval before the competent civil court (Art. 183g of the Law on Consumer Protection).

8.1.4 Does national law provide that limitation periods applicable to judicial actions should be suspended while ADR is ongoing?[7]

Yes (Art. 184a para 2 of the Law on Consumer Protection).

8.1.5 Please specify if national law establishes rules providing for recourse to judicial action following an (unsuccessful) ADR hearing[8].

If an agreement has been signed by the parties (but not declared enforceable by the court, see question 10.1.3) and one of the parties does not comply with it, the other party can bring the dispute to court (Art. 183g para 2 of the Law on Consumer Protection).

8.1.6 Is there judicial review of decisions and awards made by ADR entities? If so, by which court or tribunal is this oversight made? Is it ordinary or specialised?

No. The conciliation boards do not actually issue a decision or an award. If the procedure has been successful, the result is a binding agreement between the parties. In order to achieve the enforceability of the agreement, it can be submitted for approval to the court, see 10.1.3. In any case, the parties may refer the dispute to court (however, not in the sense of "judicial review").

If, however, the dispute was referred to arbitration, the general rules on judicial review of arbitration awards apply.

9. THE EXAMINATION OF CONSUMER PROTECTION LAW IN NATIONAL PROCEDURAL LAW: RESPECT FOR THE PRINCIPLES OF THE EFFECTIVENESS AND EQUIVALENCE OF CONSUMER PROTECTION LAW AND EX OFFICIO CONTROL

[7] The Directive on Consumer ADR provides that "the existence of an effective system for collective claims and easy recourse to ADR should be complementary". Consumer ADR is relevant not only for individual claims but also for collective ones; it can provide consumer with a means to reduce costs and save time.

[8] Per Arts.10-12, Directive on Consumer ADR.

The rules of national civil procedure that could potentially affect, and indeed undermine, the effective and equivalent protection of consumer rights are various. They include but are not limited to the rules and practices of ordinary and specialised judicial procedures, rules and practices of consumer ADR, rules applicable to special types of procedure (e.g. payment order procedures), the jurisdiction of individual courts (the courts that have jurisdiction over consumer disputes), the formal requirements that have to be satisfied to bring a case, the types of legal action that are available, the need for parties to be represented, the time-limits applicable to procedural steps of the action, rules on the taking of evidence, the possibility (or lack) to consider certain issues at specific stages of the procedure, the right to appeal and review, and rules relating to the enforcement or judgements and other enforcement titles (e.g. arbitration awards, notarial deeds, including mortgages).

On the basis of the principles of equivalence and effectiveness, the CJEU has established certain requirements for the procedural protection of consumer rights deriving from EU law. In particular (and especially in relation to the protection afforded to consumers via the Unfair Contract Terms Directive[9]), the CJEU has established an obligation on national judges (and potentially other dispute resolution facilitators) to apply consumer law of their own motion (that is, ex officio), when they have available the legal and factual elements necessary for this task. Ex officio control is one type of procedural mechanism that can be utilised within the national system to promote the effective and equivalent protection of consumer law. Thus, other mechanisms of procedure within your national legal system should be highlighted and discussed where relevant. The following questions should be answered in respect of both judicial and if relevant, alternative dispute resolution.

9.1 The basis of ex officio control of consumer protection law in national law

9.1.1 Is it clear in the national legal system when consumer protection law should be applied ex officio? Is the ex officio control of consumer protection law established as an obligation or as a (discretionary) power of the judge in national procedural law?

There is no explicit legal provision in this regard but Bulgarian courts (as well as Bulgarian legal doctrine, e.g. I. Iosifov, "Neravnopravnite klauzi v konteksta na zapovednoto proizvodstvo" in "Nauchni trudove na Rusenskia Universitet", 2013, vol. 52, series 7, p. 191 et. seq. available in Bulgarian at http://conf.uni-ruse.bg/bg/docs/cp13/7/7-33.pdf) refer to the case law of the European Court of Justice and the obligation to apply consumer protection law ex officio (e.g. District court Shumen, judgment from 05.03.2013, Case No. 810/2012). Therefore, there seems to be clarity, at least as far as the existence of a general obligation of ex officio control is concerned.

9.1.2 If there is an understanding of ex officio control of consumer protection law in the national legal, what is this control understood to encompass/not cover?

- We have been able to identify that it covers at least unfair terms and conditions proceedings (e.g. Regional court Ruse, judgment from 02.11.2015, Case No. 2259/2015) and is to be applied (at least) within ordinary action proceedings (e.g. Regional court Ruse, judgment from 12.07.2013, Case No. 1744/2013). To what extent the ex officio control should be exercised beyond that could not be clearly deduced from the case-law available to the national reporters.

[9] However, the CJEU has recognised that ex officio control – and other procedural requirements, that might in themselves (or indeed, in their absence), impact the effective enforcement of consumer law – arise across the EU's consumer protection directives.

- In particular, the obligation ex officio control in payment order proceedings and at the stage of enforcement of payment orders seems to be unclear. (Question 11.4)

9.1.3 Is the party who claims to be a consumer required to establish his or her consumer status, the existence of a consumer contract and that consumer law applies to the dispute? Is this required even if the consumer has no legal representation?
There is no special rule on the burden of proof in respect of these issues. Therefore, the general rule that the party who relies on this allegation carries the burden of proof applies.

9.1.4 What information is available to judges and dispute resolution facilitators hearing consumer protection disputes? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a consumer protection dispute to be heard and b) for the court to engage in ex officio control?
The courts will assess from the facts provided by the parties, whether there is a consumer contract, whether the definition of a consumer is fulfilled in the case etc. However, the national law does not contain a specific rule as to the minimum factual information - there are no special rules for consumer disputes in this regard.

9.1.5 Who is responsible for providing this information? If the necessary information is not available to the court (or dispute resolution facilitator), is he or she under an obligation to investigate in order to be able to respond to a relevant consumer protection dimension of the case?
Since there are no special rules for consumers in this regard, the general rules apply.
This means, e.g.:
- The parties who rely on certain facts and qualifications will have to provide the relevant information.
- During the hearing the judge has to ask questions to the parties in order to clarify the facts of the case and also to explain their relevance for the proceedings to the parties (Art. 145 Code of Civil Procedure). (See question 8.1.6.)
See also question 11.1.3.

9.1.6 Will the court provide the consumer with any assistance in gathering factual information or advancing his legal arguments before the court? Please respond for the situation where: a) the consumer has legal representation and b) the consumer has no legal representation.
Again, the general rules apply. This means that no special assistance can be provided unless generally available in civil proceedings. The normal assistance that can be provided usually entails the possibility for the consumer to apply for legal aid (under the general rules) and to engage a legal representative in the proceedings.

9.2 The possibility for ex officio control of EU consumer protection law in dispute resolution proceedings

Based on the available information, we are not able to answer the specific questions below. We refer to questions 11.1. and 11.3.

9.2.1 Is ex officio control of consumer protection law always possible when the procedure involves a full assessment of the claim on its merits?

9.2.2 Can ex officio control be exercised even when the procedure does not involve an assessment on the merits?

9.2.3 Please indicate if, per national procedural law, ex officio control can be exercised at the following stages of the procedure:

	Courts		Other dispute resolution facilitators	
	Possible to exercise ex officio control	Not possible to exercise ex officio control	Possible to exercise ex officio control	Not possible to exercise ex officio control
Ordinary proceedings				
Small claims				
Payment order				
Provisional measures				
Proceedings linked to enforcement				
Enforcement proceedings				
- Enforcement of payment order				
- Enforcement of arbitration award				
- Enforcement of mortgage				
- Enforcement of notarial deed				
Appeal proceedings (please specify:)				

9.2.4 What does ex officio control encompass in national procedural law?

9.3 Other procedural mechanisms for the equivalent and effective protection of EU consumer law

9.3.1 Does national procedural law provide that rules of EU consumer law (as well as rules that aim to satisfy EU consumer law objectives) should be understood as having equal standing to national rules of public policy (which is to say, that for the purposes of domestic law, the consumer protection provision is understood to have equal standing to a rule that must be raised ex officio by the national court)?

9.3.2 If ex officio control is not possible in certain types of proceedings or at a certain stage of proceedings (or for any other reason), does national procedural law provide for an alternative way of assessing consumer protection law?

The national procedural law does not contain any special provisions in this regard.

9.4 Ex officio control in payment order procedures

9.4.1 What information is available to the judge when a claim for the issuance of a payment order is made? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a claim for the issuance of a payment order to be granted and b) for the court to engage in ex officio control before a payment order is issued?

9.4.2 What considerations will be assessed ex officio by the court (or other competent authority) before a payment order is issued?

9.4.3 How is the consumer informed about the claim to issue a payment order against him or her? Does national procedural law make any provision for steps to be taken to ensure that consumers are informed of the claim for the issuance of a payment order so that he or she can contest it?

9.4.4 If the consumer objects to the claim, what is the next step? Do the proceedings continue, in the context of which ex officio control can be exercised? Or are the proceedings transferred to ordinary proceedings for analysis on the merits of the claim?

The payment order procedure under Bulgarian law has been explained above. There are no special rules in this regard which apply if the debtor is a consumer. In this regard we refer to Question 8.4. and Question 8.6.1.

In certain cases the objection of the consumer can lead to transferring the proceedings to ordinary proceedings (Question 8.4.5.)
However, in other cases – in which an order for immediate enforcement can be obtained (Questions 8.4.3 option 2) and 8.4.5. option 2) – the objection of the consumer (except for certain cases of convincing written evidence) will generally be considered only in the ordinary proceedings which are finalized after the immediate enforcement has already taken place (for details, see Question 8.6.).

The possibility or obligation of ex officio control in payment order proceedings remains unclear. Because of the formal nature of the payment order proceedings aiming at expedient results, the courts will usually only consider formal requirements (e.g. all problems that can be detected in the document submitted under Art. 417 of the Code of Civil Procedure, see Question 8.4.3.) Therefore, the question of unfair contract terms is generally not considered in the payment order proceedings but in the ordinary proceedings (generally on unfair terms Supreme Court of Cassation, Decision Nr. 467 from 30.6.2010 in case Nr. 834/2009; such case law exist also in consumer protection cases: see Decision Nr. 73 of the District Court of Dobrich from 3.02.2014 in case Nr. 62/2014). Regarding consumer cases, the legal doctrine requires ex officio control (even when the consumer has not raised any objections) also within the payment order proceedings.

Another issue is whether the consumer can invoke an unfair term after the time limit for objections against the issued payment order (Art. 414 para 2 of the Code of Civil Procedure) has expired. According to Art. 424, after this period a challenge of the claim in action proceedings is possible but only in case of new circumstances or new written evidence. This means that if no objection regarding unfair terms has been raised within the two weeks period, this possibility would be precluded. Legal literature suggests that in consumer protection such preclusion would be contrary to EU law. The consumer would not be able to obtain a stay of enforcement, because this provisional measure can only be issued regarding a claim which is admissible.

(Source: I. Iosifov, "Neravnopravnite klauzi v konteksta na zapovednoto proizvodstvo" in "Nauchni trudove na Rusenskia Universitet", 2013, vol. 52, series 7, p. 191 et. seq.)

The immediate enforcement possible in the context of certain payment order proceedings is also problematic in this regard. The issue is explained under question 8.6.

European Commission
An evaluation study of the impact of national procedural laws and practices on the equivalence and effectiveness of the procedural protection of consumers under EU law

JUST/2014/RCON/PR/CIVI/0082

National Report – Consumer Protection Strand

Croatia

Emilia Misčenić and Vesna Tomljenovic

CROATIA: LEGAL ANALYSIS

1. NATIONAL LEGISLATION IMPLEMENTING EU CONSUMER PROTECTION INSTRUMENTS

EU legislation	Transposing national legislation	Additional notes (e.g. if there is an overlap in application of legislation etc.)
Doorstep Selling Directive 1985/577/EEC	Consumer Protection Act, OG 96/03: Arts. 3, 29-34, 109 Consumer Protection Act, OG Nos. 79/07, 125/07, 75/09, 79/09, 75/09, 89/09, 133/09, 78/12, 56/13 and 41/14: Arts. 3, 4, 6, 30–35, 130–141b Consumer Protection Act, OG Nos. 41/14 and 110/15: Art. 5 paras. 14 and 28, Arts. 41, 57-65, 72-79, 105 and 106	Mentioned provisions from previous Consumer Protection Acts transposing Doorstep Selling Directive 1985/577/EEC are not in force anymore. They were replaced by the provisions on doorstep selling of the Consumer Protection Act, OG Nos. 41/14 and 110/15 currently in force, transposing Directive 2011/83/EU.

Package Travel Directive 90/314/EEC	Obligations Act, OG 35/05, 41/08, 125/11 and 78/15: Arts. 881-903 Consumer Protection Act, OG Nos. 41/14 and 110/15: Arts. 105, 106	There is an overlap with provisions contained in Arts. 5-9 of the Act on Provision of Services in Tourism), OG Nos. 68/07, 88/10, 30/14, 89/14, 152/14.
Unfair Contract Terms Directive 1993/13/EEC	Consumer Protection Act, OG Nos. 41/14 and 110/15: Arts. 49-56, 105 and 106	There is an overlap with provisions contained in Arts. 295-296 of the Obligations Act, OG 35/05, 41/08, 125/11.
Distance Selling Directive 1997/7/EC	Consumer Protection Act, OG 96/03: Arts. 3, 35-55, 109, 111 Consumer Protection Act, OG Nos. 79/07, 125/07, 75/09, 79/09, 75/09, 89/09, 133/09, 78/12, 56/13 and 41/14: Arts. 3, 4, 6, 36–55, 130–141b Consumer Protection Act, OG Nos. 41/14 and 110/15: Art. 5 paras. 24, 25 and 27, Arts. 41, 57-61, 66-71, 72-79, 105 and 106	Mentioned provisions from previous Consumer Protection Acts transposing Distance Selling Directive 1997/7/EC are not in force anymore. They were replaced by the provisions on doorstep selling of the Consumer Protection Act, OG Nos. 41/14 and 110/15 currently in force, transposing Directive 2011/83/EU.
Consumer Sales and Guarantees Directive 1999/44/EC	Obligations Act, OG 35/05, 41/08, 125/11 and 78/15: Arts. 400-429 Consumer Protection Act, OG Nos. 41/14 and 110/15: Art. 5 paras. 4, 20, 22, 23, 29, Arts. 41, 43, 44, 45, 105 and 106	
Unfair Commercial Practices Directive 2005/29/EC	Consumer Protection Act, OG Nos. 41/14 and 110/15: Art. 5, Arts. 30-38, 105 and 106	
Misleading and Comparative Advertising Directive 2006/114/EC	Unpermitted Advertising Act, OG No. 43/09	
Consumer Credit Agreement Directive 2008/48/EC	Consumer Credit Act, OG Nos. 75/09, 112/12, 143/13, 147/13-corrigendum, 9/15 and 102/15 Ordinance on the Approval of Provision of Consumer Credit Services, OG Nos. 14/10 and 16/13 Ordinance on Information Duty	There is an overlap with provisions contained in Arts. 300 et seq. of the Credit Institutions Act, OG Nos. 159/13, 19/15 and 102/15.

	for Consumers and on Additional Presumptions to Calculate Annual Percentage Rate of Charge, OG Nos. 14/10 and 124/13 Ordinance on Consumer Credit Remunerations, OG No. 15/14 Ordinance on the Content, Form and Means of Recording of Concluded Contracts, OG No. 1/13	
Timeshare Protection Directive 2008/122/EC	Consumer Protection Act, OG Nos. 41/14 and 110/15: Art. 5, Arts. 95-104, 105 and 106 Ordinance on the Content and Form of Notification on the Right of Consumer to Unilaterally Terminate Timeshare, Long-term Holiday Product, Resale and Exchange Contracts, OG No. 134/12 Ordinance on the Content and Form of Information on the Timeshare, Long-term Holiday Product, Resale and Exchange Contracts, OG No. 134/12	
Consumer Injunctions Directive 2009/22/EC	Consumer Protection Act, OG Nos. 41/14 and 110/15: Arts. 106-123 Decision on Determining of Authorities and Persons Authorized to Initiate Proceeding for Protection of Collective Interests of Consumers, OG No. 105/14	
Consumer Rights Directive 2011/83/EU	Consumer Protection Act, OG Nos. 41/14 and 110/15: Art. 5, Arts. 39-79, 105 and 106 Ordinance on the Content and Form of the Right of Consumer to Unilaterally Terminate Contracts Concluded at Distance and Contracts Concluded out of Business Premises, OG No. 76/14	

ADR for Consumer Disputes Directive 2013/11/EU	Proposal on Alternative Dispute Resolution for Consumer Disputes Act	The Act is in the legislative adoption procedure of the Croatian Parliament (second reading), June 2016.

Important notice: This report addresses the Croatian legislation and case law relevant until June 2016.

Source(s):
Zakon o zaštiti potrošača (Consumer Protection Act), OG Nos. 41/14 and 110/15
Zakon o obveznim odnosima (Obligations Act), OG Nos. 35/05, 41/08 and 125/11
Zakon o pružanju usluga u turizmu (Act on Provision of Services in Tourism), OG Nos. 68/07, 88/10, 30/14, 89/14 and 152/14
Zakon o nedopuštenom oglašavanju (Unpermitted Advertising Act), OG No. 43/09
Zakon o potrošačkom kreditiranju (Consumer Credit Act), 75/09, 112/12, 143/13, 147/13-corrigendum, 9/15 and 102/15
Proposal on Alternative Dispute Resolution for Consumer Disputes Act (Prijedlog Zakona o alternativnom rješavanju potrošačkih sporova, https://vlada.gov.hr/UserDocsImages//Sjednice/2015/256%20sjednica%20Vlade//256%20-%201.pdf)
Pravilnik o sadržaju i obliku obavijesti o pravu potrošača na jednostrani raskid ugovora o vremenski ograničenoj uporabi, dugotrajnim proizvodima za odmor, ponovnoj prodaji i zamjeni (Ordinance on the Content and Form of Notification on the Right of Consumer to Unilaterally Terminate Timeshare, Long-term Holiday Product, Resale and Exchange Contracts), OG No. 134/12
Pravilnik o sadržaju i obliku obavijesti o ugovoru o vremenski ograničenoj uporabi, dugotrajnim proizvodima za odmor, ponovnoj prodaji i zamjeni (Ordinance on the Content and Form of Information on the Timeshare, Long-term Holiday Product, Resale and Exchange Contracts), OG No. 134/12
Pravilnik o odobrenju za pružanje usluga potrošačkog kreditiranja (Ordinance on the Approval of Provision of Consumer Credit Services), OG Nos. 14/10 and 16/13
Pravilnik o sadržaju, obliku i načinu vođenja evidencije sklopljenih ugovora (Ordinance on the Content, Form and Means of Recording of Concluded Contracts), OG No. 1/13
Pravilnik o naknadama na potrošačke kredite (Ordinance on Consumer Credit Remunerations), OG No. 15/14
Pravilnik o obvezi informiranja potrošača i o dodatnim pretpostavkama za izračun efektivne kamatne stope (Ordinance on Inform Duty for Consumers and on Additional Presumptions to Calculate Annual Percentage Rate of Charge Information Duty), OG Nos. 14/10 and 124/13
Pravilnik o sadržaju i obliku obavijesti o pravu potrošača na jednostrani raskid ugovora sklopljenih na daljinu i ugovora sklopljenih izvan poslovnih prostorija (Ordinance on the Content and Form of the Right of Consumer to Unilaterally Terminate Contracts Concluded at Distance and Contracts Concluded out of Business Premises) OG No. 76/14
Odluka o određivanju tijela i osoba ovlaštenih za pokretanje postupka za zaštitu kolektivnih interesa potrošača (Decision on Determining of Authorities and Persons Authorized to Initiate Proceeding for Protection of Collective Interests of Consumers), OG No. 105/14
Odluka Ustavnog suda Republike Hrvatske (Decision of the Constitutional Court of the Republic of Croatia), Nos. U-I-3541/2015, U-I-2780/2015, of 4 May 2016

Mišćenić, E. (2014): Consumer Protection Law. In: Introduction to the Law of Croatia, Ed. Josipović, T. Kluwer Law International. pp. 279- 290.

1. CONCEPT OF THE CONSUMER

1.1 Please outline the concept of the consumer in national law, indicating whether it is intended to be a uniform concept, whether it has been legislated for and where it can be found (i.e. in a legislative provision, governmental guidelines, case law etc.).

The main definition of the consumer comes from Art. 5(15) of the Consumer Protection Act, according to which the consumer is any natural person who concludes the legal transaction or acts on the market outside of its trade, business, craft or professional activity. However, the Croatian legislation contains many other definitions of "consumer", which are adjusted to the subject matter of relevant legal acts they are arising from. E.g. definitions of consumer can be found in Art. 2(1)(1) of the Consumer Credit Act, Art. 110 of the Leasing Act, Art. 375(1) of the Insurance Act, Art. 300 of the Credit Institutions Act, Art. 2(8) of the E-Commerce Act, Art. 2(1)(42) of the Electronic Communications Act, Art. 2(14) of the Electronic Money Act, Art. 2(1)(8) of the Payment System Act and many other legal acts. All these definitions generally follow the uniform concept of the consumer, as a natural person (personal element) concluding a legal transaction outside of its business or professional activity (functional element). Nonetheless, there are some differing interpretations coming from practice (e.g. in case law or interpretation of the Ministry of Economy).

Source(s):

Zakon o kreditnim institucijama (Credit Institutions Act), OG Nos. 159/13, 19/15 and 102/15

Zakon o potrošačkom kreditiranju (Consumer Credit Act), 75/09, 112/12, 143/13, 147/13-corrigendum, 9/15 and 102/15

Zakon o elektroničkoj trgovini (E-Commerce Act), OG Nos. 173/03, 67/08, 36/09, 130/11 and 30/14

Zakon o elektroničkim komunikacijama (Electronic Communications Act), OG Nos. 73/08, 90/11, 133/12, 80/13 and 71/14

Zakon o elektroničkom novcu (Electronic Money Act), OG No. 139/10

Zakon o osiguranju (Insurance Act), OG No. 30/15

Zakon o leasingu (Leasing Act), OG No. 141/13

Zakon o platnom prometu (Payment System Act), OG Nos. 133/09, 136/12

Presuda Visokog upravnog suda Republike Hrvatske (Judgement of the High Administrative Court of the Republic of Croatia) No.: Us-3781/2011-4 of 28 February 2012

IUS-INFO - Mišljenja ministarstva - Smatra li se ugovor o posredovanju nekretnina potrošačkim ugovorom (Interpretation of the Ministry – Can Contract on Intermediation in Immovable's be Considered as Consumer Contract)

Mišćenić, E. (2014): Consumer Protection Law. In: Introduction to the Law of Croatia, Ed. Josipović, T. Kluwer Law International. pp. 279- 290.

2. REGULATORY AUTHORITIES COMPETENT FOR CONSUMER PROTECTION ISSUES

2.1 What regulatory authorities, if any, are competent for enforcing consumer protection law? Please identify them, their nature (i.e. whether they are public or private or mixed) and the nature of enforcement.

According to Art. 124 of the Consumer Protection Act, entities competent for consumer protection are the Croatian Parliament, the Government of the Republic of Croatia, the ministry competent for consumer protection affairs, competent inspections, the National Consumer Protection Council, business associations, consumer protection associations, units of local self-government and other bodies of public authorities each within their competence. Besides business and consumer protection associations, these authorities are all of public nature. It is considered that besides courts and ADR, the most efficient regulatory authorities competent for enforcing consumer protection law are competent inspections. According to Arts. 134-140 of the Consumer Protection Act, competent inspector of the Ministry of Economy can impose various sanctions to traders, such as prohibition of sale or provision of services or initiate misdemeanour procedure, which encompass financial penalties. This does not preclude activities of other regulatory authorities competent for the enforcement of consumer rights under other more special legal acts, such as of the competent inspectors, the Croatian National Bank and of the Croatian Financial Services Supervisory Agency under the Consumer Credit Act (Arts. 22-23) or consumer protection through supervision of traders by various regulatory agencies (e.g. Croatian Regulatory Authority for Network Industries, Croatian Competition Agency, Croatian Energy Regulatory Agency, Croatian Post and Electronic Communications Agency, Croatian Food Agency etc). This is also acknowledged in the Art. 134 of the Consumer Protection Act, which mentions the Croatian National Bank as main supervisory authority for credit, electronic money and payment services institutions.

2.2 Is there a specific venue for this type of enforcement and does this limit the jurisdiction of courts/ADR fora (even if only initially)?

When it comes to enforcement of consumer rights through regulatory agencies presenting independent, and non-profit legal persons with public authorities, there is a specific venue prescribed by specific legal acts regulating the subject matter of their competence. For example, a consumer being a subscriber of a mobile phone contract can submit its complain to a Croatian Regulatory Authority for Network Industries in accordance with the specific rules for complains provided for in Electronic Communications Act. The competent regulatory agency will issue a decision or resolution within administrative procedure, however, only after the consumer has unsuccessfully exhausted the first two steps of complaining procedure to the mobile phone operator directly. Furthermore, there is a specific venue for complaints of consumer against providers of public services prescribed by Art. 25 of the Consumer Protection Act and prior to submitting a complaint to competent inspector (Arts. 10 and 135). This type of enforcement could limit the jurisdiction of the court, e.g. in cases where the action is to be dismissed due to statutory prescribed procedure of peaceful or other enforcement of rights (Art. 354 of the Civil Procedure Act).

2.3 Can criminal prosecutions be initiated for violations of consumer protection rules? How serious must the infringement be? What are the penalties and sanctions? And might these prosecutions lead to criminal penalties or sanctions? Can individual consumers piggy back on these claims (e.g. via a partie civile method)?

The offences against the consumer protection rights are not sanctioned by the mean of criminal prosecution, but are nevertheless encompassed by the penalty law. Parts VI-VII of the Consumer Protection Act regulates misdemeanour liability of traders by prescribing financial penalties varying from 10,000,00 to 100,000,00 kn (app. from 1333,33 to 13333,33 €). The specialized competent courts deciding on misdemeanour liability of traders are in the first instance Misdemeanour Courts and in the second instance the High Misdemeanour Court of the Republic of Croatia. According to Art. 141 of the Misdemeanour Act, the person damaged by misdemeanour offence can submit a property legal claim until the end of the first instance proceedings that can relate to damage compensation, return of goods or annulment of the legal transaction concluded.

2.4 Is there judicial review of decisions of consumer regulatory authorities? If so, by which court is this judicial oversight made? Is the forum an ordinary or a specialised court or tribunal?

The answer goes from the presumption that the notion of regulatory authorities relates only to regulatory agencies, which are bodies deciding on enforcement of consumer rights by adopting administrative acts. Consequently the competent courts for the judicial review of their decisions are specialized court deciding in administrative disputes, namely in the first instance Administrative Courts and in the second instance the High Administrative Court of the Republic of Croatia.

2.5 Does the national legal system provide for a mechanism of cooperation between its national regulatory authorities and those of other Member States?

The main mechanisms of cooperation between its national regulatory authorities and those of other Member States comes from the Regulation on determination of authorities for implementation of Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (Art. 123 of the Consumer Protection Act). In accordance with the Regulation (EC) No 2006/2004, Art. 3 prescribes a list of competent authorities and designates a role of a single liaison office to Ministry of Economy. Besides enabling cooperation between national regulatory authorities, the established network enables the cooperation with Commission and regulatory authorities in other MS. There are other forms of similar cooperation, for example by the mean of European Consumer Centre of Republic Croatia formed by a Ministry of Economy and belonging to European Consumer Centre Network and cooperation through European networks Euroguichets and European Extra Judical. At national level, there is another important mechanism of cooperation between Croatian regulatory authorities, namely Ministry of Economy, counselling centre for consumer protection and competent inspectorates. These regulatory authorities cooperate closely within the project of Central Information System for Consumer Protection, which enables consumers to ask for explanation of relevant legal acts, of procedures and to submit complaints at the one place by means of e-mail.

Source(s):

Zakon o zaštiti potrošača (Consumer Protection Act), OG Nos. 41/14 and 110/15

Zakon o elektroničkim komunikacijama (Electronic Communications Act), OG Nos. 73/08, 90/11, 133/12, 80/13 and 71/14

Prekršajni zakon (Misdemeanour Act) OG Nos. 107/07,39/13 and 157/13

Zakon o upravnim sporovima (Act on Administrative Disputes) OG Nos. 20/2010, 143/2012, 152/2014

Uredba o određivanju tijela za provedbu Uredbe (EZ-a) br. 2006/2004 Europskog parlamenta i Vijeća od 27. listopada 2004. o suradnji između nacionalnih tijela odgovornih za provedbu propisa o zaštiti potrošača (Regulation on determination of authorities for implementation of Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws), OG No. 84/14

Nacionalni program zaštite potrošača za razdoblje od 2013. do 2016. godine (National Consumer Protection Programme for the Time Period 2013-2016), p. 18, OG No. 90/13

Ministarstvo gospodarstva, Zapisnik sa 2. sjednice Nacionalnog vijeća za zaštitu potrošača (Ministry of Economy, Minutes of the 2nd meeting of the National Consumer Protection Council) of 31 March 2015

Vlada Republike Hrvatske, Izvješće o provedbi Nacionalnog programa zaštite potrošača za razdoblje 2009.– 2012. (Government of the Republic of Croatia, Report on Realisation of the National Consumer Protection Programme for Time Period 2009-2012), Zagreb, September 2014

Rješenje Agencije za zaštitu tržišnog natjecanja, (Ruling of the Croatian Competition Agency) UP/I 030-02/2004-01/66, 580-02-05-41-42 of 20 October 2005

Mišćenić, E. (2014): Consumer Protection Law. In: Introduction to the Law of Croatia, Ed. Josipović, T. Kluwer Law International. pp 279- 290.

3. LEGAL AID

3.1 Is legal aid available to consumers in: a) bringing a claim and b) defending a claim before a court?

There are no specific rules on legal aid to consumers within the Croatian consumer protection legislation. However, in practice, the legal aid to consumers is offered by various counselling centres or consumer protection associations (Art. 129 of the Consumer Protection Act), which hire or employ a person with a legal expertise. Consequently, to consumer apply provisions applicable to all the other persons provided for in Free Legal Aid Act, and the "principle on informing the ignorant party" provided for in provisions of Civil Procedure Act (Art. 11), of General Administrative Procedure Act (Art. 7), of Misdemeanour Act (Art. 116(6)) etc.

3.2 For what kinds of disputes and actions is legal aid available? (NB: legal aid might not be available for consumer or contractual disputes but be available instead for a related action, e.g. actions relating to debt, mortgage arrears, eviction etc.)

When it comes to duty of the court or other body deciding in consumer dispute to inform the ignorant party about her rights, such form of legal aid is embodied in various procedural acts independent of kind of dispute or action. On the other hand, the Free Legal Aid Act distinguishes between primary and secondary legal aid (Art. 8), and offers them for different kinds of disputes and actions. Consequently, primary legal aid can be offered in every legal matter upon prior fulfilment of requirements prescribed by Art. 10(2) of the Free Legal Aid Act. Secondary legal aid is reserved for proceedings related to real estate rights (except for land registration proceedings), labour relations, family relations, execution proceedings, peaceful dispute resolution and exceptionally for all the other administrative and civil law court proceedings, when such a necessity derives from concrete living circumstances of the applicant and his household members (Art. 13(2)).

3.3 What requirements must be satisfied for the consumer to be entitled to legal aid? Please specify if there are any additional limitations to its availability.

Under the Free Legal Aid Act one can distinguish between general conditions and special requirements necessary for primary and for secondary legal aid. According to general conditions from Art. 5 the users of legal aid can be: Croatian citizens, children without Croatian citizenship placed in Croatia without of supervision of responsible adult person, foreigners with temporary residence under condition of reciprocity and foreigners with permanent residence, foreigners under temporary protection, foreigners residing illegally and shortly until adoption of decision on exile or return, applicants for asylum and foreigners under subsidiary protection and members of their families legally residing in Croatia. Special conditions for primary legal aid require that: applicant does not dispose with sufficient knowledge and capability to realize its own right, the legal aid was not offered to applicant on the ground of special acts, submitted application is obviously not unfounded, and financial circumstances of the applicant are such that the payment of expert legal aid could endanger his maintenance or of members of his household (Art. 10). Secondary legal aid can be approved if: it is more complex proceedings than those provided for in Art. 13(2), the applicant is not capable to represent himself, financial circumstances of the applicant are such that the payment of expert legal aid could endanger his maintenance or of members of his household, it is not a wanton litigation, within the last six months from submitting the application the applicant was not denied legal aid on the ground of intentional giving of incorrect information, the legal aid was not offered to applicant on the ground of special acts (Art. 13(1)). Further requirements for secondary legal aid are prescribed by Art. 14(1) of the Free Legal Aid Act, according to which the total incomes of the applicant and of the members of his household monthly do not cross the amount of budgetary basis per household member (3.326, 00 kn, 443,46 €) and the total value of property in ownership of the applicant and his household members does not cross the amount of 60 budgetary basis (199.560,00 kn, 26.608,00 €).

3.4 What does legal aid encompass? (i.e. (only) general advice, (only) assistance in preparing the case, (only) assistance with negotiation of settlements, (also) representation).

In accordance with its Art. 9 of the Free Legal Aid Act, the primary legal aid encompasses general legal information, legal advice, preparing of petitions and representation in proceedings before public authorities, European Court of Human Rights and international organizations and legal aid in peaceful out-of-court settlement of disputes. Secondary legal aid encompasses legal advice, preparing of petitions in procedure on protection of employers rights before employee, preparing of petitions and representation in court proceedings and legal aid in peaceful dispute settlement (Art. 12(1)). Moreover, secondary legal aid encompasses release of payment of court fees and release of payment of costs of court proceedings (Art. 12(2)).

Source(s):

Zakon o besplatnoj pravnoj pomoći (Free Legal Aid Act), OG No. 143/13

Zakon o parničnom postupku (Civil Procedure Act), OG SFRY 4/77, 36/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91, incorporated into Croatian legal system by OG 53/91, 91/92, 58/93, 112/99, 129/00, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 25/13, 89/14

Zakon o općem upravnom postupku (General Administrative Procedure Act), OG 47/09

Prekršajni zakon (Misdemeanour Act) OG Nos. 107/07,39/13 and 157/13

Vlada Republike Hrvatske, Izvješće o ostvarivanju prava na pravnu pomoć i utrošku sredstava u 2013. godini (Government of the Republic of Croatia, Report on Realisation of the Right to Legal Aid and on Expenses in 2013), Zagreb, September 2014

Uzelac, A., Preložnjak, B. (2012): The Development of Legal Aid Systems in the Western Balkans. A Study on Controversial Reforms in Croatia and Serbia, Kritisk Juss, No. 38, pp. 261-287

4. COSTS

4.1 What are the costs of different types of procedures before courts? Are there exemptions to the payment of fees and expenses? How can costs be paid?

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Court fees						
Court expenses						
Exemptions						

The above table cannot be fulfilled, since the presented structure does not correspond to the Croatian legal regulation of costs of different types of procedures before courts. General provision on reimbursement of court expenses can be found in Chapter 12 of the Civil Procedure Act (Arts. 151-177), which also presents a subsidiary source of law when the matter is not otherwise regulated by other procedural acts, such as Misdemeanour Act, Enforcement Act etc. According to its Art. 151 the costs of procedure encompass all the costs which have been incurred during and in connection with the procedure and shall also include the fees of lawyer and other persons entitled to a fee by the law. By introducing this general provision, the Civil Procedure Act avoids taxative enumeration of all possible costs which can occur during or in connection with proceedings (e.g. court fees, costs for taking evidence, costs of

hearings, inquest costs, personal costs of arrivals of parties and their representatives to court, costs of ensuring evidences, costs of unsuccessful settlement, costs of copying documents, costs of other bodies deciding on preliminary question, postal costs, public notaries costs, costs of court interpreters and of appointed experts etc). The Ordinance on Reimbursement of Costs in Court Proceedings encompasses in its Art. 2 only some of mentioned costs, without differing between proceedings or court expenses and without setting any limit to their amount depending upon the dispute value. On the other hand, the lawyers' fees presenting only one of numerous proceedings expenses are regulated by the Tariff on Awards and Reimbursement of Costs for Lawyers Work. The provisions on court fees can be found in Court Fees Act (Tariff on Court Fees), which regulates them in relation to the set dispute value and separately for different kinds of proceedings (civil law and execution, extra-judicial, probate, land registration proceedings, criminal proceedings initiated by individual claim, administrative, court registration and insolvency proceedings and other cases prescribed by the law). Furthermore, within each of enumerated kind of proceedings, it again sets different highest amounts of court fees for different motions during proceedings. For example, according to Tariff on Court Fees, in civil law and execution proceedings for claim and counterclaim it is to be paid in relation to dispute value: 100,00 kn (13, 23 €) for claim of value 0 –3000 kn (396,8 €); 200,00 kn (26, 45 €) for claim of value 3000 kn (396,8 €)–6000 kn (793,65 €) etc. However, for claims requesting adoption of payment order, proposals for execution etc., the court fees are half of the mentioned amounts. Moreover, the Court Fees Act does not distinguish between individual and collective claims. Instead, the court practice calculates its fees by relating them to dispute value in cases of co-litigation (Art. 23 of the Court Fees Act; Art. 161 the Civil Procedure Act). The option to exempt to the payment of fees and expenses is encompassed by the secondary legal aid regulated in the Free Legal Aid Act. According to its Art. 12(2) secondary legal aid encompasses also release of payment of court fees and release of payment of court proceedings costs (Art. 12(2)), in full or partial amount (Art. 19). There are no specific rules on how (i.e. methods of payment), the costs can be paid within mentioned legislation. The Civil Procedure Act contains general provisions on the duty of bearing proceedings costs in advance by each party for the costs caused by her proceedings actions (Art. 152), and on reimbursement of costs in accordance with the principle of liability for success in proceedings (Art. 154). The Court Fees Act does not contain provisions on methods of payment, but it contains the rules for cases of delay or non-payment of court fees (Arts. 39 et seq.).

Source(s):

Zakon o parničnom postupku (Civil Procedure Act), OG SFRY 4/77, 36/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91, incorporated into Croatian legal system by OG 53/91, 91/92, 58/93, 112/99, 129/00, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 25/13, 89/14

Zakon o sudskim pristojbama (Court Fees Act), OG Nos. 74/95, 57/96, 137/02, 125/11, 112/12, 157/13 and 110/15

Zakon o besplatnoj pravnoj pomoći (Free Legal Aid Act), OG No. 143/13

Pravilnik o naknadi troškova u sudskim postupcima (Ordinance on Reimbursement of Costs in Court Proceedings), OG Nos. 8/88, 3/94 and 150/05

Tarifa o nagradama i naknadi troškova za rad odvjetnika (Tariff on Awards and Reimbursement of Costs for Lawyers Work), OG Nos. 142/12, 103/14, 118/14 and 107/15

Presuda i rješenje Visokog trgovačkog suda Republike Hrvatske (Judgement of the High Commercial Court of the Republic of Croatia), Pž-7129/13-4 of 13 June 2014

Presuda i rješenje Vrhovnog suda Republike Hrvatske (Judgement of the Supreme Court of the Republic of Croatia), Revt-249/14-2 of 9 April 2015

The European e-justice Portal, Troškovi postupka – Hrvatska. Available at: https://e-justice.europa.eu/content_costs_of_proceedings-37-hr-en.do?clang=hr, Accessed on: 26 March 2016

Opatić, N. (2003): Troškovi postupka – parnični troškovi (Costs of Procedure – Civil Procedure Costs) Available at: http://www.pravnadatoteka.hr/pdf/Troskovi%20postupka%20-%20parnicni%20troskovi.pdf. Accessed on: 26 March 2016

5. STANDING AND REPRESENTATION IN CONSUMER DISPUTES

5.1 Does national law limit the standing of the individual consumer in respect of the claim that can be made and the forum before which it can be brought?

The consumer disputes mainly relate to civil law matters, which are decided by courts in civil procedure as a regular way of judicial protection in the area of civil rights relationships (arg. ex. Art. 1 of the Civil Procedure Act). With regard to standing of individual consumer before the court, in civil proceedings initiated by consumer due to violation of subjective rights protected under the Consumer Protection Act or some other legal act protecting consumer interests, consumer enjoys the same position as any other plaintiff bringing an action due to violation of his civil law rights. Consequently, eventual limits to an individual consumer are the same as for any individual plaintiff. From provisions of the Civil Procedure Act that could affect individual consumer to a greater amount, in respect of the claim one could exempt e.g. those on submitting an action requiring inter alia evidences proving facts on which plaintiff bases its claim (Art. 186). In respect of the forum before which the claim can be brought, as a limiting circumstance one should emphasise several possible jurisdictions of different courts depending upon concrete circumstances of the case. For example, besides the general rule on territorial jurisdiction of the court in the place of defendants domicile, residence or seat (Arts. 47-48), there are several provisions on special territorial jurisdiction for different civil law relations (e.g. Art. 52 on jurisdiction in damage compensation proceedings, Art. 53 on jurisdiction in disputes on rights protected under producers guarantee, Art. 58 on jurisdiction for persons not having domicile, residence or seat in the Republic of Croatia etc.)

5.2 Other than individual consumers, who or which bodies have standing in consumer protection disputes and for what types of claim? If the action is not brought by the individual consumer, what requirements of representation must be satisfied?

Other than individual consumers, every qualified entity or person has a right to initiate proceedings for protection of collective interests of consumers against a person who acts against in Art. 106(1) of the Consumer Protection Act enumerated provisions of the Consumer Protection Act, Obligations Act, E-Commerce Act, Consumer Credit Act etc. Art. 107(1) of the Consumer Protection Act requires that qualified entities or person have justified interest for collective protection of consumers, such as consumer protection associations or state authorities competent for consumer protection do. According to the Decision on Determining of Authorities and Persons Authorized to Initiate Proceeding for Protection of Collective Interests of Consumers, qualified entities are: following bodies have standing to apply for injunctions in court: Ministry of Economy, Ministry of Finance, Ministry of Maritime Affairs, Transport and Infrastructure, Ministry of Health, Agency for Electronic Media, Croatian Regulatory Authority for Network Industries, „Consumer“ – Croatian Union of the Consumer Protection Associations, and Union of the Consumer Protection Associations of Croatia. Moreover, Art. 107(5) enables to a qualified entity from another EU Member State to initiate proceedings for protection of collective interests of consumers. Since there are no special provisions on their representation before the court, the general provisions on legal representation of Civil Procedure Act apply (arg. ex Art. 122 of the Consumer Protection Act). According to Art. 77 every natural and legal person may be a party in the proceeding, and special regulations determine who can be a party in a proceeding besides natural and legal persons.

5.3 If a consumer wants to bring or defend an action relating to a consumer protection dispute, is there a legal (or otherwise formal) requirement that he or she has legal representation? Please specify for both judicial and ADR fora, and the bodies, associations or authorities that can provide this representation.

Since there are no special provisions for judicial proceedings initiated by an individual consumer, general provisions on legal representation of the Civil Procedure Act apply. According to Art. 77 every natural and legal person may be a party in the proceeding. Party having litigation capacity can undertake all proceedings actions by herself, while the party without such a capacity shall be represented by legal representative (Art. 79-80). With regard to legal representation of consumers before ADR fora (Art. 105 of the Consumer Protection Act), relevant Mediation Act and Ordinance and Ordinances of the Courts of Honour of the Croatian Chamber of Economy and of the Croatian Chamber of Trades and Crafts contain no special provisions on legal representation. In practice, the parties usually hire lawyers as their agents in mediation procedure. Ordinances of the Courts of Honour of the Croatian Chamber of Economy and of the Croatian Chamber of Trades and Crafts provide for subsidiary application of the Civil Procedure Act thereby leading to application of provisions on legal representation of the latter. Beyond that, relevant provisions can be found in more special legal acts dealing with consumer protection and regulating ADR before other bodies, e.g. Mediation Centre of the Croatian Insurance Bureau or the Mediation Centre in Banking Disputes of the Croatian Banking Association.

Source(s):

Zakon o parničnom postupku (Civil Procedure Act), OG SFRY 4/77, 36/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91, incorporated into Croatian legal system by OG 53/91, 91/92, 58/93, 112/99, 129/00, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 25/13, 89/14

Zakon o zaštiti potrošača (Consumer Protection Act), OG Nos. 41/14 and 110/15

Zakon o mirenju (Mediation Act), OG No. 18/11

Pravilnik o mirenju (Ordinance on Mediation), OG No. 142/11

Pravilnik o sudu časti pri Hrvatskoj gospodarskoj komori (Ordinance of the Court of Honour of the Croatian Chamber of Economy), OG Nos. 66/06, 114/06, 129/07, 8/08, 74/15

Pravilnik Suda časti Hrvatske obrtničke komore (Ordinance of the Court of Honour of the Croatian Chamber of Trades and Crafts), OG Nos. 11/07, 81/08, 145/10, 92/14 and 4/16

Odluka o određivanju tijela i osoba ovlaštenih za pokretanje postupka za zaštitu kolektivnih interesa potrošača (Decision on Determining of Authorities and Persons Authorized to Initiate Proceeding for Protection of Collective Interests of Consumers), OG No. 105/14

Presuda i rješenje Trgovačkog suda u Zagrebu (Judgement of the Commercial Court in Zagreb), P-1401/12 of 4 July 2013

6. ACTIONS BEFORE COURTS

6.1 Jurisdiction and competence of the courts in consumer disputes: General structure and special procedures aimed at protecting consumers

6.1.1 Are ordinary courts competent to hear such claims? Is there also a specialised tribunal for consumer protection disputes?

In accordance with provisions of the Civil Procedure Act on jurisdiction (Arts. 33 et seq.) and provisions on organization, activities and jurisdiction of the Courts Act (Arts. 14 et seq.), ordinary courts are competent to hear claims in consumer disputes (e.g. ordinary procedure or special small claim or order of payment procedure). However, if a sued trader is subject to an insolvency proceedings, subject matter jurisdiction lies in hands of

specialized commercial court (Art. 34b of the Civil Procedure Act; Art.21(8) of the Courts Act). Also in consumer collective redress proceedings, according to provisions of the Part IV of the Consumer Protection Act on procedural protection of consumers' rights, special commercial courts are competent to hear claims (Art. 110). There is no specialised court for consumer protection disputes.

6.1.2 Which courts are competent to hear consumer protection disputes at first instance and in appeals? Please specify the court, in light of the value of the claim (and identify any other factors that are relevant in allocation jurisdiction).

In civil proceedings initiated by an individual consumer, first instance courts are municipal courts which deal with general civil law disputes (Art. 34 of the Civil Procedure Act; Art. 18 of the Courts Act), while the second instance courts are county courts (Art. 34a of the Civil Procedure Act; Art. 19 of the Courts Act), which hear appeals from municipal courts. The first instance courts competent in consumer collective redress proceedings are commercial courts (Art. 110 of the Consumer Protection Act; Art. 21 of the Courts Act). All the appeals from commercial courts are to be heard before High Commercial Court as a second instance (Art. 34c of the Civil Procedure Act; Art. 24 of the Courts Act). The Supreme Court decides inter alia upon appeals against first instance decisions of county courts and of the High Commercial Court and upon revision against second instance decisions from county courts (Art. 34d of the Civil Procedure Act; Art. 20 of the Courts Act). Although there are several provisions connecting the subject matter jurisdiction with the value of the claim (e.g. Arts. 40(3), 186(2) etc. of the Civil Procedure Act), provisions on subject matter jurisdiction of ordinary courts do not explicitly mention value of the claim. According to Art. 40(4) if after the respondent has begun litigation on the merits, plaintiff omits to set the value of the claim the first instance court will determine the value on its own. However, if the first instance court doesn't do it until conclusion of main hearing, it is considered that the value of the claim amounts 50.000,00 kn (6.613,56 €). Similar provision is relevant for the procedures before commercial courts saying that in such cases it shall be considered that the value of the claim is 100.000,00 kn (13.227,51 €) (Art. 495.a).

6.1.3 What is the nature of the procedure at first instance, e.g. is it a simplified or a summary procedure, and is there an assessment of the merits? Please specify in light of the value of the claim (and identify any other factors that are relevant in allocating jurisdiction).

The first instance procedure is an ordinary one and includes assessment of the merits (e.g. Art. 8 on conscientious and careful assessment of facts and evidences or Arts. 294 et seq. of the Civil Procedure Act on oral hearing). However, with respect of the value of the claim, one should mention existence of special proceedings regulated in the third Part of the Civil Procedure Act, which inter alia encompass summary proceedings on payment order (Arts. 445.a–456) and small claim procedures (Arts. 457–468). The small claim procedure before ordinary courts concerns the value of the claim under 10.000,00 kn (1322,75 €) and if the plaintiff during the proceedings amends the claim so that its value exceeds 10.000,00 kn, the proceedings shall be finalized according to the provisions of the Civil Procedure Act on ordinary proceedings (Arts. 458 and 464(1)). Also if by the conclusion of the oral hearing conducted under rules on ordinary proceedings, the plaintiff reduces the claim under 10.000,00 kn, further proceedings shall be continued according to the rules on small claims procedure (Art. 464(2)).

6.1.4 Please identify the formal requirements that must be satisfied for a consumer dispute to be heard before a court. These might include time limits applicable to the filing of the action/defence, representation requirements etc.

A consumer dispute initiated by an individual consumer or as an collective redress proceeding must fulfil general formal requirements for civil law proceedings: 1) requirements concerning the court (subject matter and territorial jurisdiction, composition, objectivity of the judge); 2) requirements concerning the parties (party and litigation capacity, legal representation, process legitimacy, legal interest); and 2) requirements concerning the subject matter

(formal regularity of the claim and non-existence of double litis pendent, of court settlement and of res iudicata). If within the stage of preliminary examination of the claim (Art. 280–283) the court finds that a complaint is incomprehensible or incomplete, or there are lacks concerning party or litigation capacity or regarding legal representation, the court shall take necessary steps to remove these obstacles. The court can dismiss an action if it finds that the claim is not justiciable or the action was submitted untimely or prior peaceful or other enforcement of right foreseen by the law was not conducted prior to filing of the action. According to Art. 186(1) action must contain specific claim regarding the merits and incidental claims, the facts on which the plaintiff bases the claim, evidences to support these facts and other information's to be enclosed with every submission. All submissions to court (e.g. action, response to action, statements etc.) must be completely understandable, contain what is necessary to proceed in connection to them and be submitted within the deadlines determined by the court (Art. 106 etc.). E.g., if the respondent doesn't submit an answer to the claim within the time limit set (but in any case not shorter than 30 or longer than 45 days) a no-answer default judgment shall be rendered under fulfilment of certain conditions (default judgment) (Arts. 285(2) and 331.b). One should emphasise that fulfilment of some of these requirements differs significantly in individual and consumer collective redress proceedings, where e.g. the existence of legal interest is presumed in cases prescribed by the Consumer Protection Act (Arts. 107, 114), the action has to contain specific claims in accordance with the Consumer Protection Act requirements (Art. 114) etc.

6.1.5 In respect of the claims and relevant procedures available in the national legal system, what kind of relief might be available in consumer protection disputes? (monetary remedies, injunctions, skimming off etc.)?

Among existing provisions concerning consumer protection disputes, one should mention action for injunctions for the protection of consumers' interests regulated in Arts. 106 et seq. of the Consumer Protection Act. This is an condemnatory action that can be brought by qualified entity or person due to violation of collective interests of consumers against traders (Art.106(2)), and if the claim is justified, the court will issues a decision 1) determining and precisely defining infringement act, 2) ordering a defendant to stop with activities violating consumer protection provisions and if possible, ordering measures necessary for removal of detrimental consequences created by defendant's unlawful behaviour and 3) prohibiting such or similar behaviour in future (Art. 114) with respect to all consumers (Art. 117). The collective redress procedure doesn't exclude the possibility of initiating damage compensation proceedings, of initiating procedure for declaring the contract null or void, or the possibility of initiating any other proceedings for realization of rights guaranteed by the Consumer Protection Act or other laws (Art. 120).

6.1.6 Please provide a brief overview of the role of parties and judges in civil proceedings generally (e.g. with reference to the principle of party disposition, the obligation of parties to make and prove factual allegations and to make and provide legal arguments, the possible role of the court). This overview should be brief; these issues will be dealt with in more detail in the questions that follow.

General provisions on the role of parties are enshrined in Basic provisions of the Civil Procedure Act (Arts. 2–14). According to principle of party disposition, reflected in Arts. 2-3, the court must make decision within the scope of the claim set in procedure and cannot refuse to decide on a claim falling within its jurisdiction (Art. 2). Pursuant to Art. 3 parties may dispose freely with their claims: withdraw them, concede the claim of their adversary or settle. According to Art. 7(1) the parties are obliged to present the facts on which they base their claims and to suggest evidences proving these facts (Art. 299 on this duty during the oral hearing). The court is entitled to determine facts and to find out evidences not proposed by the parties only if it suspects that the parties are intending to dispose of claims with which they may not dispose out of Art. 3(3) (Art. 7(2)). In any case, the judge cannot base its judgment on the facts and evidences about which the parties have not been given the opportunity to make their observations (Art. 7(3)). According to Art. 5(1) the court shall give an opportunity to every party to enter his or her plea regarding

the claims and allegations made by the opposing party. According to the provisions on oral hearing the judge or presiding judge of a panel plays an active role in the civil proceedings by ensuring that all decisive facts are presented, parties incomplete allegations are supplemented, and all the relevant evidences are presented (Arts. 294 et seq.).

Source(s):

Zakon o parničnom postupku (Civil Procedure Act), OG SFRY 4/77, 36/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91, incorporated into Croatian legal system by OG 53/91, 91/92, 58/93, 112/99, 129/00, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 25/13, 89/14

Zakon o sudovima (Courts Act), OG Nos. 28/13, 33/15 and 82/15

Zakon o zaštiti potrošača (Consumer Protection Act), OG Nos. 41/14 and 110/15

6.2 Small claims

6.2.1 Does a small claims procedure exist in the Member State? If yes, is it a specialised or simplified procedure?

The small claim procedure is regulated in the Third Part of the Civil Procedure Act on special procedures (Arts. 457-467.a).

6.2.2 What are the value thresholds for claims brought under the small claims procedure? Moreover, are there any other factors that shape the use of the small claims procedure (including the nature of the claim, the area of consumer protection law into which the claim falls etc.)?

In accordance with Art. 458 of the Civil Procedure Act small claim procedure concerns disputes which claim relates to monetary amount not overriding 10.000,00 kn (1.322,75 €), or do not relate to monetary amount but the plaintiff accepts monetary substitute in the above specified amount or relate to delivery of movable thing but the plaintiff accepts monetary substitute in the above specified amount. The same is applicable to small claim procedures before commercial courts, where these procedures concern the amount not exciding 50.000,00 kn (6.613,75 €) (Art. 502(1). Small claim procedure is also pursued upon objection against the payment order if the amount of the objected part of the payment order does not exceed 10.000,00 kn (Art. 460), i.e. 50.000,00 kn before commercial courts. Disputes on immovable, arising from certain labour relations and trespassing disputes are not considered a small claim disputes (Art. 459).

6.2.3 What forms must be completed to raise the application? Who assists the consumer in completing these forms?

The provisions of the Civil Procedure Act on specialized small claim procedure do not contain rules on forms to be completed to raise an application or on assistance to plaintiffs (including consumers) in this regard. In accordance with Art. 461.a(2) in small claim procedure the parties are obliged at latest in the action i.e. response to the action, to submit all the facts on which they base their claims and suggest evidences necessary to establish presented facts. According to Art. 457, if this chapter doesn't foresee any special provisions, the rest of provisions of the Civil Procedure Act apply in small claim procedures. Consequently, consumers and any other plaintiffs must satisfy formal requirements on submitting an action and other submissions prescribed by general provisions and provisions on ordinary proceedings (Arts. 106 et seq., Art. 185 etc.) and with regard to assistance they may hire an agent (Arts. 89 et seq.) or try to apply for a free legal aid in accordance with provisions of the Free Legal Aid Act.

6.2.4 How can an application for a small claim be made (e.g. online, by post or in person)?

Since there are no special provisions on this matter for small claim procedures, in accordance with Art. 457, general provisions of the Civil Procedure Act on submissions (Arts. 106 et seq.) and on service of communications (Arts. 133 et seq.) apply. According to Art. 106 all submissions (action, response to action, legal remedies and other

statements, proposals and notifications) which are given outside of hearing are to be submitted in writing and can also be given orally and recorded in the minutes of the court. According to Art. 133(1) the way of service of communications, which also encompass submissions, encompasses the possibility to service by the mean of post, or through certain court official i.e. court servant, competent administrative body, public notary or directly in the court premises or by the mean of electronic communication in accordance with the special act. This is also confirmed by provisions of the Rules of Procedure of Courts on service of communications to court register office, which distinguishes between service in person and postal service (Arts. 92 and 96). With regard to procedures before commercial courts, there is a special provision on submissions in electronic form (Art. 492.a).

6.2.5 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

In small claim procedure the parties are obliged at latest in action i.e. answer to an action, to present all the facts on which they base their claims and to suggest evidences proving presented facts (Art. 461.a(2)). New facts and new evidences can be offered at preparatory hearing only if parties were not able to present them, without their fault, in action i.e. answer to an action (Art. 461.a(3)), while all the other newly presented facts and evidences will not be taken into account by the court (Art. 461.a(4)). According to Art. 465 if the plaintiff doesn't come to the first hearing to which he was regularly invited, it will be considered that he withdraw his action, except in case where defendant starts litigating. If both parties don't appear at later hearing, the court will postpone the hearing, and if they both miss the new hearing, it will be considered that the plaintiff withdraw his action (paras. 1-2). In absence of special provisions, the general rules of the Civil Procedure Act apply to small claim procedures (Art. 457), i.e. also provisions on taking of evidence (Arts. 219 et seq.) and on preparation of a preparatory and of a main hearing to which the parties are invited by the court (Art. 286 et seq.). Consequently, during the so-called preliminary procedure as a first stage of a civil procedure, the parties are obliged to present their factual allegations and propose evidences, while the main hearing is limited exclusively to procedure of taking evidences.

6.2.6 Are the costs of the successful party reimbursed?

Since there are no specific rules for reimbursement of costs in small claim procedure, according to Art. 457, general provisions of the Civil Procedure Act on proceedings costs (Arts. 151 et seq.) apply. According to Art. 154(1) the party who loses proceeding completely, is obliged to pay the costs to the opposite party and his/her intervener. If the party was only partially successful in proceeding, the court may, taking into account the achieved success, order that each party bears her own costs or that one party reimburses to the other and to intervener the proportionate amount of costs (Art. 154(2)). Pursuant to Art. 155(1) the court will determine compensation only of those costs which were necessary for conducting a litigation.

Source(s):

Zakon o parničnom postupku (Civil Procedure Act), OG SFRY 4/77, 36/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91, incorporated into Croatian legal system by OG 53/91, 91/92, 58/93, 112/99, 129/00, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 25/13, 89/14

Zakon o besplatnoj pravnoj pomoći (Free Legal Aid Act), OG No. 143/13

Sudski poslovnik (Rules of Procedure of Courts), OG Nos. 37/14, 49/14, 8/15, 35/15 and 123/15

Dika, M. (2009): Novelirani postupak u sporovima male vrijednosti [Novelties in the Procedure on Small Claim Disputes], Collected Papers of the Law Faculty of the University of Rijeka. Vol. 30. Nr. 1. pp. 1-32

6.3 Claims other than small claims

6.3.1 If a consumer protection dispute does not qualify as a small claim, what other procedures are available? What are the value thresholds and other factors determining the use of such procedures?

In accordance with Art. 464(1) if the plaintiff amends the claim during the small claim procedure so that its value exceeds 10.000,00 kn (1322,75 €), the procedure shall be finalized according to the provisions of the Civil Procedure Act on ordinary procedure. Besides ordinary procedure, the third Part of the Civil Procedure Act on special procedures regulates a summary proceeding on payment order (Arts. 445.a–456) and collective redress procedures (Arts. 502.a-502.h; Arts. 106 et seq. of the Consumer Protection Act).

6.3.2 How can such claims be made? Please specify if the applications can be made online, or by post or in person.

According to Art. 185 of the Civil Procedure Act civil procedure is initiated by an action, which is outside of hearing to be submitted in writing or orally and recorded in the minutes of the court (Art. 106). According to Art. 133(1) the way of service of communications, including submissions, encompasses possibility to deliver by post, or through certain court official i.e. court servant, competent administrative body, public notary or directly in the court premises or by the mean of electronic communication in accordance with the special act. With regard to collective redress procedures, in procedures before commercial courts submissions can be submitted in electronic form (Art. 492.a).

6.3.3 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

The Civil Procedure Act contains detailed rules on taking of evidence by differing between several types of evidences: on-site inspection, documents, witnesses, appointed experts, hearing of parties (Arts. 219 et seq.). General rule is that each party must prove the facts and suggest evidences on which it bases her claim or refutes the allegations and evidences of her opponent. The court may caution the parties on their duty of providing facts and presenting evidence, especially of the need to present decisive facts and propose specific evidence and present the reasons why they believe this is necessary. Art. 299 prescribes that parties are obliged in action i.e. answer to an action or at latest during the preparatory hearing, to present all the facts on which they base their claims, to suggest evidences proving presented facts and express themselves about allegations on facts and evidences of the other party. New facts and new evidences can be offered at oral hearing only if parties were not able to present them, without their fault, prior to conclusion of preparatory procedure and to express themselves about allegations concerning facts and evidences of the other party. During the stage of preparing a preliminary hearing (Art. 284, 286 – 292) and setting a date for the oral hearing (Art. 293), the court invites the parties to appear in the court. In case of defendant's non appearance, a default judgment because of non – appearance can be brought under fulfilment of certain conditions (absence judgment) (Art. 332). There is also a possibility to render a judgment without an oral hearing (Art. 332.a), if in his answer to action the defendant admitted decisive facts. Similarly, in procedures before commercial courts, such as consumer collective redress procedures, if the both parties omit preparatory hearing or the first hearing for the main hearing or any later hearing, the court will postpone the hearing, and if they omit the new hearing, it shall be considered that the plaintiff withdraw the action (Art. 499(2)).

6.3.4 Are the costs of the successful party reimbursed?

Pursuant to general provisions of the Civil Procedure Act on proceedings costs, the party who loses proceeding completely, is obliged to pay the costs to the opposite party and his/her intervener (Art. 154(1)). The court will determine compensation only of those costs which were necessary for conducting a litigation (Art. 155(1)). In case the party was only partially successful, the court may order, by taking into account the achieved success that each party bears her own costs or that one party reimburses to the other and intervener the proportionate amount of costs (Art. 154(2)). The court may decide that one party reimburses all the costs of the opposite party and her intervener, if the opposite party has not succeeded only with regard to relatively insignificant part of her claim, which has not caused special costs (Art. 154(3)).

Source(s):

Zakon o parničnom postupku (Civil Procedure Act), OG SFRY 4/77, 36/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91, incorporated into Croatian legal system by OG 53/91, 91/92, 58/93, 112/99, 129/00, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 25/13, 89/14
Sudski poslovnik (Rules of Procedure of Courts), OG Nos. 37/14, 49/14, 8/15, 35/15 and 123/15

6.4 Claims for the issuance of a payment order

6.4.1 Does an order for payment procedure exist in the national system? Is it a simplified procedure?

An order for payment procedure is regulated in the Third part of the Civil Procedure Act on special procedures and it represents a summary proceeding (Arts. 445a – 456). According to Art. 448(1) payment order is issued by the judge i.e. president of the panel without holding a hearing.

6.4.2 Which authorities or courts are competent to hear claims for the issuance of payment orders?

According to Civil Procedure Act, the order for payment procedure is not explicitly reserved for certain court or certain authority. Art. 447 is prescribing that in disputes belonging to jurisdiction of commercial courts, the court will issue payment order when the claim relates to due main claim in money not exceeding 20.000,00 kn (2.645,50 €). Consequently, in consumer disputes the courts deciding in these procedures will be those to whose subject matter jurisdiction the dispute belongs, presumably ordinary and commercial courts. This can be supported by Art. 453 prescribing that the defendant can object to subject matter and territorial competence of the court only when contesting payment order. Further on, in accordance with provisions of the Enforcement Act, payment order can also form part of the execution order brought by a court or public notary on the ground of trustworthy document (Art. 1(1)).

6.4.3 Are there any formal requirements that must be satisfied for the application for the issuance of a payment order to be made (e.g. standard forms, representation by a lawyer, the detail of description required, the need to provide written evidence etc.)?

According to Art. 446 when a claim related to due amount of money is to be proven by trustworthy document attached to an action in original or a notarized copy, the court will issue an order to defendant to fulfil the claim from action (payment order). It is required from the plaintiff to specially enumerate in his action the reasons why he proposes issuing of payment order instead of proposing execution on the ground of trustworthy document (documented payment order). If he doesn't prove his legitimate interest the court will dismiss the action. When the claim concerns due main claim in money not exciding 5.000,00 kn (661,37 €), the court will issue a payment order although the action was not supported by trustworthy documents, but the action contains the ground and the amount of depth and indicates evidences on the ground of which the verity of allegations in the claim can be proven (Art. 447(1), non-documented payment order).

6.4.4 What information is generally available to the authority or court when a claim for the issuance of a payment order is made?

Besides from action mentioned in Art. 446, information available to public notaries or courts comes from trustworthy documents supporting an action. According to Art. 31(1) of the Enforcement Act, trustworthy document is an invoice, promissory note and cheque with protest and return accounts if they are necessary for the foundation of the claim, public document, extract from business books, legally notarized private document and document that is considered to be a public document according to special regulations. A calculation of interests is also considered to be an invoice. In accordance with Art. 446(2) a trustworthy document is suitable for execution if it contains information on creditor, debtor and on the subject, sort, volume and time of the fulfilment of monetary obligation, whereby the invoice to a natural person must also contain a warning to a debtor that in case of non-fulfilment of monetary obligation a creditor can request execution (Art. 446(3)).

6.4.5 What opportunity is available for a defence/statement of opposition to be advanced? How should this be done and what is its effect? Please specify if the means of advancing a defence differ depending on the value of the claim and the court dealing with it.

Since the payment order is issued by the judge i.e. president of the panel without holding a hearing (Art. 448(1)), the only mean of advancing a defence is through defendants objection against the payment order (Art. 450(1)). In case of complete and admissible objections a preparatory hearing will be set by the court and in decision on the merits the court will decide whether the payment order shall remain in force, completely or partially, or be annulled. According to Art. 452(1) the plaintiff can object that there were no legal grounds for the issuance of a payment order (Arts. 446-447) and that there are obstacles to further advancement of procedure. In that case the court will primarily decide upon this objection and if justified, it shall annul the order for payment. Once that ruling is final, it will initiate discussion on the merits of the case, when there is a place for such a discussion. If the court does not accept such an objection, it will move on with the discussion on the merits of the case and the ruling on it will form a part of the decision on the merits (Art. 452).

6.4.6 What is the effect if the claim is uncontested, i.e. if there is a lack of defence/statement of opposition?

According to Art. 450(2) in the part in which the payment order is not contested by an objection, it becomes final. The payment order shall also remain in force, if until the conclusion of the main hearing the defendant waives all submitted objections (Art. 456(2)).

6.4.7 If the defendant is a consumer, and he or she does not respond to or raise an objection to the issuance of the payment order, does the authority dealing with the claim for payment order proceedings have the power to examine any issue of consumer protection law of its own motion before treating the action as usual?

The competent court watches of its own motion upon fulfilment of conditions for the issuance of the payment order. Since the provisions concerning the proof of plaintiffs' legal interest are ius cogens, the court is watching upon them ex officio and if the plaintiff doesn't prove his legitimate interest the court shall dismiss the action as inadmissible (Art. 446(2)). Moreover, according to Art. 445.a if there are no special provisions in this Chapter, in the procedure on order for payment the rest of provision of the Civil Procedure Act apply. This includes ex officio duty of the courts to control of parties' dispositions arising from Art. 3(3) according to which, the court shall not consider parties dispositions which are contrary to mandatory regulations and rules on public morality, which also includes mandatory consumer protection provisions (Art. 41 of the Consumer Protection Act). The same duty exist e.g. for courts or public notaries issuing an execution order containing a payment order on the ground of trustworthy document in accordance with provisions of the Enforcement Act, which foresee subsidiary application of provisions of the Civil Procedure Act (Art. 21(1).

6.4.8 What steps must the pursuer take in order to obtain an enforceable decision?

The court decision in form of ruling on the payment order becomes final if it was not objected against (Art. 450(2)). Pursuant to Art. 25(1) of the Enforcement Act, the court decision, including payment order (Art. 24(1)), ordering fulfilment of the claim relating to certain giving or doing is enforceable if it became final and if the deadline for the voluntary fulfilment passed. The latter runs from the day of delivery of the decision to the enforcement debtor, if nothing else is prescribed by the law. With regard to consumer disputes, it is relevant that the first instance court decision ordering a natural person who is not pursuing a registered activity the payment of the claim not exciding 5.000,00 kn (661,37 €), becomes enforceable within 8 days from the day of delivery to a person to whom payment is ordered. The appeal against such decision does not postpone the enforcement (Art. 26).

6.4.9 Is this decision final, or can the defendant appeal against it?

According to Art. 450(2) in the part in which the payment order is not contested by an objection, it becomes final. If the amount of the objected part of the payment order does not exceed 10.000,00 kn (1322,75 €), a small claim procedure shall be pursued (Art. 460). Pursuant to Art. 450(1) payment order can only be contested by an objection, whereby the untimely, incomplete or inadmissible objections will be dismissed by the court without holding a hearing (Art. 451(1)). If the payment order is contested only with regard to decision on costs, this decision can only be contested through an appeal against the order. However, if the court does not accept the application for issuance of payment order, it will advance with the procedure upon the action and this ruling of the court cannot be appealed against (Art. 449). With regard to execution order a part of which forms a payment order, this order can be objected according to provisions of the Enforcement Act (Art. 57 et seq).

Source(s):

Zakon o parničnom postupku (Civil Procedure Act), OG SFRY 4/77, 36/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91, incorporated into Croatian legal system by OG 53/91, 91/92, 58/93, 112/99, 129/00, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 25/13, 89/14

Ovršni zakon (Enforcement Act), OG Nos. 112/12, 25/13, 93/14

6.5 Appeals in consumer disputes

6.5.1 Are appeals possible in all consumer disputes? Please specify for small claims and other types of claims.

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.00	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Nature of the procedure at 1st instance	Municipal court- Ordinary procedure: 10.000 + kn/ 1322,75 + €	Municipal court- Ordinary procedure: 10.000 + kn/ 1322,75 + €	Municipal court- Ordinary procedure: 10.000 + kn/ 1322,75 + €	Commercial Court- Special collective redress procedure	Commercial Court- Special collective redress procedure	Commercial Court- Special collective redress procedure
	Municipal court- Small claims procedure: 0-10.000 kn 0-1322,75 €					
2nd instance – appeal to?	County court - Ordinary procedure	County court - Ordinary procedure	County court - Ordinary procedure	High Commercial Court	High Commercial Court	High Commercial Court

	County court - Small claims procedure					
3rd instance – appeal to?	Supreme court - Ordinary procedure		Supreme court - Ordinary procedure 200.000 kn+ 26.455+ €			Supreme court - 500.000+ kn 66.137,56 +€
	Supreme court – Small claims procedure					

6.5.2 Please briefly specify the national appeal procedure, including any requirements to be satisfied for appeals. These might include, but are not limited to, conditions of admissibility, value thresholds, time-limits, the scope of review, and the impact of the appeal on enforcement (provisional enforcement). Please refer to any rules specifically applicable in respect of the claims and relevant procedures outlined above.

National appeal procedure regulated in the Civil Procedure Act distinguishes between two types of legal remedies against not final (regular) and against final court decisions (extraordinary). Regular encompass appeals against first instance judgements and objections to payment order, while appeals against the court's rulings are only allowed when this is not expressly prohibited (Art. 378). While the regular legal remedies in principle (Arts. 379, 437, 502.f) suspend the enforcement, the extraordinary don't (Art. 384). According to Art. 348 parties may lodge an appeal against a first instance judgment within 15 days from the day of delivery of its transcript, unless the Act provides for another time limit (8 days in disputes concerning checks and bills of exchange). An appeal has to satisfy certain requirements regarding the content, such as specification of the contested judgement, grounds for appeal, signature of the appellant etc. (Art. 350). Untimely, incomplete, or inadmissible appeals shall be dismissed by the first instance court without a hearing (Art. 358(1)). An appeal is inadmissible, if it was brought by a person not authorised to submit an appeal, or person who waived her right to appeal or a person without a legal interest to submit an appeal (Art. 358(3)). If the appeal satisfies prescribed requirements, the second instance court shall start deciding upon appeal (Art. 348(3)) by examining its validity and grounds. Pursuant to Art. 353(1) a judgment can be appealed on the ground of essential violation of civil procedure rules (Art. 354), of erroneous or incomplete establishment of the facts (Art. 355) and erroneous application of the substantive law (Art. 356). There are exceptions to this rule with regard to certain judgements. The second instance court is examining the first instance judgement only regarding the part contested in appeal, and if this is not visible from the appeal, it is considered that the judgement is contested in relation to a part in which the party was unsuccessful in the dispute (Art. 365(1)). The second instance court is examining the first instance judgement within the limits of reasons stated in the appeal, by observing ex officio to certain essential violations of civil procedure rules and to regular application of substantive law (Art. 365(2)). The judgement or the ruling in small claims procedure can be appealed only because of enumerated essential violations of civil procedure rules and because of erroneous application of the substantive law, within 8 days from publication or delivery to a party (Art. 467). The extraordinary legal remedies include revision (Arts. 382-400), renewal of

procedure (421-428), and renewal of procedure upon a final judgment of the ECHR in Strasbourg concerning a violation of a fundamental human right or freedom (428.a). Revision as an recourse against final judgments of the second instance courts is a limited remedy, which can be applied only when 1) the amount of the contested part of the claim exceeds 200.000,00 kn (26.455,02 €), and regardless of the value threshold 2) in labour disputes concerning the (non)existence of employment relation and 3) when the second instance judgement was rendered according to provisions of Arts. 373.a and 373.b (ordinary revision in Art. 382(1)). In cases in which the parties cannot bring a revision according to these rules, they are allowed to bring a revision against a second instance judgment if the decision in the dispute depends upon the solution of certain substantive or procedural law question important for ensuring the uniform application of law and for equality of all in its application (extraordinary revision in Art. 382(2)). In small claim procedures only extraordinary revision is allowed and under condition that the second instance court has indicated this in the judgement (Art. 467.a). Revision is to be submitted within the 30 days from the day of delivery of the second instance judgment (Art. 382). Regarding the collective redress proceedings, it is important to outline that in procedures before commercial courts the revision from Art. 382(1)(1) is not allowed, if the value of the claim does not exceed 500.000,00 kn (66.137,56 €) (Art. 497.a). In relation to all the other provisions, Art. 502a regulates subsidiary application of the rest of provision of the Civil Procedure Act, if there are no special rules in the Chapter on collective redress procedure. The deadline for submitting an appeal in proceedings before commercial courts is 8 days (Art. 500) and the court may decide that an appeal doesn't suspend the enforcement or determine shorter deadline for fulfilment of defendants claims (Art. 502.f). A special provision on provisional enforcement in Art. 502.g regulates that before initiating or during the procedure (without clarifying whether it concerns only the first or also other instance procedures), the court may determine provisional measures foreseen by Enforcement Act, if the plaintiff makes plausible that the defendant acted in a manner which violated or seriously endangered collective interests or rights the protection of which is requested by action and determination of a measure is necessary to remove the danger of irreparable damage or to prevent violence.

Source(s):

Zakon o parničnom postupku (Civil Procedure Act), OG SFRY 4/77, 36/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91, incorporated into Croatian legal system by OG 53/91, 91/92, 58/93, 112/99, 129/00, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 25/13, 89/14

Presuda i rješenje Vrhovnog suda Republike Hrvatske (Judgement of the Supreme Court of the Republic of Croatia), Revt-249/14-2 of 9 April 2015

Odluka Ustavnog suda Republike Hrvatske (Decision of the Constitutional Court of the Republic of Croatia), Nos. U-I-1569-2004, U-I-305-2005, U-I-1677-2004,U-I-320-2005, U-I-1702-2004, U-I-464-2006, U-I-1904-2004, U-I-3351-2006, U-I-2677-2004 of 20 December 2006, OG No. 2/07 of 4 January 2007

6.6 Enforcement in consumer disputes

6.6.1 If the assessment of a consumer protection issue has not been possible at an earlier stage of the proceedings, is it always possible – either ex officio (see section 10 below) or if the consumer raises a possible violation of consumer protection law – for this assessment to be undertaken during enforcement proceedings?

One possible way of ex officio control is through Art. 21(1) of the Enforcement Act, which provides for subsidiary application of Civil Procedure Act in enforcement proceedings. This includes inter alia the ex officio duty of the courts to watch upon parties dispositions which are against the rules of mandatory nature, such as consumer protection rules, and against public morality (Art. 3(3) of the Civil Procedure Act). With regard to substantive law

requirements and consequences of the execution of the enforcement procedure, provisions of acts regulating real rights and obligation relations apply accordingly (Art. 21(2) of the Enforcement Act). This encompasses also the ex officio duty of courts, e.g. to watch upon the nullity of contracts (Art. 327(1) of the Obligations Act). Arbitration agreements as procedural contracts also forge this control and pursuant to Art. 39(1) of the Arbitration Act the court shall determine enforcement of arbitration award, except if it finds the existence of some of the reasons for the annulment of the award out of Art. 36(2)(2) (non-existence of arbitrability and contrariety to rules of public order). When deciding upon the proposal for the enforcement of the award, the court shall limit itself to examination of existence of conditions out of Arts. 39, 40, 47 and 48 of the Arbitration Act (Art. 49(1)). The provisions on enforcement of arbitration awards (Arts. 47 et seq.) foresee a possibility for the opposing party to express herself about the proposal for the enforcement of the award before the court, however, only if this doesn't endanger successful realization of the requested enforcement (Art. 49(3)). Besides this option, the consumer can raise a possible violation of consumer protection law, only through the action for the annulment of the arbitration award (Art. 36). The same applies to the Enforcement Act, which contains the possibility for the debtor to appeal against the ruling on enforcement (Art. 50) and to submit an objection against the ruling on enforcement brought on the ground of the trustworthy document (Art. 57). The enumerated grounds for appeal, to some of which the court is watching ex officio (Art. 50(5)) are focused on matters such as enforceability of the documents, deadline for the enforcement, limitation period for the claim etc. (Arts. 50(1)).

6.6.2 In the particular case of consumer protection, if a court examines consumer protection law (either ex officio or on the basis of an argument advanced by the consumer), does national procedural law provide that interim measures should 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 final decision will have full effect?

Provisions of the Civil Procedure Act on collective redress proceedings foresee a possibility for adoption of interim measures regulated in the Enforcement Act under fulfilment of certain conditions (Art. 502.g). Nonetheless, interim measures from the Enforcement Act don't encompass a measure such as stay of enforcement proceeding (Arts. 340 et seq.). The responding provisions can be found in the Chapter of the Enforcement Act (Arts. 65 et seq.) on deferral of enforcement. Pursuant to Art. 65, following the proposal of the execution debtor, under condition that the debtor makes plausible that pursuing of enforcement would cause him irreparable damage or damage that can be compensated with difficulties, or if he makes plausible that this is necessary to prevent violence, the court may completely or in part defer the enforcement in certain taxatively enumerated situations. These concern cases in which a legal remedy was raised against a decision on enforcement, or in which an action for the annulment of the arbitral award on the ground of which the enforcement is ordered is brought, or when an action demanding a putting of a settlement or of a notarial deed on the ground of which the enforcement is allowed out of force etc. Moreover, according to Art. 72(1) the enforcement shall be suspended ex officio, if the enforcement document (title) is repealed, amended, annulled, put out of force or lost its legal effect in some other way, i.e. if the confirmation of enforceability is repealed.

Source(s):

Zakon o parničnom postupku (Civil Procedure Act), OG SFRY 4/77, 36/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91, incorporated into Croatian legal system by OG 53/91, 91/92, 58/93, 112/99, 129/00, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 25/13, 89/14

Ovršni zakon (Enforcement Act), OG Nos. 112/12, 25/13, 93/14

Zakon o arbitraži (Arbitration Act), OG Nos. 88/01

Zakon o obveznim odnosima (Obligations Act), OG Nos. 35/05, 41/08 and 125/11

Presuda Općinskog suda u Splitu (Judgement of the Municipal Court in Split), Pi-800/12 of 24 May 2013
Josipović, T. (2013): Enforcement Activity in Consumer Protection Regulation in Croatia, Journal of Consumer Policy, No. 36:287

7. ACTIONS FOR COLLECTIVE REDRESS

7.1 Injunctive relief, linking individual and collective actions

7.1.1 If collective proceedings are launched, does national procedural law provide that ongoing individual claims, relating to the same dispute, should be stayed until the collective proceedings are brought to an end? Please specify if this constitutes an obligation on the part of the national judge or if it is at his or her discretion.

The argument arising from more special provisions on consumer collective redress proceedings regulated in the Consumer Protection Act enables the individual consumer dispute to be brought independently of the collective proceeding. Pursuant to Art. 120, initiating or conducting a proceeding pursuant to Art. 106(1) of the Consumer Protection Act shall not prevent a person to whom the damage was caused by the trader's conduct contrary to the provisions of this Act and other regulations listed in Art. 106(1), to initiate before the competent court proceedings for compensation against the trader who has caused damage through unpermitted conduct, or to initiate before the competent court proceedings for the annulment of the contract concluded under the influence of unpermitted conduct, or to initiate any other proceedings before the court to realise rights based on provisions of this or other laws. Since there is no identity of the proceedings parties, such proceedings are not in contrariety with the Civil Procedure Act prohibition on the existence of the same claims between the same parties upon which the court is watching ex officio - litis pendent (Art. 194). However, in court practice there were examples of request for a stay of proceeding by applying Art. 213(1) of the Civil Procedure Act, when the court decides not to solve a preliminary question (Art. 12) on its own.

7.1.2 If individual proceedings are stayed, please indicate what the effect of the court or ADR entity's decision in the collective action on those individual proceedings would be, i.e. whether the outcome of the collective action binds the consumer bringing an individual action.

Although more special provisions on consumer collective redress proceedings out of Consumer Protection Act (Arts. 106 et seq.) and subsidiary applicable provisions on special collective redress proceedings out of Civil Procedure Act (Arts. 502.a et seq.) don't foresee any provision concerning stay of proceedings, subsidiary applicable provisions on ordinary procedure contain Art. 186.f. concerning ADR. According to this Article, if the parties to a civil proceeding annexed an agreement proposing mediation at some of the mediation centres, the court shall instruct the parties to consult that centre within the 8 days and stay a procedure until the mediation process is finalized. In case of a successful mediation, the parties will conclude a settlement before the court which sent them to mediation. The parties can also during the whole first and second instance proceeding agree to request from the court the stay of proceedings due to peaceful dispute resolution, independent of the way and fora (Art. 186.g). Beyond that, both sets of rules contain provisions on the binding effect of the court decision for other courts, according to which the court decision brought in (consumer) collective redress proceeding have binding effect upon other courts in proceedings initiated individually by a consumer relating to compensation of damage caused by the defendants actions (Art. 118 of the Consumer Protection Act and Art. 502.c. of the Civil Procedure Act). Moreover, according to Art. 117 of the Consumer Protection Act such a court decision has an erga omnes effect, which enables, besides to plaintiff or

qualified entity or person from Art 107(2), to every consumer to request an enforcement of a decision ordering a defendant to refrain in the future from the same or similar illegal behaviour in relation to all consumers.

Source(s):

Zakon o parničnom postupku (Civil Procedure Act), OG SFRY 4/77, 36/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91, incorporated into Croatian legal system by OG 53/91, 91/92, 58/93, 112/99, 129/00, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 25/13, 89/14

Zakon o zaštiti potrošača (Consumer Protection Act), OG Nos. 41/14 and 110/15

Presuda Općinskog suda u Rijeci (Judgement of the Municipal Court in Rijeka), P-3196/2012 of 31 July 2014

Presuda Općinskog suda u Osijeku (Judgement of the Municipal Court in Osijek), P-788/2014-48 of 1 April 2015

Presuda Općinskog suda u Osijeku (Judgement of the Municipal Court in Osijek), P-135/2018-8 of 19 June 2015

Baretić, M. (2009): Individualna i kolektivna zaštita potrošača u hrvatskom pravu [Individual and Collective Consumer Protection in the Croatian Law]. In: V. Tomljenović, E. Čulinović Herc, V. Butorac Malnar (eds.), Republika Hrvatska na putu prema Europskom pravosudnom području: Rješavanje trgovačkih i potrošačkih sporova [The Republic of Croatia on its Way to the European Judicial Area: Resolution of Commercial and Consumer Disputes], Faculty of Law University of Rijeka, Rijeka, pp. 241–286

Dika, M. (2003): Udružna tužba kao instrument apstraktne zaštite potrošača [Representative Action of Association as an Instrument of Abstract Consumer Protection]. Croatian Law Review. Vol. 3(10), pp. 37-43

8. CONSUMER ALTERNATIVE DISPUTE RESOLUTION

8.1 Consumer disputes before ADR fora

8.1.1 Is ADR mandatory for all parties bringing a claim related to a consumer protection dispute?

Art. 105 of the Consumer Protection Act on out-of-court resolution of consumer disputes prescribe that in case of a dispute between a consumer and a trader, an application may be brought to the Court of Honour of the Croatian Chamber of Economy and of the Croatian Chamber of Trades and Crafts, or the proposal for mediation to mediation centres. According to Art. 109(1), prior to initiating of the consumer collective redress proceedings, the parties may initiate mediation procedure before the mediation centre. ADR as a voluntary mean of dispute resolution is also foreseen by numerous other legal acts concerning consumer protection, such as Consumer Credit Act, Insurance Act, Payment System Act etc. and is practiced before the Mediation Centre of the Croatian Employer's Association, Croatian Insurance Bureau, Mediation Centre in Banking Disputes etc. In accordance with the Green Paper of European Commission on Alternative Dispute Resolution in Civil and Commercial Law arbitration proceedings as being quasi-judicial proceeding which end up with an arbitral award having the force of a final court judgement, are excluded from analysis of this Chapter.

8.1.2 Please specify if there are limitations to the use of ADR. These might include the nature of the claim (i.e. whether both individual and collective claims are possible), requirements of representation, time limits, value thresholds, etc.

The above presented provisions (Arts. 105 and 109 of the Consumer Protection Act) enable mediation before mediation centres in both consumer individual and collective disputes. Mediation Act regulates mediation in civil, commercial, labour and other disputes on rights which are in free disposition of the parties (Art. 1(1)). It contains requirements in relation to parties' agreement on participation in mediation procedure, on a person of a mediator, time limits concerning acceptance of a mediation proposal and concerning ending of mediation through settlement etc. (Arts. 6 et seq.). Dispute resolution before the Courts of Honour of the Croatian Chamber of Economy and of the

Croatian Chamber of Trades and Crafts is regulated by their Ordinances, which both contain detailed rules on application, preliminary mediation procedure, limitation periods etc.

8.1.3 Can ADR entities issue binding decisions and can they enforce those decisions? If not, please explain how they are enforced.

The mediation can inter alia be finalized by conclusion of the settlement agreement (Art. 12), which shall be binding on the parties to the settlement (Art 13(1)). A settlement agreement is enforceable document (title) if it determines a specific obligation to perform on which parties may reach a settlement and if it contains a liable party's authorization for direct enforcement (enforceability clause) (Art 13(2) of the Mediation Act and Art. 7 of the Ordinance). The parties may agree for the settlement agreement to be formulated as a notarial deed, a court settlement or an arbitration award based on a settlement (Art 13(5)). The Courts of Honour of the Croatian Chamber of Economy and of the Croatian Chamber of Trades and Crafts decide in the first instance by adoption of rulings and of judgements containing warnings that can be enforced by these entities and may end up by a settlement having effect of enforceable title. Pursuant to Art. 23 of the Enforcement Act a settlement achieved in proceedings before the courts of honour of Croatian chambers and a settlement achieved in a mediation proceeding are enforceable titles.

8.1.4 Does national law provide that limitation periods applicable to judicial actions should be suspended while ADR is ongoing?[10]

Pursuant to Art. 17(1) of the Mediation Act, the parties who have in accordance with this Act chosen mediation in an attempt to settle a dispute shall not be prevented from initiating judicial, arbitration or other proceedings because of expiry of limitation or prescription period. 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)). There is exception to this rule in Art. 17(4) saying 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 don't provide similar provisions.

8.1.5 Please specify if national law establishes rules providing for recourse to judicial action following an (unsuccessful) ADR hearing[11].

In case of an unsuccessful mediation, the parties may recourse to a judicial action, what could be interpreted from Art. 5 of the Mediation Act. According to this provision mediation can be conducted regardless of whether there is a court, arbitral or other proceeding conducted on the subject matter of the dispute. Similarly, the Court of Honour of the Croatian Chamber of Economy decides upon the application also in cases when the proceeding before the ordinary or specialized court is initiated between the same parties and in the same dispute matter (Art. 6(2) of the Ordinance). However, in case of a successful mediation settlement concluded in a form of a court settlement, recourse to a judicial action would be prevented by a res iudicata principle (Art. 354 of the Civil Procedure Act).

8.1.6 Is there judicial review of decisions and awards made by ADR entities? If so, by which court or tribunal is this oversight made? Is it ordinary or specialised?

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[10] The Directive on Consumer ADR provides that "the existence of an effective system for collective claims and easy recourse to ADR should be complementary". Consumer ADR is relevant not only for individual claims but also for collective ones; it can provide consumer with a means to reduce costs and save time.

[11] Per Arts.10-12, Directive on Consumer ADR.

Since the ADR proceedings and ordinary, arbitral or other proceedings in principle don't exclude themselves, the national law does not provide for a possibility of a judicial review of ADR decisions. Proceedings before Courts of Honour of the Croatian Chamber of Economy and of the Croatian Chamber of Trades and Crafts both regulate procedure upon appeals, while one of the ways of objecting to enforcement of ADR decisions is by contesting the ruling on enforcement brought on the ground of these decisions in accordance with provisions of the Enforcement Act.

Source(s):

Zakon o mirenju (Mediation Act), OG No. 18/11

Ovršni zakon (Enforcement Act), OG Nos. 112/12, 25/13, 93/14

Pravilnik o mirenju (Ordinance on Mediation), OG No. 142/11

Pravilnik o Sudu časti pri Hrvatskoj gospodarskoj komori (Ordinance of the Court of Honour of the Croatian Chamber of Economy), OG Nos. 66/06, 114/06, 129/07, 8/08, 74/15

Pravilnik Suda časti Hrvatske obrtničke komore (Ordinance of the Court of Honour of the Croatian Chamber of Trades and Crafts), OG Nos. 11/07, 81/08, 145/10, 92/14 and 4/16

Presuda Suda časti pri Hrvatskoj gospodarskoj komori (Judgment of Court of Honour of Croatian Chamber of Economy) No. P-I-50/10 of 25 March 2011

Presuda Suda časti pri Hrvatskoj gospodarskoj komori (Judgment of Court of Honour of Croatian Chamber of Economy) No. PŽ-II-13/11 of 7 October 2011

Ministarstvo gospodarstva, Alternativno rješavanje potrošačkih sporova u Republici Hrvatskoj (Ministry of Economy, Alternative Dispute Resolution in the Republic of Croatia). Available at: http://potrosac.mingo.hr/hr/potrosac/clanak.php?id=12645. Accessed on: 29 March 2016

Green Paper of European Commission on Alternative Dispute Resolution in Civil and Commercial Law, COM(2002) 196 final, Brussels, 19 April 2002

Tepeš, N. (2009): Izvansudsko rješavanje potrošačkih sporova u Hrvatskoj [Out-of-court Resolution of Consumer Disputes in Croatia]. In: V. Tomljenović, E. Čulinović Herc, V. Butorac Malnar (eds.), Republika Hrvatska na putu prema Europskom pravosudnom području: Rješavanje trgovačkih i potrošačkih sporova [The Republic of Croatia on its Way to the European Judicial Area: Resolution of Commercial and Consumer Disputes], Faculty of Law University of Rijeka, Rijeka, pp. 171–200

Mišćenić, E., Butorac Malnar, V. (2017): Online rješavanje potrošačkih sporova [Online Consumer Disputes Resolution], Croatian Academy of Legal Sciences Yearbook, Vol. VIII No.1, pp. 103-142

9. THE EXAMINATION OF CONSUMER PROTECTION LAW IN NATIONAL PROCEDURAL LAW: RESPECT FOR THE PRINCIPLES OF THE EFFECTIVENESS AND EQUIVALENCE OF CONSUMER PROTECTION LAW AND EX OFFICIO CONTROL

9.1 The basis of ex officio control of consumer protection law in national law

9.1.1 Is it clear in the national legal system when consumer protection law should be applied ex officio? Is the ex officio control of consumer protection law established as an obligation or as a (discretionary) power of the judge in national procedural law?

From the procedural point of view the control of consumer protection law is encompassed within existing provisions on ex officio control in civil procedure. In cases prescribed by the law, e.g. Civil Procedure Act, the ex officio control represents a duty for the judge. For example, the ex officio duty of courts to watch upon parties' dispositions

that are contrary to mandatory rules and public morality in civil proceedings (Art. 3(3)) encompasses inter alia ex officio control of parties dispositions that are contrary to mandatory rules of consumer protection law. Pursuant to Art. 41(1) of the Consumer Protection Act the consumer may not waive the rights nor can the rights which he acquires through provisions this or other statutory acts protecting consumer rights be limited. The non-observance of this basic civil procedure principle, would lead to one of essential violations of civil procedure rules under Art. 354 of the Civil Procedure Act. In this respect, one should mention Conclusions of the Supreme Court of the Republic of Croatia of 12 April 2016 (No. Su-IV-155/16), concerning ex officio control of unfair contract terms: "In cases when this doesn't follow from factual allegations of the parties, i.e. when there is no explicit statement of parties in respect of nullity of certain general standard contract term, the court must ex officio (when it has general standard contract terms at disposal), evaluate whether provisions of general standard contract terms are invalid, i.e. in case when this doesn't follow from factual allegations and there are no general standard contract terms available in the proceeding file, the court is not obliged to evaluate nullity (preclusion) of certain provision of general standard contract terms ex officio, and the adequacy of the claim shall in this case be decided upon the rules on the burden of proof".

9.1.2 If there is an understanding of ex officio control of consumer protection law in the national legal system, what is this control understood to encompass/not cover?

From the procedural point of view, the courts duty to ex officio control of parties' dispositions in civil proceedings (Art. 3(3)) encompasses mandatory rules on consumer protection arising out of the Consumer Protection Act and other relevant statutory acts. Besides that, the ex officio control would relate to consumer protection provisions setting a nullity of certain contract terms (e.g. Arts. 41(2) and 55(1) of the Consumer Protection Act, Art. 408(2) of the Obligations Act), upon which the courts are watching ex officio (Art. 327(1) of the Obligations Act). For example, this concerns provisions of the consumer protection law, such as Arts. 41(2) of the Consumer Protection Act prescribing a nullity of contract terms which are more disadvantageous to the consumer than those regulated by this Act or by other statutory acts regulating consumer protection. However, there is a procedural limitation to this ex officio control, which the court is exercising within the limits of the claims specified by the action of the consumer – non ultra petita (Art. 2(1) of the Civil Procedure Act). Such an understanding of ex officio control of consumer protection law was already confirmed by several cases of Croatian courts and ADR fora dealing with unfair contract terms, which applied the harmonized national provisions consistently to the established CJEU case law, in particular in the famous Croatian collective redress proceeding in the case Franak, dealing with unfair contract terms in credit agreements.

9.1.3 Is the party who claims to be a consumer required to establish his or her consumer status, the existence of a consumer contract and that consumer law applies to the dispute? Is this required even if the consumer has no legal representation?

This is not at all required from the consumer what arises from several important provisions of the Civil Procedure Act, which are, as mentioned above, in principle also applicable in ADR proceedings. The first supporting provision is the one on action and its obligatory content, according to which the court shall act upon the action, even when the plaintiff haven't specified the legal ground of its claim, and even when specified, the court is not bound by it – iura novit curia (186(3) of the Civil Procedure Act). Pursuant to provisions on jurisdiction, immediately after obtaining an action, the court is ex officio evaluating its jurisdiction and composition on the ground of statements in action and facts known to the court (Art. 15(1) and (2) of the Civil Procedure Act). This corresponds to findings of the CJEU in the case C-497/13 Faber, to observance of which the Croatian applicants of law are obliged besides by the EU law also by provisions of the Constitution of the Republic of Croatia (Arts. 134, 141.c, 141.d).

9.1.4 What information is available to judges and dispute resolution facilitators hearing consumer protection disputes? Does national procedural law provide for rules as to the minimum factual information that must

be available: a) for a consumer protection dispute to be heard and b) for the court to engage in ex officio control?

The information available to judges or other dispute resolution facilitators come from action, i.e. application of the consumer. According to Art. 186(1) of the Civil Procedure Act action must contain specific claim regarding the merits and incidental claims, the facts on which the plaintiff bases the claim, evidences to support these facts and other information's to be enclosed with every submission. With regard to consumer collective redress proceedings, it is important for action to contain specific claims in accordance with the requirements specified in the Consumer Protection Act (Arts. 106, 114). Further information to the court or dispute resolution facilitators can of course arise from the procedure on taking of evidences (e.g. Arts. 219 et seq. of the Civil Procedure Act). As explained, the court will pursue ex officio control of parties' dispositions, within the limits of the claims (Arts. 2 and 3 of the Civil Procedure Act).

9.1.5 Who is responsible for providing this information? If the necessary information is not available to the court (or dispute resolution facilitator), is he or she under an obligation to investigate in order to be able to respond to a relevant consumer protection dimension of the case?

To consumer disputes as all the other civil law disputes apply civil procedure rules on the burden of proof and taking of evidence (Arts. 219 et seq). There is a general rule in civil law proceedings on parties duty to present the facts on which they base their claims and to suggest evidences proving these facts (Arts. 7(1), 299, 461.a(2)). The court is entitled to determine facts and to establish evidences not proposed by the parties only if it suspects that the parties are intending to dispose of claims with which they may not dispose out of Art. 3(3) of the Civil Procedure Act (Art. 7(2)). After hearing presented evidences, the court decides which facts it considers proven in accordance with its own conviction established on the ground of conscientious and careful assessment of all the evidence presented individually and on the ground of the result of whole procedure (Art. 8). When the court was not able to form its opinion on the existence of certain fact, it applies the rules on the burden of proof (Art. 221a). Pursuant to Art. 219 each party must prove the facts and suggest evidences on which it bases her claim or refutes the allegations and evidences of her opponent. However, there are exceptions to this general rule in more special substantive law provisions on consumer protection which shift the burden of proof to the trader (e.g. 49(4), Arts. 60, 93, 111 etc. of the Consumer Protection Act; Art. 400(3) of the Obligations Act) and thus facilitate consumer's position in a proceeding.

9.1.6 Will the court provide the consumer with any assistance in gathering factual information or advancing his legal arguments before the court? Please respond for the situation where: a) the consumer has legal representation and b) the consumer has no legal representation.

Irrespective of legal representation, the court plays a warning and a consulting role and may warn the parties about their duty of providing facts and presenting evidence, especially of the need to present decisive facts and propose specific evidence and present reasons why they believe this is necessary (Art. 219). When requesting from plaintiff to answer to action, the court shall invite plaintiff to present all decisive facts and suggest all evidences by which it denies allegations and evidences of the opposite party and it will warn the parties that after conclusion of the preliminary procedure they may not present new facts and propose new evidences, except in case of Art. 299(2) (Art. 284(3)). The consumers' position in a proceeding is nevertheless to certain extent relieved by substantive law rules on shifting of burden of proof to trader as exception to more general rule in Art. 219(1) of the Civil Procedure Act. In addition to that, the court shall instruct the party who, for reasons of ignorance, fails to avail himself/herself of the rights belonging to him/her under the Civil Procedure Act, as to which procedural actions he/she may take (Art. 11(1)).

Source(s):

Ustav Republike Hrvatske (Constitution of the Republic of Croatia), OG Nos. 56/90, 135/97, 113/00, 28/01, 76/10 and 5/14
Zakon o parničnom postupku (Civil Procedure Act), OG SFRY 4/77, 36/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91, incorporated into Croatian legal system by OG 53/91, 91/92, 58/93, 112/99, 129/00, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 25/13, 89/14
Zakon o zaštiti potrošača (Consumer Protection Act), OG Nos. 41/14 and 110/15
Zakon o obveznim odnosima (Obligations Act), OG Nos. 35/05, 41/08 and 125/11
Presuda Vrhovnog suda Republike Hrvatske (Judgement of the Supreme Court of the Republic of Croatia), Rev x 126/2008-2 of 15 October 2008
Zaključci Vrhovnog suda Republike Hrvatske (Conclusions of the Supreme Court of the Republic of Croatia), No. Su-IV-155/16 of 12 April 2016
Judgment and order of the Commercial Court in Zagreb of 4 July 2013, P-1401/12
Judgment and order of the High Commercial Court of the Republic of Croatia of 13 June 2014, Pž-7129/13-4
Judgment and order of the Supreme Court of the Republic of Croatia of 9 April 2015, Revt-249/14-2
Decision of the Constitutional Court of the Republic of Croatia of 13 December 2016, U-III – 2521 / 2015 and others
Presuda Općinskog suda u Rijeci (Judgement of the Municipal Court in Rijeka), P-3196/2012 of 31 July 2014
Case C-497/13, Froukje Faber v Autobedrijf Hazet Ochten BV., EU:C:2015:357
Mišćenić, E. (2014): Consumer Protection Law. In: Introduction to the Law of Croatia, Ed. Josipović, T. Kluwer Law International. pp. 279- 290
Mišćenić, E. (2016): Croatian Case "Franak": Effective or "Defective" Protection of Consumer Rights?, Harmonius Journal of Legal and Social Studies in South East Europe, Vol. V, pp. 184-209

9.2 The possibility for ex officio control of EU consumer protection law in dispute resolution proceedings

9.2.1 Is ex officio control of consumer protection law always possible when the procedure involves a full assessment of the claim on its merits?

When the procedure involves a full assessment of the claim on its merits, the courts are obliged to watch upon substantive law provisions of consumer protection and other laws regulating their duty to ex officio control, such as e.g. provisions on the nullity of contracts (Art. 327(1) of the Obligations Act). However, the ex officio control is possible only within the limits of the claims specified by the action of the consumer – non ultra petita (Art. 2(1) of the Civil Procedure Act). The non-observance of courts duty to ex officio control prescribed either by procedural or substantive law would lead to one of essential violations of civil procedure rules under Art. 354 or to erroneous application of the substantive law under Art. 356 of the Civil Procedure Act. Such an interpretation is confirmed by an existing practice of courts and ADR fora in rather developing consumer case law.

9.2.2 Can ex officio control be exercised even when the procedure does not involve an assessment on the merits?

As deriving from previously analysed procedural provisions, ex officio control can be exercised in certain stages of ordinary and special procedures, which do not involve an assessment on the merits. As one of the examples, one should mention establishment of the court territorial jurisdiction on the ground of prorogation clause, to the nullity of which the courts are watching ex officio. Such an interpretation comes from understanding of this parties' agreement as a process law contract, to which in absence of explicit procedural law provisions, provisions of the civil law on the nullity of contracts apply accordingly (Dika 2012, p. 224). This interpretation is in accordance with ex officio duty of courts to watch upon parties' procedural dispositions contrary to mandatory rules, also coming from substantive law

provisions on consumer protection, such as provisions on the nullity of unfair contract terms, detrimental contract terms, or of contracts, to which the courts are watching ex officio. Consequently, when establishing its jurisdiction, the court shall dismiss such an action. Another example is a special payment for order procedure, where the courts are watching ex officio upon fulfilment of conditions for the issuance of the payment order (Art. 446).

9.2.3 Please indicate if, per national procedural law, ex officio control can be exercised at the following stages of the procedure:

To our knowledge ex officio control can be exercised at the following stages of the civil law court proceedings. The table on other dispute resolution facilitators concerns only public notaries in enforcement proceedings and consumer dispute resolution before the Courts of Honour of the Croatian Chamber of Economy and of the Croatian Chamber of Trades and Crafts, which Ordinances foresee subsidiary application of Civil Procedure Act provisions. Rules concerning provisional measures, proceedings linked to enforcement and enforcement proceedings are regulated by the Enforcement Act, that foresees subsidiary application of the Civil Procedure Act (Art. 21).

	Courts		Other dispute resolution facilitators	
	Possible to exercise ex officio control	Not possible to exercise ex officio control	Possible to exercise ex officio control	Not possible to exercise ex officio control
Ordinary proceedings	✓		✓	
Small claims	✓		✓	
Payment order	✓		✓	
Provisional measures	✓		✓	
Proceedings linked to enforcement	✓		✓	
Enforcement proceedings	✓		✓	
- Enforcement of payment order	✓		✓	
- Enforcement of arbitration award	✓		✓	
- Enforcement of mortgage	✓		✓	
- Enforcement of notarial deed	✓		✓	
Appeal proceedings (please specify): Appeal against first instance court decisions Revision	✓		✓	

9.2.4 What does ex officio control encompass in national procedural law?

This comprehensive question encompasses numerous provisions of the Civil Procedure Act on courts duty to ex officio control regarding: parties procedural dispositions, existence of legal interest in actions, intervening and legal remedies, principle audiatur et altera pars, jurisdiction (subject matter, absolute, territorial in case of exclusive competence of another court), party and litigation capacity, legal representation rules (legal representatives, agents), litis pendent, requirements for interveners, waiver of claims, certain provisions relating to taking of evidences (e.g. in case of suspect about prohibited parties' dispositions, witnesses, legal documents etc.), existence of the final judgment (res iudicata), existence of the court settlement, certain essential violation of civil procedure rules,

erroneous application of the substantive law, interim measures in special proceedings (trespassing, labour disputes) etc.

Source(s):

Zakon o parničnom postupku (Civil Procedure Act), OG SFRY 4/77, 36/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91, incorporated into Croatian legal system by OG 53/91, 91/92, 58/93, 112/99, 129/00, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 25/13, 89/14

Zakon o zaštiti potrošača (Consumer Protection Act), OG Nos. 41/14 and 110/15

Zakon o obveznim odnosima (Obligations Act), OG Nos. 35/05, 41/08 and 125/11

Ovršni zakon (Enforcement Act), OG Nos. 112/12, 25/13, 93/14

Pravilnik o mirenju (Ordinance on Mediation), OG No. 142/11

Pravilnik o sudu časti pri Hrvatskoj gospodarskoj komori (Ordinance of the Court of Honour of the Croatian Chamber of Economy), OG Nos. 66/06, 114/06, 129/07, 8/08, 74/15

Pravilnik Suda časti Hrvatske obrtničke komore (Ordinance of the Court of Honour of the Croatian Chamber of Trades and Crafts), OG Nos. 11/07, 81/08, 145/10, 92/14 and 4/16

Dika, M. (2012): Prorogacija mjesne nadležnosti u hrvatskom pravu [Prorogation of Territorial Jurisdiction in Croatian Law], Collected Papers of the Law Faculty of the University of Zagreb. Vol. 62. Nr. 1-2. pp. 211-228

9.3 Other procedural mechanisms for the equivalent and effective protection of EU consumer law

9.3.1 Does national procedural law provide that rules of EU consumer law (as well as rules that aim to satisfy EU consumer law objectives) should be understood as having equal standing to national rules of public policy (which is to say, that for the purposes of domestic law, the consumer protection provision is understood to have equal standing to a rule that must be raised ex officio by the national court)?

As previously explained, the Croatian procedural law observes mandatory provisions of the consumer protection law within various provisions on ex officio control in civil law procedure (e.g. rules on parties dispositions, erroneous application of the substantive law etc.). In application of substantive law rules on consumer protection, the courts are obliged to interpret them and apply consistently to EU acquis, including the relevant CJEU case law. Besides from the general principles of EU law and Treaties, such an obligation for Croatian courts and other applicants of law emerges from provisions on EU law prescribed by the Constitution (Arts. 141.c, 141.d). For those national consumer protection rules approximated with provisions of EU Consumer Protection Directives, which the CJEU interpreted as having equal standing to the rules of public policy, there is a duty of courts and other dispute resolution facilitators to interpret them and apply them consistently to the relevant CJEU case law (e.g. Faber, Océano Grupo etc.). Except of this duty existing in relation to some consumer protection rules, such as the one on the presumption of the lack of conformity during the first six months in consumer sales contracts (Art. 400(3) of the Obligations Act), for other consumer protection rules, besides from the duty of EU consistent interpretation, this duty also arises explicitly directly from the substantive law. This concerns consumer protection provisions on the nullity of certain contract terms (Arts. 55(1) and 41(2) of the Consumer Protection Act), upon which the courts are watching ex officio (Art. 327(1) of the Obligations Act).

9.3.2 If ex officio control is not possible in certain types of proceedings or at a certain stage of proceedings (or for any other reason), does national procedural law provide for an alternative way of assessing consumer protection law?

Besides regular legal remedies (appeals, objection to payment order), under fulfilment of special conditions the parties may use other extraordinary legal remedies. Art. 421 of the Civil Procedure Act regulates grounds and

requirements for the proposal for the renewal of procedure, once after the court decision became final. These grounds include e.g. violation of the principle audiatur et altera pars, or of provisions on legal representation, criminal offences during the trial like falsification of documents or authentication of the false content on the ground of which court decision was brought, opening of the possibility for the party to use the final court decision rendered earlier between the same parties and concerning the same claim, discovering of new facts and evidences which would have led to a more favourable decision for a party etc. A proposal for the renewal of the procedure is always to be submitted to the court which rendered the decision in the first instance (Art. 424(1)). Another extraordinary legal remedy regulated in Art. 428.a enables to a party, whose human right or fundamental freedom protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms was violated, to file up the proposal for the renewal of procedure to the first instance court deciding in the proceeding in which the violating decision was brought, within 30 days from the day when the ECtHR judgment finding this violation, became final.

Source(s):

Ustav Republike Hrvatske (Constitution of the Republic of Croatia), OG Nos. 56/90, 135/97, 113/00, 28/01, 76/10 and 5/14

Case C-497/13, Froukje Faber v Autobedrijf Hazet Ochten BV., EU:C:2015:357

Joined Cases C–240/98 to C–244/98, Océano Grupo Editorial and Salvat Editores, EU:C:2000:346

Mišćenić, E. (2012): Unfair Contract Terms in the Contract Law, Country Report for Croatia. and Legal Consequences of Unfairness of Contractual Terms. In: Civil Law Forum for South East Europe-Collection of Studies and Analyses, 2012, 2nd Regional Conference. pp. 195-223 and pp. 257-258

Mišćenić, E. (2016): Legal Risks in Development of EU Consumer Protection Law, in: Mišćenić, E., Raccah A., Legal Risks in EU Law, Springer, 136-165

9.4 Ex officio control in payment order procedures

9.4.1 What information is available to the judge when a claim for the issuance of a payment order is made? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a claim for the issuance of a payment order to be granted and b) for the court to engage in ex officio control before a payment order is issued?

The information available to the judge varies upon the matter whether it decides in procedure upon documented or non-documented order for payment (Arts. 446-447 of the Civil Procedure Act). In case of a documented payment order, information will arise from the action and the attached trustworthy document (e.g. invoice, promissory note, cheque, extract from business books, notarized private document etc.). With regard to minimum factual information that must be available, besides from action and the trustworthy document supporting the action, in case of a documented order for payment it is required from the plaintiff to prove his legitimate interest by specially enumerating in his action the reasons why he proposes issuing of payment order instead of proposing execution on the ground of trustworthy document (Art. 446(2)). In case of a non-documented order for payment relating to main claim in money not exciding 5.000,00 kn (661,37 €), the court will issue a payment order although the action was not supported by trustworthy documents. However, Art. 447(1) requires that action contains the ground of and the amount of depth and indicates evidences on the ground of which the verity of allegations in the claim can be proven. The competent court watches ex officio upon fulfilment of conditions for the issuance of the payment order. Provisions concerning the proof of plaintiffs' legal interest are ius cogens and the court is watching upon them ex officio. Therefore, if the plaintiff doesn't prove his legitimate interest the court shall dismiss the action as inadmissible (Art. 446(2)).

9.4.2 What considerations will be assessed ex officio by the court (or other competent authority) before a payment order is issued?

As mentioned the competent court watches ex officio upon fulfilment of conditions for the issuance of the payment order, in particular upon the mandatory provision on the proof of plaintiffs' legal interest. In addition to that, subsidiary application of the rest of provisions of the Civil Procedure Act (Art 445.a), enables application of basic principle on the courts duty to control of parties' dispositions (Art. 3(3)). According to this rule, the court shall not consider parties dispositions which are contrary to mandatory regulations and rules on public morality.

9.4.3 How is the consumer informed about the claim to issue a payment order against him or her? Does national procedural law make any provision for steps to be taken to ensure that consumers are informed of the claim for the issuance of a payment order so that he or she can contest it?

As any other defendant, the consumer has to be informed of the claim for the issuance of a payment order in accordance with Art. 448(3) of the Civil Procedure Act, which regulates the delivery of the payment order to both of the parties. In addition, the action and the attached documents are delivered to the defendant. The general provisions on delivery contain a special provision on personal delivery of action, payment order, judgement and of ruling to a natural person not pursuing a registered activity in disputes, i.e. on delivery to a party, or to her legal representative or her agent (Art. 142).

9.4.4 If the consumer objects to the claim, what is the next step? Do the proceedings continue, in the context of which ex officio control can be exercised? Or are the proceedings transferred to ordinary proceedings for analysis on the merits of the claim?

If the court doesn't accept the application for issuance of payment order, it will advance with the procedure upon the action and this ruling of the court cannot be appealed against (Art. 449). In case of the consumer contests a payment by submitting a timely, complete and admissible objection (Art. 451) a court will set a preparatory hearing. In its decision on the merits of the claim, the court will decide whether the payment order shall remain in force, completely or partially, or be annulled (Art. 451(3)). If the plaintiff objects that there were no legal grounds for the issuance of a payment order (Arts. 446 and 447) and that there are obstacles to further advancement of procedure, the court will primarily decide upon this objection (Art. 452(1)). If objection is justified, the court shall annul the order for payment and once that ruling is final, it will initiate discussion on the merits of the case, when there is a place for such a discussion. If the court does not accept such an objection, it will move on with the discussion on the merits of the case and the ruling on it will form a part of the decision on the merits.

Source(s):

Zakon o parničnom postupku (Civil Procedure Act), OG SFRY 4/77, 36/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91, incorporated into Croatian legal system by OG 53/91, 91/92, 58/93, 112/99, 129/00, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 25/13, 89/14

Ovršni zakon (Enforcement Act), OG Nos. 112/12, 25/13, 93/14

Opatić, N (2002): Pravni interes u građanskom parničnom postupku [Legal Interest in Civil Procedure]. Available at: http://www.pravnadatoteka.hr/pdf/Pravni%20interes%20u%20gradjanskom%20parnicnom%20postupku.pdf, Accessed on: 26 March 2016

European Commission
An evaluation study of the impact of national procedural laws and practices on the equivalence and effectiveness of the procedural protection of consumers under EU law

JUST/2014/RCON/PR/CIVI/0082

National Report – Consumer Protection Strand

Cyprus

Nikolaos Katiforis

CYPRUS: LEGAL ANALYSIS

1. NATIONAL LEGISLATION IMPLEMENTING EU CONSUMER PROTECTION INSTRUMENTS

EU legislation	Transposing national legislation	Additional notes (e.g. if there is an overlap in application of legislation etc.)
Doorstep Selling Directive 1985/577/EEC		
Package Travel Directive 90/314/EEC		
Unfair Contract Terms Directive 1993/13/EEC		
Distance Selling Directive 1997/7/EC		
Consumer Sales and Guarantees		

Directive 1999/44/EC		
Unfair Commercial Practices Directive 2005/29/EC	The Unfair Business – to - |Consumer Commercial Practises Law of 2007 (L. 103 (I) / 2007)	
Misleading and Comparative Advertising Directive 2006/114/EC		
Consumer Credit Agreement Directive 2008/48/EC		
Timeshare Protection Directive 2008/122/EC		
Consumer Injunctions Directive 2009/22/EC		
Consumer Rights Directive 2011/83/EU	Protection of Consumers Law 2013 (L. 133 (I) 2013),	
ADR for Consumer Disputes Directive 2013/11/EU		

1. CONCEPT OF THE CONSUMER

1.1 Please outline the concept of the consumer in national law, indicating whether it is intended to be a uniform concept, whether it has been legislated for and where it can found (i.e. in a legislative provision, governmental guidelines, case law etc.).

Source(s): L. 133 (I) 2013, Part I, nr. 2: A natural person, who, as regards the contracts covered by the specific law, is acting outside the scope of an economic activity (trade, business, craft, liberal profession).

The question cannot be further answered due to lack of relevant information.

2. REGULATORY AUTHORITIES COMPETENT FOR CONSUMER PROTECTION ISSUES

What regulatory authorities, if any, are competent for enforcing consumer protection law? Please identify them, their nature (i.e. whether they are public or private or mixed) and the nature of enforcement.

4.1.1. Ministry of Commerce, Industry and Tourism. Competition and Consumer Protection Service.
4.1.2. NATIONAL CONSUMER ORGANISATIONS

- The Cyprus Consumers Association: It is a non-political, independent, non-governmental Consumers Organisation. As an independent non-profit organisation, the Association strives to safeguard the consumers' rights. Its main activities are: information on Cyprus Consumer Protection Laws, information on Consumer Rights & Responsibilities, advice on Complaint Procedures for Faulty, damaged or unsatisfactory products and / or services, reading Library on Consumer Publications such as WHICH, (U.K) Consumer Reports (U.S.A), Consumer Choice (Ireland) and more generally consumer related services.

  The Cyprus Consumers Association represents the Cyprus consumers in over 30 committees in Cyprus, and also in the European Union (European organisations such as, European Consultative Groups; European Consumer Consultative Group (ECCG), and ECCG subgroup on financial services (FSCG), (BEUC & ANEC) and Consumers International (CI). The Cyprus Government provides an annual grant to the Cyprus Consumers Association.

  Headquarters/Main office: Address: 5 Acropolis Ave., (Flat 21) 2000 Strovolos, P.O. Box 24874, CY-1304 Nicosia. Tel: +357 22 516 112 Fax: +357 22 516 118 E-mail: cca@spidernet.net Website: www.cyprusconsumers.org.cy

- The Cyprus Consumers Union and Quality of Life It is an independent, non-political, non-governmental and non-profit organisation officially registered under the Cypriot law (reg. nr. HE 136674).

  The main objective of the Union is to safeguard and promote the rights and the interests of the consumers in Cyprus without any form of discrimination. The Union is represented in a large variety of Institutions in Cyprus (i.e the Advisory Committee chaired by the Minister of Commerce, Industry and Tourism, in Parliamentary Committees etc) and abroad.

  Financially the Union is supported by the Cyprus Government from where it received an annual grant.

  Office address: 56 Stavrou Avenue, Kariatis Center, Block A2 Apt. 107, CY-2035 Strovolos, Nicosia. Correspondence address: P.O. Box 16033, CY-2085 Strovolos Tel: +357 22 313 111 Fax: +357 22 463 077 E-mail: consumersunion@cytanet.com.cy Website: www.consumersunion.org.cy

- Cyprus Workers Confederation – Consumers Department It is an independent non-profit organisation and is dedicated to the overall protection of consumers' rights. The Confederation is both member of I.C.F.T.U. and E.T.U.C. The Confederation is partly funded by the government.

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- Pancyprian Federation of Labour – Consumers Department It is an independent non-profit organisation. The Federation is active in the consumers' protection and places emphasis in solving consumers' problems. The head of the department is Mr. Andreas Pavlikkas. The Federation is partly funded by the government.

  Office address: Archermou 31 – 35 Street, CY-1045 Nicosia Correspondence address: P.O. Box 21855, CY-1514 Nicosia Tel: +357 22 866 400 Fax: +357 22 349 382 E-mail: peo@cytanet.com.cy

4.1.3. NATIONAL COUNCILS/ASSEMBLIES OF CONSUMER ORGANISATIONS AND OTHER STAKEHOLDERS

- Consumer Advisory Committee: The Committee is chaired by the Minister of Commerce, Industry and Tourism. It is responsible for the liaison with all other stakeholders on all issues of concern to the consumer. Stakeholders are also informed of all policy initiatives at European and national level. Members of the Committee are the consumer associations, professional organisations, trade unions etc.

2.1 Is there a specific venue for this type of enforcement and does this limit the jurisdiction of courts/ADR fora (even if only initially)?

The Competition and Consumer Protection Service of the Ministry of Commerce, Industry and Tourism may either apply to the competent Court (District Court) for the issuing of a prohibitory or mandatory order, including an interim order or impose an administrative fine (Art. 22 nr. 24, 25, 26).

2.2 Can criminal prosecutions be initiated for violations of consumer protection rules? How serious must the infringement be? What are the penalties and sanctions? And might these prosecutions lead to criminal penalties or sanctions? Can individual consumers piggy back on these claims (e.g. via a partie civile method)?

Any person who contravenes or omits to comply with the provisions of Law 133 (I) 2013, i.e. (i) by concealing, destroying or falsifying data, or (ii) by giving to the Competition and Consumer Protection Service of the Ministry of Commerce, Industry and Tourism, false or misleading information, or (iii) by refusing to submit to the Competition and Consumer Protection Service of the Ministry of Commerce, Industry and Tourism the requested information, data or documents, or (iv) interferes in any way to any object, which was pledged by the Competition and Consumer Protection Service of the Ministry of Commerce, Industry and Tourism or (v) fails to comply with an order of the Competition and Consumer Protection Service of the Ministry of Commerce, Industry and Tourism, commits an offence and shall, on conviction be liable to fine not exceeding Euro 100.000,00 or to a term of imprisonment not exceeding 6 months, or to both such fine and imprisonment (Art. 22 nr. 23).

2.3 Is there judicial review of decisions of consumer regulatory authorities? If so, by which court is this judicial oversight made? Is the forum an ordinary or a specialised court or tribunal?

The decisions of the Competition and Consumer Protection Service of the Ministry of Commerce, Industry and Tourism are appealed before the Minister of Commerce, Industry and Tourism (Art. 22 nr. 25).

2.4 Does the national legal system provide for a mechanism of cooperation between its national regulatory authorities and those of other Member States?

The question cannot be answered due to lack of relevant information.

3. LEGAL AID

3.1 Is legal aid available to consumers in: a) bringing a claim and b) defending a claim before a court?

Legal Aid Law 2002 has been implemented in Cyprus Directive 2002/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes and confers the right upon any individual to ask for Legal Aid from the State if that individual is financially unable to pay his/her legal costs in a judicial process.

The Legal Aid Procedure Rules of 2003 provide for costs regarding legal aid cases.
Under Legal Aid Law, legal aid is provided in the following situations:

- Criminal proceedings before a court, against any person, for an offence that he may have committed in violation of any legislative provision, for which an imprisonment sentence is provided for exceeding one year and includes preliminary interrogation and every other stage of interrogation or other procedure taking place before the commencement of subsequent criminal proceedings that relate to it;
- Criminal proceedings lodged by any person, where the offence in examination concerns determined violations of human rights.
- Civil proceedings before a court, at any stage, lodged against the Republic for damages sustained by a person due to determined violations of human rights; or
- Civil proceedings lodged outside the Republic, and will include only advice.
- Proceedings concerning parental care, alimony, recognition of child, adoption, proprietary relations of spouses and any other marital or family dispute.
- Legal aid will also be granted in trans boundary civil and commercial cases
- Legal aid is also granted to asylum seekers for filling a recourse in the Supreme Court against the rejection of his application for asylum. In this case legal aid is limited only to the first instance jurisdiction and does not extend to the filing of an appeal.

3.2 For what kinds of disputes and actions is legal aid available? (NB: legal aid might not be available for consumer or contractual disputes but be available instead for a related action, e.g. actions relating to debt, m ortgage arrears, eviction etc.)

The question cannot be answered due to lack of relevant information.

3.3 What requirements must be satisfied for the consumer to be entitled to legal aid? Please specify if there are any additional limitations to its availability.

The question cannot be answered due to lack of relevant information.

3.4 What does legal aid encompass? (i.e. (only) general advice, (only) assistance in preparing the case, (only) assistance with negotiation of settlements, (also) representation).

Legal aid includes any kind of assistance which is usually provided by a lawyer in relation to proceedings, in all stages, until the delivery of a judgment, as well as appeal proceedings and in the case of a criminal procedure includes any stage relating to the procedure before its commence.
Source(s): www.mjpo.gov.cy, fra.europa.eu

4. COSTS

4.1 What are the costs of different types of procedures before courts? Are there exemptions to the payment of fees and expenses? How can costs be paid?
See above, Final Part, under 1.

The question cannot be answered due to lack of relevant information.

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Court fees						
Court expenses						
Exemptions						

5. STANDING AND REPRESENTATION IN CONSUMER DISPUTES

5.1 Does national law limit the standing of the individual consumer in respect of the claim that can be made and the forum before which it can be brought?

No as the unfairness of commercial practices may be challenged under common law.

An unfair commercial practice may constitute a breach of contract in appropriate cases, or duress or undue influence as well as other tortious claims such as passing off or injurious falsehood depending on the nature of the case.

Also, where a consumer entered into a consumer contract with a trader influenced by an unfair commercial practice, such as misleading advertising, the consumer may have the right to rescind a contract on the bases of fraudulent misrepresentation under Contract Law.

Also an unfair commercial practice may be prohibited under Competition law if it constitutes a restrictive enterprise agreement or abuse of dominant position. That is why an agreement, which fixes directly or indirectly the purchase or reselling prices, is prohibited under Competition law aiming at the protection of the consumer.

Such claims can be brought before district courts by affected natural persons or legal entities
Cyprus law does not recognise class action. However, independent actions may be joined to common proceedings.
According to the Civil Procedure Rules, a person may be joined into an ongoing action as a Plaintiff on condition that the right to relief arises from same transaction. Where plaintiffs bring separate actions, actions may be joined where a common question of law or fact arises in these actions (see Order 9). In addition, Order 9 provides that a plaintiff has the right to join as co-defendant any person against whom he has the right to relief.
The Civil Procedure Rules (Order 14) also provides that when two or more actions are pending in the same Court, whether by the same or different plaintiffs against the same or different defendants, and the claims of these actions involve such a common question of law or fact which renders it desirable that the actions should be consolidated, the Court has the discretion to order the consolidation of these actions. Where a plaintiff or defendant is added, the writ of summons and/or the pleadings must be amended accordingly.
An interested party may also apply to the court for leave to intervene under common law principles..

Bringing claims to a Cypriot court is done in accordance with a limitation period, which is prescribed by the Limitation of Actionable Rights Law that establishes limitations period for litigious cases for both civil and commercial disputes.

In litigation cases related to the breach of contracts, the limitation period is established at six years[12].

5.2 Other than individual consumers, who or which bodies have standing in consumer protection disputes and for what types of claim? If the action is not brought by the individual consumer, what requirements of representation must be satisfied?

See above under 4.1.
There are a number of consumer complaints bodies that protect consumer rights. Some of these are statutory bodies, others are regulated by industry, while some are voluntary organisations.

The Competition and Consumer Protection Authority of the Ministry of Industry, Commerce and Tourism is specified as qualified entity. In addition, any legally constituted organisation which by virtue of any law or their memorandum of association have an interest in the protection of consumers' collective interests may take action. No further criteria are laid down.,

Consumers have the option either to report a complaint to the Competition and Consumer Protection Service under the auspices of the Ministry of Commerce, or to the Cyprus Consumer Association.

The Acts containing provisions, which can be seen as general provisions on unfair commercial practices impose a duty either to the Competition and Consumer Protection Service of the Ministry of Trade, Industry and Tourism or its Director to examine upon submission of a complaint any violations of the provisions of any applicable Acts.

Qualified entities may seek a wider range of orders, such as requiring the trader to take corrective measures, or any other order that may be reasonable in the circumstances of the case. Furthermore, it is not necessary that the collective interests of consumers are harmed, and even an infringement affecting a single consumer makes it possible to apply for an injunction, although it is not clear whether an injunction can be sought directly by an affected individual consumer, or whether this should be done by a qualified authority on his behalf. No reference is made to such a right vested on individual consumers.

5.3 If a consumer wants to bring or defend an action relating to a consumer protection dispute, is there a legal (or otherwise formal) requirement that he or she has legal representation? Please specify for both judicial and ADR fora and the bodies, associations or authorities that can provide this representation.

The CCP Service is the competent government service responsible for the enforcement of the consumer protection laws aiming at safeguarding consumer interests.

[12] Answers given by M. Kyriakou (Senior Legal Officer) and N. Papanikolaou (Legal Officer A).

The main powers of all CCP Service's Competent Authorities are either to apply to the Court for the issuing of a prohibitory or mandatory order, including an interim order, or to impose an administrative fine with regard to the violation of the consumer protection legislations.

Where the CCP Service considers that there is a transgression of the law, it may, if it deems to be necessary, apply to the District Court for the issuing of a prohibitory or mandatory order against any physical or legal person who, according to the Court's opinion is liable for the transgression of any legislation.

In October 2001, the European Commission and Member States established the European Extra- Judicial Network (EEJ-Net). The network aims to help consumers resolve their cross-border disputes through ADR schemes. It operates through clearing houses located in each Member State.

In identifying cases regarded as appropriate for ADR, judges may suggest the use of ADR, or make an Order directing the parties to attempt ADR. If, following an ADR Order, the parties fail to settle their case they must inform the Court of the steps taken towards ADR and why they failed. It has been said that although the Court's practice is non-mandatory, ADR Orders impose substantial pressure on parties If the Defendant does not file an appearance or defence within the prescribed limits, then the Plaintiff may file an application for a judgment in default.

Following the application, the matter is fixed for proof and on that day, the Plaintiff may prove his case, either by filing an affidavit or by giving oral evidence.

The judgment in default can be set aside by the judge if the Defendant has good reasons for not filing his defence and he shows that he has a good defence.

The Defendant may dispute the jurisdiction by requesting leave to file a conditional appearance and then he can file an application to stay the proceedings because of lack of jurisdiction. The most common grounds for disputing jurisdiction are a lack of jurisdiction or the pending of the same case in a Court of another State or the existence of an exclusive jurisdiction clause in the disputed agreement. If the Defendant omits to file a conditional appearance, as prescribed by the Civil Procedure Rules, he will not be entitled to dispute the jurisdiction[13].

6. ACTIONS BEFORE COURTS

6.1 Jurisdiction and competence of the courts in consumer disputes: General structure and special procedures aimed at protecting consumers

6.1.1 Are ordinary courts competent to hear such claims? Is there also a specialised tribunal for consumer protection disputes?

[13] Answers given by M. Kyriakou (Senior Legal Officer) and N. Papanikolaou (Legal Officer A).

Ordinary courts are competent to hear such claims.

6.1.2 Which courts are competent to hear consumer protection disputes at first instance and in appeals? Please specify the court, in light of the value of the claim (and identify any other factors that are relevant in allocation jurisdiction).

District Courts & Supreme Court.

6.1.3 What is the nature of the procedure at first instance, e.g. is it a simplified or a summary procedure, and is there an assessment of the merits? Please specify in light of the value of the claim (and identify any other factors that are relevant in allocating jurisdiction).

If the Defendant does not file an appearance or defence within the prescribed limits, then the Plaintiff may file an application for a judgment in default.

Following the application, the matter is fixed for proof and on that day, the Plaintiff may prove his case, either by filing an affidavit or by giving oral evidence.

The judgment in default can be set aside by the judge if the Defendant has good reasons for not filing his defence and he shows that he has a good defence.

The Defendant may dispute the jurisdiction by requesting leave to file a conditional appearance and then he can file an application to stay the proceedings because of lack of jurisdiction. The most common grounds for disputing jurisdiction are a lack of jurisdiction or the pending of the same case in a Court of another State or the existence of an exclusive jurisdiction clause in the disputed agreement. If the Defendant omits to file a conditional appearance, as prescribed by the Civil Procedure Rules, he will not be entitled to dispute the jurisdiction[14].

6.1.4 Please identify the formal requirements that must be satisfied for a consumer dispute to be heard before a court. These might include time limits applicable to the filing of the action/defence, representation requirements etc.

The main stages involving the formal requirements in civil proceedings are as follows:
Filing a writ of summons, generally indorsed or specially indorsed, for service of a writ of summons to the Defendants.
Filing of a Note of Appearance by the Defendant within 10 days from the time of service. If the Defendant disputes the jurisdiction, he must apply for leave to file a conditional appearance.
If the Defendant is outside the jurisdiction, the Plaintiff must first apply for leave to seal the writ and then for leave to serve it outside the jurisdiction.
If a generally indorsed statement of claim is filed, then a statement of claim must be filed within ten days of an appearance.
The Defendant must file his statement of defence within 14 days after filing an appearance if a specially indorsed writ of summons is filed, or 14 days after the statement of claim if a generally indorsed writ of summons is filed.

[14] Answers given by M. Kyriakou (Senior Legal Officer) and N. Papanikolaou (Legal Officer A).

The Plaintiff may file a reply within 7 days after receiving the defence, but it is not compulsory.
If the Defendant has a counterclaim, the Plaintiff will file a reply to and defence against the counterclaim within 14 days of the counterclaim.
Once the pleadings close, any party is entitled to apply to the court for a hearing date. The Registrar fixes the matter for directions and the judge decides when to fix the matter for hearing.
During the trial, both parties produce evidence and their submissions so that a judgment may be issued[15].

6.1.5 In respect of the claims and relevant procedures available in the national legal system, what kind of relief might be available in consumer protection disputes? (monetary remedies, injunctions, skimming off etc.)?

Consequences of breaches of the various legislative provisions vary between criminal sanctions, civil law remedies, injunctions or similar orders depending on each applicable Act. Dealing directly or indirectly with commercial practices, which might be considered as unfair.

Un unfair commercial practice, which may be prohibited under Competition law, may also lead to different sanctions, such as criminal ones.

Also, lawfully established organizations or associations which either by virtue of a law or by their articles of association establish satisfactorily a legitimate interest in the protection of the collective interests of consumers, have the right under certain applicable Acts to apply to the Court for an injunction against any person who is involved in the violation of the particular Act having the effect of combating unfair commercial practices.

For example, the Court on application of the Competition and Consumers Protection Service of the Ministry of Commerce, Industry and Tourism is empowered to issue a prohibitory or mandatory order against any person who is liable for a violation of the provisions of certain applicable Acts, including an interim order providing for a) the immediate cessation of such violation, or b) the taking of rectifying measures within a specified time-limit which will prevent the unlawful situation created by such violation being investigated, or c) any other act or measure necessary or reasonable under the circumstances.

Some of the most important instances are found in s.17 of the Act for the Conclusion of Consumer, Distance Contracts of 2000, s.10 of the Certain Aspects of the Sale of Consumer Goods and Associated Guarantees Act of 2000 and s.14 of the Consumer Contracts Concluded away from Business Premises of 2000.

6.1.6 Please provide a brief overview of the role of parties and judges in civil proceedings generally (e.g. with reference to the principle of party disposition, the obligation of parties to make and prove factual allegations and to make and provide legal arguments, the possible role of the court). This overview should be brief; these issues will be dealt with in more detail in the questions that follow.

The Court preserves its discretionary powers to give any directions, additionally to the provisions included in the amended Order 30, as it deems just under the circumstances (O.30 r. 9)[16]. Overall, the Court shall exercise its powers

[15] Answers given by M. Kyriakou (Senior Legal Officer) and N. Papanikolaou (Legal Officer A).
[16] "The Court may give any additional directions as it deems just under the circumstances in accordance to the

in accordance to the criteria mentioned in rule 9 such as the mitigation of costs throughout litigation and ensuring that the parties are on an equal footing, adequately prepared and informed about the course of the case.

6.2 Small claims

6.2.1 Does a small claims procedure exist in the Member State? If yes, is it a specialised or simplified procedure? There is no small claims procedure in Cyprus. Ordinary court procedure applies to such claims. District courts are competent to deal with Reg. No 861/2007 (i.e. cross border claims under euro 2,000).

Rule 6 of the amended Order 30 states that claims, the financial dispute of which does not exceed the amount of €3.000 are allocated by the Registrar to a "Fast Trial" schedule.

6.2.2 What are the value thresholds for claims brought under the small claims procedure? Moreover, are there any other factors that shape the use of the small claims procedure (including the nature of the claim, the area of consumer protection law into which the claim falls etc.)?

See above under 8.2.1. As regards cross border claims the threshold is 2000 euros.

6.2.3 What forms must be completed to raise the application? Who assists the consumer in completing these forms?

The same forms are used as in all other actions. In cross border disputes the forms used are the ones set out in the EU Regulation **(**EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure. The consumer can be assisted by a lawyer in completing such forms.

6.2.4 How can an application for a small claim be made (e.g. online, by post or in person)?

In European Small claims procedures the claim form may be filed in the Registry of the District court competent to hear the claim or can be send by post or by any other means of communication such as by fax or email. In all other cases the action must be filed in person, or through a lawyer at the registry of the court.
In small claims of up to 3000 Euros the writ of summons must be filed in person or though an advocate in the registry of the court competent to hear the claim.

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following criteria:
(α) the speeding up of the case.
(β) the ensuring of the equal treatment of the parties.
(γ) the saving or mitigation of the expenses.
(δ) the case management in proportion to:
(i) the financial object of the case.
(ii) its importance.
(iii) the complexity of the raised subjects, either factual or legal.

6.2.5 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

As regards the abovementioned Small Claims Procedure, according to Order 30 r. 6 of the Civil Procedure Rules, the Court may, at its discretion, be based on the written affidavits, which have been given by the parties or by witnesses.,

As an exception, the Court may give directions for a person who has already submitted written evidence to give oral evidence if the Court deems this necessary or following an application by a party (O.30 r. 7).
The concise nature of the procedure for cases falling under the "Fast Trial" schedule is still preserved since the time allocated for the examination-in-chief or the cross-examination of a party or witness shall not exceed 30 minutes, always subject to the discretion of the Court (O.30 r. 7(e)).

6.2.6 Are the costs of the successful party reimbursed?

As a general rule, the costs follow the event. That is, the winning party is allowed to claim his legal costs from his opponent. However, the costs which are taxed by the Registrar in favour of the winning party do not always cover the fees that are paid to his lawyer.
The costs in legal proceedings generally depend on the complexity of the case and the time consumed and they vary according to the lawyers involved. There are also statutory regulations according to which there are minimum charges for each stage of the litigation, depending on the scale of the claim.

Source(s):

6.3 Claims other than small claims

6.3.1 If a consumer protection dispute does not qualify as a small claim, what other procedures are available? What are the value thresholds and other factors determining the use of such procedures?

District Judges have jurisdiction to hear claims of value up to €100,000
Senior District Judges have jurisdiction to hear claims of value up to €500,000.
Presidents have jurisdiction to hear any claims, without limitation. The value of each claim is the amount which is in reality in dispute between the parties and which is disclosed in the pleadings or is admitted by the parties at any stage of the proceedings.

6.3.2 How can such claims be made? Please specify if the applications can be made online, or by post or in person.

In European Small claims procedures the claim form may be filed in the Registry of the District court competent to hear the claim or can be send by post or by any other means of communication such as by fax or email. In all other cases the action must be filed in person, or through a lawyer at the registry of the court.
In small claims of up to 3000 Euros the writ of summons must be filed in person or though an advocate in the registry of the court competent to hear the claim[17].

6.3.3 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

The question, as regards the burden of proof, cannot be answered due to lack of relevant information.

Under Cyprus law, evidence consists of information by which certain facts are proven or disproven.
With regard to expert evidence, in particular, the opinion of an expert is generally admissible: whenever an issue comprises a subject of which knowledge can only be acquired by special training or experience; whenever the area concerned constitutes an established area of expertise; and/or whenever the expert witness has made a special study of the subject, or acquired special evidence therein.
Witnesses normally give oral evidence usually on oath or affirmation. Following a recent amendment of Cyprus' evidence law, a witness can now make a written witness statement. Witnesses giving evidence at trial are cross-examined before the court by the opposite party and re-examined by the party calling him, and after reexamination, they may be questioned by the Court.
Witnesses are served with a witness summons in order to attend for examination, or to produce any document. In case a witness has been duly summoned but refuses to attend the Court, it may issue a warrant of arrest compelling him to appear before it.
Under the Civil Procedure Rules (Order 36), the Cyprus courts may order that:
Any particular fact or facts be proven by an affidavit;
Where any witness is in a country with which a Convention in this regard has been or shall be extended to Cyprus, the Court may order such a witness to be examined before the competent Court or authority of such country or before any person appointed by such a Court or authority.
The Cyprus Courts also have the power to make orders for the discovery and inspection of document.

6.3.4 Are the costs of the successful party reimbursed?

As a general rule, the winning party is allowed to claim his legal costs from his opponent. However, the costs which are taxed by the Registrar in favour of the winning party do not always cover the fees that are paid to his lawyer.
The costs in legal proceedings generally depend on the complexity of the case and the time consumed and they vary according to the lawyers involved. There are also statutory regulations according to which there are minimum charges for each stage of the litigation, depending on the scale of the claim.

Source(s):

[17] Answers given by M. Kyriakou (Senior Legal Officer) and N. Papanikolaou (Legal Officer A).

6.4 Claims for the issuance of a payment order

6.4.1 Does an order for payment procedure exist in the national system? Is it a simplified procedure?

There is no specific national "order for payment" other than that provided for in Reg. 1896/2006, for the application of which a procedural regulation has been adopted.

6.4.2 Which authorities or courts are competent to hear claims for the issuance of payment orders?

6.4.3 Are there any formal requirements that must be satisfied for the application for the issuance of a payment order to be made (e.g. standard forms, representation by a lawyer, the detail of description required, the need to provide written evidence etc.)?

6.4.4 What information is generally available to the authority or court when a claim for the issuance of a payment order is made?

6.4.5 What opportunity is available for a defence/statement of opposition to be advanced? How should this be done and what is its effect? Please specify if the means of advancing a defence differ depending on the value of the claim and the court dealing with it.

6.4.6 What is the effect if the claim is uncontested, i.e. if there is a lack of defence/statement of opposition?

6.4.7 If the defendant is a consumer, and he or she does not respond to or raise an objection to the issuance of the payment order, does the authority dealing with the claim for payment order proceedings have the power to examine any issue of consumer protection law of its own motion before treating the action as usual?

6.4.8 What steps must the pursuer take in order to obtain an enforceable decision?

6.4.9 Is this decision final, or can the defendant appeal against it?

Source(s):

6.5 Appeals in consumer disputes

6.5.1 Are appeals possible in all consumer disputes? Please specify for small claims and other types of claims.

Appeals are possible in all consumer disputes, even as regards the small claims procedure.

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 –	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- €	Collective claim of value € 20.001+

		€ 20.000			20.000	
Nature of the procedure at 1st instance						
2nd instance – appeal to?						
3rd instance – appeal to?						

6.5.2 Please briefly specify the national appeal procedure, including any requirements to be satisfied for appeals. These might include, but are not limited to, conditions of admissibility, value thresholds, time-limits, the scope of review, and the impact of the appeal on enforcement (provisional enforcement). Please refer to any rules specifically applicable in respect of the claims and relevant procedures outlined above.

See above under I 2.2.

6.6 Enforcement in consumer disputes

The CJEU has identified a number of situations concerning the enforcement stage of consumer protection disputes in which the effective and equivalent protection of EU consumer rights may be affected by national procedural rules. These include – in relation to the effectiveness and equivalency of the protection afforded by the Unfair Contract Terms Directive, for example – the enforcement of arbitration awards, the enforcement stage in the recovery of consumer credit and the enforcement of mortgages, which often links together declaratory and enforcement proceedings. As such, we focus on these situations below. However, other problematic situations exist. Please indicate if additional (and potentially problematic) situations are identifiable in your national legal system.

Moreover, if possible, please provide the reference/citation of an article that provides an overview of the way in which enforcement operates in relation to consumer protection disputes within your national legal system.

6.6.1 If the assessment of a consumer protection issue has not been possible at an earlier stage of the proceedings, is it always possible – either ex officio (see section 10 below) or if the consumer raises a possible violation of consumer protection law – for this assessment to be undertaken during enforcement proceedings?

The question cannot be answered due to lack of relevant information.

6.6.2 In the particular case of consumer protection, if a court examines consumer protection law (either ex officio or on the basis of an argument advanced by the consumer), does national procedural law provide that interim measures should 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 final decision will have full effect?

The question cannot be answered due to lack of relevant information.

7. ACTIONS FOR COLLECTIVE REDRESS

The CJEU has considered that situations in which individual and collective actions are in some way linked are those in which the effective and equivalent protection of EU consumer rights may be affected by national procedural rules. As such, we will focus on these situations. However, other problematic situations exist. Please indicate if additional (and potentially problematic) situations are identifiable in your national legal system.

Moreover, if possible, please provide the reference/citation of an article that provides an overview of the way in which the collective redress mechanism operates within your national legal system.

Presently, Cyprus does not have any type of collective action for damages. However, independent actions may be joined to common proceedings.
According to the Civil Procedure Rules, a person may be joined into an ongoing action as a Plaintiff on condition that the right to relief arises from same transaction. Where plaintiffs bring separate actions, actions may be joined where a common question of law or fact arises in these actions (see Order 9). In addition, Order 9 provides that a plaintiff has the right to join as co-defendant any person against whom he has the right to relief.
The Civil Procedure Rules (Order 14) also provides that when two or more actions are pending in the same Court, whether by the same or different plaintiffs against the same or different defendants, and the claims of these actions involve such a common question of law or fact which renders it desirable that the actions should be consolidated, the Court has the discretion to order the consolidation of these actions. Where a plaintiff or defendant is added, the writ of summons and/or the pleadings must be amended accordingly.
An interested party may also apply to the court for leave to intervene under common law principles.

7.1 Injunctive relief, linking individual and collective actions

The case law of the CJEU requires that a person or organisation with a legitimate interest in consumer protection must be able to bring an action before a national court or tribunal in respect of an alleged violation of consumer rights deriving from Union law, either for compensation or for injunctive relief, to preclude the continued violation of consumer rights[18].

7.1.1 If collective proceedings are launched, does national procedural law provide that ongoing individual claims, relating to the same dispute, should be stayed until the collective proceedings are brought to an

[18] This derives from the EU directives. For example, in respect of the UCTD, Art.6(1), Art.7(1) and (2) UCTD, provide that the Member States must ensure 1) that unfair terms are not binding on the consumer and 2) that adequate and effective means exist to prevent the continued use of unfair terms in consumer contracts. The CJEU has held that effective implementation requires that the consequence of the finding of the violation – in the case of a finding of unfairness under the UCTD – is for the term to be declared invalid, and that the effect of this invalidity extends not only to the parties to the action for an injunction but also to those who have concluded a contract with the seller/supplier to which the same terms apply.

end? Please specify if this constitutes an obligation on the part of the national judge or if it is at his or her discretion.

7.1.2 If individual proceedings are stayed, please indicate what the effect of the court or ADR entity's decision in the collective action on those individual proceedings would be, i.e. whether the outcome of the collective action binds the consumer bringing an individual action.

8. CONSUMER ALTERNATIVE DISPUTE RESOLUTION

The questions below focus on some key concerns relating to consumer disputes before ADR fora. If possible, please provide the reference/citation of an article that provides a general overview of the way in which consumer alternative dispute resolution operates within your national legal system.

8.1 Consumer disputes before ADR fora

8.1.1 Is ADR mandatory for all parties bringing a claim related to a consumer protection dispute?

8.1.2 Please specify if there are limitations to the use of ADR. These might include the nature of the claim (i.e. whether both individual and collective claims are possible), requirements of representation, time limits, value thresholds, etc.

The Competition and Consumer Protection Service has established a non mandatory (Art. 10 of Law 78 (I) 2011) out-of-court settlement of consumer disputes with arbitration procedures mechanism, which is dealing with consumer to business disputes that are a result of a purchase of goods or provision of services, the cost of which is not exceeding Euro 3.000 (excluding possible further expenses and interest rates. ADR is not mandatory as regards such disputes (Law 78 (I) 2011). In 2011 Cyprus enacted the Law on Extrajudicial Settlement of Consumer Claims via Arbitration.

There are no limitations to the use of ADR.

8.1.3 Can ADR entities issue binding decisions and can they enforce those decisions? If not, please explain how they are enforced.

Such decisions have the enforceability of a court decision. (Art. 26 (3) of Law 78 (I) 2011.

8.1.4 Does national law provide that limitation periods applicable to judicial actions should be suspended while ADR is ongoing?[19]

No.

[19] The Directive on Consumer ADR provides that "the existence of an effective system for collective claims and easy recourse to ADR should be complementary". Consumer ADR is relevant not only for individual claims but also for collective ones; it can provide consumer with a means to reduce costs and save time.

8.1.5 Please specify if national law establishes rules providing for recourse to judicial action following an (unsuccessful) ADR hearing[20].

No.

8.1.6 Is there judicial review of decisions and awards made by ADR entities? If so, by which court or tribunal is this oversight made? Is it ordinary or specialised?

Decisions and awards made by ADR entities, despite their nature as enforceable decisions, can be indirectly reviewed in the context of the enforcement proccedings.

9. THE EXAMINATION OF CONSUMER PROTECTION LAW IN NATIONAL PROCEDURAL LAW: RESPECT FOR THE PRINCIPLES OF THE EFFECTIVENESS AND EQUIVALENCE OF CONSUMER PROTECTION LAW AND EX OFFICIO CONTROL

The rules of national civil procedure that could potentially affect, and indeed undermine, the effective and equivalent protection of consumer rights are various. They include but are not limited to the rules and practices of ordinary and specialised judicial procedures, rules and practices of consumer ADR, rules applicable to special types of procedure (e.g. payment order procedures), the jurisdiction of individual courts (the courts that have jurisdiction over consumer disputes), the formal requirements that have to be satisfied to bring a case, the types of legal action that are available, the need for parties to be represented, the time-limits applicable to procedural steps of the action, rules on the taking of evidence, the possibility (or lack) to consider certain issues at specific stages of the procedure, the right to appeal and review, and rules relating to the enforcement or judgements and other enforcement titles (e.g. arbitration awards, notarial deeds, including mortgages).

On the basis of the principles of equivalence and effectiveness, the CJEU has established certain requirements for the procedural protection of consumer rights deriving from EU law. In particular (and especially in relation to the protection afforded to consumers via the Unfair Contract Terms Directive[21]), the CJEU has established an obligation on national judges (and potentially other dispute resolution facilitators) to apply consumer law of their own motion (that is, ex officio), when they have available the legal and factual elements necessary for this task. Ex officio control is one type of procedural mechanism that can be utilised within the national system to promote the effective and equivalent protection of consumer law. Thus, other mechanisms of procedure within your national legal system should be highlighted and discussed where relevant. The following questions should be answered in respect of both judicial and if relevant, alternative dispute resolution.

9.1 The basis of ex officio control of consumer protection law in national law

The question cannot be further answered due to lack of relevant information.

[20] Per Arts.10-12, Directive on Consumer ADR.

[21] However, the CJEU has recognised that ex officio control – and other procedural requirements, that might in themselves (or indeed, in their absence), impact the effective enforcement of consumer law – arise across the EU's consumer protection directives.

9.1.1 Is it clear in the national legal system when consumer protection law should be applied ex officio? Is the ex officio control of consumer protection law established as an obligation or as a (discretionary) power of the judge in national procedural law?

Ex officio control of consumer protection law is not established in Cyprus. However, Prof. Christiana Markou supports that ex officio control should be applied on the basis of the nature of consumer protection law as belonging to the public order legislation (see her presentation of 8/5/2016 at the workshop "Civil Law and economic crisis"organised by the European University of Cyprus).

9.1.2 If there is an understanding of ex officio control of consumer protection law in the national legal, what is this control understood to encompass/not cover?

9.1.3 Is the party who claims to be a consumer required to establish his or her consumer status, the existence of a consumer contract and that consumer law applies to the dispute? Is this required even if the consumer has no legal representation?

Yes. The question cannot be further answered due to lack of relevant information.

9.1.4 What information is available to judges and dispute resolution facilitators hearing consumer protection disputes?

No special information is available to judges and dispute resolution facilitators hearing consumer protection disputes.
There are no special procedural provisions as regards consumer protection disputes.
Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a consumer protection dispute to be heard and b) for the court to engage in ex officio control?

a) No.

9.1.5 Who is responsible for providing this information? If the necessary information is not available to the court (or dispute resolution facilitator), is he or she under an obligation to investigate in order to be able to respond to a relevant consumer protection dimension of the case?
It is a general rule, as regards civil proceedings, that the party who raised an issue bears the burden of proving the facts in issue[22].

9.1.6 Will the court provide the consumer with any assistance in gathering factual information or advancing his legal arguments before the court? Please respond for the situation where: a) the consumer has legal representation and b) the consumer has no legal representation.

[22] A. Neocleous & Co, Introduction to Cyprus Law, p. 101.

The Court preserves its discretionary powers to give any directions, additionally to the provisions included in the amended Order 30, as it deems just under the circumstances (O.30 r. 9)[23]. Overall, the Court shall exercise its powers in accordance to the criteria mentioned in rule 9 such as the mitigation of costs throughout litigation and ensuring that the parties are on an equal footing, adequately prepared and informed about the course of the case.

9.2 The possibility for ex officio control of EU consumer protection law in dispute resolution proceedings

9.2.1 Is ex officio control of consumer protection law always possible when the procedure involves a full assessment of the claim on its merits?

The question cannot be answered due to lack of relevant information.

9.2.2 Can ex officio control be exercised even when the procedure does not involve an assessment on the merits?

The question cannot be answered due to lack of relevant information.

9.2.3 Please indicate if, per national procedural law, ex officio control can be exercised at the following stages of the procedure:

	Courts		Other dispute resolution facilitators	
	Possible to exercise ex officio control	Not possible to exercise ex officio control	Possible to exercise ex officio control	Not possible to exercise ex officio control
Ordinary proceedings	v		v	
Small claims	v		v	
Payment order	v		v	
Provisional measures	v		v	
Proceedings linked to enforcement	v		v	
Enforcement proceedings	v		v	
- Enforcement of payment order	v		v	
- Enforcement of arbitration award	v		v	

[23] "The Court may give any additional directions as it deems just under the circumstances in accordance to the following criteria:
(α) the speeding up of the case.
(β) the ensuring of the equal treatment of the parties.
(γ) the saving or mitigation of the expenses.
(δ) the case management in proportion to:
(i) the financial object of the case.
(ii) its importance.
(iii) the complexity of the raised subjects, either factual or legal.

- Enforcement of mortgage	v		v	
- Enforcement of notarial deed	v		v	
Appeal proceedings (please specify:)	v		v	

The question cannot be answered due to lack of relevant information.

9.2.4 What does ex officio control encompass in national procedural law?

According to Art. 31 of Law 14/1960, the court has the power to supplement written procedural rules by developing procedure according the principle of (procedural) equity, "so that all the contested issues will be fully and finally judged".

The question cannot be answered due to lack of relevant information.

Source(s):

9.3 Other procedural mechanisms for the equivalent and effective protection of EU consumer law

See above under 11.2.4.

The questions cannot be answered due to lack of relevant information.

9.3.1 Does national procedural law provide that rules of EU consumer law (as well as rules that aim to satisfy EU consumer law objectives) should be understood as having equal standing to national rules of public policy (which is to say, that for the purposes of domestic law, the consumer protection provision is understood to have equal standing to a rule that must be raised ex officio by the national court)?

9.3.2 If ex officio control is not possible in certain types of proceedings or at a certain stage of proceedings (or for any other reason), does national procedural law provide for an alternative way of assessing consumer protection law?

9.4 Ex officio control in payment order procedures

See above under 11.2.4.

The questions cannot be answered due to lack of relevant information.

9.4.1 What information is available to the judge when a claim for the issuance of a payment order is made? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a claim for the issuance of a payment order to be granted and b) for the court to engage in ex officio control before a payment order is issued?

9.4.2 What considerations will be assessed ex officio by the court (or other competent authority) before a payment order is issued?

9.4.3 How is the consumer informed about the claim to issue a payment order against him or her? Does national procedural law make any provision for steps to be taken to ensure that consumers are informed of the claim for the issuance of a payment order so that he or she can contest it?

9.4.4 If the consumer objects to the claim, what is the next step? Do the proceedings continue, in the context of which ex officio control can be exercised? Or are the proceedings transferred to ordinary proceedings for analysis on the merits of the claim?

European Commission
An evaluation study of the impact of national procedural laws and practices on the equivalence and effectiveness of the procedural protection of consumers under EU law

JUST/2014/RCON/PR/CIVI/0082

National Report – Consumer Protection Strand

Czech Republic

Bohumil Dvořák and Silvia Kubešová

CZECH REPUBLIC: LEGAL ANALYSIS

1. NATIONAL LEGISLATION IMPLEMENTING EU CONSUMER PROTECTION INSTRUMENTS

EU legislation	Transposing national legislation	Additional notes (e.g. if there is an overlap in application of legislation etc.)
Doorstep Selling Directive 1985/577/EEC	Act No. 40/1964, the Civil Code Act No. 89/2012, the Civil Code (now effective code)	
Package Travel Directive 90/314/EEC	Act. No. 159/1999, the Certain Conditions of Business Activities in Tourism Act Act No. 40/1964, the Civil Code Act No. 89/2012, the Civil Code (now effective code)	
Unfair Contract Terms Directive 1993/13/EEC	Act No. 40/1964, the Civil Code Act No. 89/2012, the Civil Code (now effective code)	
Distance Selling Directive 1997/7/EC	Act No. 40/1964, the Civil Code Act No. 89/2012, the Civil Code	

	(now effective code)	
Consumer Sales and Guarantees Directive 1999/44/EC	Act No. 40/1964, the Civil Code Act No. 89/2012, the Civil Code (now effective code)	
Unfair Commercial Practices Directive 2005/29/EC	Act No. 634/1992, the Consumer Protection Act Act No. 40/1995, the Advertising Regulation Act	
Misleading and Comparative Advertising Directive 2006/114/EC	Act No. 40/1995, the Advertising Regulation Act Act No. 513/1991, the Commercial Code (now ineffective) Act No. 89/2012, the Civil Code	
Consumer Credit Agreement Directive 2008/48/EC	Act No. 145/2010, the Consumer Credit Act	
Timeshare Protection Directive 2008/122/EC	Act No. 89/2012, the Civil Code Act No. 634/1992, the Consumer Protection Act	
Consumer Injunctions Directive 2009/22/EC	Act No. 634/1992, the Consumer Protection Act Act No. 89/2012, the Civil Code	
Consumer Rights Directive 2011/83/EU	Act No. 634/1992, the Consumer Protection Act Act No. 89/2012, the Civil Code	
ADR for Consumer Disputes Directive 2013/11/EU	Act No. 634/1992, the Consumer Protection Act Act No. 64/1986, the Czech trade inspection Act Act No. 229/2002, the Financial Arbitrator Act Act No. 127/2005, the Electronic Communication Act Act No. 29/2000, the Postal Service Act Act No. 458/2000, the Energy Act	

Source(s):

1. CONCEPT OF THE CONSUMER

1.1 Please outline the concept of the consumer in national law, indicating whether it is intended to be a uniform concept, whether it has been legislated for and where it can found (i.e. in a legislative provision, governmental guidelines, case law etc.).

In the Czech legal system, the Charter of Fundamental Rights and Freedoms forms a wide constitutional basis for the legal regulation of consumer relations; at the under-constitutional private and public law levels it is Act No. 89/2012 Sb., the Civil Code (namely sections 419, 1810-1867, 2158-2174, 2521-2549 and 2976-2990), and Act No. 634/1992 Sb., the Consumer Protection Act, respectively. Both legal fields are influenced by law of the European Union.

Source(s): The Charter of Fundamental Rights and Freedoms, Act No. 89/2012 Sb., the Civil Code, Act No. 634/1992, the Consumer Protection Act.

2. REGULATORY AUTHORITIES COMPETENT FOR CONSUMER PROTECTION ISSUES

2.1 What regulatory authorities, if any, are competent for enforcing consumer protection law? Please identify them, their nature (i.e. whether they are public or private or mixed) and the nature of enforcement.

In the case of a consumer dispute, it is in the first place the courts that are competent to enforce the rights of consumer protection.
Monitoring compliance with consumer law is carried out, subject to certain exceptions (s. 23 of Act No. 634/1992 Sb.), by the Czech Trade Inspection Authority (an administrative body subordinated to the Ministry of Industry and Trade of the Czech Republic).
S. 23 of Act No. 634/1992 Sb., the Consumer Protection Act, lists other controlling bodies, e.g., the State Agriculture and Food Inspection Authority, regional hygiene centres, the State Veterinary Authority, the Czech Arms and Ammunition Testing Authority, the Czech National Bank, the State Institute for Drug Control, the Czech Energy Regulatory Office, the Czech Telecommunications Authority, the Office for Personal Data Protection, etc.
Under s. 23a of Act No. 634/1992 Sb., the Consumer Protection Act, said bodies may:
1) use ordinary remedial measures, e.g., they may issue binding instructions to rectify discovered shortcomings within set time periods;
2) use specific remedial measures, e.g., where there is an immediate threat of damage to life, health, or property, they may temporarily discontinue the sale of products or supply of services, or close the business premises, or they may issue a resolution imposing a duty on a producer, importer, supplier, or seller to withdraw from circulation a product that is dangerous because it may be confused with a foodstuff; or
3) impose financial penalties, i.e., fines.

2.2 Is there a specific venue for this type of enforcement and does this limit the jurisdiction of courts/ADR fora (even if only initially)?

The above-listed regulatory bodies may issue administrative decisions in administrative proceedings which are enforceable by way of administrative execution procedure (s. 103 and foll. of Act No. 500/2004 Sb., the Code of Administrative Procedure), and reviewable by courts. In cases of judicial review of administrative decisions, which is possible after all remedial measures have been used within the framework of

administrative proceedings, the courts proceed in compliance with Chapter V of Act No. 99/1963 Sb., the Code of Civil Procedure.

2.3 Can criminal prosecutions be initiated for violations of consumer protection rules? How serious must the infringement be? What are the penalties and sanctions? And might these prosecutions lead to criminal penalties or sanctions? Can individual consumers piggy back on these claims (e.g. via a partie civile method)?´

Prosecution may be commenced only after a crime under s. 253 of the Criminal Code has been committed (harm caused to a consumer).
To qualify as a crime, damage must exceed CZK 5,000 (approximately €180) and must be caused by skimping on quality, amount, or weight of goods; a person also commits said crime if he/she markets a major volume of goods, work, or services (i.e., worth at least CZK 50,000 (approximately €1,851)) and at the same time conceals material defects therein.
Punishments that may be imposed for committing said crime are imprisonment not exceeding 1 year, prohibition to undertake professional activities, and/or forfeiture of a thing; a combination of all three penalties may be imposed in one criminal proceeding.
In the course of criminal proceedings, a court may decide on damages in so-called adhesion proceedings. A prerequisite for applying said procedure is that a victim duly enforces his/her right to damages in the course of the criminal proceedings. Where it is not possible to decide on the claim in the course of criminal proceedings (e.g., the claim for damages is not sufficiently substantiated), the criminal court will refer the victim to civil proceedings.

2.4 Is there judicial review of decisions of consumer regulatory authorities? If so, by which court is this judicial oversight made? Is the forum an ordinary or a specialised court or tribunal?

The decisions of supervisory bodies (administrative authorities) are subject to judicial review. The judicial review of decisions of supervisory bodies is carried out in compliance with the rules contained in Part V of Act No. 99/1963, the Code of Civil Procedure. The reviews are carried out upon application before the ordinary courts. Courts having subject-matter jurisdiction at first instance are the district courts.

2.5 Does the national legal system provide for a mechanism of cooperation between its national regulatory authorities and those of other Member States?

Act No. 160/2007 Sb., which amended Act No. 64/1986 Sb., on the Czech Trade Inspection Authority, incorporated s. 7c, which states that where it is found that a person being inspected perpetrated an unlawful activity on the territory of the European Community, or in any state comprising the European Economic Area, which damages or may be detrimental to the common interest of consumers, a director of an inspectorate of the Czech Trade Inspection Authority will issue a resolution prohibiting such activity.

Source(s): Act No. 634/1992, the Consumer Protection Act, Act No. 64/1986, the Czech trade inspection Act, Act No. 229/2002, the Financial Arbitrator Act, Act No. 127/2005, the Electronic Communication Act, Act No. 29/2000,

the Postal Service Act, Act No. 458/2000, the Energy Act, Act No. 40/2009, the Criminal Code, amendment No. 160/2007 to the Act No. 64/1986, the Czech trade inspection Act

3. LEGAL AID

The Czech legal system does not contain any statutory regulation for legal aid available to consumers. Some legal aid is provided only by private consumer organisations. Thus, it is not possible to answer the ensuing questions.

3.1 Is legal aid available to consumers in: a) bringing a claim and b) defending a claim before a court?

3.2 For what kinds of disputes and actions is legal aid available? (NB: legal aid might not be available for consumer or contractual disputes but be available instead for a related action, e.g. actions relating to debt, mortgage arrears, eviction etc.)

3.3 What requirements must be satisfied for the consumer to be entitled to legal aid? Please specify if there are any additional limitations to its availability.

3.4 What does legal aid encompass? (i.e. (only) general advice, (only) assistance in preparing the case, (only) assistance with negotiation of settlements, (also) representation).

Source(s):

4. COSTS

4.1 What are the costs of different types of procedures before courts? Are there exemptions to the payment of fees and expenses? How can costs be paid?

Court fees are levied for individual types of procedures made before courts, or for individual acts of court, or for recording a fact into a public register. The scale of fees can be found in the attachment to Act No. 549/1991 Sb., on court fees.
a) Where the subject of proceedings is a pecuniary performance not exceeding CZK 20,000 (approximately €740), the court fee is CZK 1,000 (approximately €37).
b) Where the value of a pecuniary performance is higher than CZK 20,000 (approximately €740) but does not exceed CZK 40,000,000 (approximately €1,481,481), the court fee is 2% of such amount.
c) Where the value exceeds CZK 40,000,000 (approximately €1,481,481), the court fee is CZK 2,000,000 (approximately €74,074) and 1% of the sum exceeding CZK 40,000,000 (approximately €1,481,481); values exceeding CZK 250,000,000 (approximately €9,259,259) are not taken into account.
The law provides for certain types of procedures and persons in proceedings to be exempt from court fees (ss. 11(1) and 11(2) of Act No. 549/1991 Sb., on court fees, respectively). Proceedings before the court regarding consumer disputes, or those in which a consumer is a participant, are not exempt from the payment of court fees.

However, a court may, upon application by a participant in proceedings, grant an exemption from court fees in cases where it is justified by the personal situation of the participant and provided that the bringing of a claim or defending it is not arbitrary or clearly unsuccessful; a full exemption may be granted only if there are particularly serious reasons justifying it (s. 138 of Act No. 99/1963 Sb., the Code of Civil Procedure).
Court fees that do not exceed CZK 5,000 (approximately €185) may be paid in the form of official duty stamps. If the court fees exceed CZK 5,000 (approximately €185), the only possible mode of payment is by transfer to the account of the court (s. 8 of Act No. 549/1991 Sb.)

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Court fees						
Court expenses	unquantifiable	unquantifiable	unquantifiable	unquantifiable	unquantifiable	unquantifiable
Exemptions						

Source(s): Act No. 549/1991 Sb., on court fees, Act No. 99/1963, the Code of Civil Procedure

5. STANDING AND REPRESENTATION IN CONSUMER DISPUTES

5.1 Does national law limit the standing of the individual consumer in respect of the claim that can be made and the forum before which it can be brought?

The Czech legal system does not contain any restrictions whatsoever on the right of individual consumers to sue.

5.2 Other than individual consumers, who or which bodies have standing in consumer protection disputes and for what types of claim? If the action is not brought by the individual consumer, what requirements of representation must be satisfied?

It follows from s. 25 (2) of Act No. 634/1992 Sb., the Consumer Protection Act, that an action to compel a duty to refrain from unlawful activity in consumer protection cases may be filed by, and a party to a case may be, a) an association, or professional association, having a legitimate interest in the protection of consumers, or b) a person stated in a list of persons eligible to bring an action to compel a duty to refrain from unlawful activity in consumer protection cases. The list of eligible persons is maintained by the European Commission and is published in the Official Journal of the European Union.

5.3 If a consumer wants to bring or defend an action relating to a consumer protection dispute, is there a legal (or otherwise formal) requirement that he or she has legal representation? Please specify for both judicial and ADR fora and the bodies, associations or authorities that can provide this representation.

In the Czech legal system, there is no duty imposed on consumers to be represented in consumer disputes.

Source(s): Act No. 634/1992, the Consumer Protection Act

6. ACTIONS BEFORE COURTS

6.1 Jurisdiction and competence of the courts in consumer disputes: General structure and special procedures aimed at protecting consumers

6.1.1 Are ordinary courts competent to hear such claims? Is there also a specialised tribunal for consumer protection disputes?

The ordinary courts of the Czech Republic have jurisdiction and are competent to decide on consumer disputes. No specialised courts or tribunals have been established to resolve consumer disputes.

6.1.2 Which courts are competent to hear consumer protection disputes at first instance and in appeals? Please specify the court, in light of the value of the claim (and identify any other factors that are relevant in allocation jurisdiction).

The courts competent to resolve consumer disputes at first instance are the district courts. At second instance, i.e., operating as appellate courts, it is the regional courts.
Where the value of a claim does not exceed CZK 10,000 (approximately €370), it is not possible to appeal the decision. These claims are referred to as small claims which are not subject to appeal (see s. 202 (2) of Act No. 99/1963 Sb., the Code of Civil Procedure).
On the other hand, where the value of a claim exceeds CZK 10,000 (€370), an appeal is admissible.

6.1.3 What is the nature of the procedure at first instance, e.g. is it a simplified or a summary procedure, and is there an assessment of the merits? Please specify in light of the value of the claim (and identify any other factors that are relevant in allocating jurisdiction).

Court proceedings over pecuniary claims may take two forms: they can either be ordinary proceedings or simplified summary proceedings, provided the claims are sufficiently demonstrable.
Therefore, a plaintiff (consumer) has to petition the court with his/her claim, whatever the amount, so that a summary proceeding resulting in the issuance of a compulsory payment order may take place.
Filing a claim is crucial; however, it is not an indispensable requirement for having the case decided in a summary proceeding. The court has the discretion to resolve, even on its own initiative, that the case be dealt with in a summary proceeding.
What is necessary is that the right being enforced is substantiated by facts asserted by the claimant, and that the court considers whether a summary proceeding is in order (despite all conditions being met, the court is not actually bound to issue a compulsory payment order). If the court does not issue the compulsory payment order, it schedules a trial date and proceeds in the same way as in any proceeding, i.e., an ordinary proceeding follows.

A compulsory payment order has to be delivered to the defendant in person only; it cannot be issued if the defendant's whereabouts are unknown or if the defendant sojourns abroad (s. 172 of Act No. 99/1963 Sb.).
What can be deemed as a specific type of compulsory payment order is an electronic compulsory payment order. It can be applied for solely by a claimant making use of an electronic form signed by a certified electronic signature. The amount claimed must not exceed CZK 1,000,000 (approximately €37,037). See s. 174a of Act No. 99/1963 Sb.

6.1.4 Please identify the formal requirements that must be satisfied for a consumer dispute to be heard before a court. These might include time limits applicable to the filing of the action/defence, representation requirements etc.

The Czech legal system does not lay down any special requirements for bringing a claim before the court with respect to consumer disputes. The requirements are the same as those for any other claim by means of which a defendant enforces his/her right in a court. As for a statute of limitation on successfully bringing a claim before the court, it must be filed within a three-year period of the date when it could have been filed for the first time.

6.1.5 In respect of the claims and relevant procedures available in the national legal system, what kind of relief might be available in consumer protection disputes? (monetary remedies, injunctions, skimming off etc.)?

The Czech legal system does not grant any special allowances to consumers. Where there is a consumer dispute, the approach towards a consumer is the same as to any other participant in proceedings.

6.1.6 Please provide a brief overview of the role of parties and judges in civil proceedings generally (e.g. with reference to the principle of party disposition, the obligation of parties to make and prove factual allegations and to make and provide legal arguments, the possible role of the court). This overview should be brief; these issues will be dealt with in more detail in the questions that follow.

Civil proceedings over consumer disputes are contentious by nature. Such proceedings are typically governed by the following principles: the free disposition principle, the adversarial principle, the principle of free assessment of evidence, and the concentration principle.
The free disposition principle means that the proceedings may be commenced only upon an application by a claimant, and whether or not the claim will be pursued until such time when a decision thereon is made always and exclusively depends on the claimant.
The adversarial principle means that the court only hears what has been presented to it by the participants in the proceedings. The facts of the case are only ascertained to the extent to which the participants assert them, using the evidence presented by the parties. Thus, it is principally the claimant who is obliged to state (assert) critical facts and produce evidence to prove them, whereas failing to do so may result in losing the case.
The principle of free assessment of evidence means that the court has the discretion to weigh evidence, whereas each piece of evidence is weighed individually and then together in their mutual connection;

doing so, the court takes into consideration all facts that have emerged in the proceedings, including anything that has been presented by the participants (s. 132 of Act No. 99/1963 Sb.).

Contentious proceedings contain certain features of the concentration principle, which means that facts and evidence must basically be presented in the proceeding before the trial court. Appeal courts will not, as a matter of principle, take account of any new facts or evidence.

The concentration principle is stricter in proceedings before a trial court. All facts and evidence must be presented either before the end of preliminary hearing, or no later than before the end of the first hearing on the case.

Source(s): Act No. 99/1963, the Code of Civil Procedure

6.2 Small claims

Proceedings over small claims are not regulated in the Czech legal system. Thus, it is not possible to provide answers to the ensuing questions and reference is made to the proceedings before courts as described above.

6.2.1 Does a small claims procedure exist in the Member State? If yes, is it a specialised or simplified procedure?

6.2.2 What are the value thresholds for claims brought under the small claims procedure? Moreover, are there any other factors that shape the use of the small claims procedure (including the nature of the claim, the area of consumer protection law into which the claim falls etc.)?

6.2.3 What forms must be completed to raise the application? Who assists the consumer in completing these forms?

6.2.4 How can an application for a small claim be made (e.g. online, by post or in person)?

6.2.5 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

6.2.6 Are the costs of the successful party reimbursed?

Source(s):

6.3 Claims other than small claims

6.3.1 If a consumer protection dispute does not qualify as a small claim, what other procedures are available? What are the value thresholds and other factors determining the use of such procedures?

6.3.2 How can such claims be made? Please specify if the applications can be made online, or by post or in person.

6.3.3 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

6.3.4 Are the costs of the successful party reimbursed?

Source(s):

6.4 Claims for the issuance of a payment order

6.4.1 Does an order for payment procedure exist in the national system? Is it a simplified procedure?

The Czech legal system regulates the issue of simplified summary proceedings for the issuance of payment orders, namely the compulsory payment order (s. 172 and foll. of Act. No. 99/1963 Sb.), the electronic compulsory payment order (s. 174a of Act No. 99/1963 Sb.), and the European compulsory payment order (s. 174b of Act No. 99/1963 Sb.).

6.4.2 Which authorities or courts are competent to hear claims for the issuance of payment orders?

A compulsory payment order may be issued only by a competent court, i.e., by a district court as a first-instance court.

6.4.3 Are there any formal requirements that must be satisfied for the application for the issuance of a payment order to be made (e.g. standard forms, representation by a lawyer, the detail of description required, the need to provide written evidence etc.)?

As it has already been stated in section 8.1.3, it is possible to issue:
(a) a compulsory payment order upon an application therefor, which is a crucial yet not necessary requirement for having the case decided in a summary proceeding. The court has the discretion to resolve, even on its own initiative, that the case be dealt with in a summary proceeding. The formalities of such applications are the same as the formalities of a claim laid down in s. 79 of Act No. 99/1963 Sb..
(b) an electronic compulsory payment order, which has to be applied for exclusively by a claimant, using an electronic form and signed by a certified electronic signature. The value of the claim cannot exceed CZK 1,000,000 (approximately €37,037). See s. 174a of Act No. 99/1963 Sb.. The formalities of the electronic form are similar to those of a claim, except that there must be stated either the date of birth of an individual, the identification number of a legal entity, or the identification number of an individual who is an entrepreneur. All documentary evidence must also be presented in the electronic format.
A necessary requisite for both types of payment order is that the claim is substantiated by facts asserted by the plaintiff, and that the court considers whether a summary proceeding is in order (despite all conditions being met, the court is not actually bound to issue a compulsory payment order).

6.4.4 What information is generally available to the authority or court when a claim for the issuance of a payment order is made?

A claim (application for the issuance of a payment order) must be for the enforcement of a right to be paid a certain sum of money, and it must state whether the right being enforced follows from the facts asserted by the claimant. (s. 172 of Act No. 99/1963 Sb.). The court will not issue a payment order if the whereabouts of the defendant are unknown, or if the payment order is to be served on the defendant abroad.

6.4.5 What opportunity is available for a defence/statement of opposition to be advanced? How should this be done and what is its effect? Please specify if the means of advancing a defence differ depending on the value of the claim and the court dealing with it.

It is possible for the defendant to file a protest against both a compulsory payment order and an electronic payment order within 15 days of the service of such order, i.e., the defendant's response to the order is that he/she defends the claim. It is not necessary for the defendant to provide any reasoning in the protest. If a protest is filed, the payment order is set aside and a trial is scheduled. (ss. 172-174 of Act No. 99/1963 Sb.).

6.4.6 What is the effect if the claim is uncontested, i.e. if there is a lack of defence/statement of opposition?

Where a protest is not filed, the payment order becomes enforceable in the same way as a final and conclusive judgment. (ss. 172-174 of Act No. 99/1963 Sb.)

6.4.7 If the defendant is a consumer, and he or she does not respond to or raise an objection to the issuance of the payment order, does the authority dealing with the claim for payment order proceedings have the power to examine any issue of consumer protection law of its own motion before treating the action as usual?

A court has no such competences in the Czech legal system.

6.4.8 What steps must the pursuer take in order to obtain an enforceable decision?

Once the payment order becomes enforceable, the judgment creditor must apply for the judicial execution of a decision or for the execution upon a judgment debtor.

6.4.9 Is this decision final, or can the defendant appeal against it?

The only remedial measure available against the payment order, which is a decision on a claim, is a protest. An appeal is not admissible.

Source(s): Act No. 99/1963, the Code of Civil Procedure

6.5 Appeals in consumer disputes

6.5.1 Are appeals possible in all consumer disputes? Please specify for small claims and other types of claims.

As a matter of principle, it is possible to appeal decisions in all consumer disputes. The key aspect of filing an appeal is the value of the claim.
An appeal is not thus admissible against a judgment in which a decision has been made with respect to a claim not exceeding CZK 10,000 (approximately €370), whereas accessories to a claim are not taken into consideration.

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Nature of the procedure at 1st instance						
2nd instance – appeal to?						
3rd instance – appeal to?						

6.5.2 Please briefly specify the national appeal procedure, including any requirements to be satisfied for appeals. These might include, but are not limited to, conditions of admissibility, value thresholds, time-limits, the scope of review, and the impact of the appeal on enforcement (provisional enforcement). Please refer to any rules specifically applicable in respect of the claims and relevant procedures outlined above.

The Czech Republic has two-instance proceedings.
A participant in proceedings may lodge an appeal against a decision of a district or regional court deciding at first instance, unless it is precluded by law (s. 201 of Act No. 99/1963 Sb.). Thus, an appeal is not admissible against a resolution of a procedural nature (e.g., the one under which the case is managed), against a judgment in which it was decided on a claim not exceeding CZK 10,000 (approximately €370), whereas accessories to a claim are not taken into consideration (s. 202 of Act No. 99/1963 Sb.)
An appeal may be lodged within 15 days of the service of a judgment executed in writing.
Where an appeal is lodged, the effect and enforceability of a trial court decision is postponed.
An appeal court, being a court of second instance, reviews the decisions of first-instance courts on both facts and points of law, based on particular appeal reasons provided for by law (s. 205(2) of Act No. 99/1963 Sb.).
The appeal court may: a) uphold the decision of a trial court, provided that it is factually correct (s. 219 of Act No. 99/1963 Sb.); b) reverse the decision and send the case back to the trial court for a new decision (s. 219a of Act No. 99/1963 Sb.); or c) change the decision of the first-instance court, provided that the decision of the trial court was wrong although the facts were correctly determined or, having repeated or

completed the evidence stage, the facts of the case are determined in such a way that it is possible to decide on merits (s. 220 of Act 99/1963 Sb.).

Source(s): Act No. 99/1963, the Code of Civil Procedure

6.6 Enforcement in consumer disputes

The CJEU has identified a number of situations concerning the enforcement stage of consumer protection disputes in which the effective and equivalent protection of EU consumer rights may be affected by national procedural rules. These include – in relation to the effectiveness and equivalency of the protection afforded by the Unfair Contract Terms Directive, for example – the enforcement of arbitration awards, the enforcement stage in the recovery of consumer credit and the enforcement of mortgages, which often links together declaratory and enforcement proceedings. As such, we focus on these situations below. However, other problematic situations exist. Please indicate if additional (and potentially problematic) situations are identifiable in your national legal system.

Moreover, if possible, please provide the reference/citation of an article that provides an overview of the way in which enforcement operates in relation to consumer protection disputes within your national legal system.

6.6.1 If the assessment of a consumer protection issue has not been possible at an earlier stage of the proceedings, is it always possible – either ex officio (see section 10 below) or if the consumer raises a possible violation of consumer protection law – for this assessment to be undertaken during enforcement proceedings?

In the course of execution proceedings, it is not possible to consider the issues of consumer law. The purpose of the execution proceedings is to enforce what has been compelled in the enforceable judgment, not to assess its rightfulness, which is the purpose of the preceding trial proceedings.

6.6.2 In the particular case of consumer protection, if a court examines consumer protection law (either ex officio or on the basis of an argument advanced by the consumer), does national procedural law provide that interim measures should 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 final decision will have full effect?

Under Czech law, it is possible for a court to issue a preliminary ruling so as to provisionally regulate the relationships between the parties after the civil proceedings have been commenced; it may also be issued in cases where the execution of a judgment might be at risk (s. 102 of Act No. 99/1963 Sb.).
A preliminary ruling may also be issued prior to the commencement of civil proceedings for the same reasons (s. 74 of Act No. 99/1963 Sb.).

Source(s): Act No. 99/1963, the Code of Civil Procedure

7. ACTIONS FOR COLLECTIVE REDRESS

The CJEU has considered that situations in which individual and collective actions are in some way linked are those in which the effective and equivalent protection of EU consumer rights may be affected by national procedural rules. As such, we will focus on these situations. However, other problematic situations exist. Please indicate if additional (and potentially problematic) situations are identifiable in your national legal system.

Moreover, if possible, please provide the reference/citation of an article that provides an overview of the way in which the collective redress mechanism operates within your national legal system.

7.1 Injunctive relief, linking individual and collective actions

The case law of the CJEU requires that a person or organisation with a legitimate interest in consumer protection must be able to bring an action before a national court or tribunal in respect of an alleged violation of consumer rights deriving from Union law, either for compensation or for injunctive relief, to preclude the continued violation of consumer rights[24].

As the Czech legal system does not provide for actions for collective redress, the ensuing questions cannot be answered.

7.1.1 If collective proceedings are launched, does national procedural law provide that ongoing individual claims, relating to the same dispute, should be stayed until the collective proceedings are brought to an end? Please specify if this constitutes an obligation on the part of the national judge or if it is at his or her discretion.

7.1.2 If individual proceedings are stayed, please indicate what the effect of the court or ADR entity's decision in the collective action on those individual proceedings would be, i.e. whether the outcome of the collective action binds the consumer bringing an individual action.

Source(s):

8. CONSUMER ALTERNATIVE DISPUTE RESOLUTION

The questions below focus on some key concerns relating to consumer disputes before ADR fora. If possible, please provide the reference/citation of an article that provides a general overview of the way in which consumer alternative dispute resolution operates within your national legal system.

8.1 Consumer disputes before ADR fora

[24] This derives from the EU directives. For example, in respect of the UCTD, Art.6(1), Art.7(1) and (2) UCTD, provide that the Member States must ensure 1) that unfair terms are not binding on the consumer and 2) that adequate and effective means exist to prevent the continued use of unfair terms in consumer contracts. The CJEU has held that effective implementation requires that the consequence of the finding of the violation – in the case of a finding of unfairness under the UCTD – is for the term to be declared invalid, and that the effect of this invalidity extends not only to the parties to the action for an injunction but also to those who have concluded a contract with the seller/supplier to which the same terms apply.

8.1.1 Is ADR mandatory for all parties bringing a claim related to a consumer protection dispute?

It is not obligatory for a consumer to resort to an ADR before commencing litigation.

8.1.2 Please specify if there are limitations to the use of ADR. These might include the nature of the claim (i.e. whether both individual and collective claims are possible), requirements of representation, time limits, value thresholds, etc.

A consumer has the right to have a consumer dispute arising from a purchase agreement or from a service agreement settled out of court, except for disputes arising from agreements concluded: a) in the field of healthcare services rendered to patients by healthcare professionals for the purposes of providing healthcare, including prescribing, dispensing, and supplying medicinal substances and medical devices; b) in the field of public interest services of a non-economic nature; and c) with public providers of further or tertiary education.
An out-of-court settlement procedure for a consumer dispute is commenced upon an application that may be filed with the Czech Trade Inspection Authority, or with an authorised body, no later than within one year of the date on which the consumer first attempted to enforce his/her right with the seller.
The out-of-court settlement procedure must be brought to an end within 90 days of its commencement; where a case is particularly complex, the period may be prolonged by no more than an additional 90 days.

8.1.3 Can ADR entities issue binding decisions and can they enforce those decisions? If not, please explain how they are enforced.

1) ADR proceedings before the Czech Trade Inspection Authority, which is a general body dealing with out-of-court settlements of consumer disputes, may be terminated by a written agreement made by the parties to a dispute. However, such agreement is not binding on the parties; it may only serve as a ground for a judicial decision if the parties to the dispute decide to petition a court.
2) Where the Financial Arbitrator, which is a specialised body handling out-of-court settlements of disputes between consumers and financial institutions, decides in a dispute, the decision is binding on the parties to the proceedings.
3) Where the Czech Telecommunications Authority, which is a specialised body dealing with out-of-court settlements of consumer disputes, namely disputes between a provider of electronic communication services and its customer, or between a provider of postal services and a customer, decides in a dispute, the decision is binding on the parties to the proceedings.
4) Where the Czech Energy Regulatory Office, a specialised body handling out-of-court settlements of consumer disputes, namely disputes between a provider of electricity, gas or heat energy and a customer, decides in a dispute, the decision is binding on the parties to the proceedings.

8.1.4 Does national law provide that limitation periods applicable to judicial actions should be suspended while ADR is ongoing?[25]

The commencement of the out-of-court settlement procedure for a consumer dispute is considered to be an agreement on an out-of-court settlement; it means that if the limitation period started to run prior to the commencement, it is halted for the period of the out-of-court settlement procedure. Otherwise it starts to run again after one of the parties to the procedure expressly refuses to continue in the out-of-court settlement (s. 20o of Act No. 634/1992, the Consumer Protection Act; s. 647 of Act No. 89/2012, the Civil Code).

8.1.5 Please specify if national law establishes rules providing for recourse to judicial action following an (unsuccessful) ADR hearing[26].

If the out-of-court settlement of a consumer dispute has been conducted by the Czech Trade Inspection Authority, it is possible to file a claim with a court both in the case where the procedure was successful, i.e. an agreement was reached, and in the case where the procedure was unsuccessful, i.e. no agreement was reached.
However, if a special consumer dispute was decider by the Financial Arbitrator, the Czech Telecommunications Authority, or the Energy Regulatory Office, it is possible to bring an administrative action to a court that will review the binding decision of a respective body, applying provisions contained in Part V of Act no. 99/1963 Sb., the Code of Civil Procedure (s. 244 and fol. of the Act).

8.1.6 Is there judicial review of decisions and awards made by ADR entities? If so, by which court or tribunal is this oversight made? Is it ordinary or specialised?

Where the out-of-court settlement has been conducted by the Czech Trade Inspection Authority, it is possible to file a claim before the court both in the case where the procedure was successful, i.e., an agreement was reached, and in the case where the procedure was unsuccessful, i.e., no agreement was reached.
Where a special consumer dispute was decided by a Financial Arbitrator, the Czech Telecommunications Authority, or the Czech Energy Regulatory Office, it is possible to bring an administrative action to a court that will review the binding decision of a respective body, applying provisions of Part V of Act No. 99/1963 Sb., the Code of Civil Procedure (s. 244 and foll. of the Act).
The courts competent to carry out judicial reviews are the ordinary courts.

Source(s): Act No. 634/1992, the Consumer Protection Act, Act No. 64/1986, the Czech trade inspection Act, Act No. 229/2002, the Financial Arbitrator Act, Act No. 127/2005, the Electronic Communication Act, Act No. 29/2000,

[25] The Directive on Consumer ADR provides that "the existence of an effective system for collective claims and easy recourse to ADR should be complementary". Consumer ADR is relevant not only for individual claims but also for collective ones; it can provide consumer with a means to reduce costs and save time.

[26] Per Arts.10-12, Directive on Consumer ADR.

the Postal Service Act, Act No. 458/2000, the Energy Act, amendment No. 160/2007 to the Act No. 64/1986, the Czech trade inspection Act, Act No. 89/2012, the Civil Code

9. THE EXAMINATION OF CONSUMER PROTECTION LAW IN NATIONAL PROCEDURAL LAW: RESPECT FOR THE PRINCIPLES OF THE EFFECTIVENESS AND EQUIVALENCE OF CONSUMER PROTECTION LAW AND EX OFFICIO CONTROL

The rules of national civil procedure that could potentially affect, and indeed undermine, the effective and equivalent protection of consumer rights are various. They include but are not limited to the rules and practices of ordinary and specialised judicial procedures, rules and practices of consumer ADR, rules applicable to special types of procedure (e.g. payment order procedures), the jurisdiction of individual courts (the courts that have jurisdiction over consumer disputes), the formal requirements that have to be satisfied to bring a case, the types of legal action that are available, the need for parties to be represented, the time-limits applicable to procedural steps of the action, rules on the taking of evidence, the possibility (or lack) to consider certain issues at specific stages of the procedure, the right to appeal and review, and rules relating to the enforcement or judgements and other enforcement titles (e.g. arbitration awards, notarial deeds, including mortgages).

On the basis of the principles of equivalence and effectiveness, the CJEU has established certain requirements for the procedural protection of consumer rights deriving from EU law. In particular (and especially in relation to the protection afforded to consumers via the Unfair Contract Terms Directive[27]), the CJEU has established an obligation on national judges (and potentially other dispute resolution facilitators) to apply consumer law of their own motion (that is, ex officio), when they have available the legal and factual elements necessary for this task. Ex officio control is one type of procedural mechanism that can be utilised within the national system to promote the effective and equivalent protection of consumer law. Thus, other mechanisms of procedure within your national legal system should be highlighted and discussed where relevant. The following questions should be answered in respect of both judicial and if relevant, alternative dispute resolution.

9.1 The basis of ex officio control of consumer protection law in national law

9.1.1 Is it clear in the national legal system when consumer protection law should be applied ex officio? Is the ex officio control of consumer protection law established as an obligation or as a (discretionary) power of the judge in national procedural law?

When resolving consumer disputes, as well as reviewing decisions of specialised bodies for the out-of-court settlement of a consumer dispute, the courts are bound by the case law of the European Court of Justice; however, they do not ex officio consider the protection of consumer law.

9.1.2 If there is an understanding of ex officio control of consumer protection law in the national legal, what is this control understood to encompass/not cover?

[27] However, the CJEU has recognised that ex officio control – and other procedural requirements, that might in themselves (or indeed, in their absence), impact the effective enforcement of consumer law – arise across the EU's consumer protection directives.

The question can´t be answered.

9.1.3 Is the party who claims to be a consumer required to establish his or her consumer status, the existence of a consumer contract and that consumer law applies to the dispute? Is this required even if the consumer has no legal representation?

Where a party asserts that he/she is a consumer, it is necessary to prove such an assertion, e.g., by proving the existence of a consumer contract. Such proof is necessary also in cases where the party is not legally represented.

9.1.4 What information is available to judges and dispute resolution facilitators hearing consumer protection disputes? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a consumer protection dispute to be heard and b) for the court to engage in ex officio control?

Proceedings relating to consumer disputes do not follow any special rules.

9.1.5 Who is responsible for providing this information? If the necessary information is not available to the court (or dispute resolution facilitator), is he or she under an obligation to investigate in order to be able to respond to a relevant consumer protection dimension of the case?

Parties to a dispute are responsible for presenting to the court all crucial facts and evidence relating to the consumer dispute. The court will not on its own initiative ascertain those facts or look for evidence.

9.1.6 Will the court provide the consumer with any assistance in gathering factual information or advancing his legal arguments before the court? Please respond for the situation where: a) the consumer has legal representation and b) the consumer has no legal representation.

The court does not provide a consumer with any factual information.

Source(s): Act No. 99/1963, the Code of Civil Procedure

9.2 The possibility for ex officio control of EU consumer protection law in dispute resolution proceedings

9.2.1 Is ex officio control of consumer protection law always possible when the procedure involves a full assessment of the claim on its merits?

This issue is not regulated by Czech law in any way whatsoever.

9.2.2 Can ex officio control be exercised even when the procedure does not involve an assessment on the merits?

This issue is not regulated by Czech law in any way whatsoever.

9.2.3 Please indicate if, per national procedural law, ex officio control can be exercised at the following stages of the procedure:

This issue is not regulated by Czech law in any way whatsoever; therefore, it is not possible to answer the ensuing questions.

	Courts		Other dispute resolution facilitators	
	Possible to exercise ex officio control	Not possible to exercise ex officio control	Possible to exercise ex officio control	Not possible to exercise ex officio control
Ordinary proceedings				
Small claims				
Payment order				
Provisional measures				
Proceedings linked to enforcement				
Enforcement proceedings				
- Enforcement of payment order				
- Enforcement of arbitration award				
- Enforcement of mortgage				
- Enforcement of notarial deed				
Appeal proceedings (please specify:)				

9.2.4 What does ex officio control encompass in national procedural law?

Source(s):

9.3 Other procedural mechanisms for the equivalent and effective protection of EU consumer law

9.3.1 Does national procedural law provide that rules of EU consumer law (as well as rules that aim to satisfy EU consumer law objectives) should be understood as having equal standing to national rules of public policy (which is to say, that for the purposes of domestic law, the consumer protection provision is understood to have equal standing to a rule that must be raised ex officio by the national court)?

This issue is not regulated by Czech law in any way whatsoever.

9.3.2 If ex officio control is not possible in certain types of proceedings or at a certain stage of proceedings (or for any other reason), does national procedural law provide for an alternative way of assessing consumer protection law?

This issue is not regulated by Czech law in any way whatsoever.

Source(s):

9.4 Ex officio control in payment order procedures

9.4.1 What information is available to the judge when a claim for the issuance of a payment order is made? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a claim for the issuance of a payment order to be granted and b) for the court to engage in ex officio control before a payment order is issued?

The conditions for issuing a compulsory payment order are dealt with in part 8.4 Judicial review ex officio is not carried out.

9.4.2 What considerations will be assessed ex officio by the court (or other competent authority) before a payment order is issued?

This issue is not regulated by Czech law in any way whatsoever. Nonetheless, a court may issue a compulsory payment order provided that a claim has been filed enforcing a right to the payment of a certain sum of money, and the right being enforced is substantiated by facts presented by the claimant.

9.4.3 How is the consumer informed about the claim to issue a payment order against him or her? Does national procedural law make any provision for steps to be taken to ensure that consumers are informed of the claim for the issuance of a payment order so that he or she can contest it?

This issue is not regulated by Czech law in any way whatsoever.

9.4.4 If the consumer objects to the claim, what is the next step? Do the proceedings continue, in the context of which ex officio control can be exercised? Or are the proceedings transferred to ordinary proceedings for analysis on the merits of the claim?

Where the defendant disagrees with the compulsory payment order issued, he/she has to file a protest against it within 15 days of the service of such compulsory payment order; when he/she does so, the payment order is set aside. The court then follows the course of ordinary proceedings and schedules a trial to hear the case. For more information, refer to part 8.4.

Source(s): Act No. 99/1963, the Code of Civil Procedure

European Commission
An evaluation study of the impact of national procedural laws and practices on the equivalence and effectiveness of the procedural protection of consumers under EU law

JUST/2014/RCON/PR/CIVI/0082

National Report – Consumer Protection Strand

Denmark

Clement Salung Petersen

DENMARK: LEGAL ANALYSIS

1. NATIONAL LEGISLATION IMPLEMENTING EU CONSUMER PROTECTION INSTRUMENTS

EU legislation	Transposing national legislation	Additional notes (e.g. if there is an overlap in application of legislation etc.)
Doorstep Selling Directive 1985/577/EEC	Danish Consumer Contracts Act (Act No 1457 of 17 December 2013) https://www.retsinformation.dk/Forms/R0710.aspx?id=160666	
Package Travel Directive 90/314/EEC	Danish Act on Package Travel (Act No 472 of 30 June 1993) https://www.retsinformation.dk/Forms/R0710.aspx?id=59467	

Unfair Contract Terms Directive 1993/13/EEC	Danish Contracts Act (Promulgation Act No 193 of 02 March 2016) https://www.retsinformation.dk/Forms/R0710.aspx?id=177079 Danish Marketing Practices Act (Promulgation Act No 1216 of 25 September 2013) https://www.retsinformation.dk/Forms/R0710.aspx?id=158302	
Distance Selling Directive 1997/7/EC	Danish Consumer Contracts Act (Act No 1457 of 17 December 2013) https://www.retsinformation.dk/Forms/R0710.aspx?id=160666 Danish Act on Actions for Injunctions (Act No 1257 of 20 December 2000) https://www.retsinformation.dk/Forms/R0710.aspx?id=4858	
Consumer Sales and Guarantees Directive 1999/44/EC	Danish Sale of Goods Act (Promulgation Act No 140 of 17 February 2014) https://www.retsinformation.dk/Forms/R0710.aspx?id=142961 Danish Marketing Practices Act (Promulgation Act No 1216 of 25 September 2013) https://www.retsinformation.dk/Forms/R0710.aspx?id=158302	
Unfair Commercial Practices Directive 2005/29/EC	Danish Marketing Practices Act (Promulgation Act No 1216 of 25 September 2013) https://www.retsinformation.dk/Forms/R0710.aspx?id=158302	
Misleading and Comparative Advertising Directive 2006/114/EC	Danish Marketing Practices Act (Promulgation Act No 1216 of 25 September 2013) https://www.retsinformation.dk/Forms/R0710.aspx?id=158302	
Consumer Credit Agreement Directive 2008/48/EC	Danish Credit Agreements Act (Promulgation Act No 1336 of 26 November 2015) https://www.retsinformation.dk/forms/r0710.aspx?id=172910	
Timeshare	Danish Act No 102 of 15 February 2011	

Protection Directive 2008/122/EC	https://www.retsinformation.dk/Forms/R0710.aspx?id=135849	
Consumer Injunctions Directive 2009/22/EC	Danish Act on Actions for Injunctions (Act No 1257 of 20 December 2000 as amended) https://www.retsinformation.dk/Forms/R0710.aspx?id=4858	
Consumer Rights Directive 2011/83/EU	Danish Consumer Contracts Act (Act No 1457 of 17 December 2013) https://www.retsinformation.dk/Forms/R0710.aspx?id=160666 Danish Sale of Goods Act (Promulgation Act No 140 of 17 February 2014) https://www.retsinformation.dk/Forms/R0710.aspx?id=142961	
ADR for Consumer Disputes Directive 2013/11/EU	Danish Consumer Complaints Act (Act No 524 of 29 April 2015) https://www.retsinformation.dk/forms/r0710.aspx?id=169709	

Source(s):
Please see the references supra.

1. CONCEPT OF THE CONSUMER

1.1 Please outline the concept of the consumer in national law, indicating whether it is intended to be a uniform concept, whether it has been legislated for and where it can found (i.e. in a legislative provision, governmental guidelines, case law etc.).

Danish consumer protection law includes no explicit uniform concept of the consumer. However, generally speaking, a consumer is a person primarily acting for purposes that are not related to his/her trade, business, craft or profession.[28]

- In the Danish Sale of Goods Act, a consumer sale is defined as a contract of sale between a buyer (consumer) and a trader acting in the course of trade when the buyer is primarily acting for purposes that are not related to his/her trade.[29]

[28] Compare the definition in Article 2(a) of the Consumer Rights Directive (Directive 2011/83(EU)).
[29] Section 4 a of the Danish Sale of Goods Act.

- In the Danish Contracts Act and the Danish Consumer Contracts Act, a consumer contract is defined as a contract between a trader acting in the course of trade and another party who is primarily acting for purposes that are not related to his/her trade or business.[30]
- In the Danish Credit Agreement Act, a consumer is defined as a person who in connection with transactions governed by the Act is primarily acting for purposes that are not related to his/her trade or business.

The concept of the consumer in Danish law might go further than the definition outlined in EU law. Thus, a legal person acting for non-commercial purposes might be a consumer under Danish law.

Source(s):
Please see the references to the relevant Danish Acts supra 1.

2. REGULATORY AUTHORITIES COMPETENT FOR CONSUMER PROTECTION ISSUES

2.1 What regulatory authorities, if any, are competent for enforcing consumer protection law? Please identify them, their nature (i.e. whether they are public or private or mixed) and the nature of enforcement.

The Danish Competition and Consumer Authority
The Danish Competition and Consumer Authority (DCCA) is a public authority under the Ministry of Business and Growth. It is responsible, inter alia, for enforcing a number of consumer protection laws and for contributing to the development of new politics and regulation regarding consumer welfare. It also acts as secretariat for different authorities and bodies, including the Danish Consumer Ombudsman and the Danish Consumer Complaints Board. Detailed information (in English) about the DCCA is available at http://en.kfst.dk/About-us.

The Danish Consumer Ombudsman
The Danish Consumer Ombudsman (DCO) is an independent public authority responsible for supervising compliance with the Danish Act on Marketing Practices and several other consumer protection laws. Detailed information (in English) about this authority is available at http://www.consumerombudsman.dk/About-us and http://www.consumerombudsman.dk/About-us/organisation.

The Danish Consumer Complaints Board and other consumer complaints boards
These complaints boards (which will be described further infra 8) are not regulatory authorities.

2.2 Is there a specific venue for this type of enforcement and does this limit the jurisdiction of courts/ADR fora (even if only initially)?

The Danish consumer ADR system and the role of courts in consumer disputes is described infra 8.

2.3 Can criminal prosecutions be initiated for violations of consumer protection rules? How serious must the infringement be? What are the penalties and sanctions? And might these prosecutions lead to criminal

[30] Section 2 of the Danish Consumer Contracts Act.

penalties or sanctions? Can individual consumers piggy back on these claims (e.g. via a partie civile method)?

Criminal prosecution can be initiated for certain violations of the Danish Consumer Contracts Act and the Danish Credit Agreement Act.[31] The penalty is a fine. Under the Credit Agreement Act, it can also involve disqualification.

Criminal prosecution can also be initiated against a trader, who has committed gross or repeating violations of his/her duty to inform the consumer about the ADR system.[32] The penalty is a fine.

The Danish Administration of Justice Act allows victims to file a civil claim in connection with public prosecution of a criminal offence (adhæsionsproces).[33] However, several requirements must be fulfilled before the court can render a decision concerning the civil claim in such criminal proceedings, including that it will not cause any significant inconvenience to include such a civil claim in the criminal proceedings. In practice, this option to file a civil claim in criminal proceedings is therefore rarely used in Danish law.

2.4 Is there judicial review of decisions of consumer regulatory authorities? If so, by which court is this judicial oversight made? Is the forum an ordinary or a specialised court or tribunal?

A decision from a consumer regulatory authority can become subject to judicial review by the Danish courts.[34] The cases will be heard by a district court in the first instance and by a high court in the second instance, which are both ordinary (non-specialized) courts.

Cases to which the Danish Consumer Ombudsman is a party and where the application of the Marketing Practices Act, the Financial Business Act or the Payment Services Act is of significant importance can instead be brought before the Danish Maritime and Commercial Court if requested by one of the parties.[35]

2.5 Does the national legal system provide for a mechanism of cooperation between its national regulatory authorities and those of other Member States?

Yes, the Danish Competition and Consumer Authority as well as the Danish Consumer Ombudsman are highly involved in consumer protection enforcement activities in the EU. The Competition and Consumer Authority represents Denmark in the Consumer Policy Network as well as the Consumer Financial Programme Committee. The Consumer Ombudsman is appointed as the central enforcement authority in the Consumer Protection Cooperation.[36]

Source(s):

[31] See Section 34 of the Danish Consumer Contracts Act and Sections 56 and 57 of the Danish Credit Agreements Act.
[32] Sections 4 and 5 of the Danish Consumer Complaints Act.
[33] See Chapter 89 of the Danish Administration of Justice Act.
[34] Denmark has no separate administrative courts.
[35] Section 225(2)(3) of the Danish Administration of Justice Act. Further information about the Maritime and Commercial Court is available at www.shret.dk.
[36] Further information in English is available at http://en.kfst.dk/Consumer/International-cooperation and http://www.consumerombudsman.dk/About-us/intcooperation/eu.

3. LEGAL AID

3.1 Is legal aid available to consumers in: a) bringing a claim and b) defending a claim before a court?

Yes, provided that they fulfil the relevant requirements.[37]

3.2 For what kinds of disputes and actions is legal aid available? (NB: legal aid might not be available for consumer or contractual disputes but be available instead for a related action, e.g. actions relating to debt, mortgage arrears, eviction etc.)

Legal aid is generally available in all types of consumer disputes.

3.3 What requirements must be satisfied for the consumer to be entitled to legal aid? Please specify if there are any additional limitations to its availability.

There are two legal aid schemes available to consumers:

Enforcement of a decision from a consumer complaints board

If the Danish Consumer Complaints Board or one of the authorized Danish consumer complaints boards (see infra 8) has passed a decision in favour of the consumer, and the opposing party (the trader) does not comply with the decision, a special legal aid scheme applies.[38] This scheme aims to ensure that consumers can take the case to court and/or enforce the complaints board's decision in an enforcement court. Under this special legal aid scheme, the DCCA and/or a specifically appointed lawyer will represent the consumer in litigation before the Danish courts vis-a-vis the trader.[39]

Civil proceedings concerning consumer disputes

In other civil proceedings (than those mentioned supra concerning a decision from a consumer complaints board), the consumer can apply for free legal aid to the Free Legal Aid Division of the Civil Affairs Agency (Civilstyrelsen). Under this general legal aid scheme, free legal aid can be granted only if the applicant has a reasonable cause to bring the action (i.e. a prospect of succeeding with his/her claim) and, usually, the applicant must also meet certain financial requirements.[40]

Private legal expenses insurance

If the consumer has private legal expenses insurance, the consumer usually cannot get free legal aid to cover expenses that are covered by the legal expenses insurance.[41]

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[37] The Danish free legal aid scheme is regulated in Chapter 31 of the Danish Administration of Justice Act. This is supplemented by a special legal aid scheme in the Danish Consumer Complaints Act.

[38] The rules are laid down in Chapter 8 of the Danish Consumer Complaints Act.

[39] For details (in Danish only), see http://www.forbrug.dk/Artikler/Dine-klagemuligheder/Oversigt-over-klageinstanser/Forbrugerklagesystemet/Naar-du-faar-medhold-i-Forbrugerklagenaevnet/publikationer?tc=85F18799CCB641DBBC48F938B6593A9A.

[40] The rules are laid down in Chapter 31 of the Danish Administration of Justice Act. An overview (in English) of the Danish legal aid schemes is available at this public website: http://www.civilstyrelsen.dk/Home/fri_proces/english.aspx.

[41] Section 335 of the Danish Administration of Justice Act.

3.4 What does legal aid encompass? (i.e. (only) general advice, (only) assistance in preparing the case, (only) assistance with negotiation of settlements, (also) representation).

A party who is granted free legal aid under the general legal aid scheme (see supra 5.3) is exempted from the obligation to pay court fees and all reasonable costs related to the case will be paid by the government. If such party loses the case and is ordered to pay costs to the opposing party, the government will also pay such costs.[42] The court will assign a lawyer to the party who is granted free legal aid (court-assigned counsel), and the party can request that a specific lawyer is assigned.

Under the special legal aid scheme (concerning decisions from a consumer complaints board, see supra 5.3), the DCCA will assist the consumer in filing the claim or a lawyer will be assigned to assist the consumer. The details of this scheme depend on whether the consumer has private legal expenses insurance and whether the dispute will be heard in small claims proceedings or not.[43]

Source(s):
A general overview of the Danish legal aid schemes is included in Clement Salung Petersen, Access to the Danish Civil Justice System: Recent reforms and current challenges, in: Ervo/Nylund, The future of civil litigation (Springer 2014).

An overview (in English) of the Danish legal aid schemes is available at this public website: http://www.civilstyrelsen.dk/Home/fri_proces/english.aspx.

See also the overview provided at this website: http://www.consumereurope.dk/indhold-FE/Indhold-consumereurope/Complaints-in-Denmark/Free-legal-aid?tc=0E3B6D188CED47E6948048B8DD30A7B1.

4. COSTS

4.1 What are the costs of different types of procedures before courts? Are there exemptions to the payment of fees and expenses? How can costs be paid?

For a general description of Danish court fees, please see supra II.A.2.1.1 at 3.

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Court fees	DKK 500	DKK 500–	DKK 1,950-	The same	The same	The same

[42] See Section 331 of the Danish Administration of Justice Act.
[43] Detailed information (in Danish only) is available at: http://www.forbrug.dk/Artikler/Dine-klagemuligheder/Oversigt-over-klageinstanser/Forbrugerklagesystemet/Naar-du-faar-medhold-i-Forbrugerklagenaevnet/publikationer?tc=85F18799CCB641DBBC48F938B6593A9A.

	(~€ 67)	1,950 (~€ 67-260*) + a listing fee if the individual claim exceeds DKK 50,000. The listing fee corresponds to the court fee for instituting legal proceedings, see II.A.2.1.1 at 3	75,000* (~€ 260-10,000) + a listing fee, which corresponds to the court fee for instituting legal proceedings, see II.A.2.1.1 at 3			
Court expenses						
Exemptions		*In certain cases (including cases for judicial review) the court fee and the listing fee is each limited to DKK 2,000	*In certain cases (including cases for judicial review) the court fee and the listing fee is each limited to DKK 2,000		The same	The same

Source(s):

5. STANDING AND REPRESENTATION IN CONSUMER DISPUTES

5.1 Does national law limit the standing of the individual consumer in respect of the claim that can be made and the forum before which it can be brought?

No. General principles on locus standi apply also to the individual consumer in such cases.

The consumer may have an option (but not an obligation) to bring the claim before a consumer complaints board (see infra 8).

5.2 Other than individual consumers, who or which bodies have standing in consumer protection disputes and for what types of claim? If the action is not brought by the individual consumer, what requirements of representation must be satisfied?

The Danish Consumer Ombudsman (DCO) has standing to bring civil and criminal actions on behalf of consumers, but the DCO may also request the police to initiate investigation and criminal prosecution.[44]

If the Danish Consumer Complaints Board or one of the other authorized consumer complaints boards rule in favour of the consumer, and the trader does not comply with the decision of the complaints board, the Danish Competition and Consumer Authority can institute legal proceedings on behalf of the consumer against the trader.[45] On how the DCCA normally assists consumers to institute legal proceedings, see supra 5.3 and 5.4.

An individual consumer may empower others (such as a private NGO within the field of consumer law) to act on his/her behalf in court (mandatarfuldmagt).

In group actions, consumers may ask a private NGO to act as their group representative.

Certain entities from other Member States may seek an injunction against infringements of consumer rights granted by EU law under the rules in the Consumer Injunctions Directive (2009/22/EC) as implemented in Danish law (see supra III.A.1).

5.3 If a consumer wants to bring or defend an action relating to a consumer protection dispute, is there a legal (or otherwise formal) requirement that he or she has legal representation? Please specify for both judicial and ADR fora and the bodies, associations or authorities that can provide this representation.

A consumer is under no obligation to have legal representation before Danish courts, unless the court decides that legal representation is necessary for an expedient handling of the dispute.[46]

Source(s):

6. ACTIONS BEFORE COURTS

6.1 Jurisdiction and competence of the courts in consumer disputes: General structure and special procedures aimed at protecting consumers

[44] Further information in English is availble at http://www.consumerombudsman.dk/About-us/introduction.
[45] Section 35 of the Danish Consumer Complaints Act.
[46] Section 259 of the Danish Administration of Justice Act.

6.1.1 Are ordinary courts competent to hear such claims? Is there also a specialised tribunal for consumer protection disputes?

Denmark has a long-standing tradition for providing easy access to justice through complaints boards and tribunals, including in consumer protection disputes. The Danish ADR system for consumer complaints has been revised following transposition of the ADR Directive.[47] It is not mandatory for consumers to use the ADR system.

In disputes concerning contractual obligations stemming from sales contracts or service contracts[48], a consumer can file a complaint to the Centre for Dispute Resolution (Center for Tvistløsning), which is part of the Danish Competition and Consumer Authority (DCCA).[49] The complaint may be filed online.[50] The consumer must also pay a fee of DKK 100 (approx. € 13). The Centre for Dispute Resolution will then try to mediate the dispute between the consumer and the trader.

If this mediation is unsuccessful, the consumer can file a complaint to the Danish Consumer Complaints Board (Forbrugerklagenævnet). The consumer must pay a fee of DKK 400. If the Danish Consumer Complaints Board decides in favour of the consumer, the trader who loses the case must pay a fee of DKK 6,000 to the Danish Competition and Consumer Authority to cover their costs related to handling the case. If the case is settled on terms generally favouring the consumer, the fee is DKK 1,000. The Consumer Complaints Board can only hear complaints against traders established in Denmark.

Besides the Consumer Complaints Board, several other complaints boards have been approved under the Danish Consumer Complaints Act to handle specific types of consumer complaints.[51] If one of these complaints boards has jurisdiction to decide a dispute, the Danish Consumer Complaints Board has no jurisdiction to decide the dispute.

When a complaint is pending in the Danish consumer ADR system, the trader cannot bring the case before the ordinary Danish courts.[52] If the consumer is sued by the trader before filing a complaint in the Danish ADR system, the consumer can request that the court refers the case to the competent complaints board. This system thus encourages using the Danish ADR system instead of the ordinary courts to handle most consumer law disputes. However, the court may deny a consumer's request to refer the case to the ADR system if the court finds that the complaint is completely without merit or is not suited to be dealt with in the ADR system.

If a consumer wins the case before a complaints board, the decision of the complaints board shall be served on the trader.[53] If the trader does not object to the decision in writing within 30 days after service of the decision, the consumer can ask an enforcement court to execute the decision directly.[54] However, any of the parties can also

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[47] Danish Act No 524 of 29 April 2015 on consumer complaints ("*lov om alternativ tvistløsning i forbindelse med forbrugerklager (forbrugerklagleoven)")*, available in Danish at https://www.retsinformation.dk/forms/r0710.aspx?id=169709.
[48] See Section 9 of the Consumer Complaints Act and compare Article 2 of the ADR Directive.
[49] This authority has a website in English at http://en.kfst.dk.
[50] See http://www.forbrug.dk/Artikler/Dine-klagemuligheder/Oversigt-over-klageinstanser/Forbrugerklagesystemet/Center-for-Klageloesning/Klag-online?tc=85F18799CCB641DBBC48F938B6593A9A.
[51] A list of these approved consumer complaints boards are available here: http://www.kfst.dk/Forbrugerforhold/Klageforhold/Liste-over-klageorganer
[52] Section 15 and 30 of the Danish Consumer Complaints Act.
[53] Section 31 of the Danish Consumer Complaints Act.
[54] See Chapter 8 in the Danish Consumer Complaints Act.

choose to bring the decision from a complaints board before the ordinary courts.[55] There is a specific legal aid scheme for consumers in such cases, which entails that a consumer can request free legal aid if a complaints board has decided a case in favour of the consumer and the trader subsequently brings the case before the courts, see supra 5.3 and 5.4.

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.

Finally, it should be noted that other complaints boards are available for other specific types of disputes, including for complaints against lawyers and real estate agents.[56] Some of these are subject to rules similar to those described above regarding the relationship to the ordinary Danish courts. Finally, there are also several privately established ADR bodies.[57]

6.1.2 Which courts are competent to hear consumer protection disputes at first instance and in appeals? Please specify the court, in light of the value of the claim (and identify any other factors that are relevant in allocation jurisdiction).

The district courts have competence to hear consumer protection disputes at first instance. Appeals are heard by one of the two Danish high courts. There are some restrictions on the right to appeal, see supra II.A.2.2.

6.1.3 What is the nature of the procedure at first instance, e.g. is it a simplified or a summary procedure, and is there an assessment of the merits? Please specify in light of the value of the claim (and identify any other factors that are relevant in allocating jurisdiction).

The procedure at first instance will either be a small claims procedure or an ordinary civil procedure. The small claims procedure is a simplified procedure aimed at parties with small claims and (typically) no legal representation. The small claims procedure is used, if the value of the claim is less than DKK 50,000 (approx. € 6,700) or the parties agree to use the small claims procedure, unless the court decides that the dispute should be heard under an ordinary civil procedure.[58]

6.1.4 Please identify the formal requirements that must be satisfied for a consumer dispute to be heard before a court. These might include time limits applicable to the filing of the action/defence, representation requirements etc.

The relationship between the Danish ADR system for consumer disputes and the ordinary Danish courts, including time-limits for bringing a decision from a consumer ADR body before the ordinary Danish courts, is described supra 8.1.1.

[55] Section 35 of the Danish Consumer Complaints Act.
[56] An overview is available here: http://www.forbrug.dk/Klagemuligheder/Oversigt-over-klageinstanser/Andre-Klageinstanser.
[57] A non-exhaustive list is available here: http://www.forbrug.dk/Klagemuligheder/Oversigt-over-klageinstanser/Private-klageinstanser.
[58] Sections 400 and 402 of the Danish Administration of Justice Act.

Generally, a consumer having legal standing can bring a consumer dispute before the ordinary Danish courts. A consumer is under no obligation to have legal representation before Danish courts, unless the court decides that legal representation is necessary for an expedient handling of the dispute.[59]

6.1.5 In respect of the claims and relevant procedures available in the national legal system, what kind of relief might be available in consumer protection disputes? (monetary remedies, injunctions, skimming off etc.)?

Before the ordinary Danish courts, any type of relief might be available in consumer protection disputes, provided that such relief is warranted by the applicable law. This will usually include monetary remedies and might also include injunctions and orders for specific performance.

6.1.6 Please provide a brief overview of the role of parties and judges in civil proceedings generally (e.g. with reference to the principle of party disposition, the obligation of parties to make and prove factual allegations and to make and provide legal arguments, the possible role of the court). This overview should be brief; these issues will be dealt with in more detail in the questions that follow.

Please see this excerpt:[60]

> "Danish civil litigation is based on an adversarial procedure according to which it is for the parties to define their judicial controversy, i.e. the disputed issues which the court is requested to adjudicate (the Verhandlungsmaxime). The judicial controversy is defined by the claims ("påstande") and allegations ("anbringender") of the parties. It is a fundamental principle of Danish civil procedure law that a court cannot award a party something more than he has claimed and that the court can base its decision only on the allegations made by the party or on allegations which cannot be waived.[61]
>
> A claim consists of a concise statement of the preferred outcome of the case. The claimant may e.g. claim that the defendant has to pay a certain amount of money, whereas the defendant may claim to be acquitted. Allegations consist of concise statements of fact which the party claims to be able to prove, and which – if proven – can justify the party's claim. In the allegations, a party must also 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 his claim.[62] Traditionally, the allegations are not supposed to comprise the "pure" legal arguments of the parties. After the recent reform of Danish civil procedure, the parties are now required to also include statements of their legal arguments in the pleadings.[63] At the trial, the parties argue their case based on the allegations as well as the legal arguments on which they rely.
>
> According to the dispositionsmaxime (which reflects the general private law principle on freedom of contract), it is for the parties to decide which claims and allegations they wish to make. However, the dispositionsmaxime may be limited by e.g. mandatory statutory law. If a claim is illegal under applicable mandatory law, including fundamental rules of public policy (ordre public), and the mandatory rules cannot be waived by contract under any circumstances, a party is also unable to waive an allegation that the claim of the

[59] Section 259 of the Danish Administration of Justice Act.
[60] Excerpt from Clement Salung Petersen, "Treaties in Domestic Civil Litigation: Jura Novit Curia?", Nordic Journal of International Law 80 (2011) 369-402 at 374.
[61] Section 338 of the Danish Administration of Justice Act.
[62] See *e.g.* P. Spleth, 'Omkring den borgerlige retspleje', *Juristen* (1959), p. 344,
[63] See *e.g.* Section 348(2)(4) and section 351(2)(3) of the Danish Administration of Justice Act.

counterparty is illegal under such mandatory rules. Consequently, a court will normally always ex officio consider such allegations, provided the facts of the case make it sufficiently clear that such mandatory rules apply.[64]

Traditionally, Danish courts have no power over the choice of issues and evidence put forward by the parties. Danish courts thus have no general investigative powers or authority to order the production of evidence in civil litigation. However, Danish courts have significant control over the litigation process and may, to a certain extent, also seek to influence the substantive outcome of the proceedings. A court can thus e.g. call on a party to declare his position as regards questions of fact or questions of law, which are deemed potentially relevant, or call on a party to provide evidence of facts, which may otherwise be uncertain.[65] Danish courts are also entitled to disallow evidence, which is deemed irrelevant.[66]

When the claims and allegations of the parties have been sufficiently clarified, it is for the court to render a judgment based on the relevant law.[67] In this regard, a Danish court is under an obligation to independently (i.e. regardless of the "pure" legal arguments of the parties) and ex officio consider which law is relevant and to apply this law correctly, also where the parties have not explicitly referred to the relevant law. These principles for the judicial application of law reflect the Latin adages jura novit curia and da mihi factum, dabo tibi jus.[68]

However, rules apply to specific facts and if the facts necessary to apply a rule are not sufficiently covered by the allegations of the parties, the court cannot apply the rule.[69] In this way, the allegations of the parties (indirectly) affect the rules applied by the courts.

Even though the court is not bound by the legal arguments of the parties, the obligation of courts to ex officio consider and apply the law is presumed to presuppose that the parties have "sufficiently clarified" their allegations, and that this required degree of clarification is generally higher in the high courts and the Supreme Court than in the district courts.[70] It is also assumed that the required degree of clarification may depend on the nature of the applicable rule: Whereas well-known rules should always be considered and applied (if applicable), a court may choose to consider and apply more specialised or controversial rules (i.e. where the content of the rule is legally uncertain) only if the allegations of the parties make it sufficiently clear that (at least one of) the parties wish to invoke such a rule. If it is unclear whether a specialised or controversial rule is applicable in a specific dispute, Danish courts have sometimes refrained from considering and applying the rule, if the question has not been addressed (or has only been superficially addressed) by the parties in their legal arguments.[71]

It is fair to say that these principles governing the judicial application of law leave a margin of discretion to the Danish courts in civil litigation and that the parties are able to influence the judicial application of law through their allegations and arguments, even though the courts are not as such bound by the legal arguments of the parties."

Source(s):

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[64] Section 338 of the Danish Administration of Justice Act.
[65] Section 339 of the Danish Administration of Justice Act.
[66] Section 341 of the Danish Administration of Justice Act.
[67] *See e.g.* Section 64(1) of the Danish Constitution.
[68] *See* B. Gomard & M. Kistrup, [...], p. 528, and E. Werlauff & L. Lindencrone Pedersen, [...], p. 268.
[69] A Danish court may instead call on the parties to consider making further allegations, see Section 339, ss. 1-3.
[70] B. Gomard and M. Kistrup, [...], p. 528. In civil litigation before the district courts, a party not represented by counsel is also entitled to (some) guidance by the court, see Section 339(4) of the Danish Administration of Justice Act.
[71] See M. Munch, 'Jura novit curia', in: *Ugeskrift for Retsvæsen* (1972, Volume B), p. 189 et seq. See also B. Gomard and M. Kistrup, [...], p. 531 and p. 545.

Please see the references in the footnotes supra.

6.2 Small claims

6.2.1 Does a small claims procedure exist in the Member State? If yes, is it a specialised or simplified procedure?

Yes, a small claims procedure exists in Danish civil procedure law.[72] It is a simplified procedure.

6.2.2 What are the value thresholds for claims brought under the small claims procedure? Moreover, are there any other factors that shape the use of the small claims procedure (including the nature of the claim, the area of consumer protection law into which the claim falls etc.)?

The general value threshold for claims brought under the small claims procedure is DKK 50,000 (approx. € 6,700).[73] The parties may agree to use the small claims procedure even for claims exceeding this threshold.[74] However, in all cases the court may decide to refer the claim to be heard under ordinary civil procedure rules.[75]

6.2.3 What forms must be completed to raise the application? Who assists the consumer in completing these forms?

The Danish courts have made a standard claim form for small claims proceedings, but it is not mandatory to use this form.[76] The Danish courts provide guidance to consumers who have no legal representation.[77] In cases concerning (enforcement of) decisions from a consumer complaints board, the Danish Consumer and Competition Authority (DCCA) and/or an appointed lawyer will assist the consumer, if it becomes necessary to bring the case before the courts, see supra 5.3 and 5.4.

6.2.4 How can an application for a small claim be made (e.g. online, by post or in person)?

Small claims proceedings are initiated by filing a claim form to a competent Danish court. The claim form can be sent by post or secure e-mail to the court, or the consumer can manually hand in the claim form at the court office.

6.2.5 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

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[72] See Chapter 39 of the Danish Administration of Justice Act.
[73] Section 400 of the Danish Administration of Justice Act.
[74] *Ibid.*
[75] Section 402 of the Danish Administration of Justice Act.
[76] The form is available for download at http://www.domstol.dk/selvbetjening/blanketter/staevningogsvarskrift/Pages/default.aspx.
[77] Guidance notes (in Danish) are available here: http://www.domstol.dk/Selvbetjening/blanketter/Blanketter/Sm%C3%A5sager%20-%20Vejledning%20til%20st%C3%A6vning.pdf.

As a point of departure, the general rules on the taking of evidence in civil cases are also available in small claims disputes, including pre-trial taking of evidence. However, in small claims proceedings, any evidence must be approved by the court.[78] The court approves evidence that is likely to be of relevance to the case.[79] Furthermore, there is a special procedure for the taking of court-appointed expert evidence in small claims proceedings.[80]

A party and/or his/her legal representative must appear in court hearings. There will normally be a preliminary hearing, which is usually held as a conference call, and a final hearing at the court.

6.2.6 Are the costs of the successful party reimbursed?

Yes, the English rule applies. However, only a modest amount is reimbursed to cover the lawyer costs of the successful party in small claims proceedings.

Source(s): Danish Administration of Justice Act, Section 408.

6.3 Claims other than small claims

6.3.1 If a consumer protection dispute does not qualify as a small claim, what other procedures are available? What are the value thresholds and other factors determining the use of such procedures?

If the small claims procedure does not apply, the ordinary civil procedure will apply. However, if the opposing party is not expected to have an objections against the claim, a special debt collection procedure can be used for claims not exceeding DKK 100,000 (approx. € 13,400), see infra 8.4.

6.3.2 How can such claims be made? Please specify if the applications can be made online, or by post or in person.

By filing a claim form to the relevant court, compare supra 8.2.4.

6.3.3 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

The general Danish civil procedure rules on the taking of evidence apply.

A party and/or his/her legal representative must appear in court hearings. There will normally be a preliminary hearing, which is usually held as a conference call, and a final hearing in the form of a traditional court meeting.

6.3.4 Are the costs of the successful party reimbursed?

[78] Section 403 of the Danish Administration of Justice Act.
[79] *Ibid*.
[80] Section 404 of the Danish Administration of Justice Act.

Yes, the English rule applies. See supra II.A.2.1.1 at 11.

Source(s):

6.4 Claims for the issuance of a payment order

6.4.1 Does an order for payment procedure exist in the national system? Is it a simplified procedure?

Yes.

6.4.2 Which authorities or courts are competent to hear claims for the issuance of payment orders?

The bailiff's courts, which are part of the district courts.

6.4.3 Are there any formal requirements that must be satisfied for the application for the issuance of a payment order to be made (e.g. standard forms, representation by a lawyer, the detail of description required, the need to provide written evidence etc.)?

There is a mandatory standard form for claims for the issuance of a payment order.[81] There are no requirements for representation by a lawyer. The creditor must give reasons for the claim, but there is no need to provide written evidence for the claim.

6.4.4 What information is generally available to the authority or court when a claim for the issuance of a payment order is made?

The information that must be included in the mandatory standard form comprises, in particular:[82]

- The names and addresses of the parties
- A specification of the claim (the principal amount, interest, reminder fees, etc.)
- A short account of the factual and legal circumstances on which the claim is based.

6.4.5 What opportunity is available for a defence/statement of opposition to be advanced? How should this be done and what is its effect? Please specify if the means of advancing a defence differ depending on the value of the claim and the court dealing with it.

The debtor can inform the court that he/she has objections against the claim. There are no formal requirements to such objections, as long as it is clear that the debtor has objections. In case of such objections, the court will dismiss the application for a payment order or, if requested by the creditor in the mandatory standard form, refer the case to continue in ordinary dispute proceedings (either under the ordinary civil procedure or under the small claims procedure, as described supra).

6.4.6 What is the effect if the claim is uncontested, i.e. if there is a lack of defence/statement of opposition?

[81] Available at http://www.domstol.dk/selvbetjening/blanketter/inkasso/Pages/default.aspx.
[82] Section 477 b of the Danish Administration of Justice Act.

If the claim is unclear or not duly explained in the account of relevant circumstances on which the claim is based, or if that account may be assumed to be incorrect, the court must dismiss the claim.[83] The bailiff's court can probably also dismiss the claim if it is illegal, including if it is violating mandatory consumer protection rules. There is no reported Danish case-law concerning ex officio application of consumer protection law.

In other situations where the claim is uncontested, the bailiff's court will make an endorsement of the payment order. If requested by the creditor in the mandatory standard form, the bailiff's court will then start ordinary enforcement proceedings. Otherwise, the endorsed payment order will be sent to the creditor.

6.4.7 If the defendant is a consumer, and he or she does not respond to or raise an objection to the issuance of the payment order, does the authority dealing with the claim for payment order proceedings have the power to examine any issue of consumer protection law of its own motion before treating the action as usual?

Yes, to the extent mentioned supra 8.4.6.

6.4.8 What steps must the pursuer take in order to obtain an enforceable decision?

When the bailiff's court has endorsed the payment order as mentioned supra, it will be enforceable.

6.4.9 Is this decision final, or can the defendant appeal against it?

The defendant (debtor) can request a re-opening of the case.[84] The bailiff's court will re-open the case if such request is filed within 4 weeks from endorsement of the payment order. The bailiff's court may re-open the case in special circumstances, if such request is filed later but within 1 year from the endorsement.

Furthermore, the defendant can also appeal against formal decisions of the bailiff's court.[85]

Source(s):

6.5 Appeals in consumer disputes

6.5.1 Are appeals possible in all consumer disputes? Please specify for small claims and other types of claims.

Yes, there is a general right to appeal decisions from a district court to a high court both in ordinary civil proceedings and in small claims proceedings, with the exceptions mentioned supra 8.1.2. The main exception is that if the proceedings concern a claim with an economic value not exceeding DKK 20,000 (approx. € 2,700), the judgment may be appealed only with the permission of the Danish Appeals Permission Board.[86]

[83] Section 477 c of the Danish Administration of Justice Act.
[84] Section 477 e(4) of the Danish Administration of Justice Act.
[85] Section 477 g of the Danish Administration of Justice Act.
[86] Section 368(1) of the Danish Administration of Justice Act.

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Nature of the procedure at 1st instance	Ordinary civil procedure <u>or</u> Small claims procedure Please see supra for details	Ordinary civil procedure <u>or</u> Small claims procedure Please see supra for details	Ordinary civil procedure <u>or</u> Small claims procedure Please see supra for details	The same	The same	The same
2nd instance – appeal to?	High Court	High Court	High Court	The same	The same	The same
3rd instance – appeal to?	Supreme Court	Supreme Court	Supreme Court	The same	The same	The same

6.5.2 Please briefly specify the national appeal procedure, including any requirements to be satisfied for appeals. These might include, but are not limited to, conditions of admissibility, value thresholds, time-limits, the scope of review, and the impact of the appeal on enforcement (provisional enforcement). Please refer to any rules specifically applicable in respect of the claims and relevant procedures outlined above.

Please see supra II.A.2.2.

Source(s):

6.6 Enforcement in consumer disputes

6.6.1 If the assessment of a consumer protection issue has not been possible at an earlier stage of the proceedings, is it always possible – either ex officio (see section 10 below) or if the consumer raises a possible violation of consumer protection law – for this assessment to be undertaken during enforcement proceedings?

In enforcement proceedings, it is impossible to raise objections against claims based on a judgment or court-endorsed payment order.[87] This is described in detail supra II.A.3.3.5.

In enforcement proceedings based on a court-endorsed payment order, the case concerning endorsement of the payment order may be re-opened as described supra 8.4.9 and infra 8.6.2.

Similarly, in enforcement proceedings based on a judgment, a party may ask a court to re-open the case in which the judgment was previously delivered.[88] The court can decide that such a re-opening of the case shall stay the execution of the judgment.[89]

6.6.2 In the particular case of consumer protection, if a court examines consumer protection law (either ex officio or on the basis of an argument advanced by the consumer), does national procedural law provide that interim measures should 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 final decision will have full effect?

If a court decides to re-open a case in which it has previously rendered judgment as described supra 8.6.1, the court may decide to stay the execution of said judgment.[90]

If a bailiff's court decides to re-open a case concerning a payment order, it shall annul the endorsement of the payment order.[91] This will make the payment order unenforceable.

Source(s):

7. ACTIONS FOR COLLECTIVE REDRESS

7.1 Injunctive relief, linking individual and collective actions

The case law of the CJEU requires that a person or organisation with a legitimate interest in consumer protection must be able to bring an action before a national court or tribunal in respect of an alleged violation of consumer rights deriving from Union law, either for compensation or for injunctive relief, to preclude the continued violation of consumer rights[92].

[87] Section 501 of the Danish Administration of Justice Act.
[88] Section 367 of the Danish Administration of Justice Act.
[89] Sections 367 and 480(3) of the Danish Administration of Justice Act.
[90] Sections 367 and 480 of the Danish Administration of Justice Act.
[91] Section 477 e (5) of the Danish Administration of Justice Act.
[92] This derives from the EU directives. For example, in respect of the UCTD, Art.6(1), Art.7(1) and (2) UCTD, provide that the Member States must ensure 1) that unfair terms are not binding on the consumer and 2) that adequate and effective means exist to prevent the continued use of unfair terms in consumer contracts. The CJEU has held that effective implementation requires that the consequence of the finding of the violation – in the case of a finding of unfairness under the UCTD – is for the term to be declared invalid, and that the effect of this invalidity extends not only to the parties to the action for an injunction but also to those who have concluded a contract with the seller/supplier to which the same terms apply.

7.1.1 If collective proceedings are launched, does national procedural law provide that ongoing individual claims, relating to the same dispute, should be stayed until the collective proceedings are brought to an end? Please specify if this constitutes an obligation on the part of the national judge or if it is at his or her discretion.

There are no special Danish rules for such situations. Under general civil procedure rules, which also apply in these situations, a court may stay the proceedings when necessary, including in order to await an administrative or judicial decision that might influence the outcome of the case.[93]

7.1.2 If individual proceedings are stayed, please indicate what the effect of the court or ADR entity's decision in the collective action on those individual proceedings would be, i.e. whether the outcome of the collective action binds the consumer bringing an individual action.

A consumer, who is already party to an individual action, cannot take part in a group action concerning the same claim, unless the consumer discontinues the individual action, cf. general civil procedure principles concerning lis pendens. If the consumer is not a member of the group filing a group action, the decision in this collective action will not be formally binding on the consumer. Nevertheless, the decision in the collective action may establish a precedent.

Source(s):

8. CONSUMER ALTERNATIVE DISPUTE RESOLUTION

8.1 Consumer disputes before ADR fora

8.1.1 Is ADR mandatory for all parties bringing a claim related to a consumer protection dispute?

The Danish consumer ADR system is described supra 8.1.1.

8.1.2 Please specify if there are limitations to the use of ADR. These might include the nature of the claim (i.e. whether both individual and collective claims are possible), requirements of representation, time limits, value thresholds, etc.

Please see supra 8.1.1.

8.1.3 Can ADR entities issue binding decisions and can they enforce those decisions? If not, please explain how they are enforced.

Please see supra 8.1.1.

[93] Section 345 of the Danish Administration of Justice Act.

8.1.4 Does national law provide that limitation periods applicable to judicial actions should be suspended while ADR is ongoing?[94]

Please see supra 8.1.1.

8.1.5 Please specify if national law establishes rules providing for recourse to judicial action following an (unsuccessful) ADR hearing[95].

Please see supra 8.1.1.

8.1.6 Is there judicial review of decisions and awards made by ADR entities? If so, by which court or tribunal is this oversight made? Is it ordinary or specialised?

Please see supra 8.1.1.

Source(s):

9. THE EXAMINATION OF CONSUMER PROTECTION LAW IN NATIONAL PROCEDURAL LAW: RESPECT FOR THE PRINCIPLES OF THE EFFECTIVENESS AND EQUIVALENCE OF CONSUMER PROTECTION LAW AND EX OFFICIO CONTROL

9.1 The basis of ex officio control of consumer protection law in national law

9.1.1 Is it clear in the national legal system when consumer protection law should be applied ex officio? Is the ex officio control of consumer protection law established as an obligation or as a (discretionary) power of the judge in national procedural law?

Danish courts have a general obligation to apply ex officio "mandatory rules that cannot be waived".[96] It is clear that this also applies to such mandatory rules under EU consumer protection law. Beyond this finding, Danish legal scholarship includes no clear understanding of the ex officio control of consumer protection law in civil litigation before Danish courts.[97] In particular, it is not clear to what extent a Danish court has an obligation to investigate of its own motion the facts of the case. In this regard, Danish courts may use their active case management powers, and Danish judges also have a duty to provide guidance to consumers who have no legal representation. It is also not clear how "active" the court should be when it comes to judgments in default of appearance.

[94] The Directive on Consumer ADR provides that "the existence of an effective system for collective claims and easy recourse to ADR should be complementary". Consumer ADR is relevant not only for individual claims but also for collective ones; it can provide consumer with a means to reduce costs and save time.

[95] Per Arts.10-12, Directive on Consumer ADR.

[96] Section 338 of the Danish Administration of Justice Act.

[97] See, in particular, Ulrik Rammeskow Bang-Pedersen and Lasse Højlund Christensen, *Den civile retspleje* (3rd Edition 2015), Lasse Højlund Christensen, *Rettens prøvelse i udeblivelsessager – særligt i* forbrugerforhold, Erhvervsjuridisk Tidsskrift 2008.129, and Marie Jull Sørensen, *Danske dommeres pligt til ex officio at påse visse forbrugerbeskyttelsesregler*, Ugeskrift for Retsvæsen 2014.403.

There is no reported case law from the Danish courts concerning such ex officio control of consumer protection law. Arguably, this is because most consumer law disputes are decided in the Danish consumer ADR system, in which consumer complaints boards have a general obligation to investigate relevant facts to decide the complaint and to ascertain and apply relevant law, including EU law, see supra 8.

9.1.2 If there is an understanding of ex officio control of consumer protection law in the national legal, what is this control understood to encompass/not cover?

See supra 11.1.1.

9.1.3 Is the party who claims to be a consumer required to establish his or her consumer status, the existence of a consumer contract and that consumer law applies to the dispute? Is this required even if the consumer has no legal representation?

Danish district courts are under an obligation to provide guidance to consumers with no legal representation.[98] The court can also encourage the consumer (or his/her legal representative) to give a statement regarding questions of fact or law that appear to be relevant to the case as well as to provide specific evidence. If the requested information is not provided by a party, this may be prejudicial to his/her case depending on general rules on the burden of proof.[99]

9.1.4 What information is available to judges and dispute resolution facilitators hearing consumer protection disputes? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a consumer protection dispute to be heard and b) for the court to engage in ex officio control?

Under Danish civil procedure rules, disputes are generally decided on the basis of the information provided by the parties, see supra A.8.1.6. The minimum information available to the court can be derived from the information required in the writ of summons and the statement of defence.[100] This includes (detailed) submissions on points of fact and law made by the parties to support their claims.

If the defendant is a consumer with no legal representation and the minimum requirements for the statement of defence are not met, the court will summon the parties to provide guidance to the consumer and offering the consumer an opportunity to supplement the statement of defence by an oral statement.[101]

Special procedural rules apply for each of the Danish consumer complaints boards mentioned supra 8.

9.1.5 Who is responsible for providing this information? If the necessary information is not available to the court (or dispute resolution facilitator), is he or she under an obligation to investigate in order to be able to respond to a relevant consumer protection dimension of the case?

[98] Section 339(4) of the Danish Administration of Justice Act.
[99] Section 344 of the Danish Administration of Justice Act.
[100] See sections 348(2) and 351(2) of the Danish Administration of Justice Act.
[101] Section 352(2) of the Danish Administration of Justice Act.

A Danish court can request further information from the parties as mentioned supra 11.1.3.[102] It is unclear under Danish law to what extent the judge has an obligation to do so.

9.1.6 Will the court provide the consumer with any assistance in gathering factual information or advancing his legal arguments before the court? Please respond for the situation where: a) the consumer has legal representation and b) the consumer has no legal representation.

Please see supra 11.1.3.

Source(s):
Please see the references supra.

9.2 The possibility for ex officio control of EU consumer protection law in dispute resolution proceedings

9.2.1 Is ex officio control of consumer protection law always possible when the procedure involves a full assessment of the claim on its merits?

Yes, to the extent described supra 11.1.1.

9.2.2 Can ex officio control be exercised even when the procedure does not involve an assessment on the merits?

As a point of departure, Danish courts have an obligation to control ex officio their jurisdiction.[103]

When the court shall give judgment in default, the court will make a prima facie assessment of the merits. The extent of ex officio control is not clear in this regard, see supra 11.1.1. The court shall also make an assessment of the merits in connection with issuance of a payment order.

9.2.3 Please indicate if, per national procedural law, ex officio control can be exercised at the following stages of the procedure:

As mentioned supra, there is no Danish case law concerning this issue. Furthermore, Danish legal scholarship has so far only to a very limited extent analysed this issue from the perspective of national Danish civil procedure law, and the conclusions reached are generally unclear. Therefore, the answers are subject to uncertainty.

	Courts	Other dispute resolution facilitators

[102] Section 339 of the Danish Administration of Justice Act.
[103] Sections 232 and 248 of the Danish Administration of Justice Act.

	Possible to exercise ex officio control	Not possible to exercise ex officio control	Possible to exercise ex officio control	Not possible to exercise ex officio control
Ordinary proceedings	X			
Small claims	X			
Payment order	(X)[104]			
Provisional measures	X			
Proceedings linked to enforcement				
Enforcement proceedings				
- Enforcement of payment order		X		
- Enforcement of arbitration award	(X)[105]			
- Enforcement of mortgage				
- Enforcement of notarial deed				
Appeal proceedings (please specify:) If ex officio control is possible in the first instance, it is usually also possible in appeal proceedings.	(X)			

9.2.4 What does ex officio control encompass in national procedural law?

In civil proceedings, a court can encourage a party (or his/her legal representative) to give a statement regarding questions of fact or law that appear to be relevant to the case as well as to provide specific evidence.[106] If the requested information is not provided by a party, this may be prejudicial to his/her case.[107] This is described supra 11.1.3.

In civil proceedings, Danish districts courts are also under an obligation to provide guidance to consumers with no legal representation.[108]

The court can apply any applicable mandatory rule ex officio regardless of the claims and allegations of the parties.[109]

Source(s):

Please see the references supra.

[104] This is not entirely clear, see *supra* 8.4.6.
[105] This depends on the general rules in the Danish Arbitration Act concerning recognition and enforcement of arbitral awards, which include general rules on *ordre public*.
[106] Section 339 of the Danish Administration of Justice Act.
[107] Section 344 of the Danish Administration of Justice Act.
[108] Section 339(4) of the Danish Administration of Justice Act.
[109] Section 338 of the Danish Administration of Justice Act.

9.3 Other procedural mechanisms for the equivalent and effective protection of EU consumer law

9.3.1 Does national procedural law provide that rules of EU consumer law (as well as rules that aim to satisfy EU consumer law objectives) should be understood as having equal standing to national rules of public policy (which is to say, that for the purposes of domestic law, the consumer protection provision is understood to have equal standing to a rule that must be raised ex officio by the national court)?

This question is not explicitly regulated in Danish procedural law, but it is generally understood that such an obligation can be derived from case law of the CJEU.

9.3.2 If ex officio control is not possible in certain types of proceedings or at a certain stage of proceedings (or for any other reason), does national procedural law provide for an alternative way of assessing consumer protection law?

Ex officio control (as defined above) is available in all types of civil proceedings including proceedings for endorsement of a payment order, see supra. These proceedings precede enforcement proceedings.

Source(s):

9.4 Ex officio control in payment order procedures

9.4.1 What information is available to the judge when a claim for the issuance of a payment order is made? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a claim for the issuance of a payment order to be granted and b) for the court to engage in ex officio control before a payment order is issued?

Please see supra 8.4.4.

9.4.2 What considerations will be assessed ex officio by the court (or other competent authority) before a payment order is issued?

If the claim is unclear or not duly explained in the account of relevant circumstances on which the claim is based, or if that account may be assumed to be incorrect, the court must dismiss the claim.[110] The bailiff's court can probably also dismiss the claim if it is illegal, including if it is violating mandatory consumer protection rules. There is no reported Danish case-law concerning ex officio application of consumer protection law. See also supra 8.4.6.

9.4.3 How is the consumer informed about the claim to issue a payment order against him or her? Does national procedural law make any provision for steps to be taken to ensure that consumers are informed of the claim for the issuance of a payment order so that he or she can contest it?

[110] Section 477 c of the Danish Administration of Justice Act.

A claim to issue a payment order is always served on the debtor according to the general rules on service of documents described supra A.4.1.[111]

9.4.4 If the consumer objects to the claim, what is the next step? Do the proceedings continue, in the context of which ex officio control can be exercised? Or are the proceedings transferred to ordinary proceedings for analysis on the merits of the claim?

The proceedings are transferred to ordinary proceedings as described supra 8.4.5.

Source(s):

[111] Section 477 d of the Danish Administration of Justice Act.

European Commission
An evaluation study of the impact of national procedural laws and practices on the equivalence and effectiveness of the procedural protection of consumers under EU law

JUST/2014/RCON/PR/CIVI/0082

National Report – Consumer Protection Strand

Estonia

Irene Kull

ESTONIA: LEGAL ANALYSIS

1. NATIONAL LEGISLATION IMPLEMENTING EU CONSUMER PROTECTION INSTRUMENTS

EU legislation	Transposing national legislation	Additional notes (e.g. if there is an overlap in application of legislation etc.)
Doorstep Selling Directive 1985/577/EEC	Law on Obligations Act (Võlaõigusseadus). Hereinafter: **LOA**. Official citation: RT I 2001, 81, 487. Estonian version: https://www.riigiteataja.ee/akt/111032016002. English version: https://www.riigiteataja.ee/en/eli/528032016012/consolide.	
Package Travel Directive 90/314/EEC	LOA Võlaõigusseaduse ja teiste seaduste muutmise seadus. – RT I, 04.02.2011, 1. Available only in Estonian: https://www.riigiteataja.ee/akt/104022011001.	
Unfair Contract Terms Directive 1993/13/EEC	LOA	

Distance Selling Directive 1997/7/EC	LOA Võlaõigusseaduse ja teiste seaduste muutmise seadus. – RT I, 04.02.2011, 1. Available only in Estonian: https://www.riigiteataja.ee/akt/104022011001.	
Consumer Sales and Guarantees Directive 1999/44/EC	LOA Võlaõigusseaduse ja teiste seaduste muutmise seadus. – RT I, 04.02.2011, 1. Available only in Estonian: https://www.riigiteataja.ee/akt/104022011001.	
Unfair Commercial Practices Directive 2005/29/EC	Consumer Protection Act (Tarbijakaitseseadus). Hereinafter: **CPA**. Official citation: RT I, 31.12.2015, 1. Available in Estonian: https://www.riigiteataja.ee/akt/111032016008. Available in English: https://www.riigiteataja.ee/en/eli/515032016002/consolide. Tarbijakaitseseaduse ja võlaõigusseaduse muutmise seadus. – RT I 2007, 56, 375. Available only in Estonian: https://www.riigiteataja.ee/akt/12874304.	
Misleading and Comparative Advertising Directive 2006/114/EC	CPA Advertising Act (Reklaamiseadus). Hereinafter: **AA**. Official citation: RT I, 2008, 15.108. Available in Estonian: https://www.riigiteataja.ee/akt/111032016007. Available in English: https://www.riigiteataja.ee/en/eli/515032016001/consolide.	
Consumer Credit Agreement Directive 2008/48/EC	LOA CPA AA Personal Data Protection Act (Isikuandmete kaitse seadus). – RT I 2007, 24, 127. Available in Estonian: https://www.riigiteataja.ee/akt/106012016010. Available in English: https://www.riigiteataja.ee/en/eli/507032016001/consolide. Conciliation Act (Lepitusseadus). – RT I 2009, 59, 385. Available in Estonian: https://www.riigiteataja.ee/akt/13240243. Available in English:	

	https://www.riigiteataja.ee/en/eli/530102013028/consolide. Law of Obligations Act, General Part of the Civil Code Act and Private International Law Act Implementation Act (Võlaõigusseaduse, tsiviilseadustiku üldosa seaduse ja rahvusvahelise eraõiguse seaduse rakendamise seadus). – RT I 2002, 53, 336. Available in Estonian: https://www.riigiteataja.ee/akt/111032016009. Available in English: https://www.riigiteataja.ee/en/eli/528032016003/consolide. Võlaõigusseaduse ja teiste seaduste muutmise seadus. – RT I, 19.10.2010, 77, 590. Available only in Estonian: https://www.riigiteataja.ee/akt/13364145. Tarbijakrediidi kulukuse määra arvutamise kord. – RT I, 15.10.2010, 76, 584. Available only in Estonian: https://www.riigiteataja.ee/akt/13363716. Euroopa tarbijakrediidi standardinfo teabelehtede vormide kehtestamine. – RT I, 22.12.2010, 4. Available only in Estonian: https://www.riigiteataja.ee/akt/122122010004.	
Timeshare Protection Directive 2008/122/EC	LOA CPA Law Enforcement Act (Korrakaitseseadus). – RT I, 22.03.2011, 4. Available in Estonian: https://www.riigiteataja.ee/akt/123032015207. Available in English: https://www.riigiteataja.ee/en/eli/504012016003/consolide. Substitutive Enforcement and Penalty Payment Act (Asendustäitmise ja sunniraha seadus). – RT I 2001, 50, 283. Available in Estonian: https://www.riigiteataja.ee/akt/112072014029. Available in English: https://www.riigiteataja.ee/en/eli/522012015001/consolide. Tarbijakrediidi kulukuse määra arvutamise kord. – RT I, 15.10.2010, 76, 584. Available only in Estonian: https://www.riigiteataja.ee/akt/13363716.	

	Võlaõigusseaduse, sotsiaalmaksuseaduse ja mittetulundusühingute seaduse muutmise seadus. – RT I, 04.02.2011, 2. Available only in Estonian: https://www.riigiteataja.ee/akt/104022011002. Ehitise ajutise kasutamise lepingu, pikaajalise puhkusetoote lepingu, vahenduslepingu ja vahetussüsteemilepignu taganemisõiguse tüüpvormi kehtestamine. – RT I 29.03.2011, 22. Available only in Estonian: https://www.riigiteataja.ee/akt/129032011022.	
Consumer Injunctions Directive 2009/22/EC	LOA CPA CCP	
Consumer Rights Directive 2011/83/EU	LOA CPA Sidevahendi abil sõlmitud lepingust ja väljapool äriruume sõlmitud lepingust taganemise avalduse tüüpvormi ja taganemise näidisjuhendi kehtestamine. – RT I, 03.01.2014, 1. Available only in Estonian: https://www.riigiteataja.ee/akt/103012014001.	
ADR for Consumer Disputes Directive 2013/11/EU	CPA	

Source(s):
National State Gazette: www.riigiteataja.ee
Eur-lex

1. CONCEPT OF THE CONSUMER

1.1 Please outline the concept of the consumer in national law, indicating whether it is intended to be a uniform concept, whether it has been legislated for and where it can found (i.e. in a legislative provision, governmental guidelines, case law etc.).

According to LOA § 1(5) a consumer is a natural person who concludes a transaction not related to independent economic or professional activities. This is a uniform concept. Similar definition can be found in CPA § 2(2)1.

Source(s):
LOA § 1(5), CPA § 2(2)1.

2. REGULATORY AUTHORITIES COMPETENT FOR CONSUMER PROTECTION ISSUES

2.1 What regulatory authorities, if any, are competent for enforcing consumer protection law? Please identify them, their nature (i.e. whether they are public or private or mixed) and the nature of enforcement.

Consumer Protection Board (Tarbijakaitseamet). Official web-page: http://www.tarbijakaitseamet.ee/et. The Consumer Protection Board is a government authority within the area of government of the Ministry of Economic Affairs and Communications (CPA § 21(1)). The primary duty of the Consumer Protection Board is to protect the rights and interests of consumers in accordance with Estonian legislation. The Consumer Protection Board is competent to:

1) make proposals to amend or establish legislation relating to consumer protection;

2) exercise supervision over compliance with the requirements provided for the protection of consumer rights in the CPA, legislation established on the basis of the CPA, and other acts;

3) settle complaints submitted to the Board concerning violations of the requirements established to protect consumer rights or forward such complaints to the relevant institutions for settlement;

4) inform the public of the activities of a trader or producer which violate consumer rights or damage the legitimate interests of consumers;

5) advise consumers, consumer associations and traders and assist in increasing their awareness of consumer protection issues;

6) conduct negotiations with undertakings and business organisations, including providers of services of general interest in a dominant position, on issues relating to the quality of the services and reasonable prices for the consumers;

7) enter into co-operation agreements with other supervisory authorities and local governments;

8) demand through county courts that the application of standard terms which cause unfair harm to the collective interests of consumers and unfair commercial practices be prohibited and that any other activities which violate consumer rights be terminated.

2.2 Is there a specific venue for this type of enforcement and does this limit the jurisdiction of courts/ADR fora (even if only initially)?

Yes and no: the Consumer Protection Board settles complaints submitted to the Board concerning violations of the requirements established to protect consumer rights and forward such complaints to the relevant institutions (courts) for settlement. However, the decisions of the Consumer Protection Board are not binding on the parties and cannot be enforced through the national enforcement procedure.

2.3 Can criminal prosecutions be initiated for violations of consumer protection rules? How serious must the infringement be? What are the penalties and sanctions? And might these prosecutions lead to criminal penalties or sanctions? Can individual consumers piggy back on these claims (e.g. via a partie civile method)?

There are certain deeds which are punishable under Estonian law: violation of requirements for goods, sale of goods or provision of services (CPA § 68), deceiving consumers (CPA § 69), violation of prohibition on use of unfair commercial practices (CPA § 70), failure to implement principle on responsible lending (CPA § 71), failure to comply with maximum annual percentage rate and limitations on compensation for

collection costs required from consumer (CPA § 72), failure to provide information concerning alternative dispute resolution entity and online alternative dispute resolution platform (CPA § 73) and refusal to accept legal tender (CPA § 74). The punishments vary, depending on the provision violated, but do not exceed 32 000 euros. Proceedings in these matters are conducted either by the Consumer Protection Board, the Health Board, the rural municipality or city government, depending on the particular violation (see on this: CPA § 75).

2.4 Is there judicial review of decisions of consumer regulatory authorities? If so, by which court is this judicial oversight made? Is the forum an ordinary or a specialised court or tribunal?

According to Art 21(1)3 of the CPA, the Consumer Protection Board is entitled to forward the complaints made by the consumers to necessary other state bodies. That power does not, however, imply that there is an automatic appeal procedure relating to the decisions of the Consumer Protection Board. The decisions of the Consumer Protection Board are not binding on the parties and do not constitute enforcement titles. Hence, ordinary claims in consumer disputes can always be submitted to the county courts, regardless of the previous decision by the Consumer Protection Board.

2.5 Does the national legal system provide for a mechanism of cooperation between its national regulatory authorities and those of other Member States?

No.

Source(s):
CPA, CCP.

3. LEGAL AID

3.1 Is legal aid available to consumers in: a) bringing a claim and b) defending a claim before a court?

Yes. Legal aid is available on the same conditions as in general civil and commercial matters. If the consumer does not have sufficient financial means to protect his interests in court, he is entitled to the state legal aid according to the conditions set forth by CCP §-s 180-193. Such legal aid is given in the form of a free counsel or exemption from paying the state fee or other fees relating to translations, appeals etc. The court can also order the consumer to pay such fees as instalments. Legal aid is given to a consumer requesting legal aid only if the following conditions are met (CCP § 181(1)): 1) the said person is unable to pay the procedural expenses due to his financial situation or is able to pay such expenses only in part or in instalments and 2) there is sufficient reason to believe that the intended participation in the proceedings would be successful. The application for receiving legal aid should be submitted to the court where the claim form was submitted (CCP § 184(1)). The court then evaluates the application and makes a decision whether to grant legal aid or not (CCP § 187(1)). Before making a decision, the court can ask an opinion about the application from the other parties to the proceedings e.g. the defendant (CCP § 187(1)). In addition to claimant, the defendant can also apply for the legal aid according to the same conditions as the claimant (CCP § 180-193).

3.2 For what kinds of disputes and actions is legal aid available? (NB: legal aid might not be available for consumer or contractual disputes but be available instead for a related action, e.g. actions relating to debt, mortgage arrears, eviction etc.)

See the answer to para 5.1. Legal aid is available for all disputes, provided that the conditions for granting such aid are fulfilled.

3.3 What requirements must be satisfied for the consumer to be entitled to legal aid? Please specify if there are any additional limitations to its availability.

See the answer to para 5.1.

3.4 What does legal aid encompass? (i.e. (only) general advice, (only) assistance in preparing the case, (only) assistance with negotiation of settlements, (also) representation).

See the answer to para 5.1.

Source(s): CCP §§ 180-193

4. COSTS

4.1 What are the costs of different types of procedures before courts? Are there exemptions to the payment of fees and expenses? How can costs be paid?

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Court fees	400 EUR	750 EUR	900 EUR – 3400 EUR depending on the value of the claim.	400 EUR	750 EUR	900 EUR – 3400 EUR depending on the value of the claim.
Court expenses	Depend on the case	Depend on the case	Depend on the case	Depend on the case	Depend on the case	Depend on the case
Exemptions	None for consumers	None for consumers	None for consumers	None for consumers	None for consumers	None for consumers

Source(s):
State fee act, appendix 1. Available at: https://www.riigiteataja.ee/aktilisa/1301/2201/4001/lisa1.pdf#.

5. STANDING AND REPRESENTATION IN CONSUMER DISPUTES

5.1 Does national law limit the standing of the individual consumer in respect of the claim that can be made and the forum before which it can be brought?

No. The consumer can make claims to the court as any other claimant.

5.2 Other than individual consumers, who or which bodies have standing in consumer protection disputes and for what types of claim? If the action is not brought by the individual consumer, what requirements of representation must be satisfied?

Such other bodies include the Consumer Protection Board and consumer associations.

The Consumer Protection Board can demand through county courts that the application of standard terms which cause unfair harm to the collective interests of consumers and unfair commercial practices be prohibited and that any other activities which violate consumer rights be terminated (CPA § 21(1)8)).

Consumer associations can represent consumers in courts (CPA § 19(1)4) provided that they meet the criteria set by CCP § 218 (e.g. the person acting in the name of the consumer association is an attorney at law). Consumer associations which represent the interests of the consumers on the national or local level and which membership includes at least 50 people and federations of associations, which member associations have a total membership of at least 50 people, have, in addition the right to demand through a court, in the cases provided by LOA and in order to protect the collective interests of consumers, that the application of standard terms which cause unfair harm to consumers be terminated or that other violations be terminated and that any future violations be refrained from (CPA § 19(3)).

5.3 If a consumer wants to bring or defend an action relating to a consumer protection dispute, is there a legal (or otherwise formal) requirement that he or she has legal representation? Please specify for both judicial and ADR fora and the bodies, associations or authorities that can provide this representation.

No, there is no such requirement. Only if a dispute reaches the Supreme Court, must the consumer be represented by a sworn attorney (CCP § 218(4)).

Source(s):
CPA, LOA, CCP.

6. ACTIONS BEFORE COURTS

6.1 Jurisdiction and competence of the courts in consumer disputes: General structure and special procedures aimed at protecting consumers

6.1.1 **Are ordinary courts competent to hear such claims? Is there also a specialised tribunal for consumer protection disputes?**

Yes, ordinary courts are competent to hear such claims. No specialised tribunals exist for consumer protection disputes.

6.1.2 **Which courts are competent to hear consumer protection disputes at first instance and in appeals? Please specify the court, in light of the value of the claim (and identify any other factors that are relevant in allocation jurisdiction).**

County court which has jurisdiction is competent to hear a consumer protection dispute. As a general rule of jurisdiction, a claim against a natural person can be filed to the court of such person's place of

residence and an action against a legal person can be filed with the court of such person's seat (CCP § 79). However, consumers can also submit certain claims to the courts in the place of residence of the consumer (CCP § 90). More precisely, such actions include actions arising from a contract or relationship specified in LOA § 35, 46 or 52, subsection 208 (4), §§ 379 or 402, subsection 635 (4) or §§ 709, 734 or 866 or an action arising from another contract concluded with an undertaking having a seat or place of business in Estonia. The above does not apply to actions arising from contracts of carriage.

6.1.3 **What is the nature of the procedure at first instance, e.g. is it a simplified or a summary procedure, and is there an assessment of the merits? Please specify in light of the value of the claim (and identify any other factors that are relevant in allocating jurisdiction).**

Consumer disputes are not treated differently from any other civil disputes. If the conditions set forth by Chapter 43 (Types of simplified procedures) of the CCP are met, a consumer's claim will be dealt under the simplified procedures. For example, under CCP § 403 with the consent of the parties, the court may adjudicate a matter without hearing it in a court session. In such case the court sets, as soon as possible, a term during which petitions and documents may be submitted and the time for making public of the judgment, and notifies the participants in the proceeding thereof. The ruling shall also set out the judge adjudicating the matter. Under CCP § 405 the court adjudicates an action by way of simplified proceeding at the discretion of the court, taking account of only the general procedural principles provided by the CCP if the action concerns a proprietary claim and the value of the action does not exceed an amount which corresponds to 2,000 EUR on the main claim and to 4,000 EUR together with collateral claims.

6.1.4 **Please identify the formal requirements that must be satisfied for a consumer dispute to be heard before a court. These might include time limits applicable to the filing of the action/defence, representation requirements etc.**

Consumer disputes are not treated differently from any other civil disputes. A consumer must submit a claim form (CCP § 363) to the court having jurisdiction (this is determined under 2. part of the CCP).

General time limits applicable to the filing of the action apply (such time limits are provided by applicable substantive law. If Estonian national law applies, 10. Chapter of the GPCCA should be consulted for the relevant time limits.

There is no representation requirement.

6.1.5 **In respect of the claims and relevant procedures available in the national legal system, what kind of relief might be available in consumer protection disputes? (monetary remedies, injunctions, skimming off etc.)?**

Consumer disputes are not treated differently from any other civil disputes. Thus all reliefs provided by applicable substantive law and Estonian civil procedure are possible (e.g. monetary remedies, injunctions).

6.1.6 **Please provide a brief overview of the role of parties and judges in civil proceedings generally (e.g. with reference to the principle of party disposition, the obligation of parties to make and prove factual allegations and to make and provide legal arguments, the possible role of the court). This overview should be brief; these issues will be dealt with in more detail in the questions that follow.**

Civil matters can be divided into action proceedings (hagimenetlus) and petitions proceedings (hagita menetlus). In the actions proceedings (such as consumer disputes) parties are responsible for submitting their own claims, evidence and arguments on the applicable law. In such proceedings the courts do not collect evidence on their own initiative – these proceedings are in essence competing. In petitions proceedings the judge has an investigative role (these proceedings include for example, placing a person in a closed institution, establishment of custody over an absent person etc).

Source(s):
CCP, CPA.

6.2 Small claims

6.2.1 **Does a small claims procedure exist in the Member State? If yes, is it a specialised or simplified procedure?**
Yes. It is a simplified procedure (CCP § 405).

6.2.2 **What are the value thresholds for claims brought under the small claims procedure? Moreover, are there any other factors that shape the use of the small claims procedure (including the nature of the claim, the area of consumer protection law into which the claim falls etc.)?**
Under CCP § 405 the court adjudicates an action by way of simplified proceeding at the discretion of the court, taking account of only the general procedural principles provided by the CCP if the action concerns a **proprietary claim** and the **value of the action does not exceed** an amount which corresponds to 2,000 EUR on the main claim and to 4,000 EUR together with collateral claims. There are no other factors that shape the use of the small claims procedure.

6.2.3 **What forms must be completed to raise the application? Who assists the consumer in completing these forms?**
No special form must be completed for initiating national simplified small claims procedure. A consumer must submit a claim form (CCP § 363) to the court having jurisdiction (this is determined under 2. part of the CCP).

6.2.4 **How can an application for a small claim be made (e.g. online, by post or in person)?**
All these methods are possible – general rules on submitting claims to the court apply (CCP § 363). However, as provided by CCP § 334(1) claims must be submitted in legible typewritten form in A4 format. In the case of electronic submission, a document must bear the digital signature of the sender or be transmitted in another similar secure manner which enables the sender to be identified (CCP § 336(1)).

6.2.5 **What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?**
General rules on the taking of evidence apply (Chapter 25 of the CCP). With the consent of the parties, the court may adjudicate a matter without hearing it in a court session (CCP § 403(1)). In this case the pursuer or defender does not have to appear in court. The court may also make a ruling on the conduct of a written proceeding in the matter of a monetarily appraisable action if the value of the action does not

exceed an amount which corresponds to 3200 EUR on the main claim and to 6,400 euros together with collateral claims (CCP § 404(1)).

6.2.6 **Are the costs of the successful party reimbursed?**
Yes, according to CCP § 162(1) the costs of an action are covered by the party against whom the court decides.

Source(s):
CCP

6.3 Claims other than small claims

6.3.1 **If a consumer protection dispute does not qualify as a small claim, what other procedures are available? What are the value thresholds and other factors determining the use of such procedures?**
General rules on civil procedure apply for other claims. No special procedures are foreseen for consumer protection disputes.

6.3.2 **How can such claims be made? Please specify if the applications can be made online, or by post or in person.**
General rules on submitting claims to the court apply (CCP § 363). As provided by CCP § 334(1) claims must be submitted in legible typewritten form in A4 format. In the case of electronic submission, a document must bear the digital signature of the sender or be transmitted in another similar secure manner which enables the sender to be identified (CCP § 336(1)).

6.3.3 **What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?**
General rules on the taking of evidence apply (Chapter 25 of the CCP). With the consent of the parties, the court may adjudicate a matter without hearing it in a court session (CCP § 403(1)). In this case the pursuer or defender does not have to appear in court. The court may also make a ruling on the conduct of a written proceeding in the matter of a monetarily appraisable action if the value of the action does not exceed an amount which corresponds to 3200 EUR on the main claim and to 6,400 euros together with collateral claims (CCP § 404(1)).

6.3.4 **Are the costs of the successful party reimbursed?**
Yes, according to CCP § 162(1) the costs of an action are covered by the party against whom the court decides.

Source(s):
CCP

6.4 Claims for the issuance of a payment order

6.4.1 **Does an order for payment procedure exist in the national system? Is it a simplified procedure?**

Yes. It is a simplified procedure and is regulated by 49. Chapter of the CCP.

6.4.2 **Which authorities or courts are competent to hear claims for the issuance of payment orders?**
Only Pärnu County Court (CCP § 108) hears claims for the issuance of national payment orders.

6.4.3 **Are there any formal requirements that must be satisfied for the application for the issuance of a payment order to be made (e.g. standard forms, representation by a lawyer, the detail of description required, the need to provide written evidence etc.)?**
The application must conform to CCP § 482.
More precisely, the application must be filed with the court electronically so that processing of the application by the court would be possible. The petition must bear the digital signature of the petitioner, or be submitted in another similar secure manner which enables establishment of the person who sent the petition as well as the time the petition was sent (CCP § 482(4)).
The application must set out at least the following data: 1) the data of the parties and their representatives; 2) the data of the court with which the petition is filed; 3) the sum of money claimed, whereas the main claim and any collateral claims shall be set out separately, and in case a penalty for late payment is calculated, the rate of the penalty for late payment and the period for which it is calculated shall be indicated; 4) a short description of the circumstances which constitute the basis for the claim; 5) a short description of the evidence which the petitioner would be able to use in actions in proof of the claim; 6) a confirmation that the claim is collectible and does not depend on the performance of a mutual obligation, or that such obligation has been performed; 7) a confirmation that the petitioner has presented the information honestly and according to his or her best knowledge, and that he or she is aware of the fact that presentation, knowingly, of false information to the court may result in criminal liability; 8) the data of the court which according to jurisdiction is entitled to adjudicate the claim which is the object of the payment order in actions or, in a matter arising from apartment ownership or common ownership, in a proceeding on petition.
No representation by a lawyer is needed.
There is no need to provide written evidence (only the description of the evidence).

6.4.4 **What information is generally available to the authority or court when a claim for the issuance of a payment order is made?**
The information contained in the application for the payment order (on this, see the answer to para 8.4.3).

6.4.5 **What opportunity is available for a defence/statement of opposition to be advanced? How should this be done and what is its effect? Please specify if the means of advancing a defence differ depending on the value of the claim and the court dealing with it.**
According to CCP § 485 the debtor has the right to file an objection to a claim or a part thereof with the court which made the proposal for payment within 15 days or, in the case of service of the proposal for payment abroad, within 30 days after service thereof. An objection may be submitted on the form annexed to the proposal for payment, or in another form. An objection need not be substantiated. If the petitioner has explicitly asked for termination of the proceeding in the case an objection is filed, the proceeding is terminated. Otherwise, the case continues in an ordinary action procedure.

The means of advancing a defence do not differ depending on the value of the claim or the court dealing with it.

6.4.6 **What is the effect if the claim is uncontested, i.e. if there is a lack of defence/statement of opposition?**
If the debtor does not file an objection to the proposal for payment, the court issues a payment order which is an enforceable court judgment.

6.4.7 **If the defendant is a consumer, and he or she does not respond to or raise an objection to the issuance of the payment order, does the authority dealing with the claim for payment order proceedings have the power to examine any issue of consumer protection law of its own motion before treating the action as usual?**
Generally no, but the court should check whether the dispute falls in the exclusive jurisdiction of a foreign court as provided by the EU regulations or international conventions binding on the Republic of Estonia.

6.4.8 **What steps must the pursuer take in order to obtain an enforceable decision?**
Submit an application which complies with CCP § 482 (see further on this para 8.4.3).

6.4.9 **Is this decision final, or can the defendant appeal against it?**
It is not a final decision. The debtor can appeal against payment order under CCP § 489[1]. The debtor may file an appeal against a payment order within 15 days or, in the case of service of the payment order abroad, within 30 days after service thereof. If a payment order is served by public announcement, the appeal against the ruling may be filed within 30 days after the day when the debtor learnt about the payment order or about the enforcement proceeding initiated for its enforcement.

Source(s):
CCP

6.5 Appeals in consumer disputes

6.5.1 Are appeals possible in all consumer disputes? Please specify for small claims and other types of claims.

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Nature of the procedure at 1st instance	Small claims procedure if under 4000 EUR	Ordinary civil procedure	Ordinary civil procedure	Small claims procedure if under 4000 EUR	Ordinary civil procedure	Ordinary civil procedure

2nd instance – appeal to?	Yes, to a circuit court on the conditions provided by CCP § 637(2[1])	Yes, to a circuit court	Yes, to a circuit court	Yes, to a circuit court on the conditions provided by CCP § 637(2[1])	Yes, to a circuit court	Yes, to a circuit court
3rd instance – appeal to?	Yes, to the Supreme Court	Yes, to the Supreme Court	Yes, to the Supreme Court	Yes, to the Supreme Court	Yes, to the Supreme Court	Yes, to the Supreme Court

6.5.2 **Please briefly specify the national appeal procedure, including any requirements to be satisfied for appeals. These might include, but are not limited to, conditions of admissibility, value thresholds, time-limits, the scope of review, and the impact of the appeal on enforcement (provisional enforcement). Please refer to any rules specifically applicable in respect of the claims and relevant procedures outlined above.**

General rules on civil procedure apply to consumer disputes (on this, see further: para 2.2.1). There are no special value thresholds, time-limits etc for consumer disputes.

Source(s):
CCP

6.6 Enforcement in consumer disputes

6.6.1 **If the assessment of a consumer protection issue has not been possible at an earlier stage of the proceedings, is it always possible – either ex officio (see section 10 below) or if the consumer raises a possible violation of consumer protection law – for this assessment to be undertaken during enforcement proceedings?**

No. The principle of formality applies in Estonian enforcement proceedings. This means that Estonian bailiff cannot check the contents of the enforcement title (e.g. a court judgment). It is possible to refuse to recognise or enforce a foreign judgment on the conditions provided by the relevant EU regulations/international conventions (e.g. due to such recognition or enforcement violating Estonian public policy, but it is hard to see how such defence could be raised in relation to the violations of substantive rules on consumer protection by the courts of foreign states).

6.6.2 **In the particular case of consumer protection, if a court examines consumer protection law (either ex officio or on the basis of an argument advanced by the consumer), does national procedural law provide that interim measures should 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 final decision will have full effect?**

Provisional measures can be taken only if so requested by the claimant and only on the condition that there is a reason to believe that failure to secure the action may render enforcement of a court judgment difficult or impossible (CCP § 377(1)).

Source(s):
CCP

7. ACTIONS FOR COLLECTIVE REDRESS

7.1 Injunctive relief, linking individual and collective actions

7.1.1 **If collective proceedings are launched, does national procedural law provide that ongoing individual claims, relating to the same dispute, should be stayed until the collective proceedings are brought to an end? Please specify if this constitutes an obligation on the part of the national judge or if it is at his or her discretion.**
There are no such rules in Estonian procedural law.

7.1.2 **If individual proceedings are stayed, please indicate what the effect of the court or ADR entity's decision in the collective action on those individual proceedings would be, i.e. whether the outcome of the collective action binds the consumer bringing an individual action.**
There are no such rules in Estonian procedural law.

Source(s):
CCP

8. CONSUMER ALTERNATIVE DISPUTE RESOLUTION

8.1 Consumer disputes before ADR fora

8.1.1 **Is ADR mandatory for all parties bringing a claim related to a consumer protection dispute?**
No, ADR is not mandatory.

8.1.2 **Please specify if there are limitations to the use of ADR. These might include the nature of the claim (i.e. whether both individual and collective claims are possible), requirements of representation, time limits, value thresholds, etc.**
No such limitations exist.

8.1.3 **Can ADR entities issue binding decisions and can they enforce those decisions? If not, please explain how they are enforced.**
Yes and no.
There is no ADR for consumer cases specifically, which could issue binding decisions.

According to CEP § 2(1)8, 25 and 26 agreements entered into in the proceedings conducted by out-of-court dispute settlement bodies provided by law, including agreements approved by the Legal Chancellor in conciliation proceedings are enforcement titles, but these bodies are not meant for solving consumer disputes specifically. General rules on enforcement apply for enforcing such enforcement titles (on this, see further para 3.1.1).

8.1.4 **Does national law provide that limitation periods applicable to judicial actions should be suspended while ADR is ongoing?**[112]

Yes, this comes from GPCCA § 167(3).

8.1.5 **Please specify if national law establishes rules providing for recourse to judicial action following an (unsuccessful) ADR hearing**[113]**.**

There are no special rules on this. If ADR is unsuccessful the claimant can submit his claim to a state court.

8.1.6 **Is there judicial review of decisions and awards made by ADR entities? If so, by which court or tribunal is this oversight made? Is it ordinary or specialised?**

Yes, there is a specialised procedure for declaring agreements reached through conciliator specified by the Conciliation Act § 2(2) (sworn attorney) and 3 (public notary) to be subject to enforcement (CCP Chapter 62^1). Such applications must be submitted to the court within the territorial jurisdiction of which the conciliation proceedings were conducted (CCP § 121^1). As, however, explained before, these procedures are not meant specifically for consumer disputes, but for all civil disputes.

Source(s):
CCP

9. THE EXAMINATION OF CONSUMER PROTECTION LAW IN NATIONAL PROCEDURAL LAW: RESPECT FOR THE PRINCIPLES OF THE EFFECTIVENESS AND EQUIVALENCE OF CONSUMER PROTECTION LAW AND EX OFFICIO CONTROL

9.1 The basis of ex officio control of consumer protection law in national law

9.1.1 **Is it clear in the national legal system when consumer protection law should be applied ex officio? Is the ex officio control of consumer protection law established as an obligation or as a (discretionary) power of the judge in national procedural law?**

No it is not clear. There are no special procedural rules on this obligation.

The rules on unfair general terms of contracts should, however, be applied ex officio, as stressed by the Estonian Supreme Court in various cases (Case of 18 January 2006, No 3-2-1-155-05 para 19; Case of 12 March 2008, No 3-2-1-2-08 para 13; Case of 17 June 2008, No 3-2-1-56-08 para 13; Case of 23 March

[112] The Directive on Consumer ADR provides that "the existence of an effective system for collective claims and easy recourse to ADR should be complementary". Consumer ADR is relevant not only for individual claims but also for collective ones; it can provide consumer with a means to reduce costs and save time.

[113] Per Arts.10-12, Directive on Consumer ADR.

2011, No 3-2-1-2-11 para 12; Case of 15 November 2010, No 3-2-1-100-10 para 11; Case of 29 May 2012, No 3-2-1-64-12 para 32; Case of 11 February, No 3-2-1-150-14 para 14).

9.1.2 **If there is an understanding of ex officio control of consumer protection law in the national legal system, what is this control understood to encompass/not cover?**
See the answer to para 11.1.1.

9.1.3 **Is the party who claims to be a consumer required to establish his or her consumer status, the existence of a consumer contract and that consumer law applies to the dispute? Is this required even if the consumer has no legal representation?**
Yes, the party claiming to be a consumer is required to establish his consumer status, the existence of a consumer contract and that consumer law applies to the dispute. This is required even if the consumer does not have a legal representation.

9.1.4 **What information is available to judges and dispute resolution facilitators hearing consumer protection disputes? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a consumer protection dispute to be heard and b) for the court to engage in ex officio control?**
The court is bound by the factual information submitted by the claimant.

9.1.5 **Who is responsible for providing this information? If the necessary information is not available to the court (or dispute resolution facilitator), is he or she under an obligation to investigate in order to be able to respond to a relevant consumer protection dimension of the case?**
The parties to the proceedings are responsible for providing this information. The court cannot collect evidence/factual information on its own initiative.

9.1.6 **Will the court provide the consumer with any assistance in gathering factual information or advancing his legal arguments before the court? Please respond for the situation where: a) the consumer has legal representation and b) the consumer has no legal representation.**
Consumers are not treated differently than other litigants. Hence, they can ask the court to collect evidence for them only if they are unable to collect evidence by themselves (CCP § 236(2)).

Source(s):
CCP

9.2 The possibility for ex officio control of EU consumer protection law in dispute resolution proceedings

9.2.1 **Is ex officio control of consumer protection law always possible when the procedure involves a full assessment of the claim on its merits?**
There are no rules on such ex officio control.

9.2.2 **Can ex officio control be exercised even when the procedure does not involve an assessment on the merits?**

See the answer to the previous question.

9.2.3 **Please indicate if, per national procedural law, ex officio control can be exercised at the following stages of the procedure:**
There is generally no ex officio control (except in the case of unfair general terms).

	Courts		Other dispute resolution facilitators	
	Possible to exercise ex officio control	Not possible to exercise ex officio control	Possible to exercise ex officio control	Not possible to exercise ex officio control
Ordinary proceedings		+		+
Small claims		+		+
Payment order		+		+
Provisional measures		+		+
Proceedings linked to enforcement		+		+
Enforcement proceedings		+		+
- Enforcement of payment order		+		+
- Enforcement of arbitration award		+		+
- Enforcement of mortgage		+		+
- Enforcement of notarial deed		+		+
Appeal proceedings (please specify:)		+		+

9.2.4 **What does ex officio control encompass in national procedural law?**
See the answer to the previous question.

Source(s):
CCP, LOA

9.3 Other procedural mechanisms for the equivalent and effective protection of EU consumer law

9.3.1 **Does national procedural law provide that rules of EU consumer law (as well as rules that aim to satisfy EU consumer law objectives) should be understood as having equal standing to national rules of public policy (which is to say, that for the purposes of domestic law, the consumer protection provision is understood to have equal standing to a rule that must be raised ex officio by the national court)?**
No, national procedural law does not contain such rule. Such rule does also not come from Estonian case-law (see the exception on the unfair general terms – para 11.1.1).

9.3.2 **If ex officio control is not possible in certain types of proceedings or at a certain stage of proceedings (or for any other reason), does national procedural law provide for an alternative way of assessing consumer protection law?**
The parties are always free to submit their arguments/allegations on the applicable (consumer) law.

Source(s):
CCP, LOA

9.4 Ex officio control in payment order procedures

9.4.1 **What information is available to the judge when a claim for the issuance of a payment order is made? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a claim for the issuance of a payment order to be granted and b) for the court to engage in ex officio control before a payment order is issued?**
The judge is bound by the information provided in the application for the payment order (see further on this – para 8.4.3-8.4.4).

9.4.2 **What considerations will be assessed ex officio by the court (or other competent authority) before a payment order is issued?**
The court would ex officio check whether it has jurisdiction in a consumer dispute based on the information provided by the application for the payment order.

9.4.3 **How is the consumer informed about the claim to issue a payment order against him or her? Does national procedural law make any provision for steps to be taken to ensure that consumers are informed of the claim for the issuance of a payment order so that he or she can contest it?**
Consumers are informed as any other debtors – the proposal for a payment order is served on them according to the rules on service of documents contained in the CCP.

9.4.4 **If the consumer objects to the claim, what is the next step? Do the proceedings continue, in the context of which ex officio control can be exercised? Or are the proceedings transferred to ordinary proceedings for analysis on the merits of the claim?**
If the consumer objects the proposal for a payment order, the proceedings are terminated (if so explicitly requested by the applicant) or continued as ordinary action proceedings for analysis on the merits of the claim.

Source(s):
CCP

European Commission
An evaluation study of the impact of national procedural laws and practices on the equivalence and effectiveness of the procedural protection of consumers under EU law

JUST/2014/RCON/PR/CIVI/0082

National Report – Consumer Protection Strand

Finland

Anna Nylund

FINLAND: LEGAL ANALYSIS

1. NATIONAL LEGISLATION IMPLEMENTING EU CONSUMER PROTECTION INSTRUMENTS

For the implementing national legislation the name of the act or decree is provided in Finnish followed by the number of the act and a link to the up-to-date Finnish language official version of the act. Finally, an English translation of the name of the act is provided. If an unofficial English translation exists, a link to the translation is provided. Please note that the translation may not include later amendments to the act. If only a few sections were change when the EU legislation was implemented, the number of the sections change is provided.

EU legislation	Transposing national legislation	Additional notes (e.g. if there is an overlap in application of legislation etc.)
Doorstep Selling	Kuluttajansuoja laki (28/1978) http://www.finlex.fi/fi/laki/ajantasa/1978/19780038?search%5Btype%5D=pika&search%	

Directive 1985/577/ EEC	5Bpika%5D=kuluttajansuojalaki Consumer Protection Act (unofficial English translation: http://www.finlex.fi/en/laki/kaannokset/1978/en19780038.pdf) chapter 6	
Package Travel Directive 90/314/EEC	Valmismatkalaki (1079/1994) http://www.finlex.fi/fi/laki/ajantasa/1994/19941079 Package Travel Act http://www.finlex.fi/en/laki/kaannokset/1994/en19941079.pdf Laki valmismatkaliikkeistä (939/2008) http://www.finlex.fi/fi/laki/ajantasa/2008/20080939 (no English translation available)	Full implementation, but in two separate acts
Unfair Contract Terms Directive 1993/13/EEC	Kuluttajansuoja laki (38/1978) http://www.finlex.fi/fi/laki/ajantasa/1978/19780038?search%5Btype%5D=pika&search%5Bpika%5D=kuluttajansuojalaki Consumer Protection Act http://www.finlex.fi/en/laki/kaannokset/1978/en19780038.pdf chapter 3	Implementation in throughout the CPA, the directive is interwoven with Finnish law. Hence, implementation may be difficult to recognize at first. General clause on unfair contract terms is found in CPA chapter 3 § 1.
Distance Selling Directive 1997/7/EC	Kuluttajansuoja laki (38/1978) http://www.finlex.fi/fi/laki/ajantasa/1978/19780038?search%5Btype%5D=pika&search%5Bpika%5D=kuluttajansuojalaki	

	Consumer Protection Act http://www.finlex.fi/en/laki/kaannokset/1978/en19780038.pdf chapter 6	
Consumer Sales and Guarantees Directive 1999/44/EC	Kuluttajansuoja laki (38/1978) http://www.finlex.fi/fi/laki/ajantasa/1978/19780038?search%5Btype%5D=pika&search%5Bpika%5D=kuluttajansuojalaki Consumer Protection Act http://www.finlex.fi/en/laki/kaannokset/1978/en19780038.pdf	Implemented in provisions throughout the act
Unfair Commercial Practices Directive 2005/29/EC	Kuluttajansuoja laki (38/1978) http://www.finlex.fi/fi/laki/ajantasa/1978/19780038?search%5Btype%5D=pika&search%5Bpika%5D=kuluttajansuojalaki Consumer Protection Act http://www.finlex.fi/en/laki/kaannokset/1978/en19780038.pdf	Implemented in provisions throughout the act
Misleading and Comparative Advertising Directive 2006/114/EC	Laki sopimattomasta menettelystä elinkeinotoiminnassa (1061/1978) http://www.finlex.fi/fi/laki/ajantasa/1978/19781061 Unfair Business Practices Act http://www.finlex.fi/en/laki/kaannokset/1978/en19781061.pdf	Fully implemented in the act
Consumer Credit Agreement Directive 2008/48/EC	Kuluttajansuoja laki (38/1978) http://www.finlex.fi/fi/laki/ajantasa/1978/19780038?search%5Btype%5D=pika&search%5Bpika%5D=kuluttajansuojalaki Consumer Protection Act http://www.finlex.fi/en/laki/kaannokset/1978/en19780038.pdf chapters 6a and 7 Laki osamaksukaupasta (91/1966) http://www.finlex.fi/fi/laki/ajantasa/1966/19660091 Deferred Payment Act (no English translation available) http://www.finlex.fi/fi/laki/ajantasa/2007/20070008	Implementation is fragmented
Timeshare Protection	Kuluttajansuoja laki (38/1978)	Fragmented implementa

Directive 2008/122/EC	http://www.finlex.fi/fi/laki/ajantasa/1978/19780038?search%5Btype%5D=pika&search%5Bpika%5D=kuluttajansuojalaki Consumer Protection Act http://www.finlex.fi/en/laki/kaannokset/1978/en19780038.pdf chapter 10 Laki sopimattomasta menettelystä elinkeinotoiminnassa (1061/1978) http://www.finlex.fi/fi/laki/ajantasa/1978/19781061 Unfair Business Practices Act http://www.finlex.fi/en/laki/kaannokset/1978/en19781061.pdf § 3 Laki kiinteistöjen ja vuokrahuoneistojen välityksestä (1074/2000) http://www.finlex.fi/fi/laki/ajantasa/2000/20001074 Act on realtors (no English translation available) § 20a	tion
Consumer Injunctions Directive 2009/22/EC	Laki Kilpailu- ja kuluttajavirastosta (661/2012) http://www.finlex.fi/fi/laki/ajantasa/2012/20120661 Act on the Finnish Competition and Consumer Authority (no English translation available) Kuluttajansuoja laki (38/1978) http://www.finlex.fi/fi/laki/ajantasa/1978/19780038?search%5Btype%5D=pika&search%5Bpika%5D=kuluttajansuojalaki Consumer Protection Act http://www.finlex.fi/en/laki/kaannokset/1978/en19780038.pdf chapter 2	Main part of the implementation is in the Act on the Finnish Competition and Consumer Authority
Consumer Rights Directive 2011/83/EU	Kuluttajansuoja laki (38/1978) http://www.finlex.fi/fi/laki/ajantasa/1978/19780038?search%5Btype%5D=pika&search%5Bpika%5D=kuluttajansuojalaki Consumer Protection Act http://www.finlex.fi/en/laki/kaannokset/1978/en19780038.pdf Laki osamaksukaupasta (91/1966) http://www.finlex.fi/fi/laki/ajantasa/1966/19660091 Deferred Payment Act (no English translation available)	Implemented througout the CPA No provisions were changed in the Deferred

		Payment Act, as it was deemed to be compatible with the Directive. However, the provisions must be interpreted in light of the Directive
ADR for Consumer Disputes Directive 2013/11/EU	Laki kuluttajariitalautakunnasta (8/2007) http://www.finlex.fi/fi/laki/ajantasa/2007/20070008 Consumer Disputes Resolution Board Act (no English translation available) Oikeusministeriön asteus kuluttajariitalautakunnasta (188/2007) http://www.finlex.fi/fi/laki/ajantasa/2007/20070188 Ministry of Justice Decree on Consumer Disputes Resolution Board (no English translation available) Laki muussa kuin viranomaisessa tapahtuvasta kuluttaja riitojen ratkaisemisessa (1696/2015) http://www.finlex.fi/fi/laki/ajantasa/2015/20151696 Act on Consumer Dispute Resolution Outside Public Bodies (no English translation available) Kuluttajansuoja laki (38/1978) http://www.finlex.fi/fi/laki/ajantasa/1978/19780038?search%5Btype%5D=pika&search%5Bpika%5D=kuluttajansuojalaki Consumer Protection Act http://www.finlex.fi/en/laki/kaannokset/1978/en19780038.pdf chapter 2 §§ 3 and 8b, chapter 6 § 10, and chapter 10 § 4	Implemented mainly in the Acts and Decrees on the dispute resolution organs

Preparatory works (travaux preparatoires), particularly extensive justifications and arguments given in the government bill are a core legal source in Finnish law. Implementation is often done – at least partly – through comments in the government bill. The Court of Justice of the European Union has approved this method of

implementation for the Nordic countries, see Commission v Sweden.[114] Thus, although the implementation may not be visible by looking at the text of the act, reading the preparatory works, implementation becomes fully visible. Further, fragmented implementation is unavoidable, as Finland does not have a tradition of comprehensive codes. Legislation is fragmented, and so must implementation of EU law be.

Finnish laws are often less detailed than in civil law and common law countries. General clauses are ubiquitous. The general clause prohibiting unfair contract terms is found in the Consumer Protection Act chapter 3 § 1: "A business offering consumer goods or services shall not make use of a contract term which, considering the price of the good or service and the other relevant circumstances, is to be deemed unfair from the point of view of consumers."

1. CONCEPT OF THE CONSUMER

1.1 Please outline the concept of the consumer in national law, indicating whether it is intended to be a uniform concept, whether it has been legislated for and where it can found (i.e. in a legislative provision, governmental guidelines, case law etc.).

The Consumer Protection Act[115] chapter 1 section 4 defines a consumer as "a natural person who acquires consumer goods and services primarily for a use other than business or trade."

The consumer must be a natural person, which excludes all legal persons regardless of their character. A small sports association or other organisation mainly providing leisure activities and with limited economic resources and membership, is not a consumer and is not protected by consumer protection legislation. Second, the other party must be a business.

For a natural person to be a consumer two criteria must be fulfilled. First, the goods and service for other purposes than business. Second, in mixed use, the primary purpose of the acquisition is decisive. If the owner of a small business acquires for instance a car or a computer and uses it most of the time for private purposes, he or she is a consumer. The opposite is true if the object is used most of the time for business purposes.

Business purposes covers all activities of which one is obliged under law to keep accounts. However, the definition is not accurate, as persons in business and trade who are not obliged to keep accounts, may also be considered traders. If one acquires goods and services primarily to use for oneself or one's family, or in one's home, and holiday home, one will automatically be a consumer. Goods acquired for use at work may fall in both categories depending on the nature of the goods. If one buys cloths to be used exclusively at work, one is considered a consumer, unless the clothing is of a special character and required for the special tasks to be performed at work. Ultimately, the question of who is a consumer depends is discretionary and depends on a number of factors and is decided on a case-by-case basis.

A business is defined as "a natural person or a private or public legal person who, in order to obtain income or other economic benefit, deal in, sells or otherwise offers consumer goods or services on a professional basis and for consideration" (Consumer Protection Act chapter 1 § 5). The definition is wide and covers many types of business

[114] Case C-478/99, ECLI:EU:C:2002:281.
[115] Kuluttajansuojalaki (38/1978).

purposes. It is independent of the definition of non-business purposes in the definition of the consumer. Thus, the word business is not to be understood identically in the two provisions. The main attributes of a business are commercial purposes and that services are provided professionally. The criteria do prima facie not include an evaluation of the extent of the commercial purposes related to other activities or to the goods or services provided. A person who has full-time employment may have a business in his or her spare-time, and a business trading primarily in certain types of goods, is considered to fulfil the requirement of "professional" also in relation to other types of goods. However, the evaluation is made on a case by case basis. In the Supreme Court case KKO 2008:107, a company specializing in management consulting sold a horse to a consumer. Selling horses was listen under the areas of business for the company in the company register. The Supreme Court found that the company did not act as a professional for business purposes, as the company had not traded horses before. Hence, the sale of the horse was not considered a consumer sale. The case indicates the discretionary character of the definitions.

Consumers are considered the weaker party and vulnerable. This is true even if the consumer is de facto significantly less vulnerable than the trader due to his or her superior knowledge, experience or economic resources.

Finland has no comprehensive codes, despite the name of some acts, hence any definition will prima facie only be valid for the act it is used in. However, in practice, the definition is transferred to other contexts and acts. For instance, the notion of consumer in terms of territorial jurisdiction for consumer cases, is the same as in the Consumer Protection Act. The core of the definition follows the Consumer Protection Act, but in the margins, there may be slight differences. The definition is almost identical to the Danish and Swedish definitions.[116]

2. REGULATORY AUTHORITIES COMPETENT FOR CONSUMER PROTECTION ISSUES

2.1 What regulatory authorities, if any, are competent for enforcing consumer protection law? Please identify them, their nature (i.e. whether they are public or private or mixed) and the nature of enforcement.

The Finnish Competition and Consumer Authority (FCCA, Kuluttaja- ja kilpailuvirasto) is competent in most areas. It has a Consumer Division, which acts to monitor and improve consumer protection by making studies, recommendations and educating consumers.

The Consumer Ombudsman (kuluttaja-asiamies) is employed by the FCCA, and is in practice the same person as the head of the Consumer Division of FCCA. Thus, the Consumer Division and the Consumer Ombudsman are overlapping entities, and one of the subsections of the Consumer Division functions as the office of the Consumer Ombudsman.[117]

The Consumer Ombudsman has authority to intervene against companies. The Consumer Ombudsman has the authority to enter the premises of a business company to find information.

First, the Consumer Ombudsman tries voluntary measures. If negotiation does not lead to satisfactory results, the Consumer Ombudsman has two paths to choose from depending on the character of the case. If the case is

[116] See e.g. Bärlund, Johan, *Reklamation i konsumentavtal*. Kauppakaari, Helsinki, 2002.

[117] Laki Kilpailu- ja kuluttajavirastosta 661/2012 (Act on the Finnish Competition and Consumer Authority). http://www.kkv.fi/en/about-us/the-consumer-ombudsman/consumer-ombudsmans-supervision-tasks/

"significant" the Consumer Ombudsman must initiate proceedings at the Market Court, requesting the court to issue a prohibition. Cases that raise a question of interpretation of consumer law, questions of principle or questions of general interest, viz. practices that are common or becoming common, are considered significant. Additionally, the Market Court (Markkinaoikeus) has authority if the severity of the breech of consumer law and the potential harm caused to consumers is significant. In cases that are not considered significant, the Consumer Ombudsman has power to issue a prohibition. The distinction between significant and non-significant cases is discretionary.

Both the Market Court and the Consumer Ombudsman have powers to prohibit the trader from continuing unlawful marketing or unlawful terms of contract. They can reinforce their prohibitions with a penalty payment. The penalty payment runs daily until the unlawful marketing stops or the trader changes the unlawful contract clauses.

The Consumer Ombudsman may also issue a temporary prohibition if the practice needs to cease urgently. The Consumer Ombudsman must apply to the Market Court within three days and request the Market Court uphold the temporary prohibition.[118]

The Consumer Ombudsman issues annually approximately 20 prohibitions and the Market Court approximately 5 prohibitions.

The Regional State Administrative Agencies (Aluehallintovirasto, AVI)[119] have competencies to enforce breeches against the rules on marking of prices on goods and services, if the breech is obvious. The Regional State Administrative Agencies may also decide to set a penalty fee.[120]

The division of tasks between authorities for consumer cases is distributed as follows:

Directive 2006/114/EC(misleading and comparative advertising)

- FCCA / Consumer Ombudsman

Directive 2011/83/EU(consumer rights)

- FCCA / Consumer Ombudsman

Directive 2008/48/EC (credit agreements)

- The Financial Supervisory Authority (FIN-FSA)[121]
- FCCA / Consumer Ombudsman

Directive 2010/13/EU(audiovisual media services)

- FCCA / Consumer Ombudsman
- Finnish Communications Regulatory Authority (FICORA)[122]

Directive 90/314/EEC(package travels)

- FCCA / Consumer Ombudsman

Directive 93/13/EEC (unfair terms in consumer contracts)

- FCCA / Consumer Ombudsman

Directive 2008/122/EC(timeshare, long-term holiday product)

[118] Consumer Protection Act chapter 2 § 16 and Act on Finnish Competition and Consumer Authority §§ 10 and 12.
[119] www.avi.fi.
[120] Consumer Protection Act chapter 2 § 18.
[121] Finanssivalvonta. www.fin-fsa.fi
[122] Viestintävirasto. www.ficora.fi / www.viestintavirasto.fi

- FCCA / Consumer Ombudsman

Directive 98/6/EC (indication of the prices)

- AVI Southern Finland
- AVI Southwestern Finland
- FCCA / Consumer Ombudsman
- AVI Western and Inland Finland
- AVI Eastern Finland
- AVI Northern Finland
- AVI Lapland

Directive 1999/44/EC (sale of consumer goods)

- FCCA / Consumer Ombudsman

Directive 2000/31/EC(electronic commerce)

- FCCA / Consumer Ombudsman
- Finnish Communications Regulatory Authority

Directive 2001/83/EC(medicinal products for human use) articles 86-100

- FCCA / Consumer Ombudsman
- Finnish Medicines Agency Fimea

Directive 2002/65/EC(distance marketing of consumer financial services)

- The Financial Supervisory Authority (FIN-FSA)
- FCCA / Consumer Ombudsman

Regulation (EC) No 261/2004 (overbooking)

- FCCA / Consumer Ombudsman
- Finnish Transport Safety Agency Trafi

Directive 2005/29/EC (unfair business-to-consumer commercial practices)

- Finnish Food Safety Authority Evira
- The Financial Supervisory Authority (FIN-FSA)
- FCCA / Consumer Ombudsman
- Finnish Medicines Agency Fimea
- National Supervisory Authority for Welfare and Health Valvira

Directive 2002/58/EC(electronic communication) article 13

- Data Protection Ombudsman

Regulation (EU) N:o 1177/2010 (rights of passengers when travelling by sea and inland waterway)

- FCCA / Consumer Ombudsman
- Finnish Transport Safety Agency Trafi

Regulation (EU) N:o 181/2011 (rights of passengers in bus and coach transport)

- FCCA / Consumer Ombudsman
- Finnish Transport Safety Agency Trafi

2.2 Is there a specific venue for this type of enforcement and does this limit the jurisdiction of courts/ADR fora (even if only initially)?

The Market Court has jurisdiction to impose and review prohibitions. The Market Court ruling is subject to appeal to the Supreme Court. The Market Court has sole jurisdictions on issues related to prohibiting marketing and forcing the trader to change its terms of contract.

District Courts have sole jurisdiction related to individual consumer contracts and issues arising from an individual consumer contract. They have power to disregard an unlawful term, but may not prohibit the trader from using the term in future contracts or invoking the term in existing contracts.

Consumer Disputes Resolution Boards may give a recommendation on cases arising from individual consumer contracts.

2.3 Can criminal prosecutions be initiated for violations of consumer protection rules? How serious must the infringement be? What are the penalties and sanctions? And might these prosecutions lead to criminal penalties or sanctions? Can individual consumers piggy back on these claims (e.g. via a partie civile method)?

The Criminal Code of Finland[123] sanctions marketing offences (chapter 30 § 1), alcoholic beverage marketing offences (chapter 30 § 1 a), unfair competition offences (chapter 30 § 2), consumer credit offences (chapter 30 § 3) and charter trip company violation and charter trip company offences (chapter 30 § 3a). The infringement must be serious and the trader must continue practices despite prohibition orders and penalty fines, for example by wilfully changing one clearly unlawful practice to another one. Finland has a traditionally had a restrictive stance towards marketing of alcoholic beverages, thus the threshold for offences on alcoholic beverages is slightly lower than otherwise. All of these are sanctioned with fines or imprisonment for at most one year.

Misleading marketing may in serious cases also be considered fraud. A violation of consumer protection laws may also be sanctioned by other provisions in the criminal code.

The public prosecutor may claim compensation for the victims, but if the victims are numerous and these are difficult to identify or the loss is complex, then the public prosecutor is likely to refrain from claiming compensation. If the public prosecutor does not claim compensation, the consumers may initiate civil proceedings. The court may also decide that the compensation claims are detached to separate civil proceedings.

2.4 Is there judicial review of decisions of consumer regulatory authorities? If so, by which court is this judicial oversight made? Is the forum an ordinary or a specialised court or tribunal?

Sanctions issued by the Consumer Ombudsman ceases if the trader opposes the sanction within eight days. The Consumer Ombudsman may file a petition with the Market Court, which will then decide the issue. The Market Court has sole jurisdiction in sanctions against unlawful marketing or contract clauses. Decisions of the Market Court can be appealed to the Supreme Court.

Other decisions made by the Consumer Ombudsman are administrative decisions and may be appealed to the competent Administrative Court and further appealed to the Supreme Administrative Court.

The trader may appeal decisions by the Regional State Administrative Agencies to the Market Court.

[123] (Rikoslaki 397/1889), http://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf

The Market Court has exclusive authority to make the final decision on the penalty fees if the business does not comply with the prohibition set by the Consumer Ombudsman or Regional State Administrative Agency.

2.5 Does the national legal system provide for a mechanism of cooperation between its national regulatory authorities and those of other Member States?

There are no formal mechanisms for cooperation set forth in legal provisions. However, The Finnish Competition and Consumer Authority cooperates with consumer protection authorities on several levels through informal and formal networks. The European Consumer Center Finland functions under the auspices of the Finnish Competition and Consumer Authority. The center advices consumer free of charge.[124]

3. LEGAL AID

3.1 Is legal aid available to consumers in: a) bringing a claim and b) defending a claim before a court?

Yes, according to general legal aid rules.

The Consumer Ombudsman may decide to provide legal representation to a consumer. A civil servant at the Consumer Ombudsman's office acts as the lawyer for the consumer and the Consumer Ombudsman pays all or some of the court fees and other expenses.[125]

The trader is liable to pay the expenses of occurred to the consumer and the Consumer Ombudsman, and the legal aid office, if the consumer is the prevailing party.

3.2 For what kinds of disputes and actions is legal aid available? (NB: legal aid might not be available for consumer or contractual disputes but be available instead for a related action, e.g. actions relating to debt, mortgage arrears, eviction etc.)

Legal aid is available for consumer in any type of case, however, the general restrictions on legal aid apply also in consumer cases.

3.3 What requirements must be satisfied for the consumer to be entitled to legal aid? Please specify if there are any additional limitations to its availability.

The consumer must meet the general requirements for legal aid. The income of the consumer must be below certain thresholds. In calculating the threshold, maintenance obligations, exceptional circumstances and any insurance covering legal expenses influence the outcome.[126] Legal aid is not granted if the case is of little importance for the party or if the outcome will be of little significance for the party.[127] The requirement of little significance relates primarily to the economic interest of the consumer. The monetary limit for cases considered to be of little significance is discretionary. A particular service or product may be of vital importance for the individual consumer, making the case significant for that consumer despite its low value. Similarly, if the consumer has repeated business

[124] Kkv.fi
[125] Act on Finnish Competition and Consumer Authority, § 13
[126] Legal Aid Act §§ 3-3b.
[127] Legal Aid Act § 7.

with the trader, and each individual trade has a low value, the total of the repeated trades may make the case significant.

In practice, the client will usually be directed to file a claim at the Consumer Disputes Resolution Board, unless the claim is large. Consumer Disputes Resolution Board proceedings are simple and do not require legal representation or the aid of a lawyer. The proceedings at the Consumer Disputes Resolution Board are of an inquisitorial nature, as opposed to proceedings in civil courts.

Consumer organisations estimate that unless the case is worth at least € 10,000-15,000, proceeding with the case is economically too risky even when the consumer has partial legal aid. Legal aid is seldom granted for consumer cases.

3.4 What does legal aid encompass? (i.e. (only) general advice, (only) assistance in preparing the case, (only) assistance with negotiation of settlements, (also) representation).

Legal aid encompasses general legal advice and when needed assistance in preparing the case, (pre-action) negotiations; costs related to necessary and proportionate evidence, and litigating the case, including assistance in court-connected mediation. Court fees are waived for recipients of legal aid. Legal aid is limited to 80 hours, but the hours may be extended.

Although the Legal Aid Offices (oikeusaputoimisto) employ lawyers (attorneys), most of the litigation is outsourced to privately practicing members of the Finnish Bar Association or a lawyer who has a permission to act as an advocate. The client may choose any member of the bar as his or her legal representative. If full legal aid is awarded, the client does not pay the lawyer. If partial legal aid is awarded, the client pays the prorated part to the lawyer. The hourly fees in legal aid are considerably lower than average hourly fees charged by lawyers. Legal aid is limited to proportionate and necessary work, and often the lawyer does not get payment for all hours. The lawyer may not charge the excess hours from the client. The court ruling in the case decides how many hours will be remunerated. In case the legal aid recipient loses the case, he or she must cover the costs of the opposing party. These costs are not covered by legal aid.[128]

As proceedings at the Consumer Disputes Resolution Board are simple and of an inquisitorial nature, legal aid is not granted for Consumer Disputes Resolution Board proceedings or similar ADR proceedings.[129]

4. COSTS

4.1 What are the costs of different types of procedures before courts? Are there exemptions to the payment of fees and expenses? How can costs be paid?

The court fee for general civil cases is a flat fee of € 500.[130] The party initiating the proceedings must pay the fee directly to the bank account of the court. Recipients of legal aid are exempted from paying the fee. In exceptional cases, the court may waive the fee, but a waiver is very rare.

[128] Legal Aid Act §§ 4-8.
[129] Legal Aid Act § 6.
[130] Tuomioistuinmaksulaki (1455/2015), the Court Fee Act.

There are no statistics or other information available on the average expenses in consumer cases. It depends on the evidence presented in the case. The party calling witnesses must compensate the witness, if the witness requests compensation. The parties must pay for any expert witnesses. The latest information on costs in general civil cases is from 2008. In 2008 the average costs were 6,543 € for the claimant and 5,554 € for the plaintiff. There is no information where the cost of proceedings is related to the value of the claim.[131]

Only the Consumer Ombudsman may file a collective claim. Court fees are waived for the Consumer Ombudsman.

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Court fees	500	500	500	0	0	0
Court expenses						
Exemptions						

5. STANDING AND REPRESENTATION IN CONSUMER DISPUTES

5.1 Does national law limit the standing of the individual consumer in respect of the claim that can be made and the forum before which it can be brought?

Consumer cases abide under the same rules for legal standing as general civil cases. A Consumer may only raise claims in his or her own name and only claims in which he or she is directly a party of the claim.

The general rules for choice of forum apply: the court at the domicile of the defendant has jurisdiction. Additionally, the consumer may bring the action against the business at his or her domicile.[132]

5.2 Other than individual consumers, who or which bodies have standing in consumer protection disputes and for what types of claim? If the action is not brought by the individual consumer, what requirements of representation must be satisfied?

The Consumer Ombudsman has the exclusive right to initiate group complaints at a Consumer Disputes Resolution Board or a group action (collective redress) in court.[133] The Consumer Ombudsman has so far never initiated collective proceedings in court.

5.3 If a consumer wants to bring or defend an action relating to a consumer protection dispute, is there a legal (or otherwise formal) requirement that he or she has legal representation? Please specify for both judicial and ADR fora and the bodies, associations or authorities that can provide this representation.

[131131] Kaijus Ervasti: Käräjäoikeuksien riita-asiat 2008. Oikeuspoliittisen tutkimuslaitoksen tutkimustiedonantoja nro 93. Helsinki 2009.
[132] Code of Judicial Procedure chapter 10 § 5.
[133] Act on Finnish Competition and Consumer Authority, §§ 14 and 15.

There is no requirement of legal representation in Finnish law.

6. ACTIONS BEFORE COURTS

As a general note, it should be remarked that consumer litigation is rare in Finland, see the general remark in part II section 2 above. Please see the introductory remark to section 9 below.

6.1 Jurisdiction and competence of the courts in consumer disputes: General structure and special procedures aimed at protecting consumers

6.1.1 Are ordinary courts competent to hear such claims? Is there also a specialised tribunal for consumer protection disputes?

Ordinary courts have competence to hear claims arising from an individual consumer dispute.

The Market Court is a special court seated in Helsinki, which has exclusive jurisdiction in certain consumer cases, in certain competition cases, in public procurement cases and in intellectual property right cases. Its territorial jurisdiction covers the entire country. In consumer cases, the Market court has exclusive competence to hear:

- Prohibition cases initiated by the Consumer Ombudsman[134];
- Prohibition cases initiated by a party who opposes a decision of a Regional State Administrative Agencies[135]
- Cases initiated by consumer protection agencies from other EU-countries[136]

6.1.2 Which courts are competent to hear consumer protection disputes at first instance and in appeals? Please specify the court, in light of the value of the claim (and identify any other factors that are relevant in allocation jurisdiction).

District Courts hear the cases as courts of first instance, Courts of Appeal and the Supreme Court function as second and third courts.

Rulings of the Market Court are subject to appeal to the Supreme Court.

6.1.3 What is the nature of the procedure at first instance, e.g. is it a simplified or a summary procedure, and is there an assessment of the merits? Please specify in light of the value of the claim (and identify any other factors that are relevant in allocating jurisdiction).

Regular procedural rules apply in consumer cases. All civil cases start at the District Court regardless of the type or value of the claim.

Finland has no summary or simplified proceedings except for uncontested pecuniary claims. For consumers, the uncontested pecuniary claims proceedings are often not available, as the claim often does not consist of payment of a specified sum of money. If the consumer initiates uncontested pecuniary proceedings and the trader does not enter appearance, the court will issue a default judgment, which is enforceable. If the trader enters appearance, the claim will be transferred ex officio to ordinary civil proceedings. The latter is considered to be risky if the value of the

[134] Consumer Protection Act chapter 2 §§ 16 and 17, Act on Finnish Competition and Consumer Authority §§ 10 and 12.
[135] .Consumer Protection Act chapter 2 § 18.
[136] Laki rajat ylittävästä kieltomenettelystä 1189/2000, Act on Cross-border Prohibition Orders.

claim is low (below € 10,000). However, many uncontested pecuniary claims are consumer claims where the trader sues the consumer.

In regular proceedings, the District Court makes a full assessment of the merits of the case and of all facts. The first step of the proceedings is normally written, with exchange of written statements. Then a preparatory hearing will be held and the judge will encourage the parties to find an amicable settlement. The final stage is the main hearing where the parties present their evidence and argue the case. For further details on the court proceedings, please see part II section 2.1.1 above.

6.1.4 Please identify the formal requirements that must be satisfied for a consumer dispute to be heard before a court. These might include time limits applicable to the filing of the action/defence, representation requirements etc.

Finland does not have special rules for consumer cases; hence, the general rules for civil proceedings apply. Legal representation is not required. The judge has a duty to help parties to define the core legal and factual issues of the case and to help distinguish disputed issues and facts from undisputed ones. If one party is unrepresented, the judge is prone to give more extensive guidance to that party. This obligation is similar to Danish, Swedish and German law (materielle Prozessleitung). However, the judge may not become partial. Thus, judges will not be able to offer advice to the parties and they will sometimes encourage an unrepresented party to acquire legal representation or legal advice. For a more detailed discussion, see section 8.1.6 below.

There are no particular time limits for consumer cases. However, the dispute between the parties must be real and on-going. Parties are expected to bring their claims in a timely manner, taking into consideration the complexity of the case and efforts to find an amicable solution.

6.1.5 In respect of the claims and relevant procedures available in the national legal system, what kind of relief might be available in consumer protection disputes? (monetary remedies, injunctions, skimming off etc.)?

The main remedy is monetary compensation. The court may order the trader to provide the consumer replacement goods, return to goods to the consumer, or to provide a service to the consumer. If the trader does not comply, the court may allow the consumer to buy a similar service at the expense of the trader.

The Market Court may at the initiative of the Consumer Ombudsman prohibit a trader from using certain types of marketing or certain contract clauses. The prohibition is fortified with a penalty fee. Unless the trader rectifies its wrongful practices within a time limit set by the Market Court, the penalty fee is issued on a daily basis until the trader complies.

6.1.6 Please provide a brief overview of the role of parties and judges in civil proceedings generally (e.g. with reference to the principle of party disposition, the obligation of parties to make and prove factual allegations and to make and provide legal arguments, the possible role of the court). This overview should be brief; these issues will be dealt with in more detail in the questions that follow.

The principle of party disposition applies fully. The parties are responsible for making and providing factual allegations and legal arguments as well as all necessary evidence.

The court has a duty to work for clarification of issues, especially if a statement is unclear or incomplete However, the court may not encourage a party to supply a particular piece of evidence and the court should stay within the limits of the claim, the cause of action and the main factual background of the case. The duty to ask clarifying questions is prima facie similar for represented and unrepresented parties. However, the judge will be likely to ask more detailed questions and will be more likely to ask questions for clarification when a party is unrepresented.

The court has an obligation to provide judicial guidance, particularly to a weaker party. However, the court may not do so in a way that would endanger the perception of the impartiality of the court, and may never provide legal advice. The duty is similar to rules in Danish, German and Swedish civil procedure law (materielle Prozessleitung in German, materiell processledning in Swedish). The court has the duty to provide clarification if it is unclear what a party to the proceedings claims, what the cause of action is, 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. The judge has a duty to help the parties identify the core issues of the case and the disputed and undisputed elements of the case.

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.[137] However, if the vehicle would be a tractor or a wheeled loader, the same question would be considered impertinent.

The principle of iura novit curia applies and the courts are free to use any legal provision and to interpret legal provisions as long as the court stays within the factual allegations and claims made by the parties.[138]

The duty of clarification and legal guidance is similar in all Nordic countries. See the corresponding section in the Danish national report for a discussion on the Danish law. However, Finland has a tradition of slightly more “inquisitorial” proceedings and the role of the judge is more active than in Danish proceedings. Thus, Finnish judges will be more inclined to provide clarification and judicial guidance.

6.2 Small claims

6.2.1 Does a small claims procedure exist in the Member State? If yes, is it a specialised or simplified procedure?

No there is not a small claims track.

6.3 Claims other than small claims

6.3.1 If a consumer protection dispute does not qualify as a small claim, what other procedures are available? What are the value thresholds and other factors determining the use of such procedures?

[137] This example is inspired by the case C-497/13 Froukje Faber v Autobedrijf Hazet Ochten BV ECLI:EU:C:2015:357.
[138] See Frände, Dan, Havansi, Erkki et.al., *Prosessioikeus.* Neljäs painos. SanomaPro, Helsinki. 2012, p. 991-997.

There is just one set of procedural rules for all civil and commercial cases. These rules will apply to consumer cases.

6.3.2 How can such claims be made? Please specify if the applications can be made online, or by post or in person.

A regular statement of claim (application for summons) must be filed. The statement of claim shall indicate:[139]
(1) the specified claim of the plaintiff;
(2) the circumstances on which the claim is based;
(3) as far as possible, the evidence that the plaintiff intends to present and what he or she intends to prove with each piece of evidence;
(4) the claim for the compensation of legal costs, if the plaintiff deems this necessary; and
(5) the basis for the jurisdiction of the court, unless jurisdiction can be inferred from the statement of claim or the documents annexed to it, such as from the address of the defendant, or in consumer cases the address of the claimant.

The consumer may write the statement of claim on his or her own, or obtain the help of a lawyer either by paying him- or herself or though legal aid.

The statement of claim can be filed by post, in person or by e-mail.[140]

6.3.3 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

Regular rules on taking evidence applies. The party making a claim has the burden of proof for the claim. However, in consumer relationships, there are several rules reversing the burden of proof. If the a defect appears in goods sold to a consumer within six months of the purchase, the trader has the burden of proof that the defect did not exist at the date of the purchase .[141] For consumer services, the trader providing the service has the burden of proof that the service has been provided with professional skill and care.[142] These rules apply to all types of sales of goods and services to consumers.

The parties present written evidence in their written submissions, usually already in the statement of claim and the statement of defence. The court may ask for further written submissions. Pieces of written evidence may also be submitted during the preparatory hearing.[143] During the preparatory stage, all oral evidence must be indicated, both as to who the parties wish to here and what the evidence is proving. However, the court does not generally evaluate the evidence during the preparatory stage. All evidence, written and oral is presented in a concentrated main hearing.

A party shall be order under threat of fine to appear in person in the main hearing unless it is deemed unnecessary.[144] If a party has legal representation, the appearance in person is deemed unnecessary if the party does not have any information of importance on the factual circumstances of the case and the party has given the legal counsel power to

[139] CJP chapter 5 section 2.
[140] Code of Judicial Procedure, 5:1. Laki sähköisestä asioinnista viranomaistoiminnassa 13/2003 , § 9
Act on Electronic Services and Communication in the Public Sector http://www.finlex.fi/en/laki/kaannokset/2003/en20030013.pdf
[141] Consumer Protection Act chapter 5 § 15.
[142] Consumer Protection Act chapter 8 § 12.
[143] CJP chapter 5 § 20.
[144] CJP chapter 12 § 6

settle the case. In consumer cases, the consumer must usually appear in person, as hearing the consumer for evidentiary purposes is necessary.

6.3.4 Are the costs of the successful party reimbursed?

The costs of the successful party are reimbursed according to the general rules: Reasonable costs incurred by necessary measures are reimbursed. [145] In practice, costs are often only reimbursed partly, as some measures are not considered fully or partly necessary. The counsel often has two bills: one for the opposing party and one for the client. There are also many exceptions to the loser pays rule. Thus, the winning party must often pay some costs himself or herself.[146]

Compensable legal costs are lawyers' fees, costs incurred for evidence (processing fees to obtain documents, reimbursements paid to witnesses, costs for expert opinions etc.), and travel costs etc. for the opposing party.

6.4 Claims for the issuance of a payment order

6.4.1 Does an order for payment procedure exist in the national system? Is it a simplified procedure?

Finland does not have an order for payment procedure as such. However, a de facto procedure for uncontested pecuniary claims exists. It is a type of simplified proceedings.[147]

6.4.2 Which authorities or courts are competent to hear claims for the issuance of payment orders?

All District Court have territorial jurisdiction.

6.4.3 Are there any formal requirements that must be satisfied for the application for the issuance of a payment order to be made (e.g. standard forms, representation by a lawyer, the detail of description required, the need to provide written evidence etc.)?

The content of the statement of claim for initiating simplified proceedings shall be:[148]

- Name and contact information of both parties,
- claims,
- short factual circumstances for the claim,
- a list of evidence the claimant wishes to invoke,
- claim for the compensation of legal costs, including costs for debt collection, if party wishes so. Legal costs and debt collection costs are fixed in simplified proceedings, but a party must claim them, they are not awarded ex officio.

The case may be filed electronically through an electronic service. For companies and organisations filing many simplified cases a separate electronic case management system exists where all communication is electronic (the system is called Santra).

Written evidence or copies of documents do not have to be attached to the statement of claim.

[145] CJP chatper 21.
[146] Lehtinen, Lasse Juhani, *Oikeuspaulain mukaisen yksityisen avustajan oikeuksista ja velvollisuuksista.* Bookwell, Porvoo, 2014.
[147] CJP chapter 5 § 3.
[148] CJP chapter 5 § 3.

The parties do not need legal representation.

Office staff of the District Court decide the cases. The office staff does not have any formal training, although some may have paralegal training (as part of a specialisation track in a bachelor's degree in business administration). If the case is difficult, the staff may either consult the judge in charge, or transfer the case to a judge.

Only circumstances on which the claim is immediately based need to be included. However, the contract, commitment or other written evidence invoked shall be clearly identified although it does not have to be enclosed.[149]

6.4.4 What information is generally available to the authority or court when a claim for the issuance of a payment order is made?

Only the information in the simplified statement of claim and information from public registers, especially information from the Population Information System and the Trade Register are available to the court officers.

6.4.5 What opportunity is available for a defence/statement of opposition to be advanced? How should this be done and what is its effect? Please specify if the means of advancing a defence differ depending on the value of the claim and the court dealing with it.

The court serves statement of claim to the defendant as part of the summons. The defendant is exhorted to state whether he or she admits or contests the claim. If the defendant contests the claims, he or she must present the grounds for contesting and as far as possible identify evidence in support of those grounds and attach any written evidence. In the summons, the court sets a time limit for the statement of defence. The time limit starts when the summons is served and is usually approximately a month. In cross-border cases, the court will generally set a longer time limit.

The defendant may state that the case is inadmissible, the cases lacks legal or factual merit, or any combination of these.

6.4.6 What is the effect if the claim is uncontested, i.e. if there is a lack of defence/statement of opposition?

If the defendant does not file a statement of defence, the court decides the case issuing a default judgment in accordance with the claims the claimant has set forth. If the plaintiff has abandoned action or if the claims are manifestly without a basis, the courts dismisses the case on its merits by judgment.[150] .

6.4.7 If the defendant is a consumer, and he or she does not respond to or raise an objection to the issuance of the payment order, does the authority dealing with the claim for payment order proceedings have the power to examine any issue of consumer protection law of its own motion before treating the action as usual?

If the claim is manifestly without merit, the court shall refrain from issuing a summons and dismiss the case on the merits. The court may dismiss the case after the deadline for the statement of defence has elapsed if the case is clearly without merit.[151]

[149] CJP chapter 5 § 3.
[150] CJP chapter 5 section 13.
[151] CJP chapter 5 §§ 6 and 13.

The court will investigate if the claims are clearly unfair or if they are in breach of a mandatory rule, such as rules on maximum fees for debt collection agencies. In consumer cases, the court will have a particular duty to ensure that the trader does not invoke terms of contract that are rendered unfair in the Unfair Contract Terms Directive. The court will also investigate if the legal costs are within the limits of the law.

6.4.8 What steps must the pursuer take in order to obtain an enforceable decision?

The claimant must not take any steps; the default judgment is issued ex offio unless the case is fully or partly manifestly without a basis.

6.4.9 Is this decision final, or can the defendant appeal against it?

There is a special appeals proceedings (reopening) for default judgments. Regular appeals proceedings is not available. Default judgments are not served by the court, the opposing party is as a rule in charge of serving the default judgment. [152]

Reopening must be applied to the court that decided the case. The time limit is thirty days and starts when the appealing party received veritable notice of the default judgment, or when the party was present at enforcement proceedings.

In the application, the party must present grounds that could have been relevant when the case was decided, for instance that a debt agreement was void or the debt was paid. If the party was originally asked to reply to a summons or to certain questions, the party must file a statement of defence or reply to those questions in the application for reopening. If the party does not comply with these rules, the court may give the party a deadline for complying to the rules under the threat of inadmissibility pf the appeal.

A party is usually granted reopening.

6.5 Appeals in consumer disputes

6.5.1 Are appeals possible in all consumer disputes? Please specify for small claims and other types of claims.

The rules are the same for all cases, thus there are no special restrictions for small claims or consumer cases. A party who has lost the case partly or fully, may appeal to the Court of Appeal.

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Nature of the procedure at	Regular civil proceedings irrespective of value					

[152] CJP chapter 12 §§ 15 and 16.

1st instance	
2nd instance – appeal to?	Appeal allowed irrespective of its value, but access to second instance is limited to preliminary written proceedings unless the Court of Appeal grants a leave for continued consideration
3rd instance – appeal to?	Only 50-60 civil cases functioning as precedent are heard

6.5.2 Please briefly specify the national appeal procedure, including any requirements to be satisfied for appeals. These might include, but are not limited to, conditions of admissibility, value thresholds, time-limits, the scope of review, and the impact of the appeal on enforcement (provisional enforcement). Please refer to any rules specifically applicable in respect of the claims and relevant procedures outlined above.

See part II, sections 2.2.1 and 2.2.2 for the regulation and conduct of appellate and third instance proceedings. The same rules apply to all types of civil proceedings.

6.6 Enforcement in consumer disputes

6.6.1 If the assessment of a consumer protection issue has not been possible at an earlier stage of the proceedings, is it always possible – either ex officio (see section 10 below) or if the consumer raises a possible violation of consumer protection law – for this assessment to be undertaken during enforcement proceedings?

The Enforcement Authority will not provide an ex officio assessment of consumer protection issues.

If the title is not res judicata, the consumer must resort to available general appeals procedures. For default judgments, the time limit for reopening (special appeals) often starts when the debtor / defendant is present at the first enforcement session. The debtor must resort to reopening and may not resort to mechanisms for contesting enforcement, as reopening is the primary recourse against default judgments.

If the title is already res judicata, the consumer must resort to mechanisms within enforcement proceedings. Enforcement may be contested on grounds of payment or limitation periods, or on other grounds. If the respondent makes it probable that grounds for the enforcement are unclear, the bailiff must issue instructions for the lodging of an action for contested enforcement at the competent court. The action for contested enforcement shall be brought within four weeks of service of the instructions. The time limit may be extended if there is an acceptable reason.[153]

An action for contested enforcement may also be field independent of any instructions given. The District Court must notify the bailiff when the action becomes pending. The District Court can stay enforcement proceedings at once. The action is considered an urgent matter.[154]

Alternatively, a party to enforcement proceedings may lodge an appeal against enforcement measures taken by the bailiff.[155] For further details on recourse against enforcement, see part II section 3.1.1 above.

[153] EC chapter 10, §§ 6, 7 and 12.
[154] EC chapter 10 §§ 13 and 15.
[155] EC chapter 11.

6.6.2 In the particular case of consumer protection, if a court examines consumer protection law (either ex officio or on the basis of an argument advanced by the consumer), does national procedural law provide that interim measures should 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 final decision will have full effect?

Courts have discretion to order enforcement to be stayed during general appeals against civil judgments and during contested enforcement proceedings. As a main rule, enforcement may be stopped only if continuing the enforcement would result in irrevocable damage. Irrevocable damage will seldom be caused if the enforcement concerns pecuniary claims. In consumer cases concerning goods or services vital to the consumer, particularly the home of the consumer, the court will be more lenient to staying the enforcement. The bailiff has an independent right to stay enforcement proceedings.[156]

7. ACTIONS FOR COLLECTIVE REDRESS

A note on consumer law proceedings in regular court proceedings in Finland as a backdrop for understanding actions for collective redress

Finland has had a dysfunctional civil litigation system for a quarter of a century. Civil litigation is vanishing; it is costly and slow. The average case processing time is almost twice as long as in the other Nordic countries. Litigation occurs seldom, and is mostly limited to particular categories of cases. Unless the interest in the case is at least € 10 000, it is often considered far too expensive to initiate litigation proceedings. Finland has no small claims proceedings, or similar. Consequently, access to court is limited for most consumers (and many small businesses alike).

There are some exceptions to the dismal condition of Finnish civil litigation. Firstly, the simplified proceedings for uncontested pecuniary claims works properly. However, from a consumer perspective, the simplified proceedings only functions as a one-way street. As only pecuniary claims[157] are subject to simplified proceedings, the proceedings are as a rule only available for the trader claiming lacking payment. They remain closed for the consumer who files a claim for non-conformity or a similar claim.

Second, consumer ADR proceedings are available to consumers. These work well and the compliance rate for traders is high. The members of the resolution boards and the staff at the consumer ADR bodies are highly qualified and have excellent knowledge of consumer law. The outcomes are respected because they are perceived as legitimate and as having a high quality. However, unlike in Denmark, the outcome is not binding.

Traders who do not comply with the decision of the consumer ADR body are blacklisted by consumer organizations. Serious traders do not want to be blacklisted for non-compliance. Because the outcome is not binding, businesses persistently refusing to comply may continue their unlawful practices because litigating the case will be too expensive for the consumer. In absence of class or group actions, the consumer is deprived of access to justice. This is true even if there are a large number of consumers having identical or similar cases with the same trader.

[156] CJP chapter 2 §§ 8 and 9 and chapter 20 §§ 22 and 23.
[157] In addition, restoration of possession or a disrupted circumstance or eviction may be subject to simplified proceedings.

Consumers are dependent on the Consumer Ombudsman, who has several tools. The Consumer Ombudsman has the exclusive right to initiate collective redress. However, the Consumer Ombudsman has so far not brought a single collective action. The Consumer Ombudsman may also help financing litigation and help the party litigate the case. The Consumer Ombudsman provides assistance in approximately two to three cases each year. Moreover, the Consumer Ombudsman may decide to issue a prohibition on using unfair contracts terms. The Market Court has jurisdiction to hear the case if the trader refuses to comply. On average, the Consumer Ombudsman issues a prohibition in less than 20 cases annually. Only three to five of these cases go to the Market Court.

Thus, consumer dispute resolution works well as long as the trader complies with the resolution in CADR proceedings. Otherwise, consumers are completely dependent on the Consumer Ombudsman. Private enforcement of consumer rights is deficient.

7.1 Injunctive relief, linking individual and collective actions

7.1.1 If collective proceedings are launched, does national procedural law provide that ongoing individual claims, relating to the same dispute, should be stayed until the collective proceedings are brought to an end? Please specify if this constitutes an obligation on the part of the national judge or if it is at his or her discretion.

The court has power to stay proceedings until the collective proceedings are brought to an end. The power is discretionary.[158]

7.1.2 If individual proceedings are stayed, please indicate what the effect of the court or ADR entity's decision in the collective action on those individual proceedings would be, i.e. whether the outcome of the collective action binds the consumer bringing an individual action.

If the proceedings in an individual claim are stayed, the outcome in the collective action is not binding for the court deciding the individual claim or for any individual not party to the collective proceedings. However, the court is likely to give it considerable weight.[159]

8. CONSUMER ALTERNATIVE DISPUTE RESOLUTION

Please read the special note on consumer law proceedings in regular courts at the beginning of part 9. It gives essential background information for understanding consumer ADR in a Finnish context.

8.1 Consumer disputes before ADR fora

8.1.1 Is ADR mandatory for all parties bringing a claim related to a consumer protection dispute?

Consumer ADR is not mandatory. However, parties will usually prefer ADR as it is readily available.

[158] CJP chapter 14 § 4.

[159] Viitanen, Klaus, "Consumer Law: A Short Introduction to the Development and Main Principles of Finnish Consumer Law ". In Nuotio, K, Melander, S. and Huomo-Kettunen, M. (eds.) *Introdcution to Finnish Law and Legal Culture*. Forum Iuris, Helsinki 2012, p. 153-167.

8.1.2 Please specify if there are limitations to the use of ADR. These might include the nature of the claim (i.e. whether both individual and collective claims are possible), requirements of representation, time limits, value thresholds, etc.

The Consumer must first contact a consumer advisor (kuluttajaneuvoja) at a local Registry Office (maistraatti) or for cross-border claims the European Consumer Center for advice. If the claimant has not done so, the Consumer Disputes Resolution Board will stay the proceedings and send the case to the consumer advisor or the European Consumer Centre for advice.

The Consumer Disputes Resolution Boards can only decide cases on consumer commodities, building and purchase and rental of housing, interests and bail bondsmen for consumer credits.

According to § 3 of the Consumer Disputes Resolution Board Act, collective insurance of employees, certain banking instruments and transfers of housing between members of the family and second hand lease fall outside the competence of the board. There are separate boards for finance and insurance and issues related to traffic damages.

Only the Consumer Ombudsman may initiate collective proceedings in the Consumer Disputes Resolution Board.

The Finnish Financial Ombudsman Bureau (FINE)[160] offers dispute resolution in services related to banking, insurance and securities issues. The services are free of charge and function in a similar way as the Consumer Disputes Resolution Boards.

The Traffic Damages Board[161] resolves disputes related to traffic accidents. It gives recommendations on if a particular damage is covered by the compulsory traffic insurance and who the guilty party is in a traffic accident. The Traffic Damages Board has a similar process as the Consumer Disputes Resolution Board.

8.1.3 Can ADR entities issue binding decisions and can they enforce those decisions? If not, please explain how they are enforced.

Consumer Disputes Resolution Boards are not binding upon the parties and the decisions cannot be enforced. The proceedings do not have any bearing on limitation periods, except for periods for limitations for purchase of real estate, Consumer Disputes Resolution Board Act § 23.

According to the Consumer Disputes Resolution Boards, businesses follow the decision in approximately 80 % of cases. If a business persistently does not follow the decision voluntarily, the consumer organisations tend to black list the business entity. The Consumer Ombudsman may also investigate the business and order the business to change its practices.

8.1.4 Does national law provide that limitation periods applicable to judicial actions should be suspended while ADR is ongoing?

No, except for periods for limitations for purchase of real estate, Consumer Disputes Resolution Board Act § 23.

[160] Vakuutus- ja rahoitusneuvonta. www.fine.fi
[161] Liikennevahinkolautakunta. www.lvk.fi

8.1.5 Please specify if national law establishes rules providing for recourse to judicial action following an (unsuccessful) ADR hearing.

The parties may initiate regular civil proceedings at any time.

8.1.6 Is there judicial review of decisions and awards made by ADR entities? If so, by which court or tribunal is this oversight made? Is it ordinary or specialised?

No. The decisions are not binding, unlike in Danish law.

9. THE EXAMINATION OF CONSUMER PROTECTION LAW IN NATIONAL PROCEDURAL LAW: RESPECT FOR THE PRINCIPLES OF THE EFFECTIVENESS AND EQUIVALENCE OF CONSUMER PROTECTION LAW AND EX OFFICIO CONTROL

9.1 The basis of ex officio control of consumer protection law in national law

11.1.1 Is it clear in the national legal system when consumer protection law should be applied ex officio? Is the ex officio control of consumer protection law established as an obligation or as a (discretionary) power of the judge in national procedural law?

It is not clear if, and to what extent, consumer law should be applied ex officio. The principles of iura novit curia and da mihi factum dabo tibi ius apply in Finnish law. The judge has a right to judicial guidance (materielle Prozessleitung in German), but this is usually performed during the oral preparatory hearing. For a description of judicial guidance, see section 8.1.6 above. The court may not give a judgment on something more or something else than what has been claimed by a party (ne ultra petita), nor base the judgment on a circumstance not referred to by a party in support of his or her claim or defence.

Usually, a court would try to solve a problem by using judicial guidance, if it is appropriate. However, this is not always available.

In the KKO 2015:60[162] The Finnish Supreme Court ruled on a question related to a default judgment. The court found that Finnish civil proceedings are based on adversarial trial and the courts have very limited powers for ex officio investigations. There is no national exception for consumer cases. The same applies to default judgments (para. 11 of the judgment).

However, the Unfair Contract Terms Directive (93/13/EEC) and the CJEU case law based on it require national courts to disregard any unfair terms (para 12.) Referring to a number of cases from the CJEU, the Finnish Supreme Court found that EU law requires national courts to investigate ex officio if a contract term is unfair for a consumer before a default judgment is issued. Any unfair contract terms in consumer contracts must be dismissed ex officio as manifestly without basis (paras. 23-24).

The judgment discusses only default judgments and clearly takes a restrictive view as to which provisions can be scrutinized ex officio, leaving several questions unanswered. Inter alia the court does not discuss if there would be a heightened duty to judicial guidance or a prohibition to accept settlements with unfair terms in consumer cases.

[162] http://www.finlex.fi/fi/oikeus/kko/kko/2015/20150060?search%5Btype%5D=pika&search%5Bpika%5D=kko%202015%3A60

9.1.1 11.1.2 If there is an understanding of ex officio control of consumer protection law in the national legal, what is this control understood to encompass/not cover?

Ex officio control covers only terms covered by the Unfair Contract Terms Directive. Thus, many issues that are considered consumer law under national law will not be affected. The distinction will probably result in difficulties as to whether a court has the power and obligation to act ex officio, and many courts are likely to extend their duties to include most aspects of consumer legislation. Courts are likely to enforce all consumer law ex officio, as it is difficult for them to know whether the consumer law is based on EU, in particular the Unfair Contract Terms Directive, or national law.

The court will only raise a question of consumer law if there is an indication that the one of the parties is a consumer and the other party is a trader.

The judge may not collect additional evidence or information. The judge may not request a party to provide additional evidence or information, since doing so would render the judge partial. If the judge believes there is not (sufficient) evidence or information available, the judge may ask if a certain fact is disputed and consequently ask how the will argument that he or she is right, or use other methods for giving hints and feedback. The judge will try to frame the question in an impartial, neutral way, yet giving the party a hint that more information is needed. Self-represented parties are a particular challenge, as they are less prone to understand subtle hints. The judge must strike a balance between neutrality on the on hand, and giving sufficient legal guidance and clarification on the other hand. However, if there is an indication that a contract term in a consumer contract is unfair, the judge may raise the question ex officio and explicitly ask for further information.

The judge is bound by the petitum, but may under some circumstances try to induce the parties to change the petitum. The power and competency of the judge depends on a number of factors. The threshold is lower if the change involves alternative claims and the cause of action remains identical. For example, changing the claim from economic compensation for a defect product to rectification of its defects is unproblematic. As would adding one claim as an alternative, subsidiary claim to the primary claim. If the amendment involves adding new claims, such as adding a claim for compensation of economic losses related to the defect product, the judge has limited powers. Adding a new claim will often also require an amendment of the factual basis of the case. The character of the new or amended claim in the petitum will also be decisive. Unfair terms of contract fall under public policy, and thus the court has more powers to raise the topic. A judge may give more explicit hints to a party without legal representation, but may not suggest a party should do something, only suggest a party could do consider doing something.[163]

Further, the conduct of the parties may influence the powers of the judge. If a party mentions an issue, the judge may ask further questions. A consumer claiming that a clause should not be binding, as the trader did not discuss it when the consumer entered into the contract and that it is unclear, the court may raise the question of if it is unfair, or otherwise contrary to consumer protection law. As the consumer has raised the issue, the court may use clarification to explore the issue further.

The topic of ex officio duties related to unfair terms of contract is a new theme in Finnish civil procedure and many questions remain unanswered. It is not clear which specific duties the judge has. As the main mechanisms are

[163] See Frände, Dan, Havansi, Erkki et.al., *Prosessioikeus.* Neljäs painos. SanomaPro, Helsinki. 2012, p. 991-997.

judicial guidance and clarification, and the balance between these and neutrality is difficult to strike, much remains open. The wording of a question, the tone of voice or body language may sometimes be decisive. This topic is discussed in section 8.1.6 above.

11.1.3 Is the party who claims to be a consumer required to establish his or her consumer status, the existence of a consumer contract and that consumer law applies to the dispute? Is this required even if the consumer has no legal representation?

Proceedings are based on the principle of iura novit curia and da mihi factum dabo tibi ius. The consumer will only have to establish the facts to support his or her status as a consumer. However, the court will need sufficient material that supporting the assertion.

11.1.4 What information is available to judges and dispute resolution facilitators hearing consumer protection disputes? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a consumer protection dispute to be heard and b) for the court to engage in ex officio control?

Proceedings before Consumer Disputes Resolutions Boards are initiated on a standard form. Different forms are available for different kinds of disputes (sale of car, repair of car, services, dry cleaning services, insurance etc.). Only written statements are allowed and only written evidence is admissible. Usually expert evidence is deemed superfluous.

In court proceedings, the information available depends on the stage of the proceedings. The parties must state their claims and the factual basis for their claims. Written evidence and a list of persons to be heard is included in the statement of claim and statement of defence. The latter does not apply for simplified proceedings for uncontested pecuniary claims, where no written evidence needs to be attached to the statement of claim.

The court needs sufficient information that points in the direction of a consumer case to investigate consumer issues ex officio. The type of the commodity may be an indication of a consumer contract, for instance a family car is usually bought by consumers, but a lorry would indicate a business to business contract. The same applies to information on the contents of the consumer contract. The court will not scrutinise the contract for unfair terms, rather there must be enough information on a term to indicate it may be unfair.

11.1.5 Who is responsible for providing this information? If the necessary information is not available to the court (or dispute resolution facilitator), is he or she under an obligation to investigate in order to be able to respond to a relevant consumer protection dimension of the case?

The parties will have to provide the information. However, consumer advisors at Register Offices give advice and assistance to consumers and businesses. The services are free of charge.

Proceedings in the Consumer Disputes Resolution Boards are of an inquisitorial nature, where the employees will obtain information ex officio or ask for information as needed. The employees investigate the case.

Court proceedings are adversarial. The judge has a duty to provide for clarification and to help the parties determine the scope of the case. In determining the scope of the case, the judge may usually not directly urge the parties to provide certain information, as this would be in conflict with the requirement for neutrality. For a discussion on the concept of judicial guidance and on striking the balance between judicial guidance and neutrality, see above sections 8.1.6 and 11.1.2.

> 11.1.6 Will the court provide the consumer with any assistance in gathering factual information or advancing his legal arguments before the court? Please respond for the situation where: a) the consumer has legal representation and b) the consumer has no legal representation.

The court will only provide help to a party in advancing legal arguments and in indicating which factual information may be relevant as part of the duty to clarify the case and the duty to provide judicial guidance. See section 8.1.6 above for an explanation of these duties.

The principle of iura novit curia requires that the parties only state a precise claim and facts supporting the claim, thus legal arguments are not necessary. The court may not assist a party in gathering factual information, as that is the sole duty of the parties. However, claims, facts and (legal and factual) arguments are to some extent inseparable. In identifying the core issues of the case and in separating disputed and undisputed issues, the court inevitably draws the connection between them and the three become an intricate web.

In practice, the judge would first try to identify whether the question was disputed. The judge would perhaps proceed with asking that the parties provide arguments for their views. Although the arguments would not necessarily be formed explicitly as legal arguments, or they would be a mix of factual and legal arguments, the judge has in practise induced the parties to advance legal arguments (or arguments that can easily be “reframed” or “translated” into legal arguments). Further, the judge would enquire which evidence the parties wish to invoke in support of their views. This question would then indicate which factual information is necessary to prove the disputed facts.

If a party is without legal representation, the judge will be likely to ask more questions and more detailed questions.

9.2 The possibility for ex officio control of EU consumer protection law in dispute resolution proceedings

9.2.1 Is ex officio control of consumer protection law always possible when the procedure involves a full assessment of the claim on its merits?

Ex officio control of consumer protection law depends of the facts of the case. The right to ex officio control of consumer protection will be allowed if:

- there is sufficient reason to believe that the case is a consumer case;
- questions for clarification are not possible as the party has not entered appearance or the questions do not provide satisfactory changes, i.e. the result is not that the question of unfair terms becomes part of the case as a result of the activities of the parties; and
- the term falls under specific EU legislation, usually the Unfair Contract Terms Directive.

If the court deems a clarifying question will not be sufficient, he or she does not have to engage in extensive efforts to induce the party to raise the question himself or herself. The judge may then proceed to raise the question ex officio at an early stage. The judge will take into account if the party has legal representation or not. If the party is self-represented, the judge will more likely raise the question ex officio at an early stage.

9.2.2 Can ex officio control be exercised even when the procedure does not involve an assessment on the merits?

If a default judgment is issued, the court must investigate the central terms of the contract. Ex officio control may also be exercised in annulment proceedings against arbitral awards. There is virtually no ex officio control in enforcement proceedings. The debtor must usually contest the enforcement by initiating enforcement proceedings.

Enforcement proceedings have not been designed with cross-border claims in mente. Thus, the rules do not sufficiently take into account inter alia arbitral awards in consumer cases, default judgments where the minimum rights of defence and consumer law may not have been respected; and ex officio application of consumer law. The Enforcement Offices lack competence to perform extensive control of consumer law ex officio. Arbitration is lawful in consumer cases in Finland. A contract clause mandating arbitration is not binding for the consumer. If the consumer consents to arbitration, the arbitral award will prima facie be binding.

9.2.3 Please indicate if, per national procedural law, ex officio control can be exercised at the following stages of the procedure:

	Courts		Other dispute resolution facilitators	
	Possible to exercise ex officio control	Not possible to exercise ex officio control	Possible to exercise ex officio control	Not possible to exercise ex officio control
Ordinary proceedings	x		Consumer ADR proceedings	
Small claims				
Payment order	x		-	
Provisional measures	x		-	
Proceedings linked to enforcement				
Enforcement proceedings				
- Enforcement of payment order		X*		
- Enforcement of arbitration award		X*		
- Enforcement of mortgage		X*		
- Enforcement of notarial deed		X*		
Appeal proceedings (please specify:) In general appeals proceedings in Courts of	x			

appeal and in contested enforcement proceedings.				

*) There is no explicit provision giving enforcement officers the power to investigate these questions. Enforcement officers are hesitant to do so

9.2.4 What does ex officio control encompass in national procedural law?

An investigation of if a term in a contract is unfair under the Unfair Contract Terms Directive, including if it falls under the Directive.

9.3 Other procedural mechanisms for the equivalent and effective protection of EU consumer law

9.3.1 Does national procedural law provide that rules of EU consumer law (as well as rules that aim to satisfy EU consumer law objectives) should be understood as having equal standing to national rules of public policy (which is to say, that for the purposes of domestic law, the consumer protection provision is understood to have equal standing to a rule that must be raised ex officio by the national court)?

Neither EU consumer law or national consumer law have a formal status of public policy. At first sight, CJEU case law on the character of consumer rights as public policy seems to resonate with Finnish (and Nordic) civil law thinking and government policies.[164] CJEU seems to have embraced – at least to some extent – the idea of social contract law as it is formulated by Thomas Wilhelmsson[165].

From a Finnish perspective the doctrine of consumer law as public policy is a quagmire of unsolved issues. The concept of public policy as used by the CJEU seems unclear and it appears to be only partially congruent with national (civil procedural) concepts. The relationship between the two seems complex and raises countless questions including inter alia the following. Is "public policy" to be understood in the same way as ordre public? What is the relationship between "public policy" and mandatory rules? Should other categories of legal provisions protecting the weaker party, such as rules protecting the employee, be treated similarly? What is the relationship between "public policy" and principles of party proceedings in legal cultures based on adversarial civil proceedings? Does, and if so to what extent, the requirement of ex officio application of consumer law change the character of the proceedings to "inquisitorial" or to quasi-iurisdictio voluntaria type of proceedings rather than adversarial, party-driven proceedings? What is the relationship between ex officio application of law and the duty of the judge to act for clarification and to provide guidance? If the rules are different for the Unfair Contract Terms Directive (and certain parts of competition law) than for other law, will the result be fragmentation of national law, and if so what will the ramifications be? So far, these issues have not been thoroughly discussed in Finnish law. The scarcity of consumer law cases (and commercial cases) in general courts is an important reason for the lack of the discussion.

The Supreme Court case KKO 2015:60 (referred above at 2.3 and 11.1.1) demonstrates part of the complexity. The District Court and the Court of Appeal disregarded the provision on late payment interest, as it was grossly unfair, but did so relying on national law. Either these courts were not aware of CJEU case law on the obligation of national courts to apply the Unfair Contract Terms Directive ex officio, or they contended it was obvious that duties arising from CJEU case law corresponds to national law. The Supreme Court discussed the relationship between the

[164] A similar view is forwarded in the Danish National Report.
[165] Wilhelmsson, Thomas, *Social Contract Law and European Integration.* Aldershot, Darthmouth, 1995.

obligations arising from EU law and national law, and concluded the duty to apply the Directive is heightened compared to national law. However, the Supreme Court left a number of questions open, as the proceedings where simplified in the case and the unfairness of the terms was blatant.

9.3.2 If ex officio control is not possible in certain types of proceedings or at a certain stage of proceedings (or for any other reason), does national procedural law provide for an alternative way of assessing consumer protection law?

No it does not, other than to provide for a possibility of appealing or contesting enforcement. The Consumer Ombudsman may initiate investigations of unfair business practices.

9.4 Ex officio control in payment order procedures

9.4.1 What information is available to the judge when a claim for the issuance of a payment order is made? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a claim for the issuance of a payment order to be granted and b) for the court to engage in ex officio control before a payment order is issued?

There are, as explained above in section 8.4, no payment order procedures in Finland per se. However, there is a simplified procedure for uncontested pecuniary claims. The same rules apply to these cases as to other civil cases.

The main difference is that court officers, who are not lawyers, process simplified cases. The officers work under the supervision of a judge and must turn difficult cases to a judge. The intensity of scrutiny may be lower due to lack of legal education of the staff.

9.4.2 What considerations will be assessed ex officio by the court (or other competent authority) before a payment order is issued?

See above section 11.1.1.

9.4.3 How is the consumer informed about the claim to issue a payment order against him or her? Does national procedural law make any provision for steps to be taken to ensure that consumers are informed of the claim for the issuance of a payment order so that he or she can contest it?

The court issues a default judgment. The opposing party serves the default judgment. In practice, the consumer becomes (officially) aware of the default judgment during enforcement proceedings. The consumer may file for reopening of the proceedings. The proceedings will continue from the stage where the default judgment was issued. See above part II sections 2.3.3 and 2.3.6.

9.4.4 If the consumer objects to the claim, what is the next step? Do the proceedings continue, in the context of which ex officio control can be exercised? Or are the proceedings transferred to ordinary proceedings for analysis on the merits of the claim?

The proceedings continue as ordinary civil proceedings for an analysis on the merits.

European Commission
An evaluation study of the impact of national procedural laws and practices on the equivalence and effectiveness of the procedural protection of consumers under EU law

JUST/2014/RCON/PR/CIVI/0082

National Report – Consumer Protection Strand

France

Emmanuel Jeuland

FRANCE: LEGAL ANALYSIS

1. NATIONAL LEGISLATION IMPLEMENTING EU CONSUMER PROTECTION INSTRUMENTS

EU legislation	Transposing national legislation	Additional notes (e.g. if there is an overlap in application of legislation etc.)
Doorstep Selling Directive 1985/577/EEC	Loi n°72-1137 du 22 décembre 1972 RELATIVE A LA PROTECTION DES CONSOMMATEURS EN MATIERE DE DEMARCHAGE ET DE VENTE A DOMICILE Loi n° 89-421 du 23 juin 1989 relative à l'information et à la protection des consommateurs ainsi qu'à diverses pratiques commerciales Loi n° 89-421 du 23 juin 1989	La recodification récente fait disparaître la section sur le démarchage pour l'inclure dans une partie sur les contrats à distance et hors établissement.

	relative à l'information et à la protection des consommateurs ainsi qu'à diverses pratiques commerciales LOI no 95-96 du 1er février 1995 concernant les clauses abusives et la présentation des contrats et régissant diverses activités d'ordre économique et commercial (1) L312-52 code conso (délai de rétractation) LOI n°2010-737 du 1er juillet 2010 - art. 14 codified L121-9Article L221-1	
Package Travel Directive 90/314/EEC	LOI no 92-645 du 13 juillet 1992 fixant les conditions d'exercice des activités relatives à l'organisation et à la vente de voyages ou de séjours (1) Décret no 94-490 du 15 juin 1994 pris en application de l'article 31 de la loi no 92-645 du 13 juillet 1992 fixant les conditions d'exercice des activités relatives à l'organisation et à la vente de voyages ou de séjours Codifié code du tourisme Article L211-1 Les dispositions du présent titre s'appliquent aux personnes physiques ou morales qui se livrent ou apportent leur concours, quelles que soient les modalités de leur rémunération, aux opérations consistant en l'organisation ou la vente : a) De voyages ou de séjours individuels ou collectifs ; b) De services pouvant être	Article L231-1 code consommation • Créé par Ordonnance n°2016-301 du 14 mars 2016 - art. Pour l'application des articles L. 232-1, L. 232-2, L. 232-3 et L. 232-4, un lien étroit avec le territoire d'un Etat membre est réputé établi notamment : 1° Si le contrat a été conclu dans l'Etat membre du lieu de résidence habituelle du consommateur ; 2° Si le professionnel dirige son activité vers le territoire de l'Etat membre où réside le consommateur, sous réserve que le contrat entre dans le cadre de cette activité ; 3° Si le contrat a été précédé dans cet Etat membre d'une offre spécialement faite ou d'une publicité et des actes

	fournis à l'occasion de voyages ou de séjours, notamment la délivrance de titres de transport, la réservation de chambres dans des établissements hôteliers ou dans des locaux d'hébergement touristique, la délivrance de bons d'hébergement ou de restauration ; c) De services liés à l'accueil touristique, notamment l'organisation de visites de musées ou de monuments historiques. Les dispositions du présent titre s'appliquent également aux opérations de production ou de vente de forfaits touristiques, tels que ceux-ci sont définis à l'article L. 211-2, ainsi qu'aux opérations liées à l'organisation de congrès ou de manifestations apparentées dès lors que celle-ci inclut tout ou partie des prestations prévues aux a, b et c du présent article.	accomplis par le consommateur nécessaires à la conclusion de ce contrat ; 4° Si le contrat a été conclu dans un Etat membre où le consommateur s'est rendu à la suite d'une proposition de voyage ou de séjour faite, directement ou indirectement, par le vendeur pour l'inciter à conclure ce contrat. Règle de renvoi au code de tourisme prévu par l'ordonnance de recodification en 2016. Article L224-104 • Créé par Ordonnance n°2016-301 du 14 mars 2016 - art. Les règles relatives aux contrats de vente de voyages et séjours à forfait sont fixées par les dispositions du chapitre unique du titre Ier du livre II du code du tourisme.
Unfair Contract Terms Directive 1993/13/EEC	**LOI no 95-96 du 1er février 1995 concernant les clauses abusives et la présentation des contrats et régissant diverses activités d'ordre économique et commercial** **L212-1 L212-2 R212-1 R212-2 R822-22 code de la consummation ancient article L132-1**	
Distance Selling Directive 1997/7/EC	Ordonnance no 2001-741 du 23 août 2001 portant transposition de	

	directives communautaires et adaptation au droit communautaire en matière de droit de la consommation LOI n° 2001-1062 du 15 novembre 2001 relative à la sécurité quotidienne L221-1 à L221-4 ancien article L121-20	
Consumer Sales and Guarantees Directive 1999/44/EC	Ordonnance n° 2005-136 du 17 février 2005 relative à la garantie de la conformité du bien au contrat due par le vendeur au consommateur L217-1 L217-20 code de la consummation ancien article L211 s.	
Unfair Commercial Practices Directive 2005/29/EC	**LOI n° 2008-3 du 3 janvier 2008 pour le développement de la concurrence au service des consommateur** **L121-1 code de la consommatioin ancient article L122 et s.**	L442-6 code du commerce pour les actions concernant les pratiques déloyales par le ministère de l'économie et les societies victimes
Misleading and Comparative Advertising Directive 2006/114/EC	Abrogation de la directive 84-450.La date d'échéance de transposition de cette directive en droit interne par les Etats membres n'est pas précisée. La présente directive entre en vigueur le 12-12-2007. L122-1 à L122-7 code de la consummation ancient article L121 et s.	
Consumer Credit Agreement Directive 2008/48/EC	**LOI n° 2010-737 du 1er juillet 2010 portant réforme du crédit à la consummation** **L314-1 à L314-26 code de la**	

	consummation ancient article L311 et suivant	
Timeshare Protection Directive 2008/122/EC	LOI n° 2009-888 du 22 juillet 2009 de développement et de modernisation des services touristiques (1) Arrêté du 15 juin 2010 fixant le contenu des formulaires standards d'information relatifs aux contrats d'utilisation de biens à temps partagé, aux contrats de produits de vacances à long terme, aux contrats de revente, aux contrats d'échange et le contenu du formulaire standard de rétractation visant à faciliter le droit de rétractation L. 211-24. Code du tourisme renvoie au code de la consummation. L224-69 et L224-70 code de la consommation	
Consumer Injunctions Directive 2009/22/EC	La présente directive entre en vigueur le 29-12-2009. La date d'échéance de transposition de cette directive en droit interne par les Etats membres n'est pas précisée. Abrogation de la directive 98/27/CE elle-même transpose par Ordonnance no 2001-741 du 23 août 2001 portant transposition de directives communautaires et adaptation au droit communautaire en matière de droit de la consommation L621-7 à L621-8 code de la consommation	
Consumer Rights Directive	**LOI n° 2014-344 du 17 mars**	

2011/83/EU	**2014 relative à la consummation L111-1 à L111-8**	
ADR for Consumer Disputes Directive 2013/11/EU	LOI n° 2014-1662 du 30 décembre 2014 portant diverses dispositions d'adaptation de la législation au droit de l'Union européenne en matière économique et financière (1) Ordonnance n° 2015-1033 du 20 août 2015 relative au règlement extrajudiciaire des litiges de consommation Décret n° 2015-1382 du 30 octobre 2015 relatif à la médiation des litiges de la consommation Décret n° 2015-1607 du 7 décembre 2015 relatif aux conditions de désignation des médiateurs d'entreprises L611-1 à L616-3	

Source(s): Legifrance Lexisnexis (tableau de concordance Jcl Consommation distribution

It is considered to be coherent since there is a consumer Code. But some aspects closed to Consumer law may be codified in other codes (Insurance Code, Public Health Code, Tourism code etc.). But there are reference in the consumer code of these provisions.

Interview:

According to Ms Foucher, in practice, there is certainly some difficulty to coordinate the European construction within the national system. The main problem is the implementation of European instruments and their complementarity with the national system.

Techniques and mechanisms of the law system answer to a certain cultural conception and tradition of law (for instance, in Consumer Law French Law approach is the consumers protection as a priority).

Law world is influences by economic considerations and political organization. In this respect, in France the Administration is powerful and very present in citizens' activities).

Therefore, implementation and adaptation of the European directives requires an **administrative, economic and organizational restructure**. As a result, **enough time is an imperious need.**

The impact on the economic model is enormous to a certain extent. It commands a lot of time to implement law mechanisms and make them truly effective for consumers.

In this regard, companies must be included in that restructuration and must be economically engaged as to help the new model work.

Moreover, the Administration will also be compromised because a certain number of reforms may pass through the State.

Problems could be listed as follows:

- Number and clarity of the instruments
- Adaptation and functionality of the economic model
- Administrative restructure
- Imperious need of sufficient time
- Procedural different conceptions between Member States may be an additional difficulty as certain reforms are not adequate to the French model
- Each system has been organized considering a number of factors (political, economic, cultural) but the central priority may be the protection of the consumer.

The actual mechanism doesn't rightly guarantee consumers' protection. Today's consumer law is extremely complex.

1. CONCEPT OF THE CONSUMER

1.1 Please outline the concept of the consumer in national law, indicating whether it is intended to be a uniform concept, whether it has been legislated for and where it can found (i.e. in a legislative provision, governmental guidelines, case law etc.).

La recodification effectuée par l'ordonnance n°2016-301 a conduit à donner une définition du consommateur du non professionnel et du professionnel ce qui inclut au delà du droit européen l'agriculteur.

The consumer, the non professional person and the professional person were not defined in French law (N. Sauphanor-Brouillaud (dir), Traité de droit civil Les contrats de consummation, n°106, 2012) until recently (Statute 17 March 2014 modified by Ordinance 14 March 2016: Au sens du présent code, est considérée comme un consommateur toute personne physique qui agit à des fins qui n'entrent pas dans le cadre de son activité commerciale, industrielle, artisanale, libérale ou agricole). Is considered to be a consumer a natural

person who is acting for purposes, which can be regarded as outside his trade, business, craft, profession or agriculture.

Article Liminaire :« Pour l'application du présent code, on entend par :

- consommateur : toute personne physique qui agit à des fins qui n'entrent pas dans le cadre de son activité commerciale, industrielle, artisanale, libérale ou agricole ;
- non-professionnel : toute personne morale qui agit à des fins qui n'entrent pas dans le cadre de son activité commerciale, industrielle, artisanale, libérale ou agricole ;
- professionnel : toute personne physique ou morale, publique ou privée, qui agit à des fins entrant dans le cadre de son activité commerciale, industrielle, artisanale, libérale ou agricole, y compris lorsqu'elle agit au nom ou pour le compte d'un autre professionnel ».

There is a definition of non-professional: Legal entity who is acting for purposes, which can be regarded as outside his trade, business, craft, profession or agriculture.

The professional is a natural person or a legal entity who is acting for purposes, which can be regarded as inside his trade, business, craft, profession or agriculture, including when thus person is acting on behalf of another professional.

Source : Legifrance

AJ Contrats d'affaires - Concurrence - Distribution 2016 p.165

Le nouveau **code** de la **consommation** : saine réorganisation et nouvelles définitions

Yves Picod, Professeur à l'Université de Perpignan, responsable du Centre du droit de la concurrence Y-S (EA du CDED)

« La volonté de clarifier le champ d'application du **code** découle de nouveaux l'article préliminaire. Il a été utilement ajouté à la définition du consommateur, calquée sur le droit européen (« toute personne physique qui agit à des fins qui n'entrent pas dans le cadre de son activité commerciale, industrielle, artisanale ou libérale »), l'exclusion de l'activité agricole. Nous avions aussi déploré à la fois l'absence de définition du professionnel et surtout celle de non-professionnel, sachant qu'elle est fréquemment employée par des dispositions essentielles du **cod** (1).

Désormais, le professionnel est défini, à l'instar de la directive du 25 octobre 2011 (2) en y ajoutant, par effet miroir, l'agriculteur. Singularité du droit français permettant une application extensive du droit de la **consommation** au-delà de la conception européenne, le non-professionnel est aussi défini. Les dispositions préliminaires s'harmonisent ainsi avec le contenu du **code** .

Cependant, la définition du non professionnel étonne un peu, car elle est, au moins en apparence, à la fois restrictive et extensive. Elle vise en effet « toute personne morale qui agit à des fins qui n'entrent pas dans le cadre de son activité commerciale, industrielle, artisanale, libérale ou agricole ». En réalité, la restriction à la seule « personne morale » n'empêchera sans doute pas la personne physique qui agit sans rapport direct avec son activité professionnelle de revendiquer la qualité de consommateur.

En revanche, la jurisprudence semblait vouloir limiter l'extension aux personnes morales n'exerçant pas d'activité

professionnelle ou dépourvues d'activité lucrative (comités d'entreprise, syndicats de copropriétaires (3)...). Or, la définition choisie est beaucoup plus large, à l'image du modèle espagnol. Elle conduira sans doute à une extension du champ d'application du **code** de la **consommation** : peu importe désormais que la personne morale exerce une activité lucrative ou non ; à l'instar des professionnels personnes physiques, le seul critère s'apprécie au regard de la finalité professionnelle de la transaction.

Pour autant, on sait que l'extension est rarement retenue depuis que la jurisprudence consacre le critère du « rapport direct ». Cependant, pour écarter une clause de plafonnement, un arrêt récent rendu par la troisième chambre civile

(4) semble prendre un chemin différent en réintroduisant le fameux critère de compétence, mais par une application discutable : le promoteur immobilier ne serait pas compétent en matière de construction ! Toutefois, on doute que cet arrêt remarqué et publié(5) fasse jurisprudence, malgré une conception extensive du champ d'application du droit de la **consommation**, pourtant dans l'air du temps... »

Regards croisés sur la réforme de la partie législative du Code de la consommation
Etude par Sabine BERNHEIM-DESVAUX
maître de conférences HDR à l'université d'Angers
et Guy RAYMOND
professeur honoraire de la faculté de droit et des sciences sociales de Poitiers
Définitions de l'article liminaire

“13. - La loi du 17 mars 2014 avait introduit dans le Code de la consommation une définition du consommateur, reprise de la Directive 2011/1983/UE, mais jugée non satisfaisante par la doctrine. L'article liminaire du nouveau Code définit désormais les trois acteurs du droit de la consommation : le consommateur, le non-professionnel et le professionnel. Ces trois définitions ont un socle commun, la référence aux activités professionnelles ; elles ont cependant leur particularisme qui permet de distinguer ces trois catégories d'acteurs.
Le socle commun est constitué par la référence à une activité professionnelle et par l'énumération des activités professionnelles, exercées ou non par l'acteur considéré. Selon que l'on envisage le consommateur, le non-professionnel ou le professionnel, il agit ou n'agit pas « dans le cadre » de l'une des activités énumérées. Cette expression « dans le cadre » posera certainement des questions d'interprétation aussi difficiles que celle de « lien direct » de l'ancien Code[Note 52]. On peut souhaiter que la Cour de cassation ne laisse pas aux juges du fond un pouvoir souverain d'appréciation, comme elle l'a fait pour le « lien direct », mais qu'elle unifiera la jurisprudence sur le sens à donner à cette expression. Cette activité peut être « commerciale, industrielle, artisanale, libérale ou agricole ». L'énumération des activités trouve son origine dans diverses directives européennes, dont celle de 1983 avec une différence capitale : l'activité agricole est visée dans l'article liminaire alors qu'elle ne l'est pas dans les textes

européens et qu'elle ne figurait pas dans l'article préliminaire introduit par la loi du 17 mars 2014. On ne peut, évidemment, que se féliciter de cette référence à l'activité agricole car la question était posée de savoir si les entreprises agricoles relevaient ou non du droit de la consommation[Note 53]. En effet, le Ministre avait déclaré, en réponse à une proposition d'amendement d'un député : « omettre l'adjectif « agricole », ce n'est pas exclure les agriculteurs de la définition du consommateur, au contraire, c'est les y inclure »[Note 54]. On mesure donc ici, l'audace des rédacteurs du nouveau code qui vont à l'encontre d'une déclaration ministérielle au cours des débats parlementaires et au-delà des directives européennes.

La question reste pendante en ce qui concerne le client de certaines professions libérales, (médecin, avocat en particulier). Ce client est-il ou non un consommateur ? Le renvoi au Code de la santé publique par l'article L. 224-105 ne résout pas la question car il ne permet que de dire que le contrat conclu entre le professionnel de santé et son client n'est pas un contrat de consommation. En revanche, l'article L. 611-4 permettrait de dire que les clients des professions de santé ne relèvent pas du droit de la consommation car il énonce que « ne sont pas considérés comme des litiges de consommation, les services de santé fournis par des professionnels de la santé aux patients pour évaluer, maintenir ou rétablir leur état de santé, y compris la prescription, l'administration et la fourniture de médicaments et de dispositifs médicaux ». On peut souhaiter que la jurisprudence de la cour d'appel de Paris, qui refuse de considérer les clients des médecins comme des consommateurs[Note 55], devienne la norme en la matière car les services rendus par certaines professions libérales, notamment les médecins et les avocats, ne relèvent pas du secteur marchand. Les clients ne doivent donc pas être considérés comme des consommateurs.

S'il y a ce socle commun, les différenciations subsistent. Il n'y a rien à dire de nouveau par rapport au consommateur puisque la définition est identique à la précédente, hormis la référence à l'activité agricole. En revanche, le texte nouveau fait apparaître une définition du non-professionnel et une définition du professionnel. En ce qui concerne le non-professionnel, on ne peut que se féliciter de la distinction qui est opérée entre le consommateur et le non-professionnel. Les textes antérieurs laissaient planer le doute sur une différenciation ou une synonymie entre les mots consommateur et non-professionnel. L'emploi de conjonctions différentes (ou, et) ne clarifiaient pas le débat. On sait désormais que les non-professionnels sont des personnes différentes des consommateurs, les premiers sont des personnes morales, les seconds des personnes physiques. Ainsi, la définition interne du consommateur est-elle conforme aux directives européennes même si le droit national étend certains articles du Code à des personnes morales ce qui est possible au regard du droit communautaire. Pourtant, on aurait souhaité que les rédacteurs soient plus audacieux encore en supprimant[Note 56] cette catégorie d'acteurs du droit de la consommation qui brouille la perception que l'on peut avoir du droit de la consommation : alors que le consommateur est une personne physique, certains articles du code s'appliquent à des personnes morales. Cette suppression des non-professionnels n'aurait pas été plus audacieuse et certainement plus positive que celle qui a consisté à abroger l'ancien article L. 141-4, véritable trophée des juges d'instance, et de ceux qui les avaient soutenus, dans leur lutte contre l'interprétation de la notion d'ordre public donnée par la Cour de cassation[Note 57].

Enfin, en ce qui concerne le professionnel, il faut simplement faire remarquer que le terme utilisé apparaît plus comme un terme générique que comme un terme précis. En effet, lorsqu'il s'agira de prendre en compte une fonction plus spécialisée, les mots se feront plus précis (fabricant, producteur, distributeur, vendeur). Il faut aussi regretter que le professionnel puisse être une personne morale de droit public, peut-être aurait-il été plus judicieux d'utiliser l'expression d'établissement public à caractère industriel ou commercial”.

Source(s):

2. REGULATORY AUTHORITIES COMPETENT FOR CONSUMER PROTECTION ISSUES

2.1 What regulatory authorities, if any, are competent for enforcing consumer protection law? Please identify them, their nature (i.e. whether they are public or private or mixed) and the nature of enforcement.

The regulatory authorities are competent for the enforcement of consumer protection issues and their nature

The ministry of economy is competent for the enforcement of consumer protection: DGCCRF Direction Générale de la Concurrence, de la Consummation et de la Repression des Fraudes (Directorate General on Competition, Consumer Law and Fraud).

INC National institute of consumer law, information, broadcast TV, review.

Interview:

According to Ms Foucher, other regulation authorities may influence indirectly through their activity. These are for example:

- The competition Authority (Autorité de la concurrence)
- The Commission with special responsibility for energy (commission régulation de l'énergie)
- The electronic communications Authority (l'ARCEP; autorité de régulation des communications électroniques et des postes)
- The financial markets regulation Authority (autorité de marchés financiers)
- The prudential supervisory Authority (l'ACPR; Autorité de contrôle prudentiel et de résolution)

In a certain degree, also the Center for French studies of Contemporary China (CECMC; Centre d'études sur la Chine moderne et contemporaine) may have a non-direct influence.

Finally, some websites, such as the Assurance Banque épargne information pôle commun ACPR/AMF, are directly conceived for the exclusive information of consumer. Therefore they might have in impact on this matter.

2.2 Is there a specific venue for this type of enforcement and does this limit the jurisdiction of courts/ADR fora (even if only initially)?

Il est possible pour un consommateur de contacter la Boîte postale 5000 du département, s'il en existe une cette instance de concertation entre consommateurs et professionnels, créée par les pouvoirs publics, existe dans plusieurs départements. Elle confie le dossier à une association de consommateurs ou à un organisme professionnel qui tentera de trouver une solution.

Son intervention est gratuite. Adressez le dossier à la BP 5000 du département où se trouve le professionnel (BP 5000 + code postal du chef-lieu : par

exemple 75000 PARIS, existe dans quasiment tous les départements.

Pour les sujets complexes, le **3939** met en relation avec Info service consommation (service de la DGCCRF). Mais pas un avis sur dossier, des informations seulement.

2.3 Can criminal prosecutions be initiated for violations of consumer protection rules? How serious must the infringement be? What are the penalties and sanctions? And might these prosecutions lead to criminal penalties or sanctions? Can individual consumers piggy back on these claims (e.g. via a partie civile method)?

Oui des procedures pénales sont possibles et le consommateur peut se porter partie civile. Les associations de consommateurs initie quelques une de ces actions quand elle porte atteinte à l'intérêt collectif des consommateurs, L621-6. IL n'existe pas de seuil de gravité mais les dommages et interest sont toujours très faibles. La these de Boré il y a une vingtaine d'années recensait moins de 1000 actions de ce type par an.

L'action publique peut être engage par le parquet quand l'atteinte au consommateur est une infraction pénale pour sanctionner l'atteinte ou et y mettre fin. Le parquet est informé par les enquêteurs de la DGCCRF. Dans le nouveau code de la consummation les sanctions ont été regroupées aux articles

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Interview:
Recently, consumer law was impact by a particular national reform; this is the Act nº 2014-344 of 17 Mars 2014 (known as "Loi Hamon").

For Ms Foucher, this legislation has notably developed the sanctions' regime. A great number of infractions are no longer subject to penal sanction but fall under the administrative order. Thus, confidentiality is at stake at the expense of consumer law's transparency.

2.4 Is there judicial review of decisions of consumer regulatory authorities? If so, by which court is this judicial oversight made? Is the forum an ordinary or a specialised court or tribunal?

Selon l'article L522-1 du code de la consummation "L'autorité administrative chargée de la concurrence et de la consommation est l'autorité compétente pour prononcer les amendes administratives sanctionnant les manquements aux dispositions mentionnées aux articles L. 511-5, L. 511-6 et L. 511-7 et l'inexécution des mesures d'injonction relatives à des manquements constatés avec les pouvoirs mentionnés aux mêmes articles." S'agissant de decision administrative un recours est possible devant le tribunal administrative competent.

2.5 Does the national legal system provide for a mechanism of cooperation between its national regulatory authorities and those of other Member States?

En cas de litige, transfrontière la direction générale de la concurrence, de la consommation et de la répression des fraudes a chargé certaines de ses directions régionales d'établir des relations avec les organismes de défense des consommateurs, ainsi qu'avec leurs homologues des différentes administrations, pour un certain nombre de pays

européens : **Allemagne – Autriche direction de** Strasbourg ; **Belgique, Royaume Uni Irlande direction de Lille** ; **Danemark - Finlande - Norvège- Suède direction de Paris ; Espagne direction de Montpellier ; Italie – Grèce direction de** MARSEILLE ; **Portugal direction de bordeaux ; Pays-Bas – Luxembourg, direction de Metz ; Suisse direction de Lyon.**

Source(s): J Calais-Auloy et F Steinmetz, Droit de la consummation, 9°, Dalloz, 2015
Coralie Ambroise-Castérot, La **recodification** 2016 du **code** de la **consommation**... ou le chemin de croix du pénaliste, AJ Pénal 2016 p.374
Site de la DGCCRF.

3. LEGAL AID

3.1 Is legal aid available to consumers in: a) bringing a claim and b) defending a claim before a court?

Oui c'est possible mais rare en pratique car ce sont les règles ordinaires qui s'appliquent. Pour recevoir une aide totale il faut avoir moins de 1000 euros de revenue par mois et pour une aide partielle 1500 euros. Loi du 10 juillet 1991, article 10

3.2 For what kinds of disputes and actions is legal aid available? (NB: legal aid might not be available for consumer or contractual disputes but be available instead for a related action, e.g. actions relating to debt, mortgage arrears, eviction etc.)

IL n'y a pas de condition de matière, l'aide juridictionnelle peut être obtenue en toute matière contentieuse ou gracieuse, devant un tribunal ou avant pour parvenir à une transaction.

3.3 What requirements must be satisfied for the consumer to be entitled to legal aid? Please specify if there are any additional limitations to its availability.

- être une personne physique
- remplir les conditions de revenue v 5.1
- pour le demandeur l'action ne doit pas apparaître manifestement irrecevable ou dénuée de fondement art 7 L 10 juil 1991 et devant la Cour de cassation si aucun moyen sérieux est relevé l'aide est refuse.

3.4 What does legal aid encompass? (i.e. (only) general advice, (only) assistance in preparing the case, (only) assistance with negotiation of settlements, (also) representation).

Tous les frais afferents aux instances (frais de procedure, d'avocat, etc.), mais si le bénéficiaire est condamné aux dépens il doit en principe les payer (mais le juge peut decider de laisser une partie des dépens à l'Etat art 42°) et peut même avoir à rembourser une fraction des fraix exposés par l'ETat art 42

Interview:
According to Ms Foucher, legal aid is not as much demanded as insurance of legal protection (assurance de protection juridique). The issue in this matter is whether consumers count or not with this kind of information. Which are the tools they dispose with in order to be well informed?

Source(s): Cadiet et Jeuland, Droit judiciaire privé, 9° éd. LexisNexis, n°53 s.
Guinchard, Ferrand, Chainais, Dalloz 33° éd. 2016, n°246 s.

4. COSTS

4.1 What are the costs of different types of procedures before courts? Are there exemptions to the payment of fees and expenses? How can costs be paid?

Le principe est la gratuité de la justice Loi du 30 déc. 1977.

Dépens montant indispensable au process et tarifé art 695 CPC frais de traduction, remuneration des experts, emoluments des officiers publics ou ministrériales remuneration des avocats réglementée (un droit fixe d'environ 6 euros + un droit proprotionnel 3 % si moins de 1000 euros) frais d'une notification international, enquête sociale, à la charge du perdant, assez proche de la notion de court fees.
Autres frais non juridiquement indispensable honoraires d'avocat si representation non obligatoire, restent à la chage des plaideurs, comprend les court expenses les frais d'avocat (sauf frais de representation).
Sauf art 700 le juge peut condemner une partie à payer ces autres frais en raison de l'équité.

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Court fees	6 euros + 1 à 3 % pour l'avocat Un droit d'appel 225 Euros	6 euros + 0,25 % pour l'vocat	idem	Pas de particularité	idem	idem
Court	Pas de	Pas de	idem	idem	idem	idem

expenses	barème	barème				
Exemptions						

Source(s): Cadiet et Jeuland, Droit judiciaire privé, 9° éd. LexisNexis, n°46 s.
Guinchard, Ferrand, Chainais, Dalloz 33° éd. 2016, n°246 s.

5. STANDING AND REPRESENTATION IN CONSUMER DISPUTES

5.1 Does national law limit the standing of the individual consumer in respect of the claim that can be made and the forum before which it can be brought?

Comme tout justiciable le consommateur doit avoir intérêt et qualité pour agir en justice (art 32 CPC).

5.2 Other than individual consumers, who or which bodies have standing in consumer protection disputes and for what types of claim? If the action is not brought by the individual consumer, what requirements of representation must be satisfied?

Action dans l'intérêt collectif de l'association agrée, elle a qualité à agir si elle est agréée, elle doit être déclarée en préfecture puis recevoir un agrément, elle doit être représentative (plus d'un an d'existence, publication et permanence effectives, au moins 10000 cotisants au plan national), avoir pour objet la défense du consommateur. L'agrément est un arrêté ministériel. L'association peut exercer une action civile aux faits qui portent un préjudice direct ou indirect à l'intérêt collectif des consommateurs art. L621-1 code de la consommation Article L621-1 "Les associations régulièrement déclarées ayant pour objet statutaire explicite la défense des intérêts des consommateurs peuvent, si elles ont été agréées à cette fin en application de l'article L. 811-1, exercer les droits reconnus à la partie civile relativement aux faits portant un préjudice direct ou indirect à l'intérêt collectif des consommateurs".
L'action en cessation agissement illicite Article L621-7 : "Les associations mentionnées à l'article L. 621-1 et les organismes justifiant de leur inscription sur la liste publiée au Journal officiel de l'Union européenne en application de l'article 4 de la directive 2009/22/ CE du Parlement européen et du Conseil du 23 avril 2009 modifiée relative aux actions en cessation en matière de protection des intérêts des consommateurs, peuvent agir devant la juridiction civile pour faire cesser ou interdire tout agissement illicite au regard des dispositions transposant les directives mentionnées à l'article 1er de la directive précitée". L'intérêt collectif est l'intérêt commun à un ensemble de consommateurs.. Cette action peut conduire à la suppression d'une clause abusive L621-8 code de la consummation.

5.3 If a consumer wants to bring or defend an action relating to a consumer protection dispute, is there a legal (or otherwise formal) requirement that he or she has legal representation? Please specify for both judicial and ADR fora and the bodies, associations or authorities that can provide this representation.

Pas vraiment de condition spécifique. Devant le tribunal d'instance et le juge de proximité, la représentation n'est pas obligatoire mais il est possible d'être représenté par un avocat sans pouvoir spécial et avec un pouvoir spécial par son conjoint qui peut être un concubin, parent allié en ligne directe ou collatérale, une personne morale de droit public, une personne attachée à son service art. 827 et 828 CPC.

Il existe un mécanisme de représentation conjointe au bénéfice des actions agréées de consommateur v.7.2 quand plusieurs consommateurs ont subis le même préjudice du fait d'un même professionnel, il faut au moins deux mandats de consommateurs.

Article R622-1 et s.

« Les consommateurs qui, sur le fondement des dispositions de l'article L. 622-1, entendent demander réparation des préjudices qui ont été causés par le fait du même professionnel et qui ont une origine commune peuvent donner à une association nationale agréée de consommateurs, en application de l'article L. 811-1, le mandat d'agir en leur nom devant les juridictions civiles, dans les conditions fixées par le présent chapitre. Sauf convention contraire, le mandat ainsi déterminé ne comporte pas devoir d'assistance ». Il n'y a eu que 10 actions de ce type depuis sa création en 1992 car c'est assez compliquée et engage la responsabilité de l'association qui n'a pas un gros budget.

Interview:

According to Ms Foucher, the general impression is that consumers don't tend to have legal representation. Before the juge de proximité consumers may defend themselves alone. As to the ADR proceedings the tendency is similar.

Source(s): J Calais-Auloy et F Steinmetz, Droit de la consummation, 9°, Dalloz, 2015.
Cadiet et Jeuland, op. cit., n°907., 384.

6. ACTIONS BEFORE COURTS

6.1 Jurisdiction and competence of the courts in consumer disputes: General structure and special procedures aimed at protecting consumers

6.1.1 Are ordinary courts competent to hear such claims? Is there also a specialised tribunal for consumer protection disputes?

Non pas de tribunal spécialisé mais le tribunal d'instance est compétent pour toutes les actions dont l'enjeu inférieur à 10000 euros, compétent en matière de tutelle mais aussi de contentieux général dont les small claims, les crédits à la consommation. Le juge de proximité compétent lorsque l'enjeu est inférieur à 4000 euros. Il peut aussi arriver que le TGI soit compétent si l'enjeu du litige de consommation est supérieur à 10000 euros et pour les actions de groupe.

Article R631-1 "Les litiges civils nés de l'application du présent code relèvent, lorsque le montant de la demande n'excède pas le taux de compétence en dernier ressort du tribunal d'instance, des règles relatives à la saisine simplifiée du tribunal d'instance fixées par les articles 843 et 844 du code de procédure civile".

6.1.2 Which courts are competent to hear consumer protection disputes at first instance and in appeals? Please specify the court, in light of the value of the claim (and identify any other factors that are relevant in allocation jurisdiction).

En appel la cour d'appel de droit commun est compétente.

6.1.3 What is the nature of the procedure at first instance, e.g. is it a simplified or a summary procedure, and is there an assessment of the merits? Please specify in light of the value of the claim (and identify any other factors that are relevant in allocating jurisdiction).

C'est une procédure ordinaire mais il existe un mode introductif d'instance simplifié qui est la déclaration au greffe (évite l'assignation envoyée par un huissier) créé par la loi du 4 mars 1988 art 843 et 844 CPC en dessous de 4000 euros, elle est peut utilisée par les consommateurs.

6.1.4 Please identify the formal requirements that must be satisfied for a consumer dispute to be heard before a court. These might include time limits applicable to the filing of the action/defence, representation requirements etc.

Il n'y a pas de délai de prescription particulier sauf pour une action qui porte sur un crédit à la consommation (délai de forclusion Article R312-35 : "Le tribunal d'instance connaît des litiges nés de l'application des dispositions du présent chapitre. Les actions en paiement engagées devant lui à l'occasion de la défaillance de l'emprunteur doivent être formées dans les deux ans de l'événement qui leur a donné naissance à peine de forclusion. Cet événement est caractérisé par…".

6.1.5 In respect of the claims and relevant procedures available in the national legal system, what kind of relief might be available in consumer protection disputes? (monetary remedies, injunctions, skimming off etc.)?

Nothing specific: monetary remedies, performance of the contract. There is an a référé injunction de faire to oblige a professional to perform a contract (peu utilise). Une rétractation est possible dans le délai de 7 jours en cas de contrat conclu hors établissement. Une clause abusive peut être considérée comme non écrite.

6.1.6 Please provide a brief overview of the role of parties and judges in civil proceedings generally (e.g. with reference to the principle of party disposition, the obligation of parties to make and prove factual allegations and to make and provide legal arguments, the possible role of the court). This overview should be brief; these issues will be dealt with in more detail in the questions that follow.

Interview:

French civil procedure is hybrid. It is neither totally inquisitorial nor completely adversarial. The principle remains the neutrality of the judge. However, **as far as the procedural social function is concerned the judge may be interventionist in the proceedings**.

Some reforms tended to increase judge interventionism, but these reforms are limited and **not specifically to the consumer protection matter**.
For instance, procedural interventionism may lead to the discovery of facts, which could be the basis of substantial reasoning of the judge. In this regard, Article 7 al. 2 CCP authorised the judge to take into account facts that had not been introduced or substantiated by the parties.
This same situation is for civil and consumer judges.

Source(s):

6.2 Small claims

6.2.1 Does a small claims procedure exist in the Member State? If yes, is it a specialised or simplified procedure?

Not a specialized procedure, le juge de proximité est competent en dessous de 4000 euros et le tribunal d'intsance en dessous de 10000 euros mais cela ne concerne pas seulement le droit de la consummation mais toutes les affaires.

6.2.2 What are the value thresholds for claims brought under the small claims procedure? Moreover, are there any other factors that shape the use of the small claims procedure (including the nature of the claim, the area of consumer protection law into which the claim falls etc.)?

See previous question

6.2.3 What forms must be completed to raise the application? Who assists the consumer in completing these forms?

Nothing specific

6.2.4 How can an application for a small claim be made (e.g. online, by post or in person)?

By post or in person for the declaration au greffe qui est un acte introductif d'instance simplifié qui n'existe que devant le Tribunal d'instance et le juge de proximité mais non spécifique à la consummation.

6.2.5 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

Nothing specific.

6.2.6 Are the costs of the successful party reimbursed?

Nothing specific see part on cost
Except that if the professional is condemned all the expenses of enforcement may be paid by the professional on the basis of equity : Article R631-4 code de la consommation

« Lors du prononcé d'une condamnation, le juge peut, même d'office, pour des raisons tirées de l'équité ou de la situation économique du professionnel condamné, mettre à sa charge l'intégralité des droits proportionnels de recouvrement ou d'encaissement prévus à l'article L. 111-8 du code des procédures civiles d'exécution ».

Source(s): Cadiet et Jeuland, op. cit., n°915.

6.3 Claims other than small claims

6.3.1 If a consumer protection dispute does not qualify as a small claim, what other procedures are available? What are the value thresholds and other factors determining the use of such procedures?

Nothing specific if more than 10000 the civil high court has jurisdiction.

6.3.2 How can such claims be made? Please specify if the applications can be made online, or by post or in person.

A normal complaint (assignation) served by a bailiff.

6.3.3 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

Nothing specific

6.3.4 Are the costs of the successful party reimbursed?

Except that if the professional is condemned all the expenses of enforcement may be paid by the professional on the basis of equity : Article R631-4 code de la consommation

Source(s): legifrance

6.4 Claims for the issuance of a payment order

6.4.1 Does an order for payment procedure exist in the national system? Is it a simplified procedure?

There is a payment order in front of the “tribunal d’instance” not only for consumer law. Art 1405 à 1425 pour toute créance don’t le montant est determine, le tribunal d’instance est competent en dessous de 10000 euros et le tribunal de grande instance au dessus de 10000 euros. Le juge du lieu ou demeure le débiteur est competent. Il y a environ 450000 procédures d’injonction de payer par an au niveau du tribunal d’instance.

6.4.2 Which authorities or courts are competent to hear claims for the issuance of payment orders?

see above

6.4.3 Are there any formal requirements that must be satisfied for the application for the issuance of a payment order to be made (e.g. standard forms, representation by a lawyer, the detail of description required, the need to provide written evidence etc.)?

Il faut envoyer une requite au greffe avec les documents justificatifs, le décompte des sommes dues et le fondement de la créance 1407 CPC

6.4.4 What information is generally available to the authority or court when a claim for the issuance of a payment order is made?
Les documents justificatifs et la requête

6.4.5 What opportunity is available for a defence/statement of opposition to be advanced? How should this be done and what is its effect? Please specify if the means of advancing a defence differ depending on the value of the claim and the court dealing with it.
Le débiteur peut faire opposition dans le délai d'un mois puis un débat contradictoire est ouvert, la procedure est orale donc le débiteur doit comparaître et exposé tous es moyens de defence.

6.4.6 What is the effect if the claim is uncontested, i.e. if there is a lack of defence/statement of opposition?
Après l'opposition su le défendeur ne comparaît pas le tribunal fait droit à la demande du créancier que si elle parait régulière et bien fondé .

6.4.7 If the defendant is a consumer, and he or she does not respond to or raise an objection to the issuance of the payment order, does the authority dealing with the claim for payment order proceedings have the power to examine any issue of consumer protection law of its own motion before treating the action as usual?
Nothing specific in consumer law.

6.4.8 What steps must the pursuer take in order to obtain an enforceable decision?
Le créancier demande que la formule exécutoire soit oppose sur l'ordonnance d'injonction de payer dans le mois qui suit l'expiration du délai d'opposition d'un mois, toutes les voies d'exécution sont alors envisageables.

6.4.9 Is this decision final, or can the defendant appeal against it?
Final no appeal art 1422 CPC

Source(s): Cadiet et Jeuland, op. cit., n°922-926

6.5 Appeals in consumer disputes

6.5.1 Are appeals possible in all consumer disputes? Please specify for small claims and other types of claims.

Pas de règles spécifiques en matière de droit de la consummation, le juge se pronounce en dernier resort en dessous de 4000 euros.

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Nature of the procedure at 1st instance	No appeal until 4000 euros	appeal	appeal			
2nd instance – appeal to?	no	no	no			
3rd instance – appeal to?	Cassation is available for all judgments de dernier ressort	Cassation	Cassation			

6.5.2 Please briefly specify the national appeal procedure, including any requirements to be satisfied for appeals. These might include, but are not limited to, conditions of admissibility, value thresholds, time-limits, the scope of review, and the impact of the appeal on enforcement (provisional enforcement). Please refer to any rules specifically applicable in respect of the claims and relevant procedures outlined above.
IL faut faire une declaration d'appel dans le délai d'un mois qui suit la notification du jugement de première instance. Puis l'appelant à 3 mois pour deposer ses conclusions et l'intimé à 2 mois. Si ces délais ne sont pas respectés la demande est irrecevable.

Source(s): Cadiet et Jeuland, n°970 s.

6.6 Enforcement in consumer disputes

The CJEU has identified a number of situations concerning the enforcement stage of consumer protection disputes in which the effective and equivalent protection of EU consumer rights may be affected by national procedural rules. These include – in relation to the effectiveness and equivalency of the protection afforded by the Unfair Contract Terms Directive, for example – the enforcement of arbitration awards, the enforcement stage in the recovery of consumer credit and the enforcement of mortgages, which often links together declaratory and enforcement proceedings. As such, we focus on these situations below. However, other problematic situations exist. Please indicate if additional (and potentially problematic) situations are identifiable in your national legal system.

Moreover, if possible, please provide the reference/citation of an article that provides an overview of the way in which enforcement operates in relation to consumer protection disputes within your national legal system.

6.6.1 If the assessment of a consumer protection issue has not been possible at an earlier stage of the proceedings, is it always possible – either ex officio (see section 10 below) or if the consumer raises a possible violation of consumer protection law – for this assessment to be undertaken during enforcement proceedings?

Il n'y a pas de règles spécifiques au droit de la consommation. Il appartient au juge de l'exécution de déterminer le montant de la créance servant de cause à la saisie lorsqu'il n'est pas arrêté de manière précise dans le titre exécutoire. cass. 2° civ., 2&1 mars 2002, n°00-18657 . De même en cas d'exécution d'un remboursement de prêt alors que le prêt n'a pas été utilisé, le juge de l'exécution se prononce également sur une exception de compensation. Le fondement est l'article R 121-14 du code de procédures civiles d'exécution « le juge de l'exécution statue comme juge du principal ».

6.6.2 In the particular case of consumer protection, if a court examines consumer protection law (either ex officio or on the basis of an argument advanced by the consumer), does national procedural law provide that interim measures should 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 final decision will have full effect?

Cela existe pour les clauses abusives pendant le temps où la commission des clauses abusives est saisie. Article R822-2 code de la consummation "La commission peut être saisie pour avis lorsque, à l'occasion d'une instance, le caractère abusif d'une clause contractuelle est soulevé.
Le juge compétent demande à la commission, par décision non susceptible de recours, son avis sur le caractère abusif de cette clause tel que défini à l'article L. 212-1. L'avis ne lie pas le juge.
La commission fait connaître son avis dans un délai maximum de trois mois à compter de sa saisine.
Il est sursis à toute décision sur le fond de l'affaire jusqu'à réception de l'avis de la commission ou, à défaut, jusqu'à l'expiration du délai de trois mois susmentionné. Toutefois, les mesures urgentes ou conservatoires nécessaires peuvent être prises".

Source(s): Cayrol, Droit de l'exécution, 2° éd. 2016 Montchrétien, n°608.

7. ACTIONS FOR COLLECTIVE REDRESS

The CJEU has considered that situations in which individual and collective actions are in some way linked are those in which the effective and equivalent protection of EU consumer rights may be affected by national procedural rules. As such, we will focus on these situations. However, other problematic situations exist. Please indicate if additional (and potentially problematic) situations are identifiable in your national legal system.

Moreover, if possible, please provide the reference/citation of an article that provides an overview of the way in which the collective redress mechanism operates within your national legal system.

7.1 Injunctive relief, linking individual and collective actions

The French class action lawsuit called “action de groupe” was instituted by means of a statute of 17th March 20147. Only organizations representing consumers (16 of these are listed) may bring an action against a company exclusively on grounds pertaining to consumer law or competition law. The civil high courts have jurisdiction in such cases. They decide on the liability of the company and order the publication of the judgment so that the interested consumers may join the class action. This is only possible with respect to consumer law issues regarding financial damages as opposed to issues of bodily harm (in his case the consumer has to bring his action himself). When a judgment on liability is rendered against the defending company, the consumer association informs the consumers of this decision. Each consumer may decide to join the suit and get a part of the damages. This class action is a substitutive action until the consumer decides to join, then the association represents the consumer. The judgment has res judicata effects on each consumer who decided to join the group. A new class action on the same grounds is not admissible (L. 623-30 Consumer Code). At the same time, the association remains the main party during all the proceedings since there are always victims who do not join. A first class action was brought against a real estate agency that had over-billed numerous clients in 2014 (there are 6 pending class actions in March 2016). The statute of the 26th of January 2016 created the same kind of class action in health law (one of the main differences is that more that 400 associations can bring the action).

The case law of the CJEU requires that a person or organisation with a legitimate interest in consumer protection must be able to bring an action before a national court or tribunal in respect of an alleged violation of consumer rights deriving from Union law, either for compensation or for injunctive relief, to preclude the continued violation of consumer rights[166].

Article L621-9 provides an action to compensate damage, which is not a penal misdemeanour. The consumer association may join the procedure.

According to Article L621-1 (and following) the consumer associations may bring a criminal action in the collective interest. They can request that a unfair clause is deemed to not exist.
An “astreinte” (penalty payment) may be ordered by the court to force a party to comply with the consumer code and to delete the unfair and illegal terms in consumer contracts (Article L621-5 and L621-6).

7.1.1 If collective proceedings are launched, does national procedural law provide that ongoing individual claims, relating to the same dispute, should be stayed until the collective proceedings are brought to an end? Please specify if this constitutes an obligation on the part of the national judge or if it is at his or her discretion.

[166] This derives from the EU directives. For example, in respect of the UCTD, Art.6(1), Art.7(1) and (2) UCTD, provide that the Member States must ensure 1) that unfair terms are not binding on the consumer and 2) that adequate and effective means exist to prevent the continued use of unfair terms in consumer contracts. The CJEU has held that effective implementation requires that the consequence of the finding of the violation – in the case of a finding of unfairness under the UCTD – is for the term to be declared invalid, and that the effect of this invalidity extends not only to the parties to the action for an injunction but also to those who have concluded a contract with the seller/supplier to which the same terms apply.

No the individual claim is autonomous but the judge can discretionary stayed a consumer proceeding. In practice there is often an individual claim and a collective claim made by a consumer association, which intervenes in the proceedings. They are adjudicated at the same time.

7.1.2 If individual proceedings are stayed, please indicate what the effect of the court or ADR entity's decision in the collective action on those individual proceedings would be, i.e. whether the outcome of the collective action binds the consumer bringing an individual action.

If there has been a collective action (in the collective interest), the judgment has a res judicata effect. The judgment may be considered as "truth" for the subsequent individual procedure (issue preclusion). But if there are a collective action and an individual action at the same time, the risk is to end with two contradictory judgments. In this situation, the Court of cassation can solve the conflict (art. 618 CCP).

Source(s):

8. CONSUMER ALTERNATIVE DISPUTE RESOLUTION

The questions below focus on some key concerns relating to consumer disputes before ADR fora. If possible, please provide the reference/citation of an article that provides a general overview of the way in which consumer alternative dispute resolution operates within your national legal system.

8.1 Consumer disputes before ADR fora

8.1.1 Is ADR mandatory for all parties bringing a claim related to a consumer protection dispute?

It is now compulsory. The professionals parties must propose a free mediation to the consumer (ordinance n°2015-1033 du 20 August 2015[167] and Decree n°2015-1382 du 30 Oct. 2015[168], art. L.612-1 Cons. C modified by Ordinance of the 14th of March 2016). This rule has entered in force the 1st January 2016. It is the implementation of the Directive 2013/11/UE of the 21st May 2013[169]. The mediator of the consumer law has to be selected and registered on a special list established by a special commission (art. L. 611-1, L611-2 ; L.611-3 Consumer Code). The consumer has to be informed of this free mediation on the professional's website and on his contracts (art. R.614-1 Cons. Code).

Interview:

[167] E. Petit, D. 2015, 2571 ; B. Mallet-Bricout, RTDciv. 2015, 952 ; B. Gorchs-Gelzer, Rev. Huissiers, 2015, 174 ; S. Bernheim-Desvaux, CCC 2015, Etude 11 et du même auteur, Résolution extrajudiciaire des litiges de consommation, J.-cl. Concurrence-consommation, fasc. 1230

[168] Fricéro, D. 2016, Pan. 450 ; E. Petit, D. 2015.2571, L. Mayer, JCP, 2016, Chron. 414, n°2.

[169] Comment. E. Jeuland, JCP 2013, 1225, n° 13.

According to Ms Foucher, two main causes are provoking the **avoidance of judicial proceedings**: a truly promotion of ADR combined with the economic interest of consumers. As to the first one, consumers are definitely oriented towards ADR. As to the second one, consumers may be mostly interested in the less expensive option.

Additionally, the impact of European instrument and their implementation on national systems require **sufficient time**.

For example, the EU Directive on ADR transposed in France this last years was adopted in a rush. No sufficient time was taken to prevent the authorisation of enough professionals to work as mediators. As a result, from the 1st January 2016 mediation is an obligatory preliminary to judicial proceeding in consumer protection and consumers may have the right to a free médiateur de la consommation. However, despite this obligation, there are only eleven authorised mediators. This situation is provoked by the fact that the French model was not prepared to implement European exigencies on this field.

Individual claims in consumer mediation. There is a collective mediation in the class action created in 2014.

8.1.2 Please specify if there are limitations to the use of ADR. These might include the nature of the claim (i.e. whether both individual and collective claims are possible), requirements of representation, time limits, value thresholds, etc.

There is a specific mediation for a collective claim in the statute of the 17th of march 2014. Art 623-22 ancien article L423-16. L'association opérante participe à la mediation, mais il n'y a pas d'obligation.

Pour la médiation de la consommation (Article L612-2 code de la consummation), il y a des restrictions la demande est manifestement infondée ou abusive, introduit plus d'un après la reclamation écrite au professionnel.

Un litige ne peut être examiné par le médiateur de la consommation lorsque :
1° Le consommateur ne justifie pas avoir tenté, au préalable, de résoudre son litige directement auprès du professionnel par une réclamation écrite selon les modalités prévues, le cas échéant, dans le contrat ;
2° La demande est manifestement infondée ou abusive ;
3° Le litige a été précédemment examiné ou est en cours d'examen par un autre médiateur ou par un tribunal ;
4° Le consommateur a introduit sa demande auprès du médiateur dans un délai supérieur à un an à compter de sa réclamation écrite auprès du professionnel ;
5° Le litige n'entre pas dans son champ de compétence.
Le consommateur est informé par le médiateur, dans un délai de trois semaines à compter de la réception de son dossier, du rejet de sa demande de médiation.

8.1.3 Can ADR entities issue binding decisions and can they enforce those decisions? If not, please explain how they are enforced.
Le principe en France est que l'adr entity ne prend pas une decision qui est exécutoire, il faut pour cela l'homolgation d'un juge (pour une mediation de groupe art L623-23. See below

8.1.4 Does national law provide that limitation periods applicable to judicial actions should be suspended while ADR is ongoing?[170]

Oui

8.1.5 Please specify if national law establishes rules providing for recourse to judicial action following an (unsuccessful) ADR hearing[171].

No there is no recourse except against the decision of homologation if refused by the judge (art 131-12 1141-4. c'est une ordonnance sur requête donc un recours en rétractation selon une procédure de référé est possible s'il est fait droit à la requête sinon un appel est possible (art 496 CPC)

8.1.6 Is there judicial review of decisions and awards made by ADR entities? If so, by which court or tribunal is this oversight made? Is it ordinary or specialised?

The judge homologates the ADR decision and has to control it. Even though the control is light, the judge has to strike out a settlement which is contrary to law (L. Mayer, Précisions sur le contrôle « léger » exercé par le juge homologateur d'une transaction, Gaz. Pal. 14-16 juin 2015, p.12. Cass. 1re civ., 10 sept. 2014, n°13-11843, JCP 2014, 1232, n°6 obs. Libchaber, RTDciv. 2015, 695 obs. Théry ; and Cass. 2° cvi., 8 janv. 2015, n°13-27377, D. 2015, 1034 note Barban ; JCP 2015, 400 note Perrier). V. aussi pour une transaction extra judiciaire : l'homologation du président du TGI art 1441-4, c'est une ordonnance sur requête donc un recours en rétractation selon une procédure de référé est possible s'il est fait droit à la requête sinon un appel est possible (art 496 CPC)

An arbitration clause is not allowed in consumer law (art 2061 Civil code, arbitration clause is allowed only for business relationships).

Interview:

According to Ms Foucher, protection of consumers means an effective, fast and minimum costs system.
Conciliation must be found between the European intervention and the national reality. European instruments must guarantee the reinforcement of the consumer's protection.

In this regard, guidelines for the clarification of the consumer status and his possibilities of non-judicial and courts actions may be useful and quite desirable.

[170] The Directive on Consumer ADR provides that "the existence of an effective system for collective claims and easy recourse to ADR should be complementary". Consumer ADR is relevant not only for individual claims but also for collective ones; it can provide consumer with a means to reduce costs and save time.

[171] Per Arts.10-12, Directive on Consumer ADR.

However, procedural obligations regardless of the specificities and particularities of procedural cultures of different Members States, is not advantageous for consumers, who may not be able to protect his rights. He may not be aware neither convinced by the effectiveness of consumer protection because of the uncertainty of the consumer status with regard to (i) the EU regulation (ii) the national regulation and (iii) the coordination between both.

Generally speaking it is not clear if the ADR bodies have to apply law. So, it is the same for mandatory EU consumer protection law. There is a discussion at the moment on this subject (see interviews).

Interview:

According to Ms Foucher, there are several unanswered questions on the mediator role as to the existence of an obligation for them to respect the consumer law. Certainly, if there is any obligation, does the obligatory mediator – to whom the consumer has the right in every consumer conflict – have to be professional of law? If consumer law is a matter of public policy, mediator should be minimally aware of its functionality and must care about the respect of this set of rules. What would be the sanction if he does not? There are still a lot of uncertainty and gaps.

Source(s):

9. THE EXAMINATION OF CONSUMER PROTECTION LAW IN NATIONAL PROCEDURAL LAW: RESPECT FOR THE PRINCIPLES OF THE EFFECTIVENESS AND EQUIVALENCE OF CONSUMER PROTECTION LAW AND EX OFFICIO CONTROL

The rules of national civil procedure that could potentially affect, and indeed undermine, the effective and equivalent protection of consumer rights are various. They include but are not limited to the rules and practices of ordinary and specialised judicial procedures, rules and practices of consumer ADR, rules applicable to special types of procedure (e.g. payment order procedures), the jurisdiction of individual courts (the courts that have jurisdiction over consumer disputes), the formal requirements that have to be satisfied to bring a case, the types of legal action that are available, the need for parties to be represented, the time-limits applicable to procedural steps of the action, rules on the taking of evidence, the possibility (or lack) to consider certain issues at specific stages of the procedure, the right to appeal and review, and rules relating to the enforcement or judgements and other enforcement titles (e.g. arbitration awards, notarial deeds, including mortgages).

On the basis of the principles of equivalence and effectiveness, the CJEU has established certain requirements for the procedural protection of consumer rights deriving from EU law. In particular (and especially in relation to the protection afforded to consumers via the Unfair Contract Terms Directive[172]), the CJEU has established an obligation on national judges (and potentially other dispute resolution facilitators) to apply consumer law of their own motion (that is, ex officio), when they have available the legal and factual elements necessary for this task. Ex officio control is one type of procedural mechanism that can be utilised within the national system to promote the effective and equivalent protection of consumer law. Thus, other mechanisms of procedure within your national legal system

[172] However, the CJEU has recognised that ex officio control – and other procedural requirements, that might in themselves (or indeed, in their absence), impact the effective enforcement of consumer law – arise across the EU's consumer protection directives.

should be highlighted and discussed where relevant. The following questions should be answered in respect of both judicial and if relevant, alternative dispute resolution.

9.1 The basis of ex officio control of consumer protection law in national law

9.1.1 Is it clear in the national legal system when consumer protection law should be applied ex officio? Is the ex officio control of consumer protection law established as an obligation or as a (discretionary) power of the judge in national procedural law?

The Decree n°2016-884 of the 29 June 2016 (Article R632-1 Code cons. modified the rule: "the judge **may raise** of its own motion the dispositions of the present code. The judge shall of its own motion strike out an abusive provision after having consulted the parties".

Le juge n'est tenu de soulever d'office qu'une clause abusive. Pour le reste la solution qui était avant la recodification une règle législative est devenue une règle réglementaire car la procédure civile relève d'un décret. Le droit commun prévu à l'article 12 du CPC est que le juge soulève d'office une règle de droit si les parties n'en ont pas invoqué (possible en droit de la consommation mais rare car une assignation doit en general comporter la mention de la règle de droit applicable), il doit requalifier les faits si les parties se sont trompés mais il n'est obligé de soulever une autre règle de droit que celle qui a été soulevée par les parties (Ass. Plén. 21 déc. 2007).

Interview:

According to Ms Foucher, it is unclear when consumer protection should be applied ex officio because **judges have no obligation to ex oficio control unless public policy is at stake.**

In principle, **French conception of consumer law makes it fall under public order of protection policy.** Which rules are considered as public policy? Does this concern all consumer law regardless of their placement?

However, that obligation is in contradiction with provisions of article L 141-4 Consumer Code, that states that the "judge **may raise** of its own motion the dispositions of the present code". The Decree n°2016-884 of the 29 June 2016 (Article R632-1 Code cons. modified the rule: "the judge **may raise** of its own motion the dispositions of the present code. The judge shall of its own motion strike out an abusive provision after having consulted the parties".

Le juge peut relever d'office toutes les dispositions du présent code dans les litiges nés de son application. Il écarte d'office, après avoir recueilli les observations des parties, l'application d'une clause dont le caractère abusif ressort des éléments du débat.

The main problem is that not all consumer law is contained in the consumer code. Moreover, this disposition provides for a **mere power on the judges hands but not an obligation on him (except for abusive clauses).**

Thus, no obligation is clearly established. In general, judge ex officio control is merely a power unless public policy is at stake. And the extent of that qualification is unknown.

In conclusion, as long as consumer law is a matter of public order of protection in principle there is an obligation on the judge. However, Consumer Code disposition makes that the situation remains unclear as to whether it is a mere power or a truly obligation on the judge to control the respect of consumer law (it is a clear obligation for abusive clause).

9.1.2 If there is an understanding of ex officio control of consumer protection law in the national legal, what is this control understood to encompass/not cover?

La possibilité de soulever d'office le droit de la consummation (R632-1 code de la conso) concerne tout le code.

9.1.3 Is the party who claims to be a consumer required to establish his or her consumer status, the existence of a consumer contract and that consumer law applies to the dispute? Is this required even if the consumer has no legal representation?

Oui il doit établir l'application des droits qu'il invoque meme s'il n'est pas représenté.

9.1.4 What information is available to judges and dispute resolution facilitators hearing consumer protection disputes? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a consumer protection dispute to be heard and b) for the court to engage in ex officio control?

Il n'y a pas de règle spécifique? Les parties apportent les pièces susceptibles de fonder leur prétention ; le juge ne peut se fonder que sur les pièces qui sont dans le dossier mais peut demander des explications de fait et de droit aux parties.

9.1.5 Who is responsible for providing this information? If the necessary information is not available to the court (or dispute resolution facilitator), is he or she under an obligation to investigate in order to be able to respond to a relevant consumer protection dimension of the case?
Le juge n'est jamais tenu de prendre des mesures d'instruction, c'est discrétionnaire.

9.1.6 Will the court provide the consumer with any assistance in gathering factual information or advancing his legal arguments before the court? Please respond for the situation where: a) the consumer has legal representation and b) the consumer has no legal representation.

There is no specificity of consumer law, except for L621-8 previously L.421-6: the consumer association may request the suppression of an abusive provision. The judge can delete the provision sua sponte.

Source(s):

9.2 The possibility for ex officio control of EU consumer protection law in dispute resolution proceedings

9.2.1 Is ex officio control of consumer protection law always possible when the procedure involves a full assessment of the claim on its merits?

Yes it is always possible.

9.2.2 Can ex officio control be exercised even when the procedure does not involve an assessment on the merits?

Oui article 12 CPC et R632-1 code de la consommaton le juge peut toujours soulevé d'office meme dans une procedure de référé.

9.2.3 Please indicate if, per national procedural law, ex officio control can be exercised at the following stages of the procedure:

Oui à tout niveau mais le médiateur n'est pas censé appliquer le droit de la consummation d'office.

	Courts		Other dispute resolution facilitators	
	Possible to exercise ex officio control	Not possible to exercise ex officio control	Possible to exercise ex officio control	Not possible to exercise ex officio control
Ordinary proceedings	yes		yes	
Small claims	yes		yes	
Payment order	After opposition		no	
Provisional measures	yes		no	
Proceedings linked to enforcement	yes		no	
Enforcement proceedings				
- Enforcement of payment order	Yes		no	
- Enforcement of arbitration award	Not in consumer law			
- Enforcement of mortgage	Not in France		Not in France	
- Enforcement of notarial deed	Yes			
Appeal proceedings (please specify:)	yes			

9.2.4 What does ex officio control encompass in national procedural law?

Le juge peut toujours soulever une règle de droit applicable non invoquée par les parties à condition de permettre aux parties d'en discuter. IL est oblige de soulever d'office quand il s'agit de règles particulières (Ass. Plén, 2007 précit.). Il n'est pas precise ce qu'est une règle particulière dans cet arrêt. On peut supposer qu'il s'agit de règle d'ordre public mais ce n'est pas certain.

Source(s): Cadiet et Jeuland

9.3 Other procedural mechanisms for the equivalent and effective protection of EU consumer law

9.3.1 Does national procedural law provide that rules of EU consumer law (as well as rules that aim to satisfy EU consumer law objectives) should be understood as having equal standing to national rules of public policy (which is to say, that for the purposes of domestic law, the consumer protection provision is understood to have equal standing to a rule that must be raised ex officio by the national court)?

Non ce n'est pas compris de cette manière puisque le code de la consummation dit qu'au contraire le juge peut soulever les règles du code de la consummation mais n'y est pas oblige sauf pour une clause abusive. See above.

9.3.2 If ex officio control is not possible in certain types of proceedings or at a certain stage of proceedings (or for any other reason), does national procedural law provide for an alternative way of assessing consumer protection law?
Le contrôle ex officio est toujours possible.

Source(s): Cadiet et Jeuland, op. cit.,

9.4 Ex officio control in payment order procedures

9.4.1 What information is available to the judge when a claim for the issuance of a payment order is made? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a claim for the issuance of a payment order to be granted and b) for the court to engage in ex officio control before a payment order is issued?

Il faut des documents justificatifs accompagnant la requite, s'il y a une opposition, la procedure devein contradictoire et les règles de l'article 12 du CPC s'appliquent (l'injonction de payer n'est pas dans le code de la consummation meme et il y a un renvoi au code de procedure civile.

9.4.2 What considerations will be assessed ex officio by the court (or other competent authority) before a payment order is issued?

Aucun s'il n'y a pas opposition, s'il y a opposition tout règle de droit applicable à la discretion du juge qui n'est oblige de le faire meme en matière de competence (art 92 l"l'incompétence peut être prononcée d'office…"

9.4.3 How is the consumer informed about the claim to issue a payment order against him or her? Does national procedural law make any provision for steps to be taken to ensure that consumers are informed of the claim for the issuance of a payment order so that he or she can contest it?

Pas de règles spécifique, l'injonction de payer lui est signifiée et il a un mois pour faire opposition.

9.4.4 If the consumer objects to the claim, what is the next step? Do the proceedings continue, in the context of which ex officio control can be exercised? Or are the proceedings transferred to ordinary proceedings for analysis on the merits of the claim?

Après opposition la procedure deviant ordinaire et contradictoire sur le fond et les règles de l'article 12 CPC s'applique (see above).

Source(s):

European Commission
An evaluation study of the impact of national procedural laws and practices on the equivalence and effectiveness of the procedural protection of consumers under EU law

JUST/2014/RCON/PR/CIVI/0082

National Report – Consumer Protection Strand

Germany

Christoph Kern and Thomas Pfeiffer

GERMANY: LEGAL ANALYSIS

1. NATIONAL LEGISLATION IMPLEMENTING EU CONSUMER PROTECTION INSTRUMENTS

EU legislation	Transposing national legislation	Additional notes (e.g. if there is an overlap in application of legislation etc.)
Doorstep Selling Directive 1985/577/EEC	Sections 312-312i, 355-360 Bürgerliches Gesetzbuch (German Civil Code) (old version) Sections 312-312k, 355-361 Bürgerliches Gesetzbuch (German Civil Code) (new version) German Version: https://www.gesetze-im-internet.de/bgb/BJNR001950896.html#BJNR001950896BJNG023602360 English version: https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1026 (last verified on 15 May 2016)	Abolished by Consumer Rights Directive 2011/83/EU
Package Travel	Sections 651a-651m Bürgerliches Gesetzbuch (German Civil Code)	

Directive 90/314/EEC	German Version: https://www.gesetze-im-internet.de/bgb/BJNR001950896.html#BJNR001950896BJNG005802377 English version: https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p2783 (last verified on 14 May 2016)	
Unfair Contract Terms Directive 1993/13/EEC	Sections 305-310 Bürgerliches Gesetzbuch (German Civil Code) German version: https://www.gesetze-im-internet.de/bgb/BJNR001950896.html#BJNR001950896BJNG023401377 English version: https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0910 (last verified on 15 May 2016)	Amended by Consumer Rights Directive 2011/83/EU
Distance Selling Directive 1997/7/EC	Sections 312-312i, 355-360 Bürgerliches Gesetzbuch (German Civil Code) (old version) Sections 312-312k, 355-361 Bürgerliches Gesetzbuch (German Civil Code) (new version) German Version: https://www.gesetze-im-internet.de/bgb/BJNR001950896.html#BJNR001950896BJNG023602360 English version: https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1026 (last verified on 15 May 2016)	Abolished by Consumer Rights Directive 2011/83/EU
Consumer Sales and Guarantees Directive 1999/44/EC	Sections 433-480, 651 Bürgerliches Gesetzbuch (German Civil Code) German version: https://www.gesetze-im-internet.de/bgb/BJNR001950896.html#BJNR001950896BJNG024101377 English version: https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1546 (last verified on 15 May 2016)	Amended by Consumer Rights Directive 2011/83/EU
Unfair Commercial Practices Directive 2005/29/EC	Sections 1-8 Gesetz gegen den unlauteren Wettbewerb (The German Act Against Unfair Competition) German version: http://www.gesetze-im-internet.de/uwg_2004/BJNR141400004.html#BJNR141400004BJNG000101140 English version: http://www.gesetze-im-	

	internet.de/englisch_uwg/englisch_uwg.html#p0008 (last verified on 15 May 2016)	
Misleading and Comparative Advertising Directive 2006/114/EC	Sections 5-6 Gesetz gegen den unlauteren Wettbewerb (The German Act Against Unfair Competition) German version: http://www.gesetze-im-internet.de/uwg_2004/BJNR141400004.html#BJNR141400004BJNG000101140 English version: http://www.gesetze-im-internet.de/englisch_uwg/englisch_uwg.html#p0008 (last verified on 15 May 2016)	
Consumer Credit Agreement Directive 2008/48/EC	Sections 488-512, 675a-676c Bürgerliches Gesetzbuch (German Civil Code) German version: https://www.gesetze-im-internet.de/bgb/BJNR001950896.html#BJNR001950896BJNG025002140 English version: https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1747 (last verified on 15 May 2016)	
Timeshare Protection Directive 2008/122/EC	Sections 401-407 Bürgerliches Gesetzbuch (German Civil Code) German version: https://www.gesetze-im-internet.de/bgb/BJNR001950896.html#BJNR001950896BJNG024802140 English version: http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1709 (last verified on 15 May 2016)	
Consumer Injunctions Directive 2009/22/EC	Section 33 para. 2 Gesetz gegen Wettbewerbsbeschränkungen (German Act against Restraints of Competition), sections 3 para. 1 ,4 and 13 para. 1 Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen (German Injunctions Act), section 8 para. 3 Gesetz gegen unlauteren Wettbewerb (The German Act Against Unfair Competition) German version: https://www.gesetze-im-internet.de/gwb/__33.html; http://www.gesetze-im-	

	internet.de/uklag/BJNR317300001.html#BJNR317300001BJNG000101377 and http://www.gesetze-im-internet.de/uklag/__14.html, https://www.gesetze-im-internet.de/uwg_2004/__8.html English version: http://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0205, http://www.gesetze-im-internet.de/englisch_uwg/englisch_uwg.html#p0085 (last verified on 15 May 2016)	
Consumer Rights Directive 2011/83/EU	Sections 312-312k, 355-361 Bürgerliches Gesetzbuch (German Civil Code) German version. https://www.gesetze-im-internet.de/bgb/BJNR001950896.html#BJNR001950896BJNG023602360 English version: https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1026 (last verified on 15 May 2016)	
ADR for Consumer Disputes Directive 2013/11/EU	Gesetz über die alternative Streitbeilegung in Verbrauchersachen (German Act of Alternative Dispute Resolution for Consumer Disputes) German version: https://www.gesetze-im-internet.de/bundesrecht/vsbg/gesamt.pdf (last verified on 15 May 2016)	

Source(s):

1. CONCEPT OF THE CONSUMER

1.1 Please outline the concept of the consumer in national law, indicating whether it is intended to be a uniform concept, whether it has been legislated for and where it can found (i.e., in a legislative provision, governmental guidelines, case law etc.).

The term “consumer” is defined in sec. 13 BGB: A consumer means every natural person who enters into a legal transaction for purposes that predominantly are outside his trade, business or profession.
It is a uniform concept; the above mentioned definition applies as well in substantive and procedural civil law.
German national law protects consumers in different situations. The legislator has also implemented some special sections only for consumers, inter alia: Sec. 312-312k BGB (Principles applying to consumer contracts; particular types of sale), sec. 355-361 BGB (Right of withdrawal in consumer contracts), sec.

474-479 BGB (Purchase of consumer goods), sec. 481-487 BGB (Time-share agreements), sec. 10 para. 3 BGB (Standard business terms).

Source(s): § 13 BGB

2. REGULATORY AUTHORITIES COMPETENT FOR CONSUMER PROTECTION ISSUES

2.1 What regulatory authorities, if any, are competent for enforcing consumer protection law? Please identify them, their nature (i.e., whether they are public or private or mixed) and the nature of enforcement.

Consumer protection law is enforced by public and private authorities mentioned in sec. 3 of the German Injunctions Act (Unterlassungsklagengesetz, "**UKlaG**"). These authorities are, even if private, non-commercial organizations like the consumer rights protection centers organized as private registered clubs ("Verbraucherschutzzentralen") financed mostly by the State, Chambers of Industry and Commerce (Industrie- und Handelskammern) and those associations which are registered on the list of qualified entities under sec. 4 UKlaG. The register can be downloaded at:
https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Verbraucherschutz/Liste_qualifizierter_Einrichtungen.pdf?__blob=publicationFile&v=32.
The above mentioned authorities can seek an injunction against the person violating consumer protection law and ask for disgorgement of profits in the case of intentional behaviour.

According to sec. 8 para. 1 and 3 of the German Act Against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb, "**UWG**"), every competitor, specific associations with legal personality which exist for the promotion of commercial or of independent professional interests, qualified entities that prove that they are entered on the list of qualified entities pursuant to sec. 4 UWG and the Chambers of Industry and Commerce or Craft Chambers are competent to claim compliance with the consumer protection law.

Additionally the German Federal Cartel Office (Bundeskartellamt, BKartA) and the German Financial Supervision Authority (Bundesamt für Finanzdienstleistungsaufsicht, BAFin) have some intervention and enforcement powers, e.g. by issuing orders that are appropriate and necessary to eliminate or to prevent undesirable developments. However, the enforcement of consumer protection law is predominantly done by private organizations using the means of private law.

2.2 Is there a specific venue for this type of enforcement and does this limit the jurisdiction of courts/ADR fora (even if only initially)?

According to sec. 6 UKlaG and sec. 13 and 14 UWG the regional court within the jurisdiction of which a defendant has his or her establishment or residence has exclusive jurisdiction. If the debtor has no establishment or domicile in Germany, the regional court is competent in the district of the defendant's place of residence. In the absence of such courts the regional court at the place where the violation occurred has jurisdiction.

2.3 Can criminal prosecutions be initiated for violations of consumer protection rules? How serious must the infringement be? What are the penalties and sanctions? And might these prosecutions lead to criminal penalties or sanctions? Can individual consumers piggy back on these claims (e.g. via a partie civile method)?

As a matter of principle, criminal prosecution cannot be initiated for violations of consumer protection rules. In certain cases the infringer has to pay compensation for the damage of the competitor or has to surrender his or her profits to the Federal budget, see sec. 9 and 10 UWG. An individual consumer cannot piggy back on these claims. He can only claim for compensation on a contractual basis and if the violation relates to it, causes damage and the infringer acts negligently.

2.4 Is there judicial review of decisions of consumer regulatory authorities? If so, by which court is this judicial oversight made? Is the forum an ordinary or a specialised court or tribunal?

The "Verbraucherschutzzentralen" in Germany do not have the power to establish legally binding rules. Thus, insofar, a judicial review is not necessary. As regards decisions of BAFin, there is judicial review according to the general rules.

2.5 Does the national legal system provide for a mechanism of cooperation between its national regulatory authorities and those of other Member States?

There are no national regulations which establish a mechanism of cooperation between the national regulatory authorities and those of other Member States. However, as "Verbraucherschutzzentralen" in Germany are organized as a private registered club, cross-border cooperation is generally possible.

Source(s):

3. LEGAL AID

3.1 Is legal aid available to consumers in: a) bringing a claim and b) defending a claim before a court?

The legal aid regulations under sec. 114 et seq. ZPO neither require that the petitioner be a consumer nor have any relationship with a concept of a consumer. Rather, it depends on the party's indigence ("Bedürftigkeit"). Any party, i.e., also a consumer, who is unable to pay the costs of litigation can request legal aid for claiming or defending a claim in court if the claim or the defence has sufficient prospects of success and does not seem frivolous.

3.2 For what kinds of disputes and actions is legal aid available? (NB: legal aid might not be available for consumer or contractual disputes but be available instead for a related action, e.g. actions relating to debt, mortgage arrears, eviction etc.)

Legal aid is available for all civil judicial proceedings.

3.3 What requirements must be satisfied for the consumer to be entitled to legal aid? Please specify if there are any additional limitations to its availability.

Sec. 114 para. 1 ZPO states that any party who, due to his or her personal and economic circumstances, is unable to pay the costs of litigation ("Bedürftigkeit"), or is able to pay them only in part or only in instalments, will be granted legal aid upon filing a corresponding application, provided that the action the party intends to bring or the defence against an action that has been brought against the party has sufficient prospects of success ("Erfolgsaussicht") and does not seem frivolous ("keine Mutwilligkeit"). The action being brought or the defence against an action is frivolous where a party that has not taken recourse to assistance with the court costs would desist, upon having judiciously assessed all circumstances, from bringing an action or defending against an action in spite of sufficient prospects of succeeding, sec. 114 para. 2 ZPO.
Sec. 115 ZPO determines in detail how to determine the party's indigence. All in all, it depends on the income deducting taxes, insurance dues and other factors. Out of the part of the monthly income remaining after deductions ("income to be used"), monthly instalments are to be assessed in the amount of half of the income to be used; such monthly instalments are to be rounded down to a full amount in EUR. Where the amount of a monthly instalment is lower than 10 EUR, the assessment of monthly instalments is to be desisted from. Where the income to be used is greater than 600 EUR, the monthly instalment shall amount to 300 EUR plus that part of the income to be used that is in excess of 600 EUR. As a maximum, and regardless of the number of court instances in which the proceedings are pursued, 48 monthly instalments are to be paid. Assistance with court costs will not be approved if it can be foreseen that the party's costs of litigation will not be higher than four monthly rates and will not exceed the partial amounts to be contributed from the party's assets.

3.4 What does legal aid encompass? (i.e. (only) general advice, (only) assistance in preparing the case, (only) assistance with negotiation of settlements, (also) representation).

Legal aid encompasses court fees and the costs of the proceedings ("Gerichts- und Verfahrenskosten"). It also encompasses the fees of the own attorney and the travel costs. The translation of documents is not comprised, but if the assigned legal assistance under sec. 121 ZPO pays for the translation, his or her costs will be compensated, sec. 46 RVG). The costs of the opposing party are not comprised. In other words, the approval of legal aid does not affect the obligation to reimburse the opponent for the costs it has incurred, sec. 123 ZPO. This means that in case the indigent party loses, he or she has to bear the full amount of the winning party's reasonable costs.

Source(s): Sec. 114-127 ZPO, especially sec. 122, 126 ZPO

4. COSTS

4.1 What are the costs of different types of procedures before courts? Are there exemptions to the payment of fees and expenses? How can costs be paid?

It must be mentioned that in German civil proceedings all court fees and expenses are reimbursed to the plaintiff if the latter wins the case, sec. 91 para. 1 ZPO.
The costs to be paid to the court comprise expenses and fees. The amount of court expenses does not depend on the value of the claim, but only on the costs that are actually incurred in the current proceeding, cf. sec. 17 para. 1 GKG.
A party receiving legal aid is either exempt from court fees or must only pay a fraction.
Court fees are usually paid by bank transfer. Additionally paying by direct debit payment or credit card is sometimes possible.

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Court fees	105-438 EUR	495-1035 EUR	1035-10.608 EUR (value of the claim is or exceeds 500.000 EUR)	Not available	Not available	Not available
Court expenses	Only the costs actually incurred	Only the costs actually incurred	Only the costs actually incurred	Not available	Not available	Not available
Exemptions	Successful application for legal aid	Successful application for legal aid	Successful application for legal aid			

Source(s): GKG

5. STANDING AND REPRESENTATION IN CONSUMER DISPUTES

5.1 Does national law limit the standing of the individual consumer in respect of the claim that can be made and the forum before which it can be brought?

In German civil procedural law disputes arising out of the violation of consumer protection law are ordinary civil proceedings. If a consumer suffered harm, he or she always has standing. However, the individual consumer cannot demand that a business cease and desist from using certain standard terms or certain commercial practices (see infra 7.2.).

5.2 Other than individual consumers, who or which bodies have standing in consumer protection disputes and for what types of claim? If the action is not brought by the individual consumer, what requirements of representation must be satisfied?

The above mentioned "Verbraucherzentralen" and other private entities are competent of enforcing, inter alia, rules relating to doorstep contracts, distance contracts, sales of consumer goods, time-share agreements, contracts relating to long-term holiday products, brokerage contracts and exchange system contracts, consumer credit agreements and package travel contracts, sec. 3 para. 1 and sec. 2 para. 1 UKlaG. In addition, the "Verbraucherzentralen" etc. can also intervene on void standard terms and conditions.
They generally do so by filing for injunctions.

5.3 If a consumer wants to bring or defend an action relating to a consumer protection dispute, is there a legal (or otherwise formal) requirement that he or she has legal representation? Please specify for both judicial and ADR fora and the bodies, associations or authorities that can provide this representation.

As consumer protection disputes in Germany are ordinary civil proceedings, the normal rules on legal representation apply meaning in proceedings before regional and higher regional courts as well as the German Federal Court parties must be represented by an attorney, sec. 78 para. 1 ZPO.
The "Verbraucherzentralen" only provide out of court legal services.

Source(s): Sec. 50 et seq. ZPO, 2 to 3 UKlaG

6. ACTIONS BEFORE COURTS

6.1 Jurisdiction and competence of the courts in consumer disputes: General structure and special procedures aimed at protecting consumers

6.1.1 Are ordinary courts competent to hear such claims? Is there also a specialised tribunal for consumer protection disputes?

As in German civil procedural law consumer disputes are ordinary civil proceedings, ordinary courts are competent to hear such claims. There are no specialized tribunals for consumer protection disputes established by law. However, the courts may themselves constitute special chambers or departments competent for consumer protection proceedings, which many courts did.

6.1.2 Which courts are competent to hear consumer protection disputes at first instance and in appeals? Please specify the court, in light of the value of the claim (and identify any other factors that are relevant in allocation jurisdiction).

Local courts are competent to hear disputes concerning claims involving an amount or with a monetary value not exceeding the sum of 5,000 EUR, sec. 23 no. 1 GVG. If the sum exceeds 5,000 EUR, the Regional Courts have first instance jurisdiction, sec. 71 para. 1 GVG.

The Regional Courts are competent to hear appeals on fact and law in the civil disputes heard by the local courts in first instance, sec. 72 para. 1 GVG. The courts of appeal have jurisdiction on appeals on fact and law against decisions of the Regional Courts, sec. 119 para. 1 no. 2 GVG.

6.1.3 What is the nature of the procedure at first instance, e.g., is it a simplified or a summary procedure, and is there an assessment of the merits? Please specify in light of the value of the claim (and identify any other factors that are relevant in allocating jurisdiction).

The procedure at first instance is by its nature an ordinary civil proceeding, i.e. with full assessment of the merits.
However, local courts may decide at their equitably exercised discretion on how to implement its proceedings if the value of the claim does not exceed the amount of 600 EUR, sec. 495a ZPO. It must be mentioned that this rule only affects the proceedings and does not dispense the court from a full assessment of the merits.

6.1.4 Please identify the formal requirements that must be satisfied for a consumer dispute to be heard before a court. These might include time limits applicable to the filing of the action/defence, representation requirements etc.

The consumer must meet the general requirements of civil procedural law when filing a consumer related claim.
This means the statement of claim must include the designation of the parties and of the court and exact information on the subject matter and the grounds for filing the claim, as well as a precisely specified petition, sec. 253 para. 2 ZPO.
The claim must be filed with the competent court and both parties must have the capacity of being a party to court proceedings as well as the capacity to sue and be sued, see sec. 50 para. 1 and 51 para. 1 ZPO.
Before Regional Courts and courts of appeals as well as before the German Federal Court of Justice parties must be represented by an attorney, sec. 78 para. 1 ZPO.
There are no time limits for consumer disputes as ordinary civil proceedings in German procedural law. However, statutes of limitation in substantial law apply when deciding on the merits of the case (the standard limitation period is three years, sec. 195 BGB).

As always, the presiding judge must instruct the defendant, in serving the complaint upon him, that should the defendant wish to defend against the complaint, he or she should notify the court of this fact within a statutory period of two weeks after the complaint has been served on him. If the defendant fails to do so, a default judgment may be delivered upon a corresponding petition being filed, sec. 276 para. 2 and 331 para. 3 ZPO.

6.1.5 In respect of the claims and relevant procedures available in the national legal system, what kind of relief might be available in consumer protection disputes? (monetary remedies, injunctions, skimming off etc.)?

The consumer may demand any relief provided for by substantive law. In particular, the consumer is not limited to damages, but may demand specific performance in any case. The consumer may also invoke

the nullity of a contract and claim back anything he or she already performed on the basis of the law of unjust enrichment.

The "Verbraucherzentralen" and other entities having standing to sue can, for instance, file for injunctions against the person violating consumer protection law, including also unfair standard terms of conditions, and skim off his profit in the case of intentional behaviour, sec. 10 para. 1 UWG and sec. 3 para. 1 UKlaG.

6.1.6 Please provide a brief overview of the role of parties and judges in civil proceedings generally (e.g. with reference to the principle of party disposition, the obligation of parties to make and prove factual allegations and to make and provide legal arguments, the possible role of the court). This overview should be brief; these issues will be dealt with in more detail in the questions that follow.

In German civil proceedings governed by the ZPO the parties (only) have to provide the facts and the relating evidence. The law is applied ex officio by the court in any case. In other words, the principle "iura novit curia" applies; the Latin phrase "da mihi facto, dabo tibi ius" is followed. Therefore, the decision of the ECJ of 17 December 2009 against Spain (C-227/08) that courts in Member States have to apply European consumer protection law on their own motion had no influence on German civil procedural law.
Thus, it is up to the parties to start the proceedings, to determine the subject-matter of the proceedings and to end the proceedings (principle of party disposition). It is also the task of the parties to make factual allegations. The court may not introduce new facts. However, the court has far-reaching powers with respect to the means of evidence with which facts asserted by the parties can be proven. Except for witness testimony, the court can order any other admissible form of evidence to be taken at its own initiative.
Moreover, the court has a duty to give hints and feedback, according to sec. 139 ZPO. As the case may be, the court must ask questions to further clarify the parties' allegations and claims. This may induce the parties to introduce new facts. However, the facts "resulting" from the court's feedback still have to be formally introduced by one of the parties.

Source(s): Sec. 23 and 71 GVG, sec. 495a ZPO, sec. 10 para. 1 UWG and sec. 3 para. 1 UKlaG, ZPO.

6.2 Small claims

6.2.1 Does a small claims procedure exist in the Member State? If yes, is it a specialised or simplified procedure?

There is no particular small claim procedure in Germany. However, it must again be mentioned that claims which do not exceed the sum of 5,000 EUR are normally dealt with before local courts. In these courts, representation by an attorney is not required. Thus, proceedings before local courts might be considered "small claims procedures" (see also 8.1.3 if the value of the claim does not exceed 600 EUR).

6.2.2 What are the value thresholds for claims brought under the small claims procedure? Moreover, are there any other factors that shape the use of the small claims procedure (including the nature of the claim, the area of consumer protection law into which the claim falls etc.)?

See 8.2.1.

6.2.3 What forms must be completed to raise the application? Who assists the consumer in completing these forms?

See 8.2.1. The consumer may be assisted by an attorney or any other person. In particular, the "Verbraucherzentralen" provide assistance.

6.2.4 How can an application for a small claim be made (e.g. online, by post or in person)?

See 8.2.1. According to general procedural law, applications can be made by post, by fax or in person; and, in some courts, as an electronic document; however, in this case, a qualified electronic signature is required.

6.2.5 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

See 8.2.1. The ordinary rules of civil procedure apply. The taking of evidence is governed by sec. 355 et seq. ZPO. However, if the parties agree, the court may use any other means of taking evidence, sec. 284 sentence 2 ZPO. If the value in dispute does not exceed 600 EUR, the court has discretion concerning the rules of procedure.
Parties or their representative must, in principle, appear in court for the oral hearing, sec. 128 para. 1 ZPO. The court may also decide that video conference techniques be used, sec. 128a ZPO. The court may also, if both parties agree, decide without an oral hearing on the basis of the writings of the parties, sec. 128 para. 2 ZPO.
If an oral hearing is scheduled, it is normally sufficient that the party's representative is present. However, the court may order that a party has to appear in person, sec. 141 ZPO.

6.2.6 Are the costs of the successful party reimbursed?

Yes, completely including the lawyer's fees (sec. 91 ZPO). See also 8.2.1.

Source(s): sec. 23, 71 GVG, sec. 91, 130 no. 6, 130a, 284, 355 et seq., 495-510b ZPO.

6.3 Claims other than small claims

6.3.1 If a consumer protection dispute does not qualify as a small claim, what other procedures are available? What are the value thresholds and other factors determining the use of such procedures?

See first 8.2.1. to 8.2.6. Apart from the ordinary civil proceeding there exist proceedings on claims arising from a deed, in which solely documentary evidence is submitted. This kind of proceeding is admissible on claims that are brought regarding the payment of a specific amount of money, or the delivery of a determined amount of other fungible things that in business dealings are customarily specified by number, measure or weight, or the delivery of securities. Characteristic feature of this proceeding is that all facts required to justify the claim and defence must be proven by records or documents, sec. 592 ZPO. However, this kind of proceeding is not limited to consumer disputes and is not used very often.

6.3.2 How can such claims be made? Please specify if the applications can be made online, or by post or in person.

See 8.2.4. and 8.3.1.

6.3.3 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

In the proceedings governed by sec. 592 ZPO solely records or documents and the petition for examination of a party are admissible as evidence, sec. 595 para. 2 ZPO.
For appearance, see 8.2.5.

6.3.4 Are the costs of the successful party reimbursed?

See 8.2.6. The losing party has to bear all the costs including court fees and statutory fees and expenditures of both of the attorneys, sec. 91 para. 1 and 2 ZPO.

Source(s): Sec. 592 and 91 ZPO

6.4 Claims for the issuance of a payment order

6.4.1 Does an order for payment procedure exist in the national system? Is it a simplified procedure?

Payment orders are available and frequently used in Germany. The procedure is simplified, with the court only examining whether the formal requirements are met. Most notably, the court does not examine whether the claim appears to be meritorious. The claim must be a claim for the payment of a specific amount in EUR, sec. 688 para. 1 ZPO. Exceptions are regulated in sec. 688 para. 2 ZPO.

6.4.2 Which authorities or courts are competent to hear claims for the issuance of payment orders?

In principle, the local court with which the claimant has his or her general venue has jurisdiction to issue the payment order, sec. 689 ZPO. However, the governments of the German States are authorized to

assign proceedings for a payment order to a local court acting for the districts of several local courts, sec. 689 para. 3 ZPO. Every State government did so. For the state of Baden-Württemberg, the local court of Stuttgart has exclusive jurisdiction for issuing payment orders.

6.4.3 Are there any formal requirements that must be satisfied for the application for the issuance of a payment order to be made (e.g. standard forms, representation by a lawyer, the detail of description required, the need to provide written evidence etc.)?

According to sec. 690 para. 1 ZPO the petition must be for the issuance of a payment order and must set out:

- The designation of the parties and, if applicable, their legal representatives and their attorneys of record;
- The designation of the court with which the petition was filed;
- The designation of the claim, with the performance demanded being specified exactly; the principal claims and ancillary claims are to be designated separately and individually, claims under agreements pursuant to sec. 491 to 509 BGB are to be designated also by citing the date on which they were concluded and the effective annual rate of interest to be provided for in accordance with sec. 492 para. 2 BGB;
- The declaration that the claim is not dependent on consideration, or that such consideration has been provided;
- The designation of the court having jurisdiction for legal proceedings determining whether or not a claim is justified.

The petition must be signed by hand; in case the petition is filed by an attorney, the petition must be transmitted in electronic form, sec. 690 para. 3 ZPO.
The court does not review whether the claimant is entitled to the claim being enforced; it only checks if the above mentioned requirements (in particular the designation of the claim) are met. Representation by an attorney is not required by law when filing a petition for the issuance of a payment order.

6.4.4 What information is generally available to the authority or court when a claim for the issuance of a payment order is made?

The court only obtains the information contained in the petition for the issuance of a payment order (see 8.4.3).

6.4.5 What opportunity is available for a defence/statement of opposition to be advanced? How should this be done and what is its effect? Please specify if the means of advancing a defence differ depending on the value of the claim and the court dealing with it.

German procedural law differs between two stages in the proceedings for a payment order.

(1) If the requirements of sec. 688 to 690 ZPO (see 8.4.1 to 8.4.3) are met, the court enacts the payment order.
The addressee can lodge an opposition against the payment order. In this case the time-limit is two weeks commencing when the payment order is being served on the defendant, sec. 692 para. 1 no. 3 and sec. 693 para. 1 ZPO. The opposition must be lodged in written form or by fax with the court that has delivered the payment order, sec. 694 para. 1 ZPO.
If an opposition is lodged in due time, and if a party (mostly the claimant) applies for legal proceedings in order to determine whether the claim is justified, the court that issued the payment order will assign the legal dispute ex officio to the court that has been designated in the payment order pursuant to sec. 692 para. 1 no. 1 ZPO (see 8.4.3) or, if the parties to the dispute concur in requesting that the matter be so assigned to a different court, it must be assigned to that court, sec. 696 para. 1 ZPO. The court registry of the court to which the dispute was transferred has to direct without undue delay that the claimant provide the reasons on which he or she bases the claim within two weeks in a form corresponding to the statement of claim, sec. 697 para. 1 ZPO. The following proceeding is just an ordinary civil proceeding and the proceeding for a payment order ends.

(2) If the respondent has not lodged an opposition or failed to do so in due time, the court must, upon a corresponding petition being filed by the claimant, issue a writ of execution based on the payment order, sec. 699 para. 1 ZPO. The writ of execution is equivalent to a default judgment declared provisionally enforceable. This means that compulsory enforcement without any provision of security is possible, sec. 700 para. 1 ZPO.
Against the writ of execution the defendant is entitled to enter a protest (see 2.3.6 for further details). Should a protest be filed, the court which issued the writ of execution has to transfer the legal dispute ex officio to the court that has been designated in the payment order pursuant to sec. 692 para. 1 no. 1 ZPO (see 8.4.3) unless the parties agree otherwise. Again, the proceeding for a payment order ends and an ordinary civil proceeding commences.
It must be mentioned that compulsory enforcement is not stayed automatically when a protest is entered. However, the debtor may file a corresponding application. However, compulsory enforcement under a writ of execution may be terminated only against provision of security unless the writ of execution was handed down in a manner not in line with the law, or the party failing to comply with procedural rules demonstrates to the satisfaction of the court that it failed to comply with procedural rules through no fault of its own, sec. 719 para. 1 ZPO.

If no protest is entered, the writ of execution becomes final and binding.

6.4.6 What is the effect if the claim is uncontested, i.e. if there is a lack of defence/statement of opposition?

If the defendant does not lodge an opposition in due time, the court must, upon a petition filed by the claimant, deliver a writ of execution based on the payment order, sec. 699 para. 1 ZPO. The writ of execution is equivalent to a default judgment declared provisionally enforceable meaning that compulsory enforcement without any provision of security is possible, sec. 700 para. 1 ZPO.

If no protest is entered against the writ of execution, it becomes final and binding.

6.4.7 If the defendant is a consumer, and he or she does not respond to or raise an objection to the issuance of the payment order, does the authority dealing with the claim for payment order proceedings have the power to examine any issue of consumer protection law of its own motion before treating the action as usual?

The petition for a payment order is only being dismissed if it does not comply with the stipulations of sec. 688 to 703c ZPO (see above). Therefore, consumer protection issues are not explicitly examined.
However, no summary proceedings for a payment order may be brought for claims that an entrepreneur has under an agreement pursuant to sec. 491 to 509 BGB (consumer credit agreements) if the effective annual rate of interest to be provided for in accordance with sec. 492 para. 2 BGB is in excess, by more than twelve percentage points, of the base rate of interest, pursuant to sec. 247 BGB, applicable at the time the agreement is concluded, sec 688 para. 2 no. 1 ZPO.

6.4.8 What steps must the pursuer take in order to obtain an enforceable decision?

If no opposition is lodged or is not lodged in due time against the payment order, the claimant may file a petition to the court to issue a writ of execution based on the payment order, sec. 699 para. 1 ZPO. The writ of execution is equivalent to a default judgment declared provisionally enforceable meaning that compulsory enforcement without any provision of security is possible, sec. 700 para. 1 ZPO.

6.4.9 Is this decision final, or can the defendant appeal against it?

As already explained, the defendant is entitled to enter a protest against the writ of execution (see 8.4.5).
If the party entering a protest fails to appear at the hearing scheduled for oral argument or fails to make him- or herself heard on the merits of the case, he or she is not entitled to enter further protest against the default judgment by which the protest is overruled, but has to appeal, sec. 345 ZPO. The appeal can only be successful insofar as such an appeal is based on the fact that there was no negligent or intentional failure to comply with procedural requirements, sec. 514 para. 2 ZPO.

Source(s): Sec. 688 to 703d ZPO

6.5 Appeals in consumer disputes

6.5.1 Are appeals possible in all consumer disputes? Please specify for small claims and other types of claims.

An appeal is only admissible if the value of the subject matter of the appeal is greater than 600 EUR or if, in its ruling, the court of first instance has granted leave to appeal, sec. 511 para. 2 ZPO.

	Individual claim of	Individual claim of	Individual claim of	Collective claim of	Collective claim of	Collective claim of

	value € 0 – € 5000	value € 5001 – € 20.000	value € 20.001+	value € 0 – 5000	value € 5001-- € 20.000	value € 20.001+
Nature of the procedure at 1st instance	Ordinary civil proceeding	Ordinary civil proceeding	Ordinary civil proceeding	Not available	Not available	Not available
2nd instance – appeal to?	Regional Court	Higher Regional Court	Higher Regional Court			
3rd instance – appeal to?	Federal Court of Justice	Federal Court of Justice	Federal Court of Justice			

6.5.2 Please briefly specify the national appeal procedure, including any requirements to be satisfied for appeals. These might include, but are not limited to, conditions of admissibility, value thresholds, time-limits, the scope of review, and the impact of the appeal on enforcement (provisional enforcement). Please refer to any rules specifically applicable in respect of the claims and relevant procedures outlined above.

The available remedy against final judgments delivered by the court of first instance is the appeal, sec. 511 para. 1 ZPO. It is only admissible if the value of the subject matter of the appeal is greater than 600 EUR or if, in its ruling, the court of first instance has granted leave to appeal, sec. 511 para. 2 ZPO. Furthermore, it is necessary that the first instance decision brings about a gravamen for the party lodging the appeal.
The time limit for lodging an appeal is one month. The period cannot be extended and begins upon the fully worded ruling having been served, at the latest, however, upon the expiry of five months following the pronouncement of the judgment, sec. 517 ZPO. The period for submitting the particulars of the appeal amounts two months and commences also on the same moment, sec. 520 para. 1 to 2 ZPO. This period can, under certain circumstances, be prolonged.

The court of appeal generally bases its hearing and decision on the facts established by the court of first instance, sec. 529 para. 1 ZPO.
The consideration of new facts, i.e., means of challenge or defence not asserted in the proceedings before the court of first instance, is only admissible in very narrow cases, sec. 531 para. 2 ZPO. However, the scope or review is limited only in relation to facts. As regards issues of law, the court of appeal undertakes a complete review.
When an appeal is lodged, the judgment does not become final and binding (res judicata). However, a first instance judgment is declared provisionally enforceable with or without security. Still, the court may, upon corresponding application, temporarily stay enforcement, sec. 719 para. 1 ZPO. Additionally, see 2.2.1 for further details on the German civil appeal procedure.

Source(s): Sec. 511 to 541 ZPO, sec. 719 para. 1 ZPO.

6.6 Enforcement in consumer disputes

Additional situations have not emerged yet and are not being discussed.

There are almost no particularities concerning the enforcement of consumer protection disputes. Therefore, we are not aware of any article on point.

6.6.1 If the assessment of a consumer protection issue has not been possible at an earlier stage of the proceedings, is it always possible – either ex officio (see section 10 below) or if the consumer raises a possible violation of consumer protection law – for this assessment to be undertaken during enforcement proceedings?

In German civil proceedings the applicable law hast to be applied ex officio at every instance (see also 8.1.6). Therefore, in proceedings before a court it is always possible to raise a violation of consumer protection law as it is a matter of the applicable law (which will generally be the case), not if it is a matter of the facts provided by the parties (see 2.2.1 and 8.5.2 for consideration of new facts in appeal procedure).

At the enforcement stage, objections that concern the claim itself are only admissible if the grounds on which they are based arose after the hearing that was the last opportunity, pursuant to the rules of the ZPO, for objections to be asserted, sec. 767 para. 2 ZPO. This also applies to the consideration of consumer protection law.

The fact that it is impossible to raise objections based on consumer protection law once the stage of enforcement is reached has not proven particularly problematic. It should be noted that in case of abuse in the provision or the use of a title by the creditor, res judicata can be broken applying sec. 826 BGB.

6.6.2 In the particular case of consumer protection, if a court examines consumer protection law (either ex officio or on the basis of an argument advanced by the consumer), does national procedural law provide that interim measures should 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 final decision will have full effect?

Insofar as a judgment declared provisionally enforceable is protested or appealed against, the court may, upon application of the aggrieved party, temporarily stay compulsory enforcement, with or without any provision of security, sec. 719 para. 1 and 707 para. 1 ZPO. However, this applies generally to all kinds of appeal and protest proceedings and is not limited to consumer protection cases (see 2.2.1 for further details).

Source(s): 707, 719, 767 ZPO, 826 BGB.

7. ACTIONS FOR COLLECTIVE REDRESS

Additional situations are not known yet.

Astrid Stadler, Die Umsetzung der Kommissionsempfehlung zum kollektiven Rechtsschutz, ZfPW 1/2015, p. 61-84

7.1 Injunctive relief, linking individual and collective actions

7.1.1 If collective proceedings are launched, does national procedural law provide that ongoing individual claims, relating to the same dispute, should be stayed until the collective proceedings are brought to an end? Please specify if this constitutes an obligation on the part of the national judge or if it is at his or her discretion.

According to sec. 148 ZPO the court may direct, where the decision on a legal dispute depends either wholly or in part on the question of whether a legal relationship does or does not exist, and this relationship forms the subject matter of another legal dispute that is pending, or that is to be determined by an administrative agency, that the hearing be suspended until the other legal dispute has been dealt with and terminated, or until the administrative agency has issued its decision.
However, this stipulation does not apply, pursuant to a decision of the German federal Court (BGH, 30 March 2005, X ZB 26/04, NJW 2005, 1947-1948), when "Verbraucherzentralen" launch corresponding proceedings.
Nevertheless, there is the possibility that the court has to order that proceedings be stayed if both parties have petitioned that this be done and if it is to be assumed that such order is suitable for the purpose intended in light of the pendency of settlement negotiations or of other sound reasons, sec. 251 ZPO.
For certain capital markets cases, a special law provides for a stay until a model case was decided, see sec. 5 Act on Model Case Proceedings in Disputes under Capital Markets Law (Capital Markets Model Case Act – "**KapMuG**").

7.1.2 If individual proceedings are stayed, please indicate what the effect of the court or ADR entity's decision in the collective action on those individual proceedings would be, i.e. whether the outcome of the collective action binds the consumer bringing an individual action.

As mentioned above, the proceeding is only stayed when the requirements of sec. 251 ZPO are met.
Generally 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, sec. 325 para. 1 ZPO. 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 a binding effect on individual proceedings exits. In proceedings against unfair standard terms and conditions, there is such a binding effect if, on the one hand, a the "Verbraucherzentrale" won the case and, on the other hand, the consumer explicitly refers to this

decision, sec. 11 UKlaG. In capital markets cases governed by the KapMuG, the decision of the model case binds all other courts, sec. 22 KapMuG.

Source(s): Sec. 251 and 325 para. 1 ZPO, sec. 11 UKlaG, KapMuG.

8. CONSUMER ALTERNATIVE DISPUTE RESOLUTION

8.1 Consumer disputes before ADR fora

8.1.1 Is ADR mandatory for all parties bringing a claim related to a consumer protection dispute?

No. Only one aspect of ADR is governed by sec. 15a para. 1 Introductory Act to the German Code of Civil Procedure (Gesetz, betreffend die Einführung der Zivilprozessordnung, "**EGZPO**"), which gives the State governments the option of instituting obligatory out-of-court conflict resolution for specific civil matters, and requires the enactment of conciliation procedures as a prerequisite for a court case. Eleven States enacted such laws, but they are not considered successful.
The matters covered by this provision are, inter alia, neighbour disputes or other disputes before local courts in which the value of the claim does not exceed the sum of 750 EUR.

In proceedings concerning distance contracts on financial services, consumer credit agreements and contracts dealing with financing assistance between an entrepreneur and a consumer as well as some stipulations related to payment services contracts, the parties may raise their issues before an conciliation body, sec. 14 para 1 UKlaG. However, this is not mandatory.

Furthermore the State governments had to establish conciliation boards at the Chambers of Industry and Commerce for the resolution of private law disputes where a claim is asserted by virtue of the UWG (meaning unfair commercial practices and unconscionable pestering on market participants through commercial practices), sec. 15 para. 1 UWG. Referral can be made to a conciliation board but it is not a prerequisite for a court case, sec. 15 para. 3 UWG.

As from 1st April 2016 the German Act of Alternative Dispute Resolution for Consumer Disputes (Verbraucherstreitbeilegungsgesetz, "**VSBG**") has entered into force which is based on Directive 2013/11/EU of 21 May 2013. Basically, the use of ADR-proceedings is not mandatory. But for some industries there is an obligation to participate in ADR-proceedings, see, e.g., sec. 191 et seq. of the German Federal Lawyers' Act (Bundesrechtsanwaltsordnung, "**BRAO**"), sec. 57a of the Civil Aviation Act (Luftverkehrsgesetz, "**LuftVG**") and sec. 111b of the Energy Market Law (Energiewirtschaftsgesetz, "**EnWG**").

8.1.2 Please specify if there are limitations to the use of ADR. These might include the nature of the claim (i.e. whether both individual and collective claims are possible), requirements of representation, time limits, value thresholds, etc.

Regarding the nature of the claim and value thresholds see 10.1.1. Neither time limits exits nor representation by an attorney is required.

The VSBG does not state specific limitations to the use of ADR, but, of course, the conciliation board ("Schlichtungsstelle") has to be responsible. The conciliation boards are able to determine value thresholds. Therefore, they have to take into account the objective of the Act – the protection of small claims. According to sec. 30 para. 1 no. 4 VSBG, the subsidiary universal-conciliation board ("Universalschlichtungsstelle") refuses the request if the value exceeds 5,000 EUR. This might be guidance for the other conciliation boards under the VSBG.

8.1.3 Can ADR entities issue binding decisions and can they enforce those decisions? If not, please explain how they are enforced.

Before the out-of-court conflict resolution offices pursuant to sec. 15a para. 1 EGZPO the parties may conclude settlements on which compulsory enforcement may be pursued, sec. 15a para. 6 EGZPO and sec. 794 para. 1 no. 1 ZPO.
The same applies for conciliation bodies pursuant to sec. 14 para. 1 UKlaG and 15 para. 1 UWG.
ADR entities itself cannot issue binding decisions but the parties can enter into binding agreements at the ADR venues. Enforcement is within the parties' responsibility.

8.1.4 Does national law provide that limitation periods applicable to judicial actions should be suspended while ADR is ongoing?[173]

According to sec. 204 para. 1 no. 4 BGB the limitation period is suspended by arranging for notice to be given of an application for conciliation filed with a conciliation body established or recognized by the State justice administration authority or, if the parties seek conciliation in mutual agreement, with any other conciliation body which settles disputes; if notice is arranged to be given shortly after the filing of the application, the limitation period is suspended immediately once the application is filed.
This also applies to VSBG-proceedings.

8.1.5 Please specify if national law establishes rules providing for recourse to judicial action following an (unsuccessful) ADR hearing[174].

There are no special rules in German law dealing explicitly with recourse to judicial action following an ADR hearing. It is without any question that a party may go to court if an ADR proceeding was not successful.

[173] The Directive on Consumer ADR provides that "the existence of an effective system for collective claims and easy recourse to ADR should be complementary". Consumer ADR is relevant not only for individual claims but also for collective ones; it can provide consumer with a means to reduce costs and save time.
[174] Per Arts.10-12, Directive on Consumer ADR.

8.1.6 Is there judicial review of decisions and awards made by ADR entities? If so, by which court or tribunal is this oversight made? Is it ordinary or specialised?

As ADR entities in Germany cannot issue binding decisions, there is no judicial review in a strict sense. However, regarding settlements on which compulsory enforcement may be pursued judicial review may take place if the nullity of the settlement is raised. Local and substantive jurisdiction is governed by the general rules (on compulsory enforcement or on ordinary proceedings, depending which remedy is raised).

Source(s): Sec. 15a EGZPO, sec. 14 para 1 UKlaG, sec. 15 para. 1 UWG, sec. 794 para. 1 no. 1 ZPO, VSBG.

9. THE EXAMINATION OF CONSUMER PROTECTION LAW IN NATIONAL PROCEDURAL LAW: RESPECT FOR THE PRINCIPLES OF THE EFFECTIVENESS AND EQUIVALENCE OF CONSUMER PROTECTION LAW AND EX OFFICIO CONTROL

9.1 The basis of ex officio control of consumer protection law in national law

9.1.1 Is it clear in the national legal system when consumer protection law should be applied ex officio? Is the ex officio control of consumer protection law established as an obligation or as a (discretionary) power of the judge in national procedural law?

In proceedings before German courts, the law is always applied (and "provided") ex officio at every instance. This holds, of course, also for consumer protection law. The "ex officio control" is mandatory (see also 8.1.6).

9.1.2 If there is an understanding of ex officio control of consumer protection law in the national legal system, what is this control understood to encompass/not cover?

The "ex officio control" covers all aspects of the law, including consumer protection law. Note, however, that only the law is to be applied ex officio, but that the facts must be provided by the parties (see 8.6.1 and 8.1.6 for further details).

9.1.3 Is the party who claims to be a consumer required to establish his or her consumer status, the existence of a consumer contract and that consumer law applies to the dispute? Is this required even if the consumer has no legal representation?

Generally, in German civil proceedings governed by the ZPO, every party has to assert the facts and, if disputed, prove the facts, of a rule on whose favourable effects the party relies. This means that the consumer must assert and, if the other party disputes the assertion, prove his or her consumer status. This applies regardless of legal representation.
However, it is presumed that a natural person has acted as a consumer, i.e. for instance, that the natural person concluded a consumer contract, cf. sec. 13 BGB. Moreover, the court has an obligation to give

hints and feedback (cf. sec. 138, 139 ZPO), and a consumer who is not represented will receive more hints and feedback than a businessman (see also 8.1.6).

9.1.4 What information is available to judges and dispute resolution facilitators hearing consumer protection disputes? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a consumer protection dispute to be heard and b) for the court to engage in ex officio control?

As consumer protection disputes are ordinary civil proceedings, the judge only has the information available provided by the parties in the statement of claim (see 8.1.4 for its minimum content) respective statement of defence and in the oral hearing. The judge may not introduce new facts. However, the judge may give hints and feedback and thus direct a party to assert relevant facts, and the judge may use any means of evidence within the scope of the facts asserted by the parties, with the sole exception of witnesses (see also 8.1.6).

9.1.5 Who is responsible for providing this information? If the necessary information is not available to the court (or dispute resolution facilitator), is he or she under an obligation to investigate in order to be able to respond to a relevant consumer protection dimension of the case?

The facts have to be provided solely by the parties, only the law is applied (and "provided") ex officio. There is no obligation to the court to investigate on the facts. But the court has an obligation to give hints and feedback (see also 11.1.4 and 8.1.6).

9.1.6 Will the court provide the consumer with any assistance in gathering factual information or advancing his legal arguments before the court? Please respond for the situation where: a) the consumer has legal representation and b) the consumer has no legal representation.

See 11.1.4, 11.1.5, and 8.1.6. The court will not directly assist the consumer in gathering factual information. However, the court will, by providing hints and feedback, guide the consumer to assert the relevant facts. Once asserted, the court can, if the fact is relevant and the other party disputes it, use all means of evidence with the sole exception of witnesses not named by a party. Note, in addition, that the court may, by providing hints and feedback, guide a party to name a person as a witness.

Source(s): Sec. 13 BGB, sec. 138, 139 ZPO.

9.2 The possibility for ex officio control of EU consumer protection law in dispute resolution proceedings

9.2.1 Is ex officio control of consumer protection law always possible when the procedure involves a full assessment of the claim on its merits?

Yes.

9.2.2 Can ex officio control be exercised even when the procedure does not involve an assessment on the merits?

In general, ex officio "control" of the applicable law cannot be exercised when the procedure does not involve an assessment on the merits.
However, in German procedural law, only in proceedings on petition for a payment order and on default judgments against the claimant, the procedure does not involve a legal review on the merits.

9.2.3 Please indicate if, per national procedural law, ex officio control can be exercised at the following stages of the procedure:

	Courts		Other dispute resolution facilitators	
	Possible to exercise ex officio control	Not possible to exercise ex officio control	Possible to exercise ex officio control	Not possible to exercise ex officio control
Ordinary proceedings	x			
Small claims	x			
Payment order		See 11.2.2		
Provisional measures	x			
Proceedings linked to enforcement	X, but see 8.6.1 regarding the statute of repose			
Enforcement proceedings				
- Enforcement of payment order	X (see 8.6.1)			
- Enforcement of arbitration award	X (see 8.6.1)			
- Enforcement of mortgage	X			
- Enforcement of notarial deed	X			
Appeal proceedings (please specify:)	x			

9.2.4 What does ex officio control encompass in national procedural law?

As mentioned before, in ordinary civil proceedings, the law is applied ex officio on the basis of the facts asserted and, if disputed, proven by the parties.

However, in proceedings governed by the FamFG except for marital matters and family dispute matters, the court has to conduct necessary inquiries ex officio in order to establish all facts that are relevant to the decision, sec. 26 and 113 para. 1 FamFG.

Source(s): ZPO, FamFG.

9.3 Other procedural mechanisms for the equivalent and effective protection of EU consumer law

9.3.1 Does national procedural law provide that rules of EU consumer law (as well as rules that aim to satisfy EU consumer law objectives) should be understood as having equal standing to national rules of public policy (which is to say, that for the purposes of domestic law, the consumer protection provision is understood to have equal standing to a rule that must be raised ex officio by the national court)?

Yes. EU consumer law applies ex officio as is the case for every other national law. Furthermore, the courts have to interpret domestic law as well as EU consumer law in accordance with European law.

9.3.2 If ex officio control is not possible in certain types of proceedings or at a certain stage of proceedings (or for any other reason), does national procedural law provide for an alternative way of assessing consumer protection law?

As mentioned above only in proceedings on petition for a payment order and on default judgments against the claimant the procedure does not involve a legal review on the merits (11.2.2). However, in both cases, that fact that consumer protection law is not applied is merely due to negligent behaviour of the party. Had the party lodged the applicable remedy or appeared in the hearing, the court would have applied consumer protection law. Thus, these situations are not problematic at all.

Source(s): ZPO.

9.4 Ex officio control in payment order procedures

9.4.1 What information is available to the judge when a claim for the issuance of a payment order is made? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a claim for the issuance of a payment order to be granted and b) for the court to engage in ex officio control before a payment order is issued?

In German civil procedural law the payment order is not “issued” by a judge but a judicial officer (“Rechtspfleger”) of the court with which the petition is filed. The information that needs to be provided when filing a petition for the issuance of a payment order is listed in sec 690 para. 1 ZPO (see 8.4.3).
There are no rules for the court to engage in ex officio control before issuing a payment order. However, the petition for a payment order has to be dismissed if it does not comply with the stipulations of sec. 688 (see 8.4.1 and 8.4.7), 689 (see 8.4.2) and 690 (see 8.4.3) ZPO and if the payment order cannot be issued for reasons given in only a part of the claim, sec. 691 para. 1 ZPO.

9.4.2 What considerations will be assessed ex officio by the court (or other competent authority) before a payment order is issued?

The judicial officer (Rechtspfleger) of the court where the petition for a payment order is filed examines ex officio if the requirements of sec. 688 (see 8.4.1 and 8.4.7), 689 (see 8.4.2) and 690 (see 8.4.3) ZPO are met. The petition for a payment order has to be dismissed as well if the payment order cannot be issued for reasons given in only a part of the claim, sec. 691 para. 1 ZPO

9.4.3 How is the consumer informed about the claim to issue a payment order against him or her? Does national procedural law make any provision for steps to be taken to ensure that consumers are informed of the claim for the issuance of a payment order so that he or she can contest it?

Note first that German civil procedural law does not differ if a petition for a payment order is filed against a consumer or an entrepreneur. Of course, the right to be heard, which is guaranteed by Art. 103 para. 1 of the German constitution, must always be respected. This is clearly the case under the relevant provisions of the ZPO: If the petition for issuing a payment order is granted, the payment order must be served to the consumer (if he or she is the respondent under the claim), sec. 693 para. 1 ZPO. The payment order contains the information provided by the creditor.

9.4.4 If the consumer objects to the claim, what is the next step? Do the proceedings continue, in the context of which ex officio control can be exercised? Or are the proceedings transferred to ordinary proceedings for analysis on the merits of the claim?

If the consumer files a protest against a writ of execution based on the payment order or lodges an opposition against the payment order, the proceeding is transferred, on the application of one of the parties (mostly the claimant), to an ordinary proceeding providing a full assessment on the merits, sec. 696 para. 1 and sec. 700 para. 3 ZPO. This entails that the court will examine ex officio whether provisions of consumer protection law apply.

Source(s): Sec. 690 para. 1 ZPO, sec. 696 para. 1 and sec. 700 para. 3 ZPO

European Commission
An evaluation study of the impact of national procedural laws and practices on the equivalence and effectiveness of the procedural protection of consumers under EU law

JUST/2014/RCON/PR/CIVI/0082

National Report – Consumer Protection Strand

Greece

Apostolos Anthimos

GREECE: LEGAL ANALYSIS

1. NATIONAL LEGISLATION IMPLEMENTING EU CONSUMER PROTECTION INSTRUMENTS

EU legislation	**Transposing national legislation**	**Additional notes (e.g. if there is an overlap in application of legislation etc.)**
Doorstep Selling **Directive 1985/577/EEC**	**Law Nr. 1961/1991 (repealed)** **Law Nr. 2251/1994**	
Package Travel Directive **90/314/EEC**	**Presidential Decree Nr. 339/1996**	
Unfair Contract Terms Directive **1993/13/EEC**	**Law Nr. 2251/1994**	
Distance Selling Directive **1997/7/EC**	**Joint Ministerial Order Nr. Z1-496/2000, [Official Gazette, Issue B 1545/2000] (Art. 4 Law Nr. 2251/1994)**	
Consumer Sales and	**Law Nr. 3043/2002 "Seller's**	

Guarantees Directive **1999/44/EC**	**liability for defect of quality and lack of agreed qualities" – Amendments of Civil Code** **Article 16 Law Nr. 3853/2010 "Simplification of procedure for the foundation of personal and capital companies, and other provisions" – Supplement of Art. 14 § 4 Law Nr. 2251/1994** **Article 6 Law N. 3587/2007 "Amendments and supplement of Law Nr. 2251/94 "on the protection of consumers" – Amendments of Art. 5 Law Nr. 2251/1994**	
Unfair Commercial Practices Directive **2005/29/EC**	**Law Nr. 3587/2007 "Amendments and supplement of Law Nr. 2251/94 on the protection of consumers"** **Joint Ministerial Order Nr. Z1-111/2012 on the transposition of a) … b) … c) points 11 & 26 of Appendix I of Directive 2005/29/EC, and) Recommendations 98/257/EC & 2001/310/EC [Official Gazette Issue (OGI) B΄ 627/07.03.2012]**	
Misleading and Comparative Advertising Directive **2006/114/EC**	**Article 9, in conjunction with Articles 9d & 9e Law Nr. 2251/1994**	
Consumer Credit Agreement **Directive 2008/48/EC**	**Joint Ministerial Order Nr. Z1-699/10, on the transposition of Directive 2008/48/EC, L 133 / 22.5.2008. [Official Gazette, Issue 917/B/23.06.2010]**	

Timeshare Protection Directive **2008/122/EC**	**Joint Ministerial Order Nr. Z1-130/2011 [Official Gazette Issue 295 B/22.2.2011]**	
Consumer Injunctions **Directive 2009/22/EC**	**Joint Ministerial Order Nr. Z1-111/2012 on the transposition of b) Directive 2009/22/EC, [Official Gazette Issue B΄ 627/07.03.2012] – Art. 2** **Law Nr. 2251/1994 – Art. 10**	
Consumer Rights **Directive 2011/83/EU**	**Joint Ministerial Order Nr. Z1-891/2013, on the transposition of Directive 2011/83/EE on consumer rights** **[Official Gazette Issue (OGI) B΄ 2144/30.08.2013]** **Law Nr. 2251/1994 – Art. 3 – 3ιγ, 4 – 4^{0}, 10 §16, Appendix**	
ADR for Consumer Disputes **Directive 2013/11/EU**	**Joint Ministerial Order Nr.70330/9-07-2015** **"Provisions on the transposition of Directive 2013/11/EU and additional national measures on the implementation of Regulation Nr. 524/2013 on the online consumer disputes resolution"** **[Official Gazette Issue (OGI) B΄ 1421/09-07.2015]** **Law Nr. 2251/1994 – Art. 10, 11a**	

Source(s):

1. CONCEPT OF THE CONSUMER

1.1 Please outline the concept of the consumer in national law, indicating whether it is intended to be a uniform concept, whether it has been legislated for and where it can found (i.e. in a legislative provision, governmental guidelines, case law etc.).

Consumer: 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 market, and use products or services being their end user.
A consumer is also: a) every target group of promotional activities, b) every person or legal entity giving a guarantee in favor of the consumer on condition that they do not act in the context of their professional or business activity.

Source(s): Art. 1 Law Nr. 2251/1994(Basic Definition)

2. REGULATORY AUTHORITIES COMPETENT FOR CONSUMER PROTECTION ISSUES

2.1 What regulatory authorities, if any, are competent for enforcing consumer protection law? Please identify them, their nature (i.e. whether they are public or private or mixed) and the nature of enforcement.

-Hellenic Consumer's Ombudsman – Independent Authority

-Amicable Dispute Resolution Boards (Article 11 Law Nr. 2251/1994; The powers to establish the above have been delegated to the Hellenic Consumer's Ombudsman by virtue of Article 3 Law Nr. 3297/2004).

-General Secretariat for the consumer (under the umbrella of the Ministry of Growth and Competitiveness) [no ADR body; consultative policy organ; monitoring powers for the proper implementation of consumer legislation; Imposes administrative fines upon reports or controls. Hence, it is vested with enforcement powers [public nature].

-The National Consumer & Market Council (N.C.M.C.) constitutes a consultative and advisory body of the Ministry of Growth, Finances & Tourism. The N.C.M.C. expresses the views of the market stakeholders and the consumers on matters related to the functioning of the market and the protection of consumers; it submits proposals and issues opinions on matters related to the market and consumers. Its operation is regulated by Article 12 of Law Nr. 2251/1994, see Ministerial Order Nr. 99792/2015 (ΦΕΚ 748/21.10.2015)[publicnature (see Article 12 Consumer Protection Act, established under the General Secretariat for the consumer].

-Consumer Unions (e.g. the Institute for Consumers (IN.KA.), the Center for the Protection of Consumers (ΚΕ.Π.ΚΑ), Article 10 Law Nr. 2251/1994 [private nature]

-European Consumer Center of Greece (ECC-NETGREECE) [public nature]

- The Hellenic Ombudsman for Banking-Investment Services (H.O.B.I.S.): A private, non-profit entity which was set up on July 1, 2005, following the merger of the Banking Ombudsman and the Investment Ombudsman. It considers fairly, impartially and openly, disputes arising from the provision of banking and investment services, aiming at their amicable settlement.

2.2 Is there a specific venue for this type of enforcement and does this limit the jurisdiction of courts/ADR fora (even if only initially)?

As stated above, the bodies aforementioned are not entrusted with the enforcement of consumer protection laws and regulations. Therefore, no limits are posed in regards to the jurisdiction of courts / ADR fora**.**

2.3 Can criminal prosecutions be initiated for violations of consumer protection rules? How serious must the infringement be? What are the penalties and sanctions? And might these prosecutions lead to criminal penalties or sanctions? Can individual consumers piggy back on these claims (e.g. via a partiecivile method)?

According to the aforementioned (general) Law on Legal Aid, there are no exceptions as to the kind of the disputes or actions, for which Legal Aid is available.

3. LEGAL AID

3.1 Is legal aid available to consumers in: a) bringing a claim and b) defending a claim before a court?

Yes, a legal aid procedure is available in both cases, based on Law Nr. 3226/2004 (Law on Legal Aid, through which Directive 2003/8 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, was transposed).

3.2 For what kinds of disputes and actions is legal aid available? (NB: legal aid might not be available for consumer or contractual disputes but be available instead for a related action, e.g. actions relating to debt, mortgage arrears, eviction etc.)

According to the aforementioned (general) Law on Legal Aid, there are no exceptions as to the kind of the disputes or actions, for which Legal Aid is available.

3.3 What requirements must be satisfied for the consumer to be entitled to legal aid? Please specify if there are any additional limitations to its availability.

Law on Legal Aid specifies the requirements as follows:
Article 1: Beneficiaries of legal aid
1. Nationals of European Union Member States who have a low income shall be eligible for legal aid. Nationals of third countries and stateless persons who have a low income shall also be eligible provided that they are domiciled or habitually resident in the European Union.
2. Persons with low income who are entitled to legal aid means persons whose annual family income is less than two-thirds the minimum annual personal pay stipulated by the national general Collective Labour Agreement.
3. Beneficiaries of Legal Aid, regarding to their criminal and civil claims, are also the victims of those criminal actions which are provided by Criminal Code's Art. Nr. 323, 323A, 323Bsubp. A, 324, 339, 342, 348A, 351, 351A and by Law's Nr. 3386/2005 Art. 87 par. 5 and 6 and 88, as the underage victims of the actions provided by Criminal Code's Art. Nr. 336, 338, 343, 345, 346, 347, 348, 348B, 348Γ and 349.

3.4 What does legal aid encompass? (i.e. (only) general advice, (only) assistance in preparing the case, (only) assistance with negotiation of settlements, (also) representation).

Law on Legal Aid specifies the requirements as follows:

Article 9: Content of legal aid
1. The provision of legal aid in cases of a civil or commercial nature takes the form of exemption from the obligation to pay part or the whole of the costs of the proceedings and, if specially requested, the appointment of a lawyer, notary and marshal with instructions to defend the beneficiary, represent him in court and afford him the assistance he needs to complete the necessary procedures.
2. The exemption from costs covers, in particular, stamp duties, court stamp duties, copy duties and supplements thereto, costs of witnesses and experts, fees or salary of the appointed lawyer, notary and marshal, and the obligation to give security for these costs.
3. Legal aid is granted separately for each trial, is valid for all levels of justice and for every court, and also covers the enforcement of the decision.
4. For legal aid to be granted in cases involving appeals, the latter must be admissible and not patently unfounded or futile. The significance of the case for the applicant is also taken into account.
5. The appointment of the lawyer counts as the beneficiary having given legal power of attorney.
6. The granting of legal aid does not affect the obligation to pay expenses awarded to the adversary.

Article 10: Special provisions for cross-border disputes
If the person applying for legal aid in a case of a civil or commercial nature is domiciled or habitually resides in another Member State of the European Union, the following special provisions apply:

(a) Legal aid may be granted to a person who satisfies the legal conditions, but whose family income exceeds the amount laid down in Section 1(2), if he demonstrates that he is unable to meet the legal expenses because of the difference in the cost of living between the Member State of his domicile or habitual residence and Greece;
(b) The exemption referred to in Section 9(1) may also cover:
(aa) the remuneration of an interpreter;
(bb) the costs of official translation of the documents needed to resolve the dispute; and
(cc) the expenditure the applicant has to meet for the travel of a person who is connected with supporting the applicant's case, if this person's physical presence in court is a requirement and the court decides that this person may not participate in the proceedings in some other way.
(c) Legal aid may also take the form of the appointment of a lawyer to provide legal advice in order to resolve the dispute before it reaches court. The appointment of a lawyer to provide legal advice is also possible for a person who is domiciled or habitually resident in Greece, but is applying for legal aid for a trial or procedural action in another Member State of the European Union until the receipt of the application for legal aid by the competent authority in the other country. Section 9(5) applies to such cases too.

Source(s): Law Nr. 3226/2004, Ch. Apalagaki (-ApostolosAnthimos),Practice of Civil Procedure, NOMIKI BIBLIOTHIKI (2008), pp. 373 - 382

4. COSTS

4.1 What are the costs of different types of procedures before courts? Are there exemptions to the payment of fees and expenses? How can costs be paid?

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Court fees VAT excluded	**Small claims** **-filing of the claim 32€** **-hearing 32€**	**Justice of the Peace Ordinary Proceedings** **-89€** **-168€**	**1st Instance Court (One Member Section)** **Ordinary Proceedings** **(up to € 250.000)** **-102€** **-219€** **1st Instance Court (Three Members Panel)** **Ordinary Proceedings** **(250.000-350.000 €)** **203€** **566€** **(350.001-800.000 €)** **363€** **726€**			

			(800.001-1.500.000) **566€** **1132€** **(1.500.001 € and above)** **822€** **1644€**			
Court expenses	**judicial stamp (depends on the amount of the claim, equal to approximately 10/1000 of the subject matter)**	**judicial stamp (depends on the amount of the claim, equal to approximat. 10/1000 of the subject matter)**	**judicial stamp (depends on the amount of the claim, equal to approximat. 10/1000 of the subject matter)**			
Exemptions		**Disputes falling under the scope of Law 3869/2010 (overindebted consumers)** **69€** **128€** **Provisional restraint order** **69€**	**Non calculable disputes** **(Action to rescind a contract as null and void)** **117€** **256€**	**Article 10§16 Law Nr. 2251/1994** **Collective action (by consumer unions)** **Competent court:** **1st Instance Court (Three Members Panel) of the residence / seat of the respondent** **Article 10§19Law Nr. 2251/1994** **Type of proceedings:** **Voluntary Proceedings** **Article 10§20Law Nr. 2251/1994**		

				117€ **256**

Source(s): **Website "Thessaloniki Bar Association"www.dsth.gr**

5. STANDING AND REPRESENTATION IN CONSUMER DISPUTES

5.1 Does national law limit the standing of the individual consumer in respect of the claim that can be made and the forum before which it can be brought?

There is no special provision on the standing of an individual consumer. The general rule, i.e. Article 68 Code of Civil Procedure, applies. In addition, there is no special provision on the forum in consumer disputes. Again, the general provisions on venue (territorial competence), i.e. Articles 22-41 Code of Civil Procedure, apply.

5.2 Other than individual consumers, who or which bodies have standing in consumer protection disputes and for what types of claim? If the action is not brought by the individual consumer, what requirements of representation must be satisfied?

By virtue of Article 10 § 15of the Law Nr. 2251/1994, consumer unions (fulfilling the requirements of the law) are entitled to file proceedings in consumer protection disputes. § 15 reads as follows:

15. Every consumers union has the legal right to ask before courts and administrative authorities any kind of legal protection of the rights of its members, as consumers. Particularly it has the legal right to bring a court action, apply for security measures, annulment or recourse against administrative acts and to be the plaintiff. Every consumers union has also the right to intervene in pending trials of its members to support their rights as consumers.

Apart from the rights aforementioned, consumers unions have the right to file a collective action. Article 10 § 16 reads as follows:

16. A consumers union which has at least five hundred (500) active members and has been enrolled in the register of consumers unions for at least one year, may bring any kind of court action for the protection of the general interests of the consuming public (collective court action). The court action of the previous subparagraph may also be brought when an illegal behavior hurts the interests of at least thirty (30) consumers.
In particular it may request:
a) The omission of the supplier's illegal behavior, even before this is actually manifested, mostly when it pertains to violating the stipulations:
aa) of articles 2, 3, 4, 4a, 5, 6, 7, 7a, 8, 9, 9a to 9i of this law,
bb) of the joint ministerial decision no F1 – 983/1991, "Consumer Credit –Harmonization with directive 87/102/EEC of Dec 22, 1986 as amended by directive 90/88/EU of Feb 22, 1990" (Government Gazette 172B'), as applicable,
cc) of the presidential decree 339/1996, "Regarding organized trips, in compliance with the Directive 90/314 (EEL 158/59) for organized trips and organized holidays and tours" (Government Gazette 225 A'), as applicable,
dd) of the ministerial decision no DYG 3(a)/83657, "Harmonization of Greek Law with the respective European Law regarding the sector of production and circulation of medicine, intended for human use in compliance with Directive

no EC/2001/1983 “regarding European code on medicines intended for human use”, as amended by Directives no EC/27/2004, EC/24/2004 regarding traditional medicine of plant origin and article 31 of EC Directive no 2002/1998 regarding the establishment of quality and safety standards for collecting, holding in check, processing, storing and distributing human blood and blood components,(Government Gazette 59 B’),
ee) of presidential decree 182/1999, “Adaptation of Greek Law to the stipulations of the Directive of the European Parliament and Council 94/47/EP of October 26,1994 “Regarding the protection of buyers as to certain aspects of contracts pertaining to acquisition of the right to use immovable property under the status of time leasing”, published in the Official Gazette of the European Communities no L. 280 on 29.10.1994”, (Government Gazette 171 A’), as applicable,
ff) of presidential decree 131/2003, “Adaptation to Directive 200/31 of the European Parliament and Council regarding certain legal aspects of services in the diffusion of information, mostly e-commerce, in the internal market (directive for the e-commerce)” (Government Gazette 116A’), as applicable,
gg) of law 2328/1995, “Legal status of private television and local radiobroadcasting, settlement of issues in the radio-television market and other stipulations” (Government Gazette 159 A’), and
hh) of presidential decree 100/2000 “Harmonization of Greek radio-television laws to the stipulations of Directive 97/36 of the European Parliament and Council of June 30, 1997 (EU no L202 of Directive EEC/89/552 of the Council (EU noL298 of 17.10.89 page 23) regarding the provision of services”.
If illegal behavior is manifested further to a recommendation or suggestion of suppliers’ unions or if those unions engage in illegal behavior, suppliers’ unions can also be asked to terminate that behavior. A consumers union can also request seizure, withdrawal or destruction of flawed products which endanger the safety or health of consuming public, and measures taking, such as the appropriate publication of all or part of the decision, or the publication of a corrective statement, so that the continuing results of the violation cease to exist.

b) Pecuniary compensation due to moral damages. To set the amount of pecuniary compensation, the court mainly takes into consideration the intensity of the violation of legal order by the illegal behavior, the size of the defendant business of the supplier and mostly, its annual turnover, as well as the requirements for general and special prevention.
c) Taking safety measures to secure the demands of the consuming public for the omission of illegal behavior or the pecuniary compensation until an enforceable decision is issued. In the event of flawed products endangering the safety or the health of the consuming public, their seizure can be ordered as a safety measure.
d) The recognition of the right to rectify the loss incurred by consumers due to the illegal behavior.

A claim may be filed jointly by more consumers unions. § 17 reads as follows:

17. A collective lawsuit as per the stipulations of the above paragraph can be filed jointly, by more than one first degree consumers unions, even if each one of them has a number of active members lower than the required minimum number, if the total number of active members of all unions exceeds this number. A collective lawsuit can be filed, jointly, by more than one consumers unions of first and second degree, even if the first degree union has a number of active members lower than the required minimum number. The collective lawsuit is filed further to a decision of the administrative council of the consumers union. Active members of unions are considered to be the ones who have fulfilled their financial obligations. The number of these members is proven with a joint formal statement of the members of the administrative board of the respective consumers union.

The status of limitation is regulated under § 18, which reads as follows:
18. A collective lawsuit is filed in an exclusive period of six (6) months counting from the last manifestation of the illegal behavior against which it is filed. Exceptionally, the requirements of case d of paragraph 16 are subject to thel imitation of article 937 of the Civil Code [i.e. 5 years upon knowledge of the damage made and the person who caused it, and in any case in 20 years, beginning from the date where the illegal behavior took place].

The particulars of the competent court are defined under § 19, which reads as follows:
19. The only court competent to deal with a collective lawsuit is the multi member first instance court under the jurisdiction of which is the residence or the registered office of the defendant. If the object of the collective lawsuit is a radio–television commercial, the court competent is only the multi member first instance court of the registered office of the radio or television station.

Finally, further procedural issues as to the procedure followed, and the binding effect of the decision, are provided for by § 20, which reads as follows:

20. Collective lawsuits of cases a' and b' of paragraph 16 go to trial according to the procedure of voluntary jurisdiction at the earliest day possible. The court may order the temporary enforcement of the decision. Legal consequences arising from this decision are valid for everyone, even if they have not been litigant parties. The res judicata of a decision, which accepts in whole or in part, a lawsuit of case d of paragraph 16 is also valid for consumers incurring losses, even if they have not participated in the relevant trial.
If a court decision on a collective lawsuit of case d' paragraph 16 becomes irrevocable, the consumer incurring a loss may, based on that decision, notify in writing the supplier, against whom the said decision was issued, of his claim, stating the details that specify it. After thirty (30) inactive days have elapsed since the written notification, the consumer, if he is not satisfied, may ask the court to issue a payment order for his claim if the claim is liquidated or can be easily liquidated. A claim can also be proven with every private document which, based on the type or the custom of the transaction, is issued as receipt to consumers.
Claims of consumers arising from illegal behavior, other than the ones specified incases a' up to d' of paragraph 16, are not affected. The right of consumers to file a lawsuit individually is not affected by the rejection of a request for lawsuit of a consumers union in accordance with the details set forth in paragraph 16.

5.3 If a consumer wants to bring or defend an action relating to a consumer protection dispute, is there a legal (or otherwise formal) requirement that he or she has legal representation? Please specify for both judicial and ADR fora and the bodies, associations or authorities that can provide this representation.

- There is no special provision regarding the representation of consumers before Greek courts. Pursuant to Article 94 § 1 Code of Civil Procedure, parties are obliged to appear before civil courts with the assistance of a lawyer. There are only two exceptions, stipulated under § 2: a) Small claims before the Justice of the Peace; b) special circumstances, calling for immediate action in order to avoid an imminent danger. Still, Article 94 § 3 of the Code grants powers to the court to oblige the litigant to hire a lawyer, if it considers it appropriate due to the circumstances of the dispute.
- Article 3 of Presidential Decree 55/2014 (Hellenic Consumer Ombudsman Regulations), which defines the procedure for filing a complaint, does not make reference to any obligation related to legal representation. No

such requirement is mentioned in the guidelines of the Hellenic Ombudsman for Banking-Investment Services (see http://hobis.gr/indexen.asp).

Source(s): Articles 10 Consumer Protection Act, 94 Code of Civil Procedure, 3 of Presidential Decree 55/2014

6. ACTIONS BEFORE COURTS

6.1 Jurisdiction and competence of the courts in consumer disputes: General structure and special procedures aimed at protecting consumers

6.1.1 Are ordinary courts competent to hear such claims? Is there also a specialised tribunal for consumer protection disputes?

Starting from the second question, there is no specialised tribunal for consumer protection disputes.
Hence, ordinary courts are competent to hear such claims.

6.1.2 Which courts are competent to hear consumer protection disputes at first instance and in appeals? Please specify the court, in light of the value of the claim (and identify any other factors that are relevant in allocation jurisdiction).

For the first instance

a. The Justice of the Peace up to 20.000 €.
b. The First Instance Court (one member section) up to 250.000 €
c. The First Instance Court (three member Panel) for claims over 250.000 €

For the appeal against the decisions of the courts aforementioned

a. The First Instance Court (one member section),
b. The Court of Appeal (one member section)
c. The Court of Appeal (three member Panel)

6.1.3 What is the nature of the procedure at first instance, e.g. is it a simplified or a summary procedure, and is there an assessment of the merits? Please specify in light of the value of the claim (and identify any other factors that are relevant in allocating jurisdiction).

There is no specialised procedure for consumer protection disputes.
Hence, ordinary proceedings apply to the hearing of such claims.

6.1.4 Please identify the formal requirements that must be satisfied for a consumer dispute to be heard before a court. These might include time limits applicable to the filing of the action/defence, representation requirements etc.

There are no specialised formal requirements for consumer protection disputes.
The requirements are similar to those asked in the course of ordinary proceedings.

6.1.5 In respect of the claims and relevant procedures available in the national legal system, what kind of relief might be available in consumer protection disputes? (monetary remedies, injunctions, skimming off etc.)?

- Monetary remedies
- Action for the rescission of a contract
- Injunctions
- Restraint orders

6.1.6 Please provide a brief overview of the role of parties and judges in civil proceedings generally (e.g. with reference to the principle of party disposition, the obligation of parties to make and prove factual allegations and to make and provide legal arguments, the possible role of the court). This overview should be brief; these issues will be dealt with in more detail in the questions that follow.

The pertinent provisions of the Civil Procedure Code are the following:

<u>For the parties</u>:
Art. 106 "Principle of party presentation",
Art. 108 "Principle of party initiative in the proceedings",
Art. 116 "Good Faith, Morality and Diligence",
Art. 216 "Substantiation of the claim",
Art. 223 "No amendment of the claim's request"
Art. 224 "No amendment of the claim's cause of action"

<u>For the court:</u>
Art. 227 "Supplementation of formal omissions",
Art. 236 "Duty to give advice on proper procedure",
Art. 254 "Reopening of the hearing for the supplementation of claim's omissions"
Source(s): Code of Civil Procedure

6.2 Small claims

6.2.1 Does a small claims procedure exist in the Member State? If yes, is it a specialised or simplified procedure?

It is a simplified procedure within the second Book of the Code of Civil Procedure (Proceedings before first instance courts, Articles 208-494), regulated under chapter13 (Special provisions on small claims, Articles466-472).

6.2.2 What are the value thresholds for claims brought under the small claims procedure? Moreover, are there any other factors that shape the use of the small claims procedure (including the nature of the claim, the area of consumer protection law into which the claim falls etc.)?

- The value threshold for small claims is up to 5000 €.
- Small claims proceedings apply only in relation to claims and / or movables.
- It is a prerequisite that the nature of the claim falls under the jurisdiction of the Justice of the Peace [there are cases where the Court of first instance (one member section) has exclusive jurisdiction to hear the case, regardless of the amount; hence, no small claims procedure is applicable in those disputes].
- No appeal available against judgments rendered in small claims proceedings [Article 512 Code of Civil Procedure].

6.2.3 What forms must be completed to raise the application? Who assists the consumer in completing these forms?

- No standardized forms; a lawsuit must be filed with the court.
- No obligation to be represented by a lawyer.
- The claimant has various options: To hire an attorney at Law, to ask for Legal Aid, or to prepare the claim alone.

6.2.4 How can an application for a small claim be made (e.g. online, by post or in person)?

- No online filing
- No postal channels available
- Only in person or through legal representative or proxy, by filing the claim at the competent court.

6.2.5 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

- Article 469 § 2 Code of Civil Procedure allows 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, and less costly ways in accordance with her / his judgment.
- It is not necessary for the pursuer or the defender to appear in court. If both parties do not appear, the court orders the discontinuance of proceedings. If one party does not appear, the hearing takes place without any sanctions imposed to the litigant in default of appearance (such as dismissal of the action for the claimant, or admission of the action for the respondent).

6.2.6 Are the costs of the successful party reimbursed?

No specific provision on costs.
General provision on costs apply (Article 176 Code of Civil Procedure).
The defeated party is burdened with the costs of litigation.

Source(s): Articles 466-472 Code of Civil Procedure

6.3 Claims other than small claims

6.3.1 If a consumer protection dispute does not qualify as a small claim, what other procedures are available? What are the value thresholds and other factors determining the use of such procedures?

- Ordinary procedure upon claim of the consumer for damages or for the rescission of the contract /
- Special proceedings upon an opposition of the consumer against a payment order issued usually by a credit institution.
- The value thresholds are the same as under point 8.1.2.

6.3.2 How can such claims be made? Please specify if the applications can be made online, or by post or in person.

See answer under point 8.2.4.

6.3.3 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

- In the course of ordinary proceedings: Chapter 12 of the second Book of the Code of Civil Procedure applies [On Evidence, Articles 335-465].In the course of special proceedings upon an opposition of the consumer against a payment order: Articles 591 §§ 3-5 Code of Civil Procedure apply, granting more ex officio powers to the court (interrogation and / or witness statements of the parties and their lawyers, expedited procedure for the submission of an expert's opinion).
- If both parties do not appear, the court orders the discontinuance of proceedings. It is necessary for the pursuer or the defender to appear in court, in order to avoid sanctions imposed to the litigant in default of appearance, such as dismissal of the action for the claimant, or admission of the action for the respondent (Articles 271 et seq. for ordinary, and 632 § 7 Code of Civil Procedure for special proceedings).

6.3.4 Are the costs of the successful party reimbursed?

In the course of ordinary proceedings: General provision on costs apply (Article 176 Code of Civil Procedure).
In the course of special proceedings: no specific provision on costs. The defeated party is burdened with the costs of litigation. General provision on costs apply (Article 176 Code of Civil Procedure).

Source(s): Code of Civil Procedure, Articles 176, 271 et seq., 335 et seq., 591 §§ 3-5, 632 § 7.

6.4 Claims for the issuance of a payment order

6.4.1 Does an order for payment procedure exist in the national system? Is it a simplified procedure?

Yes, simplified and the swiftest means of relief, Art. 623-636 Code of Civil Procedure.

6.4.2 Which authorities or courts are competent to hear claims for the issuance of payment orders?

- The Justice of the Peace for claims up to 20.000 €

- The Court of first instance (one member section) for all claims exceeding 20.000 €.

6.4.3 Are there any formal requirements that must be satisfied for the application for the issuance of a payment order to be made (e.g. standard forms, representation by a lawyer, the detail of description required, the need to provide written evidence etc.)?

- Standard forms are used for the application and the order for payment, although there's no officially recognized standardized form. In practice, the lawyer prepares both the application and the payment order, and submits them to the competent court.
- Representation by a lawyer is imperative, Article 94 §1 Code of Civil Procedure.
- Article 626 Code of Civil Procedure stipulates the particulars of the application required. Similarly, Article 630 Code of Civil Procedure lists the details required for the issuance of a payment order.
- Pursuant to Article 626 § 3 Code of Civil Procedure, written evidence must be submitted together with the application and the payment order.

6.4.4 What information is generally available to the authority or court when a claim for the issuance of a payment order is made?

The information provided by Article 626 Code of Civil Procedure, i.e. the application for a payment order fulfilling the essential elements of a document addressed to a court of law pursuant to Article 118 et seq. Code of Civil Procedure; the exact amount of the claim; documentary evidence.

6.4.5 What opportunity is available for a defence/statement of opposition to be advanced? How should this be done and what is its effect? Please specify if the means of advancing a defence differ depending on the value of the claim and the court dealing with it.

- Opposition to the payment order pursuant to Articles 632-636 Code of Civil Procedure.
- May be filed either to the Justice of the Peace, the Court of first instance (one member section), or the Court of first instance (three member panel), depending on the amount due [see answer under point 8.1.2].
- Opposition has no suspensive effect in regards to the enforcement of the payment order; however, an application to stay of execution may be filed according to Article 632 § 3 Code of Civil Procedure.
- There is no difference with respect to the means of advancing a defence, depending on the value of the claim or the court dealing with the opposition.

6.4.6 What is the effect if the claim is uncontested, i.e. if there is a lack of defence/statement of opposition?

The order of payment acquires the power of res iudicata.

6.4.7 If the defendant is a consumer, and he or she does not respond to or raise an objection to the issuance of the payment order, does the authority dealing with the claim for payment order proceedings have the power to examine any issue of consumer protection law of its own motion before treating the action as usual?

During the stage of examination of the application for issuing an order of payment the judge does not exercise an ex officio control for possible consumer protection law violations.

6.4.8 What steps must the pursuer take in order to obtain an enforceable decision?

- Application for a payment order
- Issuance of the order
- Service of the payment order to the debtor

It must be underlined that the payment order is per se an enforceable title according to Article 631 § 1 Code of Civil Procedure; hence, there is no need under Greek law to apply for obtaining an enforceable decision!

6.4.9 Is this decision final, or can the defendant appeal against it?

The defendant may file an opposition within 15 working days following service of the payment order. For persons / entities residing abroad or having an unknown residence, the time available is 30 working days following service (Article 632 § 2 Code of Civil Procedure).
If the defendant disregards the above, she / he has a second chance to oppose, in accordance with Article 633 § 2 Code of Civil Procedure. In particular, the pursuer may serve the payment order for a second time, with the aim to achieve res iudicata: If the defendant files an opposition within another 15 working days following the second service of the payment order, then the case is transmitted to the competent court [see answer under point 8.4.5], and a hearing takes place under the recently introduced special proceedings for property disputes (Article 632 § 2 Code of Civil Procedure, referring to Article 614 Code of Civil Procedure); if however the defendant does not file an opposition, or he fails to file it timely, then the payment order acquires the power of res iudicata.

Source(s): Code of Civil Procedure, Articles 623-636.

6.5 Appeals in consumer disputes

6.5.1 Are appeals possible in all consumer disputes? Please specify for small claims and other types of claims.

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Nature of the procedure at 1st instance	Small claims (Articles 466 et seq. CPC) Opposition to a default	Proceedings before the Justice of the Peace Opposition to a default	Proceedings before the Court of first instance (one member section)	For all cases: Voluntary Proceedings before the Court of first instance (three member panel) Opposition to a default judgment before the Court of		

	judgment before the Justice of the Peace (Article 469 § 1 CPC), and a reopening of the judgment before the Justice of the Peace (Article 538 CPC).	judgment before the Justice of the Peace (Article 495 § 1 CPC), and a reopening of the judgment before the Justice of the Peace (Article 538 CPC).	Opposition to a default judgment before the Court of first instance (one member section) (Article 495 § 1 CPC), reopening of the judgment before the Court of first instance (one member section) (Article 538 CPC) ------- Proceedings before the Court of first instance (three member panel) Opposition to a default judgment before the Court of first instance (three member panel) (Article 495 § 1 CPC), reopening of the judgment before the Court of first	first instance (three member panel) (Article 495 § 1 CPC), reopening of the judgment before the Court of first instance (three member panel) (Article 538 CPC)

			instance (three member panel) (Article 538 CPC)			
2nd instance – appeal to?	No appeal allowed (Article 512 CPC)	appeal before the Court of first instance (one member section) (Article 511 & 17 A CPC),	appeal before the Court of appeal (one member section) (Article 511 & 19 CPC) ----- appeal before the Court of appeal (three member panel) (Article 511 & 19 CPC)	appeal before the Court of appeal (three member panel) (Article 511, 760 et seq. & 19 CPC)	appeal before the Court of appeal (three member panel) (Article 511, 760 et seq. & 19 CPC)	appeal before the Court of appeal (three member panel) (Article 511, 760 et seq. & 19 CPC)
3rd instance – appeal to?	cassation before the Supreme Court (Article 560 CPC)	cassation before the Supreme Court (Article 560 CPC)	cassation before the Supreme Court (Article 552 CPC)	cassation before the Supreme Court (Article 552, and 769 et seq. CPC)	cassation before the Supreme Court (Article 552, and 769 et seq. CPC)	cassation before the Supreme Court (Article 552, and 769 et seq. CPC)

6.5.2 Please briefly specify the national appeal procedure, including any requirements to be satisfied for appeals. These might include, but are not limited to, conditions of admissibility, value thresholds, time-limits, the scope of review, and the impact of the appeal on enforcement (provisional enforcement). Please refer to any rules specifically applicable in respect of the claims and relevant procedures outlined above.

- Filing before the court rendering the appealable judgment (Article 495 CPC).
- Conditions of admissibility: Payment of a court fee of 200 € as a prerequisite for filing an appeal
- Value thresholds: No appeal possible for small claims (Article 512 CPC).
- Scheduling of the hearing may proceed upon the initiative of any of the parties; the court does not set a hearing date until the parties ask for it.
- Time-limits: Appeal may be filed within

a. 30 days following service of the judgment (for residents of Greece)

b. 60 days following service of the judgment (for residents abroad or of unknown residence) (Article 518 §1 CPC)
c. 2 years following publication of the judgment, in case no service takes place.

- Scope of review: Examination of the first instance ruingwithin the subject matter of the decision under appeal; new claims or amendments of the claim or the cause of action not admissible (Articles525 & 526 CPC); fresh means of evidence allowed (Article 529CPC); fresh allegations allowed (Article 527 CPC).
- The impact of the appeal on enforcement: Suspension of execution until the decision on the appeal rendered (Article 521 §§ 1 & 3 CPC); no suspension in regards to provisionally enforceable judgments (Article 521 § 2 CPC).

Source(s): Code of Civil Procedure, Article 511 et seq.

6.6 Enforcement in consumer disputes

6.6.1 If the assessment of a consumer protection issue has not been possible at an earlier stage of the proceedings, is it always possible – either ex officio (see section 10 below) or if the consumer raises a possible violation of consumer protection law – for this assessment to be undertaken during enforcement proceedings?

Both options are possible under Greek law.

- Ex officio examination of possible consumer protection law violations has been supported on the basis of Article 281 Greek Civil Code, which regulates the prohibition of abusive exercise of rights. Notwithstanding the fact that the provision is embedded in the Civil Code, legal authority and constant case law have extended its application in the ambit of Civil Procedure. In light of the above, courts have the power to examine potential violations on their own motion, most notably emanating from the field of abusive general terms imposed to consumers.
- Whenever a consumer raises a respective plea, courts are obliged to examine the legal fundament and the facts surrounding the allegation. This stance reflects one of the core elements of Civil Litigation in Greece, i.e. the principle of party presentation, embedded in Article 106 CCP.

6.6.2 In the particular case of consumer protection, if a court examines consumer protection law (either ex officio or on the basis of an argument advanced by the consumer), does national procedural law provide that interim measures should 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 final decision will have full effect?

The usual situation in this respect is depicted in the following circumstances: The 33consumer is faced with a payment order issued by a credit institution against her/him. The first line of defence is the filing of an opposition against the payment order. At the same time, the consumer wishes to halt the enforcement process. The latter begins with the service of the payment order, to which a notice of payment is usually attached. Since the opposition itself does not have a suspensive effect, the consumer files at the same day an application to stay execution. Hence, two sets of proceedings do open in the aftermath of the payment order served to the consumer: One for the annulment of the payment order, and another for the provisional stay of execution until a final and

conclusive judgment is issued with respect to the opposition. The second set is examined in the course of injunction proceedings (Articles 682 et seq. CCP). Moreover, in order to avoid possible execution measures in the meantime, i.e. between filing of the application to stay execution and the date of the hearing, the consumer is entitled to request a restraint order on the day she/he files the application (Article 691 A CCP). The request is examined by a judge entrusted with these powers [usually a Judge called "the President on Duty", who's responsible for handling any urgent matters and requests filed. The selection of the President of Duty is based on the work plan of each court, and follows a rotation system among the judges in service] in her/his chambers (hence, no court hearing takes place). The judge decides if the presence of the other party is necessary, and in the affirmative, summons the party by any possible means (i.e. beyond ordinary methods, notification per telephone, fax, etc. is admissible). Otherwise the judge proceeds with the request and decides on the same day. The result is posted in handwriting on the original document of the application for stay of execution; no reasoning is needed by law. The applicant becomes aware of the result by visiting the office of the court clerk in charge with the scheduling of the application's hearing. It is the applicant's obligation to notify the result to the defendant. It is to the best of her/his interest to inform the defendant as soon as possible, in order to avoid possible enforcement measures initiated before the notice occurs.

Source(s): Article 281 Greek Civil Code, Article 106, 632, 682 et seq., 691 A CCP

7. ACTIONS FOR COLLECTIVE REDRESS

Dellios, Yiorgos, Individual and Collective Protection of Consumers by the Lack of Substantial Negotiation of Contractual Terms, Thessaloniki (2008), Sakkoulas Publications, pp. 20 et seq.

7.1 Injunctive relief, linking individual and collective actions

7.1.1 If collective proceedings are launched, does national procedural law provide that ongoing individual claims, relating to the same dispute, should be stayed until the collective proceedings are brought to an end? Please specify if this constitutes an obligation on the part of the national judge or if it is at his or her discretion.

The prevailing opinion in legal scholarship sees no impediment for a consumer to proceed with her/his individual claims relating to the same dispute [see Apalagaki, in: Alexandridou (ed.), Consumer Protection Law – A Commentary (2008), p. 568, Nr. 46]. However, there is no supporting case law for the time being.

7.1.2 If individual proceedings are stayed, please indicate what the effect of the court or ADR entity's decision in the collective action on those individual proceedings would be, i.e. whether the outcome of the collective action binds the consumer bringing an individual action.

In light of the answer given under point 9.1.1, the question is not relevant for the Greek legal order.

Source(s): Article 10 Consumer Protection Act

8. CONSUMER ALTERNATIVE DISPUTE RESOLUTION

Bolos, The Consumer Ombudsman, Advocate Nr. 61/2007, pp. 90 et seq.

8.1 Consumer disputes before ADR fora

8.1.1 Is ADR mandatory for all parties bringing a claim related to a consumer protection dispute?

There is no mandatory ADR procedure in Greece, both for consumer protection disputes, as for any other civil and commercial disputes before filing, or during lis pendens. There are two recognized Consumer Dispute Resolution facilitators in Greece:

- The Hellenic Consumer Ombudsman (Law Nr. 3297/2004).
- The Hellenic Ombudsman for Banking-Investment Services (not established by law).

8.1.2 Please specify if there are limitations to the use of ADR. These might include the nature of the claim (i.e. whether both individual and collective claims are possible), requirements of representation, time limits, value thresholds, etc.

In principle, there are no limitations to the use of ADR concerning individual claims. In fact, there are plenty of options for the parties seeking an amicable dispute resolution, such as:

- The Hellenic Consumer Ombudsman (Law Nr. 3297/2004). All kinds of consumer disputes. Limitations pursuant to Article 6 § 2 Joint Ministerial Order transposing the Consumer ADR Directive (similar to Article 5 § 4 of the Directive), namely: the dispute is being considered by a court; the dispute is frivolous or vexatious; the consumer has not submitted the complaint to the ADR entity within a pre-specified time limit, which shall not be set at less than one year from the date upon which the consumer submitted the complaint to the trader;
- The Hellenic Ombudsman for Banking-Investment Services (H.O.B.I.S.)http://www.hobis.gr/indexen.asp. All kinds of consumer disputes involving credit, investment and insurance institutions. Limitations pursuant to Article 6 § 2 Joint Ministerial Order transposing the Consumer ADR Directive (similar to Article 5 § 4 of the Directive), namely: (a) the consumer did not attempt to contact the trader concerned in order to discuss his complaint and seek, as a first step, to resolve the matter directly with the trader; (b) the dispute is frivolous or vexatious; (c) the dispute is being or has previously been considered by another ADR entity or by a court; d) the consumer has not submitted the complaint to the ADR entity within a pre-specified time limit, which shall not be set at less than one year from the date upon which the consumer submitted the complaint to the trader; (e) dealing with such a type of dispute would otherwise seriously impair the effective operation of HOBIS.
- The European Consumer Center of Greece (ECC-NETGREECE).
- Consumer Unions.
- Mediation schemes.
- Lawyer negotiations.

  - With respect to collective claims however, prima facie there seems to be a limitation founded in Article 749 CCP. As previously mentioned, collective claims are tried in accordance with Articles 739 et seq.

CCP, i.e. in voluntary proceedings. Article 749 CCP expressly excludes provisions on mediation and settlement from the ambit of voluntary proceedings. However, legal authority unanimously considers this rule to be valid only for the so called "genuine" cases of voluntary proceedings. For the "non-genuine" cases, such as collective claims, where the contradictory element is immanent, Article 749 CCP is irrelevant.

- A second case of possible limitation is related to the Hellenic Consumer Ombudsman. There seems to be both an overlapping and a contradiction in regards to the time limits for filing a request / complaint: Article 4 § 2 of the Hellenic Consumer Ombudsman Act (Law Nr. 3297/2004) poses a term of 3 months, starting from the time the applicant was fully aware of the harmful act or omission against her/him. However, Article 3 §5 of Presidential Decree 55/2014 (Hellenic Consumer Ombudsman Rules and Regulations) regulates the matter differently: The request / complaint has to be filed within the legal term, which however is not mentioned in the provision. Things are becoming more confused by having a look at the FAQ web page [http://www.synigoroskatanaloti.gr/stk_faq1.html]. Under the question: Is there a time limit within which the request has to be submitted?, the answer is verbatim the following: Yes, the request must be submitted within a year, starting from the time when the consumer became fully aware of the harmful act or omission against her/him. If a request is filed after the lapse of three months, it is dismissed as delayed, and is withdrawn in the records.

8.1.3 Can ADR entities issue binding decisions and can they enforce those decisions? If not, please explain how they are enforced.

As stated under point 10.1.1, ADR is not mandatory. In case the parties agree to attempt an amicable solution, they have to vest the decision of the ADR entity with enforceability in accordance with Article 904 CCP (on enforceable titles / instruments). The most convenient means would be a legal instrument certified by a notary public. Other options would include a court mediation agreement (Article 214 B § 5 CCP), an agreement by a private mediation body (Article 9 Mediation Act, Law 3898/2010), or an agreement between the parties, which is ratified by the court where the case is pending (Article 214 A CCP).
A special case concerns the Hellenic Consumer Ombudsman. Both Article 4 §5Hellenic Consumer Ombudsman Act (Law 3297/2004, as subsequently amended) and Article 8 §3 of Presidential Decree 55/2014(Hellenic Consumer Ombudsman Rules and Regulations) stipulate that if the parties agree to settle the case in accordance with the written opinion of the Hellenic Consumer Ombudsman, the latter shall issue a settlement agreement, signed by the parties or their legal representatives, which is deemed to have the force of a court settlement, hence equal to an enforceable title pursuant to Article 904 § 2cCCP.

8.1.4 Does national law provide that limitation periods applicable to judicial actions should be suspended while ADR is ongoing?[175]

- Pursuant to Article 11 of the Hellenic Mediation Act (Law Nr. 3898/2010), recourse to mediation according to the conditions of this Act interrupts the running of the statute of limitations during the entire mediation

[175] The Directive on Consumer ADR provides that "the existence of an effective system for collective claims and easy recourse to ADR should be complementary". Consumer ADR is relevant not only for individual claims but also for collective ones; it can provide consumer with a means to reduce costs and save time.

process. There is no similar provision in the provisions of the Code of Civil procedure mentioned under point 10.1.3.

- Article 11 of the Joint Ministerial Order transposing the consumer ADR Directive is the equivalent provision of Article 12 § 1 of the directive aforementioned. The wording of the Greek provision is more detailed, and states that the submission of an application to an ADR body in accordance with the provisions of the Joint Ministerial Order interrupts limitation and prescription periods throughout the duration of the ADR process. Without prejudice to Articles 261 et seq. Civil Code (interruption by filing of an action), limitation and prescription periods interrupted restart when one of the following situations occur: Written refusal of the ADR body in accordance with its rules of procedure pursuant to Article 6 § 2 of the Joint Ministerial Order [the equivalent of Article 5 § 4 of the Consumer ADR Directive]; a protocol certifying the failure of ADR; or a settlement agreement has been issued by the ADR body.
- The Hellenic Consumer Ombudsman statutes clearly state that the filing of the complaint neither interrupts nor suspendsany legal time limits with respect to bringing the case to court (Article 4 § 2 Hellenic Consumer Ombudsman Act, Law 3297/2004, as subsequently amended).
- The Hellenic Ombudsman for Banking-Investment Services (H.O.B.I.S.) web site expressly states the following: Under no circumstances does the H.O.B.I.S. complaint handling procedure interrupt or suspend any legal time limits with respect to bringing the case to court.

8.1.5 Please specify if national law establishes rules providing for recourse to judicial action following an (unsuccessful) ADR hearing[176].

Articles 10 & 11 have not been included in the Joint ministerial Order transposing the consumer ADR Directive. However, there is no impediment whatsoever to a free and unhindered access of consumers to the courts (Article 20 § 1 of the Greek Constitution). Mainly for reasons of clarity, HOBIS states in its web site that the unsuccessful outcome of an ADR process, which is no more than the non-acceptance of the Recommendation Letter issued by the ADR body, is no hindrance for the parties, who may bring their case to the courts.

8.1.6 Is there judicial review of decisions and awards made by ADR entities? If so, by which court or tribunal is this oversight made? Is it ordinary or specialised?

- There is no specific provision providing for judicial review of decisions and awards made by ADR entities. The lack of enforceability makes a judicial review redundant. However, in case that decisions and awards of ADR entities are vested with enforceability (see point 10.1.3), judicial review may be exercised by a court of law. The usual grounds are error, duress, and fraud, whereas grounds of public order and bona mores may also be brought forward.
  A special case concerns the written opinions of the Hellenic Consumer Ombudsman. Both Article 3 § 7 Hellenic Consumer Ombudsman Act (Law 3297/2004, as subsequently amended) and Article 8 § 4 of Presidential Decree 55/2014 (Hellenic Consumer Ombudsman Rules and Regulations) stipulate that the opinions are not subject to revision or revocation, save the settlement agreements issued in accordance with Articles 4 § 5 Hellenic Consumer Ombudsman Act (Law 3297/2004, as subsequently amended) and Article 8 § 3 of Presidential Decree 55/2014 (Hellenic Consumer Ombudsman Rules and Regulations).

[176]Per Arts.10-12, Directive on Consumer ADR.

- The Court of first instance (three member panel) would be competent to try the case in the course of ordinary proceedings (Article 18 CCP).
- The court is not a specialized one. It examines all cases of judicial review of contracts. It must be clarified that decisions and awards made by ADR entities are not treated (at least for the time being) as court judgments or arbitral awards; hence no appellate court is competent to exercise judicial review.

Source(s): Article 20 of the Hellenic Constitution, Code of Civil Procedure, Articles 261 et seq. Civil Code, Joint Ministerial Order transposing the Consumer ADR Directive, Hellenic Mediation Act (Law 3898/2010), Hellenic Consumer Ombudsman Act (Law 3297/2004), Hellenic Consumer Ombudsman Rules and Regulations (Presidential Decree 55/2014)

9. THE EXAMINATION OF CONSUMER PROTECTION LAW IN NATIONAL PROCEDURAL LAW: RESPECT FOR THE PRINCIPLES OF THE EFFECTIVENESS AND EQUIVALENCE OF CONSUMER PROTECTION LAW AND EX OFFICIO CONTROL

9.1 The basis of ex officio control of consumer protection law in national law

9.1.1 Is it clear in the national legal system when consumer protection law should be applied ex officio? Is the ex officio control of consumer protection law established as an obligation or as a (discretionary) power of the judge in national procedural law?

There is no clear indication in favor of an ex officio control of consumer protection law. The prevailing opinion distinguishes between cases of absolute and relative nullity. The former is regulated under Article 2 § 7, whereas the latter under Article 2 § 6 of the Consumer Protection Act. Article 2 § 7 lists a vast number of abusive general terms. For the cases of absolute nullity an ex officio control by the courts is strongly supported in legal scholarship, mainly because absolute nullity is considered to be a violation of public order.

9.1.2 If there is an understanding of ex officio control of consumer protection law in the national legal, what is this control understood to encompass/not cover?

The court examines on its own motion general terms which are contrary to public order, or bind the consumer excessively, so that she/he is deprived of her/his essential constitutional rights, such as fair trial, right to judicial protection, right to be heard.

9.1.3 Is the party who claims to be a consumer required to establish his or her consumer status, the existence of a consumer contract and that consumer law applies to the dispute? Is this required even if the consumer has no legal representation?

- The party has to state the facts which will allow the court to rule whether the party fulfils the conditions to be treated as a consumer or not, and that consequently, consumer law should be applied. The party presentation principle (Article 106 CCP) is decisive in this respect.
- Given the fact that legal representation is compulsory under Greek law on Civil Procedure (save small claims disputes), the issue is of minor importance for the Greek legal order. In small claims disputes, the

judge is vested with exceptional powers (Article 469 § 2 CPC), which allow her/him to decline from procedural provisions, and go beyond what the parties have produced to the court, in order to seek the truth in the swiftest and most efficient fashion.

9.1.4 What information is available to judges and dispute resolution facilitators hearing consumer protection disputes? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a consumer protection dispute to be heard and b) for the court to engage in ex officio control?

- There aren't any national provisions focusing on the particulars of the factual information in the course of consumer disputes. The case is tried as any other dispute in ordinary proceedings (or in the case of an opposition against a payment order, in special property disputes proceedings, Article 614, and 632 et seq. CCP). In practice, the information brought to the consideration of the court is the following: The contract, existing correspondence between the parties, oral statements of the litigants, and testimonies of witnesses.
- With respect to Dispute Resolution facilitators, Article 4 of the Hellenic Consumer Ombudsman Rules and Regulations (Presidential Decree 55/2014) lists the required details of the complaint. These are: a. Full contact details of the complainant or her/his legal representatives; b. the capacity under which the complainant acts; c. Short description of the case and precise report of the facts; d. Full contact details of the supplier with supporting transaction documents; e. reference to the exact time the harmful event occurred, or, in case of an omission, the time lapsed, since the consumer filed a request to the enterprise, or the expiration of a term stipulated by law, within which the supplier should have replied; f. Details of another authority or recognized ADR body, in case a request or a complaint has been filed there; g. A Declaration which clarifies whether this or any related case is pending before a court of law; h. Short description of the actual harm caused to the interesting party, along with the request filed for dispute resolution. In addition to the above, Article 3 § 2 of the same piece of legislation accumulates extra documentation requirements, i.e. the following: a. A copy of the complainant's ID or passport, or driving license; b. hard or soft copies of crucial documents for the case at hand, such as copies of contracts, invoices, receipts, advertisements, and existing correspondence with the supplier.
  Article 6 § 6 of the Hellenic Consumer Ombudsman Rules and Regulations describes the procedure followed in case of an insufficient request filed: A letter is sent to the consumer, stating the supplementary data needed for the file. At the same time, the consumer is informed that non-compliance with the above within reasonable time (which is set on an ad hoc basis) might lead to the withdrawal of the request in the records.
- HOBIS has a complaint form available both in Greek and English on its website, which may be retrieved under the following link: http://hobis.gr/indexen.asp [Procedure > filing a complaint].

9.1.5 Who is responsible for providing this information? If the necessary information is not available to the court (or dispute resolution facilitator), is he or she under an obligation to investigate in order to be able to respond to a relevant consumer protection dimension of the case?

- The ground rule is that each party has the burden of proof in regard to the facts asserted (Article 338 CPC). This rule applies in ordinary and special proceedings. The court is not obliged to investigate, if no allegations have been made towards this direction. However, the court may order the reopening of the

hearing, if it considers that there are still some points and issues in need of further clarification (Article 254 CPC). The court may even instruct the party to request the adjournment of the hearing, in order to produce the necessary information (Article 241 CPC). Starting from 1.1.2016 however, the latter rule does not apply in the course of ordinary proceedings.

- In the course of ADR proceedings under the umbrella of the Hellenic Consumer Ombudsman, Article 6 § 9of the Hellenic Consumer Ombudsman Rules and Regulations grant powers to the rapporteur of each case, towards a direct communication and close cooperation with the parties involved. The rapporteur may ask the consumer to contribute to the proper preparation of the file, by submitting additional information, supporting evidence, related documents, as well as her/his views on the subject matter in question. In addition, §12 of the Article above grants powers to contact public authorities at large, requesting any additional information related to the consumer dispute, which could potentially contribute to its resolution.

9.1.6 Will the court provide the consumer with any assistance in gathering factual information or advancing his legal arguments before the court? Please respond for the situation where: a) the consumer has legal representation and b) the consumer has no legal representation.

a) The court will not interfere. General provisions on the conduct of the hearing apply (Articles 233 et seq. CCP).
b) [applies only in small claims]: The court will assist the consumer from the bench. It may convince her/him to request an adjournment (Article 241 CPC), so as to have the time necessary to furnish evidence.

Source(s): Consumer Protection Act, CCP, Hellenic Consumer Ombudsman Act, Hellenic Consumer Ombudsman Rules and Regulations

9.2 The possibility for ex officio control of EU consumer protection law in dispute resolution proceedings

9.2.1 Is ex officio control of consumer protection law always possible when the procedure involves a full assessment of the claim on its merits?

See answer under point 11.1.1.

9.2.2 Can ex officio control be exercised even when the procedure does not involve an assessment on the merits?

The only conceivable case where no assessment on the merits takes place, is the order for payment procedure. In this case, the judge does not exercise ex officio control.

9.2.3 Please indicate if, per national procedural law, ex officio control can be exercised at the following stages of the procedure:

	Courts	Other dispute resolution facilitators

	Possible to exercise ex officio control	Not possible to exercise ex officio control	Possible to exercise ex officio control	Not possible to exercise ex officio control
Ordinary proceedings	Absolute nullity of general terms, terms contrary to public order	Relative nullity of general terms		
Small claims	Absolute nullity of general terms, terms contrary to public order	Relative nullity of general terms		
Payment order		X		
Provisional measures	X			
Proceedings linked to enforcement		X		
Enforcement proceedings				
- Enforcement of payment order		X		
- Enforcement of arbitration award		X		
- Enforcement of mortgage		X		
- Enforcement of notarial deed		X		
Appeal proceedings (please specify:) Opposition to a payment order	X			

9.2.4 What does ex officio control encompass in national procedural law?

Examination of general terms and their compliance with the Consumer Protection Act, constitutional rights, bona mores and public order.

Source(s): Code of Civil Procedure

9.3 Other procedural mechanisms for the equivalent and effective protection of EU consumer law

9.3.1 Does national procedural law provide that rules of EU consumer law (as well as rules that aim to satisfy EU consumer law objectives) should be understood as having equal standing to national rules of public policy (which is to say, that for the purposes of domestic law, the consumer protection provision is understood to have equal standing to a rule that must be raised ex officio by the national court)?

Yes, see answer under point 11.1.1.

9.3.2 If ex officio control is not possible in certain types of proceedings or at a certain stage of proceedings (or for any other reason), does national procedural law provide for an alternative way of assessing consumer protection law?

Yes, however indirectly, see answer under point 11.1.5 & 11.1.6.

Source(s): Code of Civil Procedure

9.4 Ex officio control in payment order procedures

9.4.1 What information is available to the judge when a claim for the issuance of a payment order is made? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a claim for the issuance of a payment order to be granted and b) for the court to engage in ex officio control before a payment order is issued?

- Article 626 Code of Civil Procedure stipulates the particulars of the application required. Similarly, Article 630 Code of Civil Procedure lists the details required for the issuance of a payment order. Pursuant to Article 626 § 3 Code of Civil Procedure, written evidence must be submitted together with the application and the payment order. The information available to the judge is mentioned in Article 626 Code of Civil Procedure, i.e. the application for a payment order fulfilling the essential elements of a document addressed to a court of law pursuant to Article 118 et seq. Code of Civil Procedure; the exact amount of the claim; documentary evidence.
    - a) Yes, Article 626 Code of Civil Procedure, in conjunction with Article 629 CPC.
      b) No such rules exist in Greek law on Civil Procedure.

9.4.2 What considerations will be assessed ex officio by the court (or other competent authority) before a payment order is issued?

No ex officio control is exercised in the course of payment order proceedings.

9.4.3 How is the consumer informed about the claim to issue a payment order against him or her? Does national procedural law make any provision for steps to be taken to ensure that consumers are informed of the claim for the issuance of a payment order so that he or she can contest it?

- No information. It is an ex parte procedure (Article 627 CCP).
- No such provisions exist. The consumer becomes aware only after the payment order has been issued, i.e. when the order of payment is served. The structure of payment order in Greece does not allow

contestation. The consumer may file an opposition against the payment order pursuant to Articles 632 & 633 CPC.

9.4.4 If the consumer objects to the claim, what is the next step? Do the proceedings continue, in the context of which ex officio control can be exercised? Or are the proceedings transferred to ordinary proceedings for analysis on the merits of the claim?

- No objections possible under Greek law on Civil Procedure.
- Proceedings may take place only if the consumer files an opposition.
- In the latter case, proceedings are transferred to the court, which examines the opposition in the course of property disputes proceedings (Article 614, 591, & 632 et seq. CPC).

Source(s): Code of Civil Procedure

European Commission
An evaluation study of the impact of national procedural laws and practices on the equivalence and effectiveness of the procedural protection of consumers under EU law

JUST/2014/RCON/PR/CIVI/0082

National Report – Consumer Protection Strand

Hungary

Viktória Harsági and Dániel Gelencsér

HUNGARY: LEGAL ANALYSIS

1. NATIONAL LEGISLATION IMPLEMENTING EU CONSUMER PROTECTION INSTRUMENTS

EU legislation	Transposing national legislation	Additional notes (e.g. if there is an overlap in application of legislation etc.)
Doorstep Selling Directive 1985/577/EEC	Act IV of 1959 on the Civil Code of the Hungarian Republic; Act CLV of 1979 on Consumer Protection; 213/2008. (VIII. 29.) Government Decree on the Contracts Concluded Outside the Store with a Consumer; 370/2004. (XII. 26.) Government Decree on the	The Act IV of 1959 on the Civil Code of the Hungary was repealed by the Act V of 2013 on the Hungarian Civil Code, effective as of 15 March 2016.

	Contracts Conducted Outside the Store with a Consumer and on the Conditions of Operating Commercial Practice Outside the Store; 44/1998. (III. 11.) Government regulation on Door to Door Sale;	
Package Travel Directive 90/314/EEC	Act V of 2013 on the Hungarian Civil Code; Act CLXIV of 2005 on Trade; Act LVI. of 2009 on the adopting of 2006/123/EK regulation; Government Decree 281/2008. (XI. 28.) on the Travel Contract;	The Act CLV of 1979 on Consumer Protection was amended by the Act XLII of 2008; Government Decree 213/1996 (XII. 23.) on the Operation of Tour Organizers and Mediators was amended by Government regulation 234/2003. (XII. 16.), Government Decree 265/2001. (XII. 21.) and Government regulation 78/2005. (IV. 28.).
Unfair Contract Terms Directive 1993/13/EEC	Government Decree 18/1999. (II. 5.) on the Unfair Contract Terms in Contracts Conducted with Consumers; Act III of 1952 on the Code of Civil Procedure; Act IV of 1959 on the Civil Code of the Hungarian Republic; Act CXII of 1996 on Credit Institutions and Financial Enterprises;	Act IV of 1959 on the Civil Code of the Hungarian Republic was repealed by the Act V of 2013 on the Hungarian Civil Code, effective as of 15 March 2016.

Distance Selling Directive 1997/7/EC	Government Decree 17/1999 (II. 5.) on the Contracts Concluded Between Distant Parties Act IV of 1959 on the Civil Code of the Hungarian Republic; Act CLV of 1979 on Consumer Protection; Act LXIX of 2004; Government Decree 227/2006. (XI. 20.) on Payment Services and Digital Payment Services; Government Decree 71/2009. (IV. 2.); Government Decree 90/2005. (V. 6.); Government Decree 2/2006. (I. 4.); Government Decree 217/2008. (VIII. 29.);	Act CLV of 1979 on Consumer Protection was amended by the Act XLII of 2008; Act IV of 1959 on the Civil Code of the Hungarian Republic was repealed by the Act V of 2013 on the Hungarian Civil Code, effective as of 15 March 2016.
Consumer Sales and Guarantees Directive 1999/44/EC	Act IV of 1959 on the Civil Code of the Hungarian Republic; Government Decree 151/2003. (IX. 22.) on the Mandatory Guarantee in accordance with Certain Consumer Products;	Act IV of 1959 on the Civil Code of the Hungarian Republic was repealed by the Act V of 2013 on the Hungarian Civil Code, effective as of 15 March 2016.
Unfair Commercial Practices Directive 2005/29/EC	Act III of 1952 on the Code of Civil Procedure; Act CXL of 2004 on the	

	General Rules of Administrative Proceedings and Services; Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition; Act XLVII of 2008 on the Prohibition of Unfair Business-to-Consumer Commercial Practice; Act XLVIII of 2008 on the Basic Requirements and Certain Restrictions of Commercial Advertising Activities; Act CIV of 2010 on Freedom of the Press and on the Basic Rules Relating to Media Content; Act CLVIII of 2010 on the Pénzügyi Szervezetek Állami Felügyelete; Act CLXXV of 2011 on the Freedom of Association, on Public-Benefit Status, and on the Activities of and Support for Civil Society Organizations; Act CLI of 2012; Act CXLVIII. of 2009; Act LXVIII of 2005; Act LV of 2012;	

	Act CXI. of 2008; Act XLII. of 2008; Act CXLVIII of 2009; Act CXXVI of 2010; Act CLXXIV of 2010;	
Misleading and Comparative Advertising Directive 2006/114/EC	Act III of 1952 on the Code of Civil Procedure; Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition; Act CXL of 2004 on the General Rules of Administrative Proceedings and Services; Act XLVII of 2008 on the Prohibition of Unfair Business-to-Consumer Commercial Practice; Act XLVIII of 2008 on the Basic Requirements and Certain Restrictions of Commercial Advertising Activities; Act LXVIII of 2005;	
Consumer Credit Agreement Directive 2008/48/EC	Act CLV of 1979 on Consumer Protection; Act XXV of 2005; Act CLXII of 2009 on the	

	Consumers Loan Agreements; Act CXLVIII of 2009; Act CXXII of 2011 on the Central Credit Information System; Act LXXV of 2011; Act CCXXXVII of 2013 on Credit Institutions and Financial Enterprises; Act CXXIX of 2013 on the Hungarian National Bank; Act XCVIII of 2013; Act LXXVIII. of 2014; Government Decree 337/2012. (XII. 4.); Government Decree 361/2009. (XII. 30.); Regulation of the Minister of Economy 56/2014. (XII. 31.); Government Decree 3/2010. (III. 25.);	
Timeshare Protection Directive 2008/122/EC	Act CLV of 1979 on Consumer Protection; Act IV of 1959 on the Civil Code of the Hungarian Republic; Government Decree 141/2011. (VII. 21.)	Act IV of 1959 on the Civil Code of the Hungarian Republic was repealed by the Act V of 2013 on the Hungarian Civil Code, effective as of 15 March 2016.
Consumer Injunctions	Act III of 1952 on the Code	

Directive 2009/22/EC	of Civil Procedure; Act LIII of 1994 on the Enforcement of Judicial Decisions; Act I of 1996 on the Radio and Television Programs; Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition; Act CLV of 1979 on Consumer Protection; Act CVIII. of 2001; Act CXX of 2001 on Capital Market; Act CXL of 2004 on the General Rules of Administrative Proceedings and Services; Act XXV of 2005; Act CLVIII of 2010 on the Pénzügyi Szervezetek Állami Felügyelete; Act XLVII of 2008 on the Prohibition of Unfair Business-to-Consumer Commercial Practice; Act XLVIII of 2008 on the Basic Requirements and Certain Restrictions of Commercial Advertising Activities;	

	Act LXXVI of 2009. Government Decree 225/2007. (VIII. 31.) on the Hungarian Authority for Consumer Protection; Government Decree 329/2009. (XII. 29.); Government Decree 36/2007. (XII. 13.); Act CXXXVI. of 2010; Act LXIV. of 2012; Act CLXXIX. of 2005; Act LXVIII. of 2005; Act LXVII. of 2007; Act CXLVIII. of 2009;	
Consumer Rights Directive 2011/83/EU	Act CLV of 1979 on Consumer Protection; Act V of 2013 on the Civil Code of Hungary; Government Decree 45/2014. (II. 26.)	
ADR for Consumer Disputes Directive 2013/11/EU	**Implementation in progress**	

1. CONCEPT OF THE CONSUMER

1.1. The concept of the consumer is said to be casuistic in Hungary. A uniform concept does not exist.

On one hand, according to the Act V of 2013 on the Hungarian Civil Code (hereinafter HCC), consumer shall mean any natural person acting for purposes which are outside his trade, business or profession.

On the other hand, according to the Act CLV of 1997 on the Consumer Protection (hereinafter CP) consumer shall mean any natural person who is acting for 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. In the application of the provisions on arbitration boards - excluding Regulation (EU) No. 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC -, consumer shall also mean - in addition to what is contained above - 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.

As of our interpretation, the definition of the CP is a special one, comparison with the definition of the HCC. It means that in CP and in its enforcing regulations (Government Decrees, Government Decisions etc.) consumer has a broader interpretation. Although, there are a wide range of regulations, which refer to the notion of the HCC.

2. REGULATORY AUTHORITIES COMPETENT FOR CONSUMER PROTECTION ISSUES

2.1 The system of consumer protection is mixed in Hungary. There are different central authorities, government bodies and civil associations, too.

Probably the most important authority in this are is the Hungarian Authority of Consumer Protection (hereinafter HACP).

The HACP is entitled to carry out the basic and primary tasks related to consumer protection in Hungary. Its tasks include ensuring the protection of consumers' lives; safety and health through the active market surveillance of the distribution of non-food products, and ensure the protection of the economic interests of consumers. Therefore, the HACP carries out continuous inspections in the fields of commerce and the service sector. During these inspections, the Authority verifies that legal requirements pertaining to the provision of adequate information to consumers have been complied with, filters out unfair terms and conditions from contracts, and aims to prevent traders from misleading consumers or applying aggressive marketing methods.

The HACP was created by Government Decree No. 225/2007 (VIII.31.), and started functioning on 1st September 2007. The creation of the HACP was provided by Government's Decision No.1033/2007 (V.23.) on

government measures made necessary by the third programme of action for 2007-2010 to implement a medium-term consumer protection policy.

Since 1st April 2015 the HACP has been operating as a central office under the control of the ministry responsible for consumer protection as a central budgetary authority. In public administrative cases the capital and county government offices act at first instance within their competence for consumer protection and market surveillance, and the Hungarian Authority for Consumer Protection acts at second instance in such cases.

Since 1st January 2011, the HACP has been the host organisation of the European Consumer Centre (ECC) Hungary. As a result, the ECC can provide direct help to Hungarian consumers who experience legal conflict while performing a contract signed in another EU member state, as well as to EU citizens who have encountered problems as a result of a contract concluded in Hungary.

The HACP as the central administrative body of consumer protection is directed and represented by the Director General, appointed and held accountable for the activities of HACP by the Minister of National Development, being responsible for consumer protection. The HACP carries out its activities on the basis of an annual inspection programme approved by the Minister.

On the basis of the Government Decree, the HACP:

— delivers opinions on draft legislative provisions concerning consumers, at the request of the responsible minister;
— proposes amendments, where necessary, to legislative provisions concerning consumers;
— contributes to consumer policy making, monitors and analyses its implementation;
— manages the tasks laid down in separate legislation and related to supervising the safety and compliance of goods and services, and it operates the Central Market Surveillance Information System;
— coordinates the international relations of the HACP;
— carries out the laboratory tests necessary to perform its tasks, or has them carried out;
— ensures that HACP public officers receive periodic training;
— may agree upon cooperation with other public bodies engaged in consumer protection;
— performs duties as the designated national contact point for the RAPEX system (Rapid Exchange of Information System);
— performs duties as the designated single liaison office and main competent authority for the Consumer Protection Cooperation Network (CPC) in accordance with Regulation 2006/2004/EC;
— operates the Central Market Surveillance Information System on unsafe consumer goods and making it accessible for partner authorities.

In accordance with the relevant Government Decree, the HACP

— provides technical assistance for non-governmental organizations representing consumers' interests to increase consumer knowledge and awareness;
— issues publications on consumers’ rights;

- carries out comparative testing, or has them carried out, and publishes the results;
- prepares methodological materials to promote and harmonize consumer protection activities of local governments; and
- supports the operation of local governments' consultancy offices.
- monitors the standard contractual conditions which are used when concluding consumer contracts or publicized to this end, and if necessary, it initiates proceedings via the Director General to have the invalidity or unfairness of these conditions established as well as to have unfair contractual conditions prohibited to be used or recommended.

The website of the HACP (http://nfh.hu) offers access in addition to the most relevant legal regulations, too.

There is judicial review of decision of the HACP. Usually, courts of public administration and labour review the administrative decision of regulatory authorities (for example decisions, which imposing fines etc.).

In Hungary, there are civil associations, as well, in accordance with consumer protection. For example, National Association for Consumer Protection in Hungary also plays an important role on the scope of consumer protection (website: http://ofe.hu).

Association of Tenants and National Interest Protection Association of Insured Clients and the Clients of Financial Institutions are also important associations.

These civil associations are usually initiate public interest proceedings and issue publications in order to protect consumer's rights.

2.2 There is no specific venue for the type of enforcements mentioned above.

2.3 Public prosecutions are authorized to initiate cases for violation of consumer protection rules; however these cases are usually private law cases. For example, according to HCC, as regards contracts which involve a consumer and a business party, an action may be brought for the annulment of an unfair contract term that has been incorporated into a contract by the public prosecutor.

In case of suspicion of crime, public prosecutors are authorized to initiate criminal proceedings, as well. In the Hungarian Criminal Code, there are specific criminal offences in accordance with consumer's rights. For instance: marketing of substandard products, fraudulent attestation of conformity, misleading consumers etc.

The nature of the penalties and sanctions depends on the nature of the violation of consumer protection rules. If it is a criminal case, sanctions can be really serious, for example:

a) imprisonment;
b) custodial arrest;
c) community service work;
d) fine etc.

In case it is a civil procedure, sanctions are for example: in integrum restitutio, compensation etc.

2.4 There is a judicial review of decisions of consumer regulatory authorities. The judicial oversight made by the administrative courts in a judicial review procedure. Administrative courts are entitled to judge claims against the decision of regulatory authorities. Specialised consumer court does not exist.

2.5 In Hungary, our national legal system provide for a mechanism of cooperation between national regulatory authorities and those of other Member States. For example HACP is in strong cooperation with the authorities of other Member States.

3. LEGAL AID

3.1-3.4 According to the HCCP, the court – in the cases prescribed by law – shall provide assistance upon request to promote the party's access to justice with a view to protecting his rights and lawful interests.

The court is required to inform the party - if not represented by a legal counsel - concerning his rights and obligations accrued by the proceedings, the advocate's participation in the proceedings, and on the availability of the option to appoint a public defender. The court - in the cases and in the manner prescribed by law - may authorize complete or partial exemption from court costs to the party upon request, or from providing advance payments for court costs.

According to the Act LXXX of 2003 On Legal Aid, the State shall, within the framework of providing legal aid, grant the plaintiff, defendant, intervenor (third party), petitioner and respondent representation through a litigation friend in civil actions and - with the exception of enforcement procedures - non-contentious proceedings (hereinafter referred to as "legal proceedings") as defined in specific other legislation, and shall advance the costs thereof or pay them on behalf of the party.

The fee of a legal aid provider acting as a litigation friend on behalf of a party who has been granted exemption from costs under the HCCP (hereinafter referred to as "exemption from costs") to be borne by the State shall be paid - in connection with partial exemption, up to the amount approved -, and the State shall advance the fee of the said litigation friend as laid down in specific other legislation.

If the State guarantees representation through a litigation friend to the party and if the adverse party is not required by way of court order to cover the fee of the attorney acting as a litigation friend, the fee of the attorney acting as a litigation friend shall be paid by the State.

If, according to the court ruling, the adverse party is required to cover the fee of the attorney acting as a litigation friend, this party shall be liable to reimburse the State for the fee of the attorney acting as a litigation friend as advanced.

If the State provides representation through a litigation friend to a party, it shall advance the fee of the attorney acting as a litigation friend as well.

If, according to the court ruling, the adverse party is required to cover the fee of the attorney acting as a litigation friend, this party shall be liable to reimburse the State for the fee of the attorney acting as a litigation friend as advanced.

Legal aid shall be available to a party who is considered in need:

a) who, because of their lack of knowledge in legal matters and the intricacy of the case, would not, by proceeding personally, be able to successfully represent their interests in the suit or effectively exercise their procedural rights,
b) in whose lawsuit legal representation is obligatory,
c) who is the nonresident creditor or debtor of a maintenance claim, and the central authority of competence in matters relating to maintenance obligations having cross-border implications has notified the legal assistance service that proceedings are imminent in the case of such party or representation through a litigation friend shall be provided in such proceedings.

The following persons shall be considered in need: the party who is granted personal exemption from costs, if the exemption covers the costs of representation through a litigation friend, as well as the party to a case where the proceedings are exempt from charges.

The party may grant a power of attorney to a legal aid provider, enclosed with the binding resolution authorizing legal aid, within thirty days of receipt of the resolution to provide legal counsel in the lawsuit indicated in the resolution. (Legal aid encompass all relevant legal activity, for example general advice, assitance in preparing the case, assistance with negotiation of settlements and also representation before the court or other judicial authorities.)

If no legal aid provider undertakes to represent the party as a litigation friend and this could - with respect to the time limits - prejudice the party's rights, the party may, if he misses a procedural deadline, submit a petition for excuse in regard to the matter, and the legal assistance service shall, at the party's request, appoint a legal aid provider to act as a litigation friend, or an attorney or law firm. The legal assistance service shall notify the competent court concerning the appointment with a certified copy of the ruling therefor enclosed, or - if it subsequently gains knowledge of the court of jurisdiction and the case number - shall send the said certified copy immediately thereupon.

Legal aid is also avaliable in criminal and administrative procedures.

4. COSTS

	Individual claim of	Individual claim of	Individual claim of	Collective claim	Collective claim	Collective claim

	value € 0 – € 5000	value € 5001 – € 20.000	value € 20.001+	of value € 0 – 5000*	of value € 5001- € 20.000*	of value € 20.001+ *
Court fees [177]	€ 19- € 300	€ 300 – € 1200	€ 1201- € 4761	-	-	-
Court expenses	It depends on the conditions of the current case	It depends on the conditions of the current case	It depends on the conditions of the current case	-	-	-
Exemptions	The party is free of advance or pay of fees or expenses	The party is free of advance or pay of fees or expenses	The party is free of advance or pay of fees or expenses	-	-	-

4.1 The cost of a court procedure consists of the court fees (duties) and court expenses.

The party initiating the proceedings shall be liable to pay the duty at the time of the opening of such proceeding, unless the payment of the duty is to be decided subsequently, in which case the duty shall be paid by the party so ordered by the court. The party pay the duty by means of a stamp.

In the event if more than one obligor is involved, if the right enforced cannot be divided, or the proportion of interest cannot be established otherwise, the obligors shall assume joint and several liability, or shall otherwise be liable for payment of the duty in proportion to their interests.

If a proceeding is not initiated by the party entitled, rather by a party duly authorized to act in his name and on his behalf, payment liability shall be discharged by the party in whose interest the proceeding was initiated.

Unless otherwise prescribed by law, the duty base in judicial and non-judicial civil proceedings shall be the value of the subject matter of the proceedings at the time of the opening of the proceedings, or the value of the claim or part of claim disputed in remedy proceedings.

[177] Calculated with the rate of HUF 315 / EUR 1

***** Parties initiate public-interest proceedings (e.g. public prosecutor, HACP) are usually free of court costs; court expenses are usually beard by the State.

The basis of calculation of the duty shall be the value of the subject matter of the action defined in the HCCP.

If the value of the subject matter of the proceeding cannot be established, the basis for calculating the duty shall be, unless otherwise provided by law:

a) 350,000 forints in legal proceedings before district courts and 200,000 forints in non-litigious proceedings;
b) before the regional court:

- 600,000 forints in proceedings by any court of original jurisdiction or 350,000 forints in non-contentious proceedings,
- 300,000 forints in appeal proceedings and court proceedings or 170,000 forints in non-contentious proceedings;

c) 600,000 forints in appeal proceedings before courts of law and litigious proceedings or 300,000 forints in non-contentious proceedings;
d) before the Curia:

- in appellate proceedings 500,000 forints,
- in review procedures 700,000 forints.

The rate of duty shall be as follows: in court proceedings, 6 per cent or not less than 15,000 forints and not more than 1,500,000 forints.

The amount of court expenses depends on the conditions of the current case.

There are some exemptions to the payment of duties and expenses. The court are authirzed to exempt parties from the obligation of advance or pay duties and expenses, if the party is considered in need. There are some special cases which are automatically free of expenses or duties. Some authoritiey are always granted full exemptions of duties (for example the HACP or public prosecutors).

5. STANDING AND REPRESENTATION IN CONSUMER DISPUTES

5.1-5.3 In contractual cases, there are some limitations in accordance with the standing of the individual consumer in respect of the claim that can be made, and the forum before which it can be brought. The most common title of the suits initiated by a consumer is the null of unfair contract terms. Althoug, there are other consumer protection cases, as well.

i. Standing and representation in consumer disputes in accordance with unfair contract terms

A standard contract term shall be considered unfair if, contrary to the requirement of good faith and fair dealing, it causes a significant and unjustified imbalance in contractual rights and obligations, to the detriment of the party entering into a contract with the person imposing such contract term.

As regards contracts which involve a consumer and a business party, the provisions relating to standard contract terms shall also apply - subject to the exceptions set out in this Section - to the contract terms which have been drafted in advance by the business party and which have not been individually negotiated. The burden of proof to verify that a contract term has been individually negotiated lies with the business party.

As regards contracts which involve a consumer and a business party, where a standard contract term or any contract term which has been drafted in advance by the business party and which has not been individually negotiated shall be regarded as unfair if they are not drafted in plain and clearly understandable language, solely on that basis.

Both the HCC and the HCCP provide some important limitations:

According to the HCCP, annulled contracts shall be considered null and void as from their conclusion. No special procedure is required for the establishment of invalidity; the court observes the nullity of the contract of its own motion.

At the same time, unless otherwise provided for in the HCC, only a person who has a legal interest therein or who is so authorized by law may rely on the nullity of the contract and may bring action in connection with the nullity of the contract.

In the interest of having a violation of public interest eliminated and with regard to usurious contracts, the public prosecutor may bring action for the annulment of the contract or for invoking the legal effects of nullity.

As regards contracts which involve a consumer and a business party, an action may be brought for the annulment of an unfair contract term that has been incorporated into a contract – in addition to the parties concerned – by:

a) the public prosecutor;
b) the minister, autonomous administrative agencies, government agencies, the director of the head office;
c) the heads of the Budapest and county government agencies;
d) economic and trade organizations or interest-representation bodies and
e) associations for the protection of consumers' interests within the scope of consumer interests they protect, and organizations set up for the protection of consumers' interests under the laws of any Member State of the European Economic Area.

These proceedings are public interest proceedings.

As for the procedural limitations:

According to the HCCP actions brought for the annulment of unfair contractual terms are fall under the jurisdiction of the regional court. Legal representation is mandatory in actions of the first instance before the regional court, during all stages of the proceedings (including redress procedures as well).

The following shall be considered as legal representatives:

a) attorneys (law firms);
b) the party's relatives;
c) the party's co-defendant or co-plaintiff, and the legal counsel or authorized representatives of the co-defendant or co-plaintiff;
d) the heads and employees of administrative bodies and other budgetary agencies in actions concerning the activities of the body, and employees in actions involving the head of the body in an official capacity;
e) interest representation organizations in actions involving their own members, the subject matter of which may be utilized for the interest representation objectives set out in the organization's bylaws;
f) employees of legal persons and other economic operators in actions involving the business activities of their employers, the legal counsels (legal officers) of legal persons and other economic operators in actions where so authorized under specific other legislation and
g) any person so authorized by specific other legislation

provided that these persons have a law degree.

Where legal representation is prescribed mandatory, unless an exemption is provided by law, persons having a law degree may proceed in their own cases without legal representation, in which case he shall be recognized as being represented by legal counsel.

In ADR procedures, legal representation is usually not mandatory.

ii. Standing and representation in consumer disputes in additional cases

The standing and representation in other consumer disputes are usually limited, as well. For example in a statutory guarantee case, only the contractual party is entitled to bring a case. The mandatory of legal representation usually depends on the value of subject matter and the competence. If the regional court has authority to decide the case, the legal representation is mandatory again.

Public interest proceedings are only avaliable in cases in accordance with unfair contract terms.

6. ACTIONS BEFORE COURTS

6.1 Jurisdiction and competence of the courts in consumer disputes: General structure and special procedures aimed at protecting consumers

6.1.1 Consumer protection disputes are always heard by ordinary courts. A specialized tribunal in Hungary does not exist.

6.1.2 If the case is in accordance with unfair contract terms, regional courts are authorized to decide the case. In other consumer protection disputes, the case can be decided by district- or regional courts. District courts shall have general jurisdiction of all actions which are not delegated under the competence of the regional court by law.

Actions relating to rights in property, where the subject matter is valued over thirty million forints, with the exception of actions relating to rights in property arising out of a matrimonial relationship, if opened in conjunction with or in the course of matrimonial proceedings are fall in the jurisdiction of regional courts.

In second instance proceed

— Regional courts in cases falling within the jurisdiction of district and administration and labour courts,
— Regional courts of appeal in cases falling within the jurisdiction of Regional courts and
— in exceptional cases the Curia[178].

6.1.3 The nature of the procedure is ordinary, not simplified or summary, except if the claim is a small claim (see below).

6.1.4 – 6.1.6 As for the most important formal requirements of the procedure:

The court shall initiate proceedings in connection with civil disputes when so requested. Such request - unless otherwise provided for by law - may only be submitted by a party to the dispute.

Unless otherwise prescribed by law, the requests and legal statements made by the parties shall be binding upon the court. The court shall take into consideration the requests and statements made by the parties according to their content, rather than their formal arrangement.

Unless otherwise provided for by law, the responsibility for producing evidence for the purposes of litigation lies with the parties. The legal consequences relating to the omission of lodging a request for the performance of taking of evidence, or if such request is presented in delay, moreover, if the taking of evidence has failed shall - unless otherwise prescribed by law - fall upon the party required to produce evidence. For the purpose of deciding the dispute, the court shall inform the parties in advance concerning the facts for which the taking of evidence is required, the burden of proof, and also on the consequences of any failure of the evidentiary procedure.

A request for the performance of taking of evidence, or the court's decision ordering the taking of evidence shall not be binding upon the court. The court shall not order the taking of evidence, or the performance of taking of evidence if already ordered (seeking additional evidence or repeating the procedure), if deemed unnecessary for rendering a decision in the dispute. The court must forego the ordering of taking of evidence, if the party has submitted the request for the performance of taking of evidence in delay for reasons

[178] On 1 January 2012 the Supreme Court was replaced by the Curia

within his control, or if the request is presented contrary to good faith, unless the HCCP contains provisions to order otherwise.

Unless otherwise provided for by law, in civil proceedings the court shall not be bound by formal requirements relating to the taking of evidence, or to specific procedures for the performance of taking of evidence or to the use of specific means of proof, and may freely use the arguments of the parties, as well as any other evidence deemed admissible for ascertaining the relevant facts of the case. These provisions shall not effect the presumptions of law, including those regulations according to which certain circumstances are to be considered true in the absence of proof to the contrary.

Unless otherwise prescribed by law, the court shall adjudge civil cases in public hearing.

Court proceedings are conducted in the Hungarian language. No one may suffer any disadvantage for not understanding the Hungarian language.

Any person who is able to accrue rights and obligation under the rules of civil procedure is considered to have the capacity to be a party in legal proceedings (legal capacity).

A person may be a party in legal proceedings acting personally or by way of a counsel (competency in legal proceedings):

a) if having full legal capacity under civil law;
b) if being of legal age with partially limited legal capacity, and if there exists no restriction in his legal capacity under civil law relating to the subject matter of the action, or to procedural steps in court; or
c) if having the right of disposition of the subject matter of the action under civil law.

Two or more plaintiffs may unite in an action and two or more defendants may be jointly charged if:

a) the subject matter of the litigation is a common right or a common liability that can only be resolved in unity, or if the ruling would affect all defendants, even those not appearing in court;
b) the claims under litigation originate from the same legal relationship;
c) the claims under litigation involve the same cause of action and legal basis, and the same court is recognized to have jurisdiction Section 40 notwithstanding with respect to all defendants.

Any person who has any legal interest as to the outcome of a pending action may join one of the original parties in maintaining the action or in asserting a defense prior to the adjournment of the hearing held before judgement is given in the first instance.

Legal representation is mandatory in actions of the first instance before the regional court, during all stages of the proceedings (including redress procedures as well).

The following shall be considered as legal representatives:

a) attorneys (law firms);
b) the party's relatives;
c) the party's co-defendant or co-plaintiff, and the legal counsel or authorized representatives of the co-defendant or co-plaintiff;
d) the heads and employees of administrative bodies and other budgetary agencies in actions concerning the activities of the body, and employees in actions involving the head of the body in an official capacity;
e) interest representation organizations in actions involving their own members, the subject matter of which may be utilized for the interest representation objectives set out in the organization's bylaws;
f) employees of legal persons and other economic operators in actions involving the business activities of their employers, the legal counsels (legal officers) of legal persons and other economic operators in actions where so authorized under specific other legislation and
g) any person so authorized by specific other legislation

provided that these persons have a law degree.

Where legal representation is prescribed mandatory, unless an exemption is provided by law, persons having a law degree may proceed in their own cases without legal representation, in which case he shall be recognized as being represented by legal counsel.

Court costs - apart from the exceptions specified by law - shall mean all reasonable expenses involved in litigating an action in good faith before or outside the court (costs of preliminary inquiries and correspondence, procedural fees, witness fees, expert fees, the fees of guardians ad litem and interpreters, the cost of remote hearings and inspections, etc.). Court costs shall also cover the expenses and fees of attorneys, legal counsels and patent agents providing representation to the parties.

The court shall decide as to the bearing of court costs in its judgment or other decision delivered in conclusion of the proceedings. If, however, on the strength of law a witness, an expert or any non-litigant person is to be held liable for the costs of certain acts during the proceedings, the court shall forthwith order such person to cover the said costs. The court may follow the same procedure where the costs of certain acts during the proceedings are to be covered by either of the parties irrespective of the outcome of the proceedings.

The expenses of the successful party shall be covered by the losing party.

An action shall be initiated by lodging a statement of claim.

However HCC and other material laws usually specify time limits to file the case, if the unfair contract term is null, there is no time limit to litigate.

The statement of claim shall indicate:

a) the court of competence;
b) the names and addresses of the parties and their counsels, and their status in the action;

c) the cause of action, including a description of the circumstances invoked as the basis of the claim and a description of the evidence supporting the claim;
d) the grounds for competence and jurisdiction of the court;
e) a plea for court decision (pleading);

The plaintiff shall attach to the statement of claim the document, or a copy (extract) of such document, invoked as evidence underlying the claim, or that is required for determining court's competence and jurisdiction, and that is required to verify other circumstances which are to be taken into consideration ex officio, except if the data can be verified by a personal identification document as well; this must be indicated in the statement of claim.

Where legal representation is mandatory the statement of claim shall have attached the legal counsel's power of attorney, or the right of representation shall be verified.

Where mediation proceedings took place in the dispute between the parties, the statement of claim shall contain an indication thereof.

The court may examine the statement of claim without delay, not later than within thirty days from the time of delivery to the court, so as to determine whether it contains any remediable deficiencies, whether the case should be transferred to another venue, or as to whether the statement of claim should be rejected without issuing any writ of summons, and shall make the necessary measures.

The court shall proceed to have the day in court set within thirty days from the time of delivery of the statement of claim to the court, and shall deliver the statement of claim and a copy of the court records made to the parties together with a writ of summons ordering them to appear before the court on this date.

The hearing shall be scheduled so as to allow at least fifteen days to elapse between the time the statement of claim is delivered to the defendant and the date of the hearing. This time interval may be reduced by the presiding judge in cases of urgency.

The hearing shall be scheduled to put the first day of the hearing within four months from the time when the statement of claim is delivered to the court, except where another date is prescribed by law as the initial day of the time limit.

The plaintiff shall have the right to change his claim before the time when the hearing preceding the giving of judgment in the first instance is adjourned, provided that the claim is arising from or relates to the same cause of action as the original claim. Change of action shall be notified in writing or shall be stated for the records.

The following shall not be construed change of action:

a) if - without changing the claim enforced by the action - the plaintiff produces new evidence to support his claim, or updates previous evidence;

b) if the plaintiff demands another thing instead of the asset originally claimed due to subsequent changes, or to demand compensation for damages;
c) the plaintiff reduces his claim, or extends the claim to ancillary costs not originally demanded, and/or to any installment of any claim or ancillary costs falling due during the hearing;
d) the plaintiff requests performance in lieu of declaration, or vica versa.

Where legal representation is prescribed mandatory, plaintiff shall be allowed to make changes in his claim within thirty days after the defendant has presented his counterclaim on the merits.

If the defendant lodges an objection of imputation or a counterclaim, the plaintiff shall be allowed to make changes in his claim within thirty days from the time of delivery of the objection or counterclaim.

The plaintiff shall be allowed to make changes in his claim with the consent of the defendant at any time.

The plaintiff shall be allowed to make changes in his claim before the hearing preceding the giving of judgment in the first instance is adjourned, if he presents any fact or evidence, or any binding court or other official decision of which he was unaware before the deadline normally prescribed for the presentment of such motion without any fault on his part, and if he is able to produce credible proof to that effect.

No changes can be made in a claim if the defendant has lodged an objection of imputation or a counterclaim in response to changes made by the plaintiff in his claim.

At the hearing, after the plea of the plaintiff, the defendant shall present his counter-plea, aiming either to have the case dismissed or it offers defense argument, or contains a cross-claim (counterclaim, set-off) against the plaintiff's claim.

In the counter-plea the defendant shall present the facts underlying his defense and the supporting evidence.

Before the time when the hearing preceding the giving of judgment in the first instance is adjourned the defendant may launch a counterclaim against the plaintiff, provided that the claim is arising from or relates to the same cause of action as the plaintiff's claim, or if the claim which is the subject matter of the counterclaim can be set-off against the plaintiff's claim. The court shall dismiss the counterclaim without hearing any arguments as to the merits of the case, if it is evident that the party submitted it in delay with an intent to hamper the proceedings.

Where legal representation is prescribed mandatory, defendant shall lodge his counterclaim under the same time limits stated in accordance with the changing of claim.

6.2 Small claims

6.2.1 There is a simplified small claim procedure in Hungary.

6.2.2 According to the HCCP, specialised provisions shall apply – subject to the exceptions – to actions for the enforcement of

- any claim of a pecuniary nature only,
- falling within the competence of district courts,
- for a sum not exceeding one million forints calculated by way of the methods specified in the HCCP,
- where the action was transferred from an order for payment procedure on account of a statement of opposition, or which normally ensue order for payment procedures (in Hungary, any overdue claim of a pecuniary nature only, whose amount - calculated according to the relevant provisions of the HCCP - does not exceed one million forints may be recovered by way of an order for payment procedure only).

Small claims procedure do not really plays important role in the area of consumer disputes, as the most common dispute (unfair contract terms) is not a pure pecuniary dispute, furthermore, it falls within the competence of regional courts.

In addition, it should be noted that the application of these rules are said to be very problematic in judicial practice. The new HCCP - which is currently under preparation - leaves the rules of this special procedure.

6.2.3 Since the procedure is always starts with the order of payment procedure, petitions – except where petitions are presented orally – shall be submitted on printed application forms, where a standard form is prescribed by decree of the minister in charge of the judicial system for specific petitions.

6.2.4 Electronic petitions must be submitted using only the standard electronic form prescribed, and the petition shall be executed by a certified electronic signature and a certified time-stamp.

A petition may be submitted electronically, upon the petitioner having entered the particulars of the petition into the MOKK (Hungarian Chamber of Civil Law Notaries) computer system and having executed the petition by a certified electronic signature and a certified time-stamp.

The petitions of any party who has a legal representative and the petitions of legal persons, Hungarian branches of foreign companies and sole proprietorships may be submitted by way of electronic means only.

Unless otherwise provided by law, a party acting without legal counsel shall be entitled to present their petition orally at any notary public.

In small claim procedures, district court may hold a hearing. Parties are obliged to appear at the court, otherwise they have to bear the consequences for the failur to appear at the hearing.

6.2.5 In small claim procedures, the party shall be able to present his motions for the performance of taking of evidence on or before the first day of the hearing, unless otherwise provided by law.

In the event of any changes made in the claim, or where a counterclaim is filed, the party shall be entitled to file a motion for the taking of evidence relating to the right to which the changed claim or the counterclaim pertains during the day in court when the claim was changed or the counterclaim was filed, or if it took place between two days in court, on the following day in court. If the court set a time limit for the defendant (defendant of the counterclaim) to prepare for the hearing, the defendant shall present his motions aimed at the performance of taking of evidence within this time limit. These provisions shall also apply to cross-examination as well.

Where an objection to offsetting has been presented, a motion for the taking of evidence relating to the claim intended to be set off shall be submitted together with the objection. This provision shall also apply to cross-examination as well.

The party may present his request for the performance of taking of evidence any time during the hearing, subject to the opposing party's consent, except if the request for the performance of taking of evidence is submitted in delay for reasons within the party's control, or if the request is presented contrary to good faith.

The party shall be entitled to present his request for the performance of taking of evidence before the hearing preceding the giving of judgment in the first instance is adjourned, even if he presents any fact or evidence, or any binding court or other official decision which he was unaware of before the deadline normally prescribed for the presentment of such motion without any fault on his part, or if he has learned about the decision becoming definitive after this deadline, and if he is able to produce credible proof to that effect.

6.2.6 There is no special provisions in accordance with court costs. The costs of the successful party are usually reimbursed.

6.3 Claims other than small claims – high profile actions

6.3.1 Beyond small claim track, ordinary procedure and high profile actions are also available in consumer disputes.

According to the HCCP, specialised provisions shall apply subject to the exceptions to cases falling under the competence of the regional court (e.g. unfair contract terms cases) pertaining to:

a) the enforcement of any claim for a sum exceeding 400 million forints calculated according to the relevant provisions of the HCCP,
b) declaratory proceedings, where the amount at issue - if condemnation may be requested - exceed the sum referred to in Paragraph a),
c) actions brought pursuant to Section 67 of Act CXCV of 2011 on Public Finances.

The relevant court of the first instance shall hear the high profile actions in priority proceedings, even in the absence of a petition filed therefor. Priority proceedings ordered by the court of the first instance shall apply to all stages of the proceedings, including redress and extraordinary appeal procedures as well.

In high profile actions, the court shall examine the statement of claim without delay, not later than within eight days from the time of delivery to the court, so as to determine whether it contains any remediable deficiencies, whether the case should be transferred to another venue, or as to whether the statement of claim should be rejected without issuing any writ of summons and shall take the necessary measures.

In high profile actions, regional court may hold a hearing. Parties are obliged to appear, or at least represent himself at the court, otherwise they have to bear the consequences for the failur to appear at the hearing.

The court shall schedule the first hearing inside a sixty-day period following receipt of the statement of claim, unless the HCCP provides for an earlier date relating to the first day of the time limit. The provisions pertaining to the date of hearing shall not apply if the writ of summons is to be delivered to the party to a foreign address, and the time required for delivery shall not permit the hearing to be held in good time.

The subsequent hearing shall be scheduled within two months following the date of the hearing that was adjourned, unless: the summons ordering the party to appear before the court in person has to be delivered to a foreign address, and consequently a longer time limit is prescribed for service of process by law.

Where an expert is appointed, the court shall set the deadline for the expert to prepare an expert opinion at maximum thirty days, or up to sixty days in cases involving particularly complex issues. In exceptional circumstances the deadline may be extended on one occasion, by the same period originally prescribed, exclusively at the expert's request.

In the process of hearing high profile actions, the court may set hearings for consecutive days if deemed necessary, and if permitted and justified by the circumstances surrounding the case.

The decision of the first instance - unless the court failed to deliver it - must be committed to writing within not more then eight days from the time when it was adopted, and shall be served by process within three days from the time when it was put in writing. If the court failed to deliver a judgment, the court shall forthwith serve the judgment put in writing to the parties present at the time of delivery, and shall indicate this in the court records, and shall have it served to the parties absent within three days.

Following the conclusion of proceedings in the second instance the court shall send the documents of the case to the court of the first instance within fifteen days. The court of the first instance shall have the decision passed in conclusion of proceedings in the second instance delivered to the parties by service of process within eight days of receipt of the documents at the latest. If the court of the second instance postponed publication of the decision, it shall promptly make available a copy of its written decision to the parties present, and shall enter this in the records.

Where it is possible, the court shall adopt an interlocutory judgment or an interim judgment if so requested by either of the parties, and if the parties are not required to produce any further evidence on the subject by order of the court.

Where a party files a motion that is clearly unfounded, or files another clearly unfounded motion in the same action, such party shall be fined in the decision delivered for denying the motion for interlocutory judgment or interim judgment.

In high profile actions, the petition for review shall be submitted to the court having rendered the decision in the first instance within thirty days from the time of publication of the decision, or shall be sent by registered mail containing a copy for each party involved in the action, plus two. No application for continuation will be accepted upon failure to meet the deadline for submission of the petition for review past thirty days from the last day of the deadline, even if the party was unaware of having missed the deadline, or if the obstacle was not eliminated in due time.

6.3.2 In high profile actions legal representation is mandatory. Thus, applications can be made only online.

6.3.3 In high profile actions, for the purpose of deciding the dispute, the court shall not be liable to inform the parties in advance concerning the facts for which the taking of evidence is required, on the burden of proof, and also on the consequences of any failure of the evidentiary procedure.

In accordance with witnesses, in high profile actions the HCCP provide special provisions as follows:

Such examinations are supervised by the presiding judge. If proposed by the party having requested the examination of the witness, the witness may be first examined by the party having requested the examination of the witness, followed by the opposing party, when so requested by the opposing party. After the parties, the presiding judge and other members of the court shall also be entitled to ask questions from the witness.

If neither of the parties have exercised the right to make the proposal referred above, the witness shall be first examined by the presiding judge, and other members of the court shall also be entitled to ask questions from the witness. After that the party having requested the examination shall be entitled to interrogate the witness, followed by the opposing party.

Where a party asks the witness any question: intended to unduly influence the witness, or that contains the answer as well, the opposing party may raise an objection. The decision to sustain or overrule the objection lies with the presiding judge.

If the testimony given by a witness is contradictory to the testimony of another witness or any other person heard in person, the disagreement shall be clarified by way of confrontation if deemed necessary.

6.3.4 There is no special provisions in accordance with court costs. The costs of the successful party are usually reimbursed.

It should be noted that the application of these rules are said to be very problematic in judicial practice. The new HCCP - which is currently under preparation - leaves the rules of this special procedure.

6.4 Claims for the issuance of a payment order

6.4.1 - 6.4.9 In Hungary, the order for payment procedure is a simplified non-judicial civil proceeding for the collection of pecuniary claims that fall within the competence of a notary public.

Proceedings conducted by notaries, as non-judicial civil proceedings, shall have the same effect as court proceedings.

An overdue pecuniary claim may be recovered by way of an order for payment procedure as well. Any overdue claim of a pecuniary nature only does not exceed one million forints may be recovered by way of an order for payment procedure only, or by way of the means specified in the HCCP or in an action brought based on the expert opinion of the Body of Experts for the Certification of Compliance, provided that:

a) the defendant has a known home address or habitual residence in Hungary, or a registered office or fixed establishment (hereinafter referred to collectively as address of summons) and
b) the pecuniary claim does not originate from an employment relationship, public servant and civil servant relationship, service relationship, work-related cooperative legal relationship or from a free-lance contractor legal relationship.

An order for payment may not be issued to a defendant with no known domestic address of summons.

The competence of the notary public in order for payment procedures shall cover the entire territory of the country.

An application for the issue of an order for payment shall be submitted in writing, using the prescribed application form, or may be presented orally.

The submission of an application for the issue of an order for payment shall have the same effect as lodging a statement of claim.

A legal entity or a person with legal representative - with few exceptions - must use the electronic way. The application form must be completed by a qualified electronic signature. The electronic requests are automatically issued between the notaries by the IT-infrastructure. The civil law notary uses the internet-based IT-infrastructure that is provided by the Hungarian National Chamber of Civil Law Notaries for data-processing (website: https://fmh.mokk.hu/fmh/#x).

With some exceptions, the notary public is required to issue the order for payment without the other party having been heard. The notary public shall issue the order for payment on paper within fifteen days of the time of receipt of the application, or within three working days if the application was submitted electronically.

The notary public does not really have detailed informations about the claim, when a claim for the issuance of a payment order is made. The application form shall only contain:

a) the names of the parties and their representatives, including their address of summons and status in the proceedings;
b) the grounds for the claim (the contract underlying the claim and the right to be enforced), the amount of the claim and the associated costs;
c) the time of the contract underlying the claim and the date when the claim expired;
d) data for identification of the claim (data and number of the invoice in the case of an outstanding invoice, etc.) and
e) a specific request for the issue of an order for payment.

However, theoretically the application form may contain a brief description of the facts underlying the claim, with the supporting evidence indicated, parties do not really provide these information.

The order for payment shall contain an instruction for the defendant to satisfy the order for payment within fifteen days of the time of service, and to pay the costs of the procedure in the amount indicated, a warning that the defendant - if he argues that the claim is unfounded - has the option to file a statement of opposition if he wishes to contest the claim and finally, a warning that if, upon receipt of the order for payment, the defendant satisfies the claim it shall be treated as admission of debt, in which case the order for payment shall become enforceable on the day following the last day of the time limit prescribed for filing the statement of opposition.

The defendant may lodge a statement of opposition to the order for payment with the notary public within fifteen days of service.

If the defendant is a consumer, and he does not respond to the issuance of the payment order, the authority dealing with the claim for payment order proceedings do not have the power to examine any additional issue of consumer protection law of its own motion before treating the action as usual.

All in all, the outcome of the procedure depends on the defendant:

— If no statement of opposition has been lodged, or the defendant admits the claim, the notary will declare the order for payment enforceable.
— If the defendant admits the payment, but cannot pay it at once, he can request an installment payment from the notary.
— If he declares that he has already payed, the notary will send a notice to the creditor.
— If the creditor denies the defendant statement, the proceedings shall continue before the competent court.
— If he sends an opposition to the order for payment within the time limit (15 days), the procedure will continue in front of the competent court.

Thus, if no statement of opposition had been filed against the order for payment in due time, it shall have the same effect as a final judgment (it is enforceable etc.). If a statement of opposition is filed in due time, the order for payment procedure shall be brought before the court in respect of the part contested by the statement of opposition.

6.5 Appeals in consumer disputes

6.5.1 Appeals are possible in all consumer dispute.

	Individual claim of value **€ 0 – € 3174**[179]	Individual claim of value **€ 3174 – € 1.269.841**	Individual claim of value **€ 1.269.841+**	Collective claim of value **€ 0 – € 3174**	Collective claim of value **€ 3174 – € 1.269.841**	Collective claim of value **€ 1.269.841+**
Nature of the procedure at 1st instance	Small claim track	Ordinary procedure	High profile action	Small claim track	Ordinary procedure	High profile action
2nd instance – appeal to?	Small claim track	Ordinary procedure	High profile action	Small claim track	Ordinary procedure	High profile action
3rd instance – appeal to?	Small claim track	Ordinary procedure	High profile action	Small claim track	Ordinary procedure	High profile action

i. Second instance procedure

6.5.2 In second instance proceed:

— Regional courts in cases falling within the jurisdiction of district, administration and labour courts,
— Regional courts of appeal in cases falling within the jurisdiction of Regional courts,
— in exceptional cases the Curia.[180]

In Hungary, private law courts shall resolve the merits of the case by way of judgment, and shall resolve all other issues that may arise in the course of a hearing by way of rulings.

The judgment of the district court shall be acted by the regional court. The judgment of the regional courts shall be acted by the regional courts of appeal.

The appealable procedural rulings of the district court shall be acted by the regional court. The appealable procedural rulings of the regional court - in case of appeal - shall be acted by the regional courts of appeal. Finally, the appealable procedural rulings of the regional courts of appeal - in case of appeal - shall be acted by the Curia.

[179] Calculated with the rate of EUR 315 / HUF 1
[180] On 1 January 2012 the Supreme Court was replaced by the Curia

The decisions (judgment or ruling) of the court of the first instance may be appealed, if an appeal is not precluded by law. If a decision can be appealed, any means of contest– other than correction requests and petitions for supplementary decision –shall be recognized as an appeal.

The appeal shall have a suspensory effect in terms of the enforcement of the decision, unless otherwise provided for by law, or by a court on the strength of law. In exceptional cases, decisions can be declared final and enforceable irrespective of any appeal [HCCP 231. §]. The presiding judge shall decide regarding the suspension of enforcement, if the court of the first instance declared the judgment provisionally enforceable in contrast with the rules of the HCCP. On the other hand, if the appellate hearing is postponed, the court - at the interested party's request and upon weighing all circumstances of the case - may decide to suspend in whole or in part the enforcement of a judgment that has been declared enforceable, or may declare the judgment enforceable in whole or in part.

The appeal shall be submitted at the court of the first instance in writing, or committed to the records.

The time limit for appeal is fifteen days from the time of delivery of the decision, or three days in actions relating to bills of exchange.

An appeal can be lodged by the party, the intervener and, finally, by any person to whom any provision of the decision may be of concern, against the appropriate section.

The rate of duty shall be 8 per cent in the case of appeals submitted against judgments or not less than 15,000 forints and not more than 2,500,000 forints.[181]For an appeal submitted against a judgment passed in an action for divorce, the duty shall be 15,000 forints. The duty on a cross-appeal shall be half of the duty chargeable in accordance with Subsection (1) or not less than 5,000 forints.

If an appeal or complaint is lodged against a ruling, the rate of duty shall be 3 per cent or not less than 7,000 forints and not more than 300,000 forints.

The duty on an appeal filed against the decision of a notary public made on probate or other notarial proceedings shall be 10,000 forints.

The duty on an appeal submitted against a ruling of the court of registry, as well as against rulings made in bankruptcy and liquidation proceedings on the merits of the case shall be 30,000 forints, and 7,000 forints in all other cases.

If an appeal is lodged solely against the justification of a resolution or is for a change of deadline and/or the amendment of or dispensation with an approved allowance of payment by installment, the duty shall be 8,000 forints.

[181] Unless otherwise prescribed by law, the duty base in judicial and non-judicial civil proceedings shall be the value of the subject matter of the proceedings at the time of the opening of the proceedings, or the value of the claim or part of claim disputed in remedy proceedings.

The appeal shall indicate the decision contested and shall contain the party's argument for having the decision modified, showing also the specific provisions to be amended. New facts and evidence may be presented in the appeal if the appellant came into possession of the new fact or the new evidence after the decision was rendered in the first instance, provided that such new fact or evidence would have been to his benefit had it been considered originally. In the appeal new facts and evidence may be presented, or a motion for the performance of taking of evidence that was ignored by the court of the first instance can be made if it is intended to demonstrate the unlawfulness of the decision adopted in the first instance.

If the time limit for appeal (fifteen days) expired with respect to all parties, or if the appeal is submitted by all parties completely, the court of the first instance shall forward it together with all documents of the case to the court of the second instance within not more than eight days. If the appeal covers the declaration of the decision provisionally enforceable as well, the appeal shall be forwarded promptly, before the expiry of the time limit for appeal.

In the case of an appeal lodged against a judgment the presiding judge shall - upon having the documents delivered to the court of the second instance - take measures to request any missing information, where applicable, if the appeal should have been dismissed by the court of the first instance, the presiding judge shall proceed accordingly.

If there is no reason for the taking of the above mentioned measures, the presiding judge shall set the date for hearing the appeal within thirty days of the time of forwarding the appeal, and shall summon the parties, the interveners, and any person who appealed the decision. The hearing shall be scheduled so as to allow at least fifteen days to elapse between the time the statement of appeal is delivered to the defendant and the date of the hearing, or eight days in connection with employment relationships, actions concerning child support, claims for the establishment of fatherhood or for the expulsion of a member of a business association, or three days in actions relating to bills of exchange. This time interval may be reduced by the presiding judge in cases of urgency. The hearing shall be scheduled to put the first day of the hearing within four months from the time when the statement of appeal is delivered to the court, except where another date is prescribed by law as the initial day of the time limit.

If there are any proceedings in progress before the court of the first instance stemming from a request made for correction or supplementation of a judgment, or from an application for continuation with justification, the appellate court may suspend the proceedings until the decision concerning the correction or supplementation, or the application for continuation with justification becomes final, or until the appeal against it is forwarded.

The court of the second instance shall abolish - by way of a ruling - the judgment rendered by the court of the first instance irrespective of the framework of appeals (cross-appeals) or counter-appeals, and shall instruct the court of the first instance to reopen the case and to render a new decision if the court of the first instance had not been properly formed, or if a judge who should have been disqualified by law took part in rendering the judgment.

The court of the second instance may abolish - by way of a ruling - the judgment rendered by the court of the first instance irrespective of the framework of appeals (cross-appeals) or counter-appeals, and may instruct the court of the first instance to reopen the case and to render a new decision if the hearing has to be repeated or completed due to any infringement of the main rules of the procedure of the first instance.

If performance of taking of evidence has to be repeated or completed in a large scale or entirely, however, the conditions mentioned above are not satisfied, the court of the second instance shall have powers to abolish the judgment rendered by the court of the first instance - in any case within the framework of appeals (cross-appeals), or counter-appeals -, and may instruct the court of the first instance to reopen the case and to render a new decision within this framework.

The court of the second instance shall decide on the merits of the case based on the appellate hearing, if the decision is not forthcoming under the previous provisions.

If the judgment rendered by the court of the first instance is deemed correct as to substance, the court of the second instance shall sustain it, or shall reverse the judgment given by the court of the first instance in whole or in part, or shall adopt an interlocutory judgment or a partial verdict.

The court of the second instance shall be able to modify the judgment rendered by the court of the first instance within the framework of an appeal (cross-appeal) and counter-appeal, within this framework, however, it may decide matters relating to rights enforced by the action or underlying the argument presented in defense against it, which the court of the first instance did not address or decide. The court of the second instance shall render a decision irrespective of the framework of appeals (cross-appeals) or counter-appeals concerning unpaid duties, as well as expenses advanced by the State that have not been recovered.

If the hearing has to be carried on after the decision on an appeal lodged against the interlocutory judgment has been rendered concerning the amount (quantity) of the claim, the court of the second instance shall send the documents of the case to the court of the first instance. The court of the second instance shall follow the same procedure also if it renders an interlocutory judgment in respect of an appeal lodged against a decision for dismissing the claim.

The court of the second instance shall, in addition to the judgment rendered by the court of the first instance, review other decisions adopted during the proceedings, except for the ones that cannot be appealed under any circumstances, or the ones that may be contested separately.

The court of the second instance shall, in its ruling on the approval of the settlement, establish that the judgment rendered by the court of the first instance and contested by the appeal (cross-appeal) is abolished to the extent pertaining to the settlement.

Unless otherwise provided for, the provisions on appeals brought against judgments shall also apply to appeals lodged against rulings.

The decision of the appellate court is final and enforceable.

There are some special provisions in small claim and high priority procedures:

In small claim procedures, an appeal may be submitted upon any significant violation of rules of procedure of the first instance or upon the wrongful application of any legislation underlying the decision on the merits of the case. Material violation of the rules of procedure shall mean any violation that had an impact on the decision on the merits of the case. So the right to appeal is limited in this track.

No application for continuation with justification may be submitted after sixty days following the last day of the missed time limit for appeal, even if the party was unaware of having missed the deadline, or if the obstacle was not eliminated in due time.

In proceedings of the second instance no new fact or evidence may be presented. This prohibition shall not apply if the evidence during the proceeding of the first instance was prevented by the court's violation of procedural rules or wrongful application of legal regulations.

The presiding judge shall dismiss the appeal of his own motion upon deliberating as to the necessity of the measures if the appeal fails to indicate the grounds referred above. The appeal shall not be dismissed for this reason if the appellant indicates which specific act of the proceedings leading to the judgment in the first instance he finds unlawful, and/or which right or legitimate interest the judgment is alleged to violate in his view.

The court of the second instance shall decide on the merits of the case without a formal hearing, however it shall hold a hearing if so requested by either party. A request for hearing shall be made by the appellant in the appeal, or within eight days of receipt of the opposing party's cross-appeal, and by the opposing party of the appelant within eight days of receipt of the appeal.

If the judgment rendered by the court of the first instance is found to comply with the relevant legislation, or if any breach of procedural regulations has occurred, which had no impact on the merits of the case, the court of the second instance shall sustain the judgment of the court of the first instance.

In the event of any significant violation of the rules of procedure the court of the second instance shall abolish - by way of a ruling - the judgment rendered by the court of the first instance irrespective of the framework of appeals (cross-appeals) or counter-appeals, and shall instruct the court of the first instance to reopen the case and to render a new decision

If the judgment violates any substantive law, and the facts required for the decision can be ascertained, the court shall have powers to reverse the unlawful decision - in any case within the framework of the appeal (cross-appeal) and the counter-appeal -, or shall abolish the unlawful decision in whole or in part, and shall instruct the competent court of the first or second instance to reopen the case and to render a new decision.

As for the high priority cases, priority proceedings ordered by the court of the first instance shall apply to all stages of the proceedings, including redress and extraordinary appeal procedures as well.

ii. Third instance procedure

In the Hungarian legal system, extraordinary recourses are the Retrial and the Curia's Judicial Review.

From a theoretical point of view, judicial review may identified as a third instance procedure, however it is stated as an extraordinary recourse in the HCCP (unlike in the act of I. of 1911 on the code of civil procedure, in which it played a role of a real third instance procedure).

It plays no role whether the foreign party or the Hungarian party lodge the petition of review.

The Curia shall proceed in cases of review. A motion for the review of a final judgment or a final ruling adopted on the merits of the case may be submitted to the Curia - on the grounds of infringement - by the party, the intervener, or by any person to whom any provision of the decision may be of concern, against the appropriate section.

Judicial review may not be requested:

a) against any decision in the first instance that has become final and enforceable, unless it is permitted by law;
b) if the party did not exercise his right to appeal and the court of the second instance sustained the decision of the first instance under appeal by the other party;
c) against the part of a final decision pertaining only to payment of interest and the bearing of court costs;
d) against the part of a final decision pertaining only to deadlines for performance or payment by installments, or pertaining only to the grounds for the final decision;
e) if the decision was rendered by the Curia;
f) against any judgment for the annulment or dissolution of marriage, as regards the annulment or dissolution;
g) against any judgment to rebut the presumption of fatherhood - in the part rebutting the presumption of fatherhood -, if fatherhood is assumed by any person subject to the fathers full-fledged consent after the presumption of fatherhood has been rebutted, or if fatherhood was established by final court decision;
h) against a ruling for the approval of a settlement;
i) against judgments rendered in actions in rem;
j) in municipal government debt consolidation procedures, against the ruling ordering debt consolidation;
k) against court decisions rendered in connection with the issue of visas and
l) where precluded by law.

Judicial review may not be requested, if the court of the second instance sustained the decision of the court of the first instance in actions relating to any infringement of neighboring rights, or to trespassing, and actions relating to the control and use of jointly owned property, in enforcement actions, with the exception of cases for the termination or restriction of enforcement, where enforcement was opened on the basis of a document with an enforcement clause affixed and in actions for the settlement of parental custody or the third-party placement of a child, for making any change in placement, and in actions relating to visitation rights.

Judicial review may not be requested, if the court of the second instance sustained the decision of the court of the first instance on the grounds of the same statutory provision against decisions brought with respect to resolutions adopted by bodies of condominium owners associations.

The petition for review shall be submitted to the court having rendered the decision in the first instance within sixty days from the time of publication of the decision, or shall be sent by registered mail containing a copy for each party involved in the action, plus two.

The petition for review shall specify the decision that is the subject of the petition for review, a description of the contents of the decision desired, furthermore, it shall demonstrate - in addition to the infringement and the specific statute violated - the party's request to have the decision modified, showing also the reasons.

If the time limit for the submission of petitions for review expired with respect to all parties, or if the petition for review has been submitted by all parties the court of the first instance shall forward it together with the documents of the case to the Curia without delay, and shall send a copy of the petition for review to the court having rendered the final decision with a notice of the opening of the procedure. If enforcement has already been ordered, or if suspension of the enforcement has been requested, the petition for review shall be forwarded upon receipt without delay.

A petition for review shall have no suspensory effect concerning the enforcement of the decision, however, the Curia has powers to suspend enforcement upon request, under special circumstances. In adopting a ruling for the suspension of enforcement the court shall - first and foremost - take into consideration as to whether the original state can be restored following enforcement, or whether the damage caused by the lack of enforcement outweighs the loss the suspension of enforcement is likely to entail.

In the case of petition for review against an interlocutory judgment - if anticipated to succeed - the Curia may, of its own motion, suspend the continuation of hearing the case. The court may subsequently modify the decision it has adopted on the subject of suspension.

The Curia shall decide the petition for review without a formal hearing, except if either of the parties has requested a hearing, or if the Curia is of the opinion that a hearing is necessary. In review procedures no taking of evidence shall be performed. The Curia shall render its decision concerning the petition for review relying on the documents available. In review procedures no taking of evidence shall be performed. The Curia shall render its decision concerning the petition for review relying on the documents available.

The Curia shall have powers to review a final decision only within the framework of the petition for review or the cross-petition for review, unless it decides to dismiss the action of its own motion, or if the court that rendered the decision had not been properly formed, or if a judge who should have been disqualified by law took part in rendering the decision.

If the decision reviewed is found in compliance with the relevant legislation, or if any breach of procedural regulations has occurred, which had no impact on the merits of the case, the Curia shall sustain the decision contested.

If a decision is found unlawful, except for the breach of procedural regulations, the Curia shall abolish the final decision in question in whole or in part, and if the facts needed for a decision can be ascertained, it shall render a new, lawful decision instead of such decision or instead of the decision of the first instance, or in any other cases it shall instruct the competent court of the first or second instance to reopen the case and to render a new decision.

If the Curia has ordered the competent court of the first or second instance to reopen the case and to render a new decision, it shall also convey mandatory instructions in its ruling of abolishment.

If the Curia orders the court of the second instance to reopen the case, its decision shall be delivered to the parties by the court of the second instance, in other cases by the court of the first instance, and shall take measures - consistent with the decision - for having the enforcement procedure terminated or restricted, or for having the suspension of the enforcement procedure lifted.

6.6 Enforcement in consumer disputes

6.6.1 In Hungarian law, if the assessment of a consumer protection issue has not been possible or has been missed at an earlier stage of the proceedings, it is usually possible – typically if the consumer raises a possible violation of consumer protection law – for this assessment to be undertaken during enforcement proceedings. For example:

According to the Art. 6:104. of the HCC, in contracts which involve a consumer and a business party a contract term shall, in particular, be considered unfair if its object or effect is to:

a) provide that the consumer is bound by the contract when the business party is not;
b) entitle the business party to withdraw from or terminate the contract on a discretionary basis without giving the same right to the consumer;
c) exclude or limit the right to offset claims that the consumer may have against the business party against what the consumer may owe to the business party etc.

In contracts which involve a consumer and a business party the contract term shall, in particular, be considered unfair, until proven otherwise, if its object or effect is to:

a) declare a specific conduct of the consumer as making a contract statement, or the failure to make one, if the time limit available for performing that conduct is unreasonably short;
b) subject the consumer in making statements to particular formalities that are unreasonable;
c) extend a contract of fixed duration unless the consumer indicates otherwise, in cases where contract terms provide for an unreasonably early deadline for making such statement etc.

In case the assessment of the above mentioned conditiones has been missed, parties are entitled to initiate legal proceeding in order to prevent the enforcement of the decision. According to the HCCP, an action for the termination or limitation of enforcement initiated by a document with an enforcement clause or by an enforcement order that is treated the same if:

a) the claim to be enforced had not validly been created;
b) the claim no longer exists wholly or in part;
c) the judgment creditor granted a respite for performance, and this time limit not yet expired or
d) the judgment debtor wishes to enforce a claim that may be set off against that claim.

Parties are entitled to file a case under the following conditions, as well:

An action for the termination or limitation of enforcement initiated by a certificate of enforcement or an enforcement order that is treated the same can be brought if any fact intended for presentment during the hearing:

a) occurred at a time when it was no longer possible to present it in the proceedings preceding the decision underlying the enforcement order, or
b) occurred after the settlement underlying the enforcement order was reached.

6.6.2 The court hearing the action for termination or limitation of enforcement may award a stay of enforcement, in order to ensure that the final decision will have full effect.

7 ACTIONS FOR COLLECTIVE REDRESS

In the Hungarian legal system, a typical collective redress mechanism (collective claims) does not exist. Public prosecutors and other public (and rarely private) institutions are authorized to file cases in the public interest.

The HCC regulates this topic on Book Six (Law of Obligations), as part of the rules of invalidity [Art. 6:105-106.]. There are two stipulated occasion of public action in the HCC. The first is in connection with unfair standard contract terms between a business party and a consumer, the other one is unfair contract terms between business parties. Standard contract terms means contract terms which have been unilaterally drafted in advance by one of the parties for several transactions involving different parties, and which have not been individually negotiated by the parties.

i. Public-interest proceedings in connection with unfair standard contract terms

As regards contracts which involve a consumer and a business party, an action may be brought for the annulment of an unfair contract term that has been incorporated into a contract by:

a) the public prosecutor;
b) the minister, autonomous administrative agencies, government agencies, the director of the head office;
c) the heads of the Budapest and county government agencies;
d) economic and trade organizations or interest-representation bodies; and
e) associations for the protection of consumers' interests within the scope of consumer interests they protect, and organizations set up for the protection of consumers' interests under the laws of any Member State of the European Economic Area.

In public-interest proceedings, the court shall establish the annulment of an unfair contract term in favour of all of the parties with which the party imposing the condition has a contractual relationship, and shall order the party who applied the contract term in question to take measures for having a public notice on declaring the contract term unfair published at his own cost. The wording of such public notice and the mode of publication

shall be decided by the court. The public notice shall contain the precise description of the contract term in question, an indication that it was found unfair, including the reasons and the arguments in support of such finding. Having the term declared null and void by the court shall not affect the contracts that had already been performed prior to the date on which the action was filed.

Moreover, an action may be brought in the public interest to request to have a standard contract term or condition declared unfair, that has been defined for consumer contracts and made available to the general public, regardless of whether the term or condition in question had in fact been applied or not. If the court finds the contested standard contract term unfair, the court ruling may also contain a clause banning the party who made it available to the public from the further use of such.

Furthermore, the lawsuit mentioned above may be brought against any party who publicly recommends the use of any unfair standard contract term or condition that has been defined for consumer contracts and made available to the general public. The court, if it finds the contested standard contract term unfair, shall declare it null and void for future purposes and shall ban any further recommendation for use.

The provisions mentioned above shall also apply to any unfair standard contract term that has not been used in a contract previously. Publication shall be provided for by the party who made the standard contract term in question available to the general public or who recommended the use of such term.

ii. Public-interest proceedings in connection with unfair standard contract terms between business parties

An action may be brought by an organization representing the interests of business entities for the annulment of a contract term that has been incorporated into a contract between business parties as a standard contract term relating to the amount or due date of interest on late payment, or to the costs of recovery of the claim, that is deemed contrary to good faith and fair dealing and as such regarded as unilaterally and unjustifiably unfair to the creditor business association.

If an action in the public interest is found substantiated, the court may declare the contract term in question annulled in favour of all of the parties with which the party applying the term has a contractual relationship. Having the term declared annulled shall not affect the contracts that have already been performed.

The organization representing the interests of business entities may request to have a standard contract term declared annulled, that has been defined for contracts and made available to the general public, regardless of whether or not the term in question had in fact been applied. If the contested contract term is annulled, the court ruling may also contain a clause banning the party who made it available to the public from the further use of such.

In the above-mentioned proceedings, the court, upon the claimant's request, may order the party who applied or published the contract term in question, or who suggested the use of such, to take measures for having a public notice on declaring the contract term annulled published at its own cost. The wording of such public notice and the mode of publication shall be decided by the court. The public notice shall contain the

precise description of the contract term in question, an indication that it was annulled, including the reasons and the arguments in support of such finding.

In the application of this Section, a contract term that excludes the obligations for covering the costs incurred in connection with interests on late payments and with the recovery of claims in contracts between business parties shall be regarded as unilaterally and unjustifiably unfair to the creditor and contrary to good faith and fair dealing.

iii. Institute legal proceedings in the public interest in the basis of other acts

In addition to the HCC, a wide range of acts provide authorization for bring public actions. The most important acts are:

— 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;

1. Public actions in the act of Consumer Protection

Where the illegal actions of a business entity affect a wide range of - personally unknown - consumers whose general identity, however, can be established relying on the circumstances of the infringement, or causing substantial harm, and the case falls within the jurisdiction of the court, the public prosecutor or the associations for the protection of consumers' interests shall have the right to bring action.

2. Actions sued by the Hungarian Competition Authority

The Hungarian Competition Authority may file for civil action on behalf of consumers against a business entity engaged in any infringement of the provisions of the competition act, or the provisions of the UCPA, falling within the competence of the Authority, where such illegal action results in a grievance that affects a wide range of consumers that can be established relying on the circumstances of the infringement. The Authority shall be entitled to bring such action only after the opening of competition control proceedings in connection with the infringement in question. If the competition control proceedings are already in progress, the court shall grant continuance of the case at the request of the Authority pending conclusion of the competition control proceedings. No action may be brought after three years following the time of commission of the aforementioned violation. This deadline shall apply with prejudice.

3. Actions sued by the National Bank of Hungary

The MNB may, within the framework of its responsibilities set out in the act, bring civil action on behalf of consumers against a person engaged in any violation of the provisions of the acts listed on the MNB act, furthermore, who is allegedly engaged in the use of any unfair standard contract term covered by the Civil Code in connection with his activities, where such illegal action affects a wide range of consumers whose identity can be established relying on the circumstances of the infringement.

No action may be brought after three years following the time of commission of the aforementioned infringement. This deadline shall apply with prejudice.

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7.1.1 If collective proceedings are launched, Hungarian procedural law provide that ongoing individual claims, relating to the same dispute, should be stayed until the public interest proceedings are brought to an end.

According to the HCCP, in case the outcome of the hearing depends on the adjudication of a prior matter for which another civil action or other civil proceedings falling within the court's competence are already pending, the court could stay the proceedings until the final conclusion of such other proceedings. If these proceedings are not yet opened, the court shall set a time limit for the opening of the proceedings as appropriate. In the event of non-compliance with the said time limit, the hearing shall be continued.

It should be stated that the court is entitled, but not obliged to stay the case, it is just an opportunity for the judges.

Upon the stay of proceedings all deadlines shall be discontinued, and shall recommence when stay is terminated. All court orders introduced during the period of stay, pertinent to the merits of the case, and all acts made by the parties during the proceedings shall be null and void, except for the court orders and acts relating to the stay of proceedings or the termination of interruption.

The court's decision on the stay of proceedings - excluding the ruling ordering the parties to submit to compulsory mediation and the stay of the court's proceedings - may be contested separately; however, the court shall have powers to reverse such decision on its own accord as well.

7.1.2 If individual proceeding is stayed, the effect of the public interest decision differs as follows:

On one hand, parties may bring individual action asking the court only to declare a contract invalid without requesting the application of the legal consequences of invalidity. In public interest cases, the court shall establish the annulment of an unfair contract term in favour of all of the parties without the application of any legal consequences of invalidity (e.g. in integrum restitution, declaring a contract valid etc.).

So it means that, if the court declared the contract invalid in the public interest case, and at the same time, in the individual action, plaintiff litigates for the same (declaring the invalidity), the court proceeding in the individual case, does not continue the hearing, but it shall dismiss the case.

On the other hand, parties are usually requesting the application of the legal consequences of invalidity, as well. This leads to the following conclusions: If the court declared the contract invalid in the public interest case, and plaintiff litigates for the application of the consequences of invalidity, the court shall continue the hearing, and the public interest decision plays the role of a prejudice, in the individual procedure.

8 CONSUMER ALTERNATIVE DISPUTE RESOLUTION

8.1 Consumer disputes before ADR fora

8.1.1 – 8.1.6 In Hungary, there is a non-mandatory ADR procedure in consumer cases. According to the Act CLV of 1997 on the Consumer Protection, the Hungarian consumer arbitration board is a body registered by the organ, established on a long-term basis for the purpose of resolving consumer disputes within the framework of alternative dispute resolution procedures. The arbitration board functions as an independent body attached to the competent county (Budapest) chamber of industry and commerce (hereinafter referred to as "chamber").

The competence of the arbitration board shall cover the settlement of consumer disputes out of court.[182] To this end, the arbitration board's responsibilities shall include to attempt to reach a conciliation agreement for the settlement of the dispute or, failing this, to adopt a decision in the case to enforce consumer rights simply, efficiently and practically and under the principle of cost-efficiency. The arbitration board shall provide advice upon the consumer's or the business entity's request on the rights and obligations of the consumer.

The arbitration board of jurisdiction by reference to the consumer's home address or temporary residence shall have competence to conduct the proceedings. If the consumer has no permanent or temporary residence in Hungary, jurisdiction shall be determined based upon the address of the business entity involved in the dispute or the body vested with powers as the representative of such business entity. Where a request is lodged by several consumers collectively, the body of jurisdiction for either applicant shall have jurisdiction for all applicants.

The arbitration board shall proceed in a panel of three.

One member for the acting panel shall be delegated by the consumer requesting the procedure, and one other member by the business entity affected by the proceedings from the list of board members. The presiding umpire of the panel of arbitrators, furthermore, if either of the parties fail to exercise the right of delegation within the prescribed time limit, or if required for other reasons, the third member of the panel shall be appointed by the chairman of the board with due consideration of the requirements and of having at least one member delegated from among the board members appointed by the association for the protection of consumers' interests, one other member from among the board members appointed by the chamber or the county (Budapest) chambers of agriculture, and to all other considerations with a view to securing the appointment of an independent and impartial board member. Any member of the arbitration board who has provided advice to the consumer or the business entity in connection with the case at hand may not be appointed to the panel of arbitrators. The chairman of the arbitration board shall ascertain compliance with this requirement at the time of appointment of members to the acting panel of arbitrators.

[182] C*onsumer dispute'* shall mean any dispute between a consumer and a business entity arising out of, or in connection with, the conclusion and performance of a sales or service contract, and any dispute regarding the quality and safety of goods, the application of product liability regulations and the quality of services in the absence of a sales or service contract between a consumer and a business entity;

At least one member of the panel of arbitrators must have a law degree.

If according to the chairman of board the consumer dispute is a simple case, a sole board member shall be appointed to hear the case. However, if so requested by both parties - with a potential candidate from among the board members the arbitration board shall hear such cases in a panel of three as well.

Any arbitration board member, or his relative defined in the Civil Code, who has a personal or financial interest in the case debated, or is partial due to any other reason, shall be excluded from the proceedings, unless such member has informed the parties concerned to this effect and in knowledge of this fact neither party has raised an objection against this person.

Board members delegated by the parties or by the chairman to the acting council must, without delay, report to the chairman and introduce to the parties all circumstances that may give rise to legitimate doubt regarding his independence or impartiality.

A precondition for opening arbitration board proceedings is that the consumer has attempted to settle the case directly with the business entity affected.

Arbitration board proceedings are opened upon the consumer's request.

The request shall be submitted to the chairman of the arbitration board in writing, where the requirements of written form shall be deemed satisfied.

If the consumer is represented in the proceeding by an agent his authorization must also be attached with the request.

Within eight days of the opening of the proceedings, the chairman of the arbitration board shall review whether the board has jurisdiction and competence over the case and, in the event that the board does not have jurisdiction or competence, shall forward the case without delay to the appropriate body of jurisdiction and competence and shall notify the requesting party accordingly.

In the event that the board's jurisdiction and competence is established, the chairman shall set a hearing date for the parties within sixty days of the opening of the proceedings.

The chairman shall terminate the proceedings without a hearing for example if there is evidence that proceedings had been initiated by the same parties for the same subject under the same cause of action before another arbitration board or before a meditation panel.

If the chairman decided to refuse the request without a hearing, the parties shall be notified thereof, including the reasons, within twenty-one days following receipt of the request.

The chairman shall in due time notify the parties regarding the scheduled time of the hearing, or if he plans to lodge a motion to proceed without hearing, with a copy of the request and the list attached, and shall request

the parties to file their recommendation concerning the person they wish to delegate to the panel of arbitrators within eight days of receiving the said notice, otherwise the chairman of the arbitration board shall appoint such member ex officio.

Following deliberation and upon weighing the relevant circumstances the chairman may move that the proceedings be carried out in writing, but the consent of both parties must be obtained in order to forego holding a hearing. Consent shall be considered granted if the party fails to respond to the chairman's request within fifteen days of the date of delivery thereof.

In the notice, the business entity affected shall be requested to file a written statement (hereinafter referred to as "response") within eight days of receipt of the notice with regard to the legitimacy of the consumer's claim, the circumstances of the case, and acceptance of the decision of the panel as binding (hereinafter referred to as "ad hoc submission"). In the statement the business entity shall indicate the facts and evidence in support of its position and shall attach any documents (or copies thereof), the contents of which it relies on as evidence. The business entity shall be advised that representation in the hearing is mandatory by a person duly authorized to conclude a settlement, and, in the event of its failure to file a statement regarding the merits of the case, the panel shall pass its decision based on the information at its disposal. The notice shall contain information regarding the obligation to cooperate, and that in the event of non-compliance the consumer protection authority shall impose a fine.

The chairman shall send a copy of the response of the business entity to the consumer without delay, or if there is not sufficient time to do so, shall present it at the hearing. If the business entity fails to file a response, the panel shall continue the proceedings, however, it shall not be construed as acceptance of the requesting person's claims.

In arbitration proceedings the business entity shall be duty-bound to cooperate, including to send its response to the arbitration board under the content requirements and within the time limit provided for. The business entity shall be represented in the hearing by a person duly authorized to conclude a settlement. If the business entity's main office or place of business is registered in a county other than the one where the chamber to which the arbitration board is attached is established, the business entity's obligation to cooperate is limited to offering the possibility of concluding a settlement in writing so as to accommodate the consumer's claims. In the event of any breach of the obligation to cooperate, the arbitration board shall notify the consumer protection authority of competence concerning the infringing business entity.

In the course of the arbitration board's proceedings the acting panel, or any member thereof may not give advice concerning the rights and obligations of consumers.

In the proceedings the presiding umpire of the panel shall attempt to negotiate an agreement between the parties. The panel shall approve the negotiated settlement by resolution if it is in conformity with legal regulations, otherwise, or if there is no agreement, it shall continue the proceeding. During the proceedings the panel of arbitrators shall afford equal treatment to the parties and shall provide all parties with an opportunity to present their case and table any motions. If necessary, the presiding umpire shall inform the consumer of his rights and obligations.

Proceedings are conducted in closed sessions, unless both parties have consented for the proceedings to be held publicly.

The request or the response may be freely modified or supplemented during the course of the proceedings, unless so prohibited by the panel of arbitrators due to any potential delay caused by such action, or if the business entity objects, with a view to its ad hoc submission, to the request being modified or supplemented.

If either of the parties fails to appear at the hearing in spite of having been properly notified or fails to present his evidence, the panel shall continue the proceedings and adopt its resolution relying on the information in its possession.

The panel shall decide on the merits of the case by a simple majority of votes.

The council shall conclude the proceedings within ninety days of the time of opening. In justified cases, the presiding umpire shall have powers to extend this time limit by no more than an additional thirty days.

In the absence of a negotiated settlement the panel of arbitrators shall:

a) adopt a binding resolution if the request is found substantiated, and the business entity affected has undertaken to be bound by the decision of the arbitration board in a standard statement of submission filed at the arbitration board or the chamber, or contained in its commercial communication or in a statement filed at the time of the opening of the proceedings or, at the latest, before the decision is adopted, or

b) makes a recommendation if the request is found substantiated, however, the business entity affected has refused to be bound by the decision of the arbitration board in a statement filed at the time of the opening of the proceedings, or did not declare its position concerning the decision of the arbitration panel in terms of submission.

The panel of arbitrators shall refuse the consumer’s request if it considers upon the hearing that the request is unsubstantiated.

The binding resolution, or the recommendation shall include all motions presented in the request and the reasons underlying the decision. The costs of the proceedings, and the party to pay such costs, shall also be specified in the binding resolution.

The costs of the proceedings shall cover all expenses incurred by the parties in connection with the proceedings of the arbitration board within reason and in good faith. The costs of legal representation shall not be included in the costs of the proceedings.

The costs of the proceedings shall be borne by the party against whom the resolution was passed.

In respect of the fulfillment of the obligation established in the binding resolution a fifteen-day deadline shall be set from the day of the delivery of the resolution.

The panel shall deliver its resolution or recommendation on the day when adopted. The panel shall send within thirty days one copy of the written decision or recommendation to each of the parties.

The resolution or recommendation of the panel of arbitrators is adopted without prejudice to the consumer's right to have his claim enforced in the court of law.

The binding resolution or recommendation of the panel may not be appealed, however annulment of the resolution by court order may be requested.

Within fifteen days of receipt of the binding resolution, or recommendation, the party affected may file to have the resolution annulled by the regional court of jurisdiction by reference to where the seat of the arbitration board is located if:

a) the composition or the procedure of the panel was not in compliance with the provisions detailed above;
b) the arbitration board did not have jurisdiction or
c) the request should have been rejected without a hearing.

In addition the business entity may request within fifteen days from the time of receipt of the recommendation the regional court of jurisdiction by reference to where the seat of the arbitration board is located to abolish the recommendation, if it fails to comply with the relevant statutory provisions.

The lawsuit shall be opened naming the arbitration board as the defendant. The board in such cases shall be vested with legal capacity and competence in the court of law.

Upon request by the party affected, the court may suspend enforcement of the binding resolution of the panel of arbitrators.

The decision of the court may pertain to having the resolution or the recommendation abolished.

In the event that the business entity fails to comply with the panel's recommendation, the arbitration board shall be entitled to publish, without indicating the name of the consumer, a brief description of the dispute and the outcome of the proceedings within sixty days of the time of delivery of the recommendation to the business entity in question. In the case of recommendations published upon the presumption of service, if it has been challenged successfully, the arbitration board shall move to stop publication without delay.

In the event of the business entity's failure to discharge the binding resolution of the panel, or the negotiated settlement approved by resolution within the prescribed time limit, the consumer may request the court to append an enforcement clause to the panel's resolution, of which the chairman of the arbitration board shall be informed simultaneously.

If an enforcement procedure is launched on the strength of an enforcement clause issued upon the presumption of service, and the addressee submitted a petition to challenge the presumption of service, such petition shall have no effect in terms of carrying out the enforcement procedure. However, if the facts shown in the petition appear conceivable, the chairman of the arbitration board to which the petition had been submitted shall forthwith notify the court thereof, with its opinion on such facts and the petition enclosed. The business entity in its petition challenging the presumption of service may request the suspension of the enforcement, and the court may order such suspension without hearing the consumer affected.

If the consumer file a case and initiate the above-mentioned ADR procedure at the same time, the court may suspend the litigation process.

9 THE EXAMINATION OF CONSUMER PROTECTION LAW IN NATIONAL PROCEDURAL LAW: RESPECT FOR THE PRINCIPLES OF THE EFFECTIVENESS AND EQUIVALENCE OF CONSUMER PROTECTION LAW AND EX OFFICIO CONTROL

9.1 The basis of ex officio control of consumer protection law in national law

Ex officio control is a very strange concept for the Hungarian judges and other authorities. In the HCC there is one regulation, which we may declare as a tool of the ex officio control:

According to the HCC, annulled contracts shall be considered null and void as from their conclusion. No special procedure is required for the establishment of invalidity; the court observes the nullity of the contract of its own motion (ex officio).

However, no right may be established and performance may not be demanded on the basis of an invalid contract (even if the court observe the invalidity ex officio), other legal consequences of invalidity (e.g. in integrum restitutio) shall be invoked by the court only at the party's request to that effect, within the framework of prescription and adverse possession.

9.1.1 The above-mentioned ex officio control of consumer protection law is clear for the judges, and established as an obligation of the judge in national procedural law (during the appeal procedure and the judicial review, as well).

9.1.3 The party who claims to be a consumer is not required to establish his consumer status, the existence of a consumer contract and that consumer law applies to the dispute. The judge assesses these conditions ex officio.

9.1.4 National procedural law does not provide for rules as to the minimum factual information that must be available for a consumer protection dispute to be heard and for the court to engage in ex officio control.

9.1.5. Unless otherwise provided for by law, the responsibility for producing evidence for the purposes of litigation lies with the parties. There are no special provisions in the area of consumer protection. The legal consequences relating to the omission of lodging a request for the performance of taking of evidence, or if such

request is presented in delay, moreover, if the taking of evidence has failed shall fall upon the party required to produce evidence.

9.1.6. For the purpose of deciding the dispute, the court shall inform the parties in advance concerning the facts for which the taking of evidence is required, the burden of proof, and also on the consequences of any failure of the evidentiary procedure.

9.1.7. Case Law:

Case C-243/08 Pannon GSM Zrt.vs Erzsébet Sustikné Győrfi[183]

There is one well-known case in accordance with ex officio control in Hungary:

On 12 December 2004, Mrs Sustikné Győrfi entered into a subscription contract with Pannon for the provision of mobile telephone services. The contract was concluded on the basis of a form supplied by Pannon which stipulated that, by signing the contract, Mrs Sustikné Győrfi acknowledged the applicable terms and conditions, including the general contractual conditions forming an integral part of the contract, and accepted their content. Under those terms and conditions, the two parties to the main proceedings accepted that the court for the place where Pannon has its principal place of business has jurisdiction for any dispute arising from the subscription contract or in relation to it. That term conferring jurisdiction was not individually negotiated by the two parties. Taking the view that Mrs Sustikné Győrfi had not complied with her contractual obligations, Pannon applied, pursuant to that term, to the Budaörsi Városi Bíróság (Budaörs District Court) for an order for payment, it being the court in the territorial jurisdiction of which Pannon has its principal place of business. That court made the order sought by Pannon. Mrs Sustikné Győrfi then filed, within the prescribed time-limit, a statement of opposition to that order, and the proceedings thereby became contentious. That court noted that Mrs Sustikné Győrfi's place of residence was not within its jurisdiction. It held that Mrs Sustikné Győrfi, who receives invalidity benefit, has her place of residence in Dombegyház, in the judicial district of Békés, 275 km from Budaörs, and indicated that means of transport between Budaörs and Dombegyház are very limited on account of the lack of a direct train or bus service.

The Budaörsi Városi Bíróság observed that the applicable rules of procedure provide that the court with territorial jurisdiction is the court for the place where Mrs Sustikné Győrfi resides, that is to say, the Battonyai Városi Bíróság (Battonya District Court). The referring court explained that the Code of Civil Procedure provides that the court, in the district in question, must raise, of its own motion, the issue of territorial jurisdiction. However, as the jurisdiction is not exclusive, it is no longer possible to raise that issue after the first filing by the defendant of her defence to the substance of the dispute. The court which is seised may examine the accuracy of the facts relied on, to establish that it has jurisdiction, only where they are inconsistent with self-evident facts or facts of which the court has knowledge ex officio, or if such facts are impossible to prove or the other party disputes them. In those circumstances, the Budaörsi Városi Bíróság, entertaining doubts as to the possible unfairness of the term conferring jurisdiction in the general conditions of the contract at issue, decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

[183] European Court Reports 2009 I-04713

1. Can Article 6(1) of … Directive [93/13] – pursuant to which Member States are to provide 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 – be construed as meaning that the non-binding nature vis-à-vis the consumer of an unfair term introduced by the seller or supplier does not have effect ipso jure but only where the consumer successfully contests the unfair term by lodging the relevant application?

2. Does the consumer protection provided by Directive [93/13] require the national court of its own motion – irrespective of the type of proceedings in question and of whether or not they are contentious – to determine that the contract before it contains unfair terms, even where no application has been lodged, thereby carrying out, of its own motion, a review of the terms introduced by the seller or supplier in the context of exercising control over its own jurisdiction?

3. In the event that the second question is answered in the affirmative, what are the factors which the national court must take into account and evaluate in the context of exercising this control?

The European Court of Justice (hereinafter Court) stated that the Article 6(1) of Council Directive 93/13/EEC of 5 April 1993, on unfair terms in consumer contracts, must be interpreted as meaning that an unfair contract term is not binding on the consumer, and it is not necessary, in that regard, for that consumer to have successfully contested the validity of such a term beforehand.

According to the Court, the national court is required to examine, of its own motion, the unfairness of a contractual term where it has available to it the legal and factual elements necessary for that task. Where it considers such a term to be unfair, it must not apply it, except if the consumer opposes that non-application. That duty is also incumbent on the national court when it is ascertaining its own territorial jurisdiction.

It is for the national court to determine whether a contractual term, such as that which is the subject-matter of the dispute in the main proceedings, satisfies the criteria to be categorised as unfair within the meaning of Article 3(1) of Directive 93/13. In so doing, the national court must take account of the fact that a term, contained in a contract concluded between a consumer and a seller or supplier, which has been included without being individually negotiated and which confers exclusive jurisdiction on the court in the territorial jurisdiction of which the seller or supplier has his principal place of business may be considered to be unfair.

The Court also held, in paragraph 26 of that judgment (VH: Joined Cases C 240/98 to C 244/98 Océano Grupo Editorial and Salvat Editores), that the aim of Article 6 of the Directive would not be achieved if the consumer were himself obliged to raise the unfairness of contractual terms, and 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.

It must be pointed out, in that regard, that, if that power is to be granted to the national court, Article 6(1) of the Directive cannot be interpreted as meaning that it is only in the event that the consumer has brought a specific application in relation to it, that an unfair contract term is not binding on that consumer. Such an interpretation would rule out the possibility of the national court assessing, of its own motion, in the context of

examining the admissibility of the action which is before it, and without a specific application from the consumer to that effect, the unfairness of a contractual term.

By this question, the referring court asks the Court about the obligations on the national court, by reason of the provisions of the directive, in order to determine whether the national court, in the context of assessing its jurisdiction and irrespective of the type of action, must rule, if necessary of its own motion, on the unfairness of a contractual term.

It should also be pointed out that the Court has held, in Mostaza Claro, paragraph 38, that the nature and importance of the public interest underlying the protection which the Directive confers on consumers justify the national court being required to assess of its own motion whether a contractual term is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier.

The Court seised of the action is therefore required to ensure the effectiveness of the protection intended to be given by the provisions of the Directive. Consequently, the role thus attributed to the national court by Community law in this area is not limited to a mere power to rule on the possible unfairness of a contractual term, but also consists of the obligation to examine that issue of its own motion, where it has available to it the legal and factual elements necessary for that task, including when it is assessing whether it has territorial jurisdiction.

The reply, therefore, to the second question is that the national court is required to examine, of its own motion, the unfairness of a contractual term where it has available to it the legal and factual elements necessary for that task. Where it considers such a term to be unfair, it must not apply it, except if the consumer opposes that non-application. That duty is also incumbent on the national court when it is ascertaining its own territorial jurisdiction.

9.2 The possibility for ex officio control of EU consumer protection law in dispute resolution proceedings

	Courts		Other dispute resolution facilitators	
	Possible to exercise ex officio control	Not possible to exercise ex officio control	Possible to exercise ex officio control	Not possible to exercise ex officio control
Ordinary proceedings	**X**			**X**

Small claims	**X**			
Payment order		**X**		**X**
Provisional measures		**X**		**X**
Proceedings linked to enforcement				
Enforcement proceedings				
- Enforcement of payment order		**X**		**X**
- Enforcement of arbitration award		**X**		**X**
- Enforcement of mortgage		**X**		**X**
- Enforcement of notarial deed		**X**		**X**
Appeal proceedings:	**X**			**X**

9.3 Other procedural mechanisms for the equivalent and effective protection of EU consumer law

11.3.1 National procedural law provide that rules of EU consumer law should be understood as having equal standing to national rules of public policy (which is to say, that for the purposes of domestic law, the consumer protection provision is understood to have equal standing to a rule that must be raised ex officio by the national court).

11.3.2 National procedural law do not provide for an alternative way of assessing consumer protection law if ex officio control is not possible in certain types of proceedings or at a certain stage of proceedings.

9.4 Ex officio control in payment order procedures

11.4.1 The notary public does not really have detailed information about the claim, when a claim for the issuance of a payment order is made. The application form shall only contain:

a) the names of the parties and their representatives, including their address of summons and status in the proceedings;
b) the grounds for the claim (the contract underlying the claim and the right to be enforced), the amount of the claim and the associated costs;
c) the time of the contract underlying the claim and the date when the claim expired;
d) data for identification of the claim (data and number of the invoice in the case of an outstanding invoice, etc.) and
e) a specific request for the issue of an order for payment.

11.4.2. However, theoretically the application form may contain a brief description of the facts underlying the claim, with the supporting evidence indicated, parties do not really provide these information.

The notary public shall check the application without delay, inside the time limit prescribed for the issue of the order for payment to determine as to whether the party is to be advised to supply any missing information, whether the venue has to be changed or whether the application should be refused ex officio, and shall take the necessary measures accordingly. The notary public checks the claim formally.

The notary public shall ex officio refuse an application by way of a ruling if he finds that:

a) the case is out of the jurisdiction of any Hungarian notary public (court) pursuant to an act, Community legislation or international agreement;
b) another court or authority has jurisdiction to hear the claimant's case,
c) the order for payment may not be issued pursuant to the Act or any other statutory provision;
d) another order for payment procedure or lawsuit between the same parties for the same right under the same factual grounds is already in progress in front of a notary public or court or the order for payment adopted in respect of the case has already become definitive or another final and binding decision has been adopted;
e) the party is lacking legal capacity to sue;
f) or the claimant has requested the order for payment be served by way of substituted service of process;
g) any subsequent attempt for having the order delivered to the defendant at a domestic address has failed, for the defendant has died (defunct), or cannot be located at the address notified or moved to a place unknown;
h) the claimant has filed his claim prematurely or it cannot be enforced by judicial proceedings, except for any case of prescription;
i) a time limit applies for enforcement in civil proceedings under specific other legislation;
j) the application submitted by the legal counsel does not contain the information specified in the Act, a statement of retainer, or they did not comply with the obligation for the payment of related procedural fees.

11.4.3 The order for payment shall contain an instruction for the defendant to satisfy the order for payment within fifteen days of the time of service, and to pay the costs of the procedure in the amount indicated, a warning that the defendant - if he argues that the claim is unfounded - has the option to file a statement of opposition if he wishes to contest the claim and finally, a warning that if, upon receipt of the order for payment, the defendant satisfies the claim it shall be treated as admission of debt, in which case the order for payment shall become enforceable on the day following the last day of the time limit prescribed for filing the statement of opposition.

11.4.4 The defendant may lodge a statement of opposition to the order for payment with the notary public within fifteen days of service.

If the defendant is a consumer, and he does not respond to the issuance of the payment order, the authority dealing with the claim for payment order proceedings do not have the power to examine any additional issue of consumer protection law of its own motion before treating the action as usual.

If a statement of opposition is filed in due time, the order for payment procedure shall be brought before the court in respect of the part contested by the statement of opposition.

The service of orders for payment shall be governed by the provisions of the HCCP pertaining to the delivery of statements of claim. The order for payment may not be delivered to the defendant by way of posted

notice. There are no special rules for consumer parties. (In favour of the claimant, if so requested by the claimant in his application for the issue of an order for payment, the order for payment may be served only by process servers in accordance with the HEC on Judicial Enforcement.)

European Commission
An evaluation study of the impact of national procedural laws and practices on the equivalence and effectiveness of the procedural protection of consumers under EU law

JUST/2014/RCON/PR/CIVI/0082

National Report – Consumer Protection Strand

Ireland

Brian Hutchinson

IRELAND: LEGAL ANALYSIS

1. NATIONAL LEGISLATION IMPLEMENTING EU CONSUMER PROTECTION INSTRUMENTS

EU legislation	Transposing national legislation	Additional notes (e.g. if there is an overlap in application of legislation etc.)
Doorstep Selling Directive 1985/577/EEC	S.I. No. 224/1989 - European Communities (Cancellation of Contracts Negotiated Away From Business Premises) Regulations, 1989. http://www.irishstatutebook.ie/eli/1989/si/224/made/en/ revoked and replaced by S.I. No. 484/2013 - European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 http://www.irishstatutebook.ie/eli/2013/si/484/made/en/print	

Package Travel Directive 90/314/EEC	Package Holidays and Travel Reade Act, 1995 (No 17 of 1995) http://www.irishstatutebook.ie/eli/1995/act/17/enacted/en/ S.I. No. 235/1995 — Package Holidays and Travel Trade Act, 1995 (Commencement) Order, 1995. http://www.irishstatutebook.ie/eli/1995/si/235/made/en/print S.I. No. 270/1995 — Package Holidays and Travel Trade Act, 1995 (Bonds) Regulations, 1995. http://www.irishstatutebook.ie/eli/1995/si/270/made/en/print S.I. No. 271/1995 — Package Holidays and Travel Trade Act, 1995 (Occasional Organisers) Regulations, 1995. http://www.irishstatutebook.ie/eli/1995/si/271/made/en/print S.I. No. 290/2006 - European Communities (Cooperation Between National Authorities Responsible for the Enforcement of Consumer Protection Laws) Regulations 2006 http://www.irishstatutebook.ie/eli/2006/si/290/made/en/print As amended by: (see http://www.irishstatutebook.ie/eli/isbc/1995.html#a17_1995) Aviation Regulation Act, 2001 http://www.irishstatutebook.ie/eli/2001/act/1/enacted/en/html Consumer Protection Act 2007 http://www.irishstatutebook.ie/eli/2007/act/19/enacted/en/html Investment Funds, Companies and Miscellaneous Provisions Act 2005 http://www.irishstatutebook.ie/eli/2005/act/12/enacted/en/html S.I. No. 418/2011 - Finance (Transfer of Departmental Administration and Ministerial Functions) Order 2011. http://www.irishstatutebook.ie/eli/2011/si/418/made/en/print S.I. No. 217/2011 - Tourism and Sport (Transfer of	

	Departmental Administration and Ministerial Functions) (No. 2) Order 2011. http://www.irishstatutebook.ie/eli/2011/si/217/made/en/print State Airports (Shannon Group) Act 2014 http://www.irishstatutebook.ie/eli/2014/act/27/enacted/en/html **National Caselaw** Mary Scaife v Falcon Leisure Group (Overseas) Ltd [2007] IESC 57 The organiser is not an insurer to the customer, and the standard by which the acts in question are to be judged is that of reasonable skill and care rather than strict liability, which standard, if not expressed in a contract will be readily implied into it.	
Unfair Contract Terms Directive 1993/13/EEC	European Communities (Unfair Terms in Consumer Contracts) Regulations, S.I. No. 27 of 1995 http://www.irishstatutebook.ie/eli/1995/si/27/made/en/print European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2000, S.I. No. 307 of 2000 http://www.irishstatutebook.ie/eli/2000/si/307/made/en/print European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2013, S.I. 160 of 2013 http://www.irishstatutebook.ie/eli/2013/si/160/made/en/print	
Distance Selling Directive 1997/7/EC	European Communities (Protection of Consumers in Respect of Contracts Made by Means of Distance Communication) Regulations, 2001 - S.I. No. 207/2001 http://www.irishstatutebook.ie/eli/2001/si/207/made/en/print as amended by S.I. No. 71/2005 - European Communities (Protection of Consumers in Respect of Contracts Made by Means of Distance Communication) (Amendment) Regulations 2005	

	http://www.irishstatutebook.ie/eli/2005/si/71/made/en/print S.I. No. 383/2009 - European Communities (Payment Services) Regulations 2009 http://www.irishstatutebook.ie/eli/2009/si/383/made/en/print S.I. No. 370/2010 - European Communities (Protection of Consumers in Respect of Contracts made by Means of Distance Communication) (Amendment) Regulations 2010. http://www.irishstatutebook.ie/eli/2010/si/370/made/en/print S.I. No. 484/2013 - European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013. http://www.irishstatutebook.ie/eli/2013/si/484/made/en/print	
Consumer Sales and Guarantees Directive 1999/44/EC	S.I. No. 11/2003 - European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003 http://www.irishstatutebook.ie/eli/2003/si/11/made/en/print as amended by the Consumer Protection Act 2007 (No 19 of 2007) http://www.irishstatutebook.ie/eli/2007/act/19/enacted/en/print **Journal Article** Fidelma White, The EC Directive on Certain Aspects of Consumer Sale and Associated Guarantees: One Step Forward, Two Steps Back? 2000 (7) Commercial Law Practitioner, 3-13	
Unfair Commercial Practices Directive 2005/29/EC	Consumer Protection Act 2007 (No 19 of 2007) http://www.irishstatutebook.ie/eli/2007/act/19/enacted/en/print **National Caselaw** Larry Untoy v Ge Capital Woodchester Finance Limited and	

	Ge Capital Woodchester Limited Trading as Ge Money [2015] IEHC 557 – consideration of 'unfair commercial practices' in the context of insurance **Journal Articles** Nathan Reilly, The role of traders in the enforcement of the unfair commercial practices directive: a new unfair competition law for Ireland? 2009 Dublin University Law Journal, 31(1), 100-126	
Misleading and Comparative Advertising Directive 2006/114/EC	S.I. No. 774/2007 - European Communities (Misleading and Comparative Marketing Communications) Regulations 2007 http://www.irishstatutebook.ie/eli/2007/si/774/made/en/print **National Caselaw** Tesco Ireland Limited v Dunnes Stores [2009] IEHC 569 – court has no power to issue a an interim or interlocutory order	
Consumer Credit Agreement Directive 2008/48/EC	S.I. No. 281/2010 - European Communities (Consumer Credit Agreements) Regulations 2010 http://www.irishstatutebook.ie/eli/2010/si/281/made/en/print as amended by S.I. No. 579/2012 - European Union (Consumer Credit Agreements) (Amendment) Regulations 2012 http://www.irishstatutebook.ie/eli/2012/si/579/made/en/print S.I. No. 380/2013 - European Communities (Certain Contaminants in Foodstuffs) (Amendment) Regulations 2013. http://www.irishstatutebook.ie/eli/2013/si/380/made/en/print S.I. No. 73/2011 - European Union (Protection of Consumers in respect of Timeshare, Long-term Holiday Product, Resale and Exchange Contracts) Regulations 2011. http://www.irishstatutebook.ie/eli/2011/si/73/made/en/print Central Bank Reform Act 2010 (No 23 of 2010) http://www.irishstatutebook.ie/eli/2010/act/23/enacted/en/html	

	Journal Article Max Barrett, Consumer Credit Law: The Consumer Credit Act, the Consumer Protection Code, and the Consumer Credit Directive Considered, Irish Law Times 2009, 27, 275-280	
Timeshare Protection Directive 2008/122/EC	S.I. No. 73/2011 - European Union (Protection of Consumers in respect of Timeshare, Long-term Holiday Product, Resale and Exchange Contracts) Regulations 2011 http://www.irishstatutebook.ie/eli/2011/si/73/made/en/print as amended by S.I. No. 400/2014 - European Union (Protection of Consumers in respect of Timeshare, Long-term Holiday Product, Resale and Exchange Contracts) (Amendment) Regulations 2014. http://www.irishstatutebook.ie/eli/2014/si/400/made/en/print	
Consumer Injunctions Directive 2009/22/EC	S.I. No. 555/2010 - European Communities (Court Orders for the Protection of Consumer Interests) Regulations 2010. http://www.irishstatutebook.ie/eli/2010/si/555/made/en/print as amended by S.I. No. 484/2013 - European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013. http://www.irishstatutebook.ie/eli/2013/si/484/made/en/print S.I. No. 343/2015 - European Union (Alternative Dispute Resolution for Consumer Disputes) Regulations 2015. http://www.irishstatutebook.ie/eli/2015/si/343/made/en/print S.I. No. 500/2015 - European Union (Online Dispute Resolution for Consumer Disputes) Regulations 2015. http://www.irishstatutebook.ie/eli/2015/si/500/made/en/print	
Consumer Rights Directive	S.I. No. 484/2013 - European Union (Consumer Information,	

2011/83/EU	Cancellation and Other Rights) Regulations 2013. http://www.irishstatutebook.ie/eli/2013/si/484/made/en/print as amended by S.I. No. 250/2014 - European Union (Consumer Information, Cancellation and Other Rights) (Amendment) Regulations 2014. http://www.irishstatutebook.ie/eli/2014/si/250/made/en/print **Journal Articles** Fidelma White, Selling Online: Complying with the New Consumer Protection Regime-Cancellation and Other Rights, Commercial Law Practitioner 2015, 22(3), 63-72 Fidelma White, Selling Online: Complying with the New Consumer Protection Regime—Application and Information Obligations, Commercial Law Practitioner 2015, 22(2), 31-39	
ADR for Consumer Disputes Directive 2013/11/EU	S.I. No. 343/2015 - European Union (Alternative Dispute Resolution for Consumer Disputes) Regulations 2015. http://www.irishstatutebook.ie/eli/2015/si/343/made/en/print	

Source(s):

1. CONCEPT OF THE CONSUMER

1.1 Please outline the concept of the consumer in national law, indicating whether it is intended to be a uniform concept, whether it has been legislated for and where it can found (i.e. in a legislative provision, governmental guidelines, case law etc.).

Source(s):

The concept is relatively uniform in Ireland but it is by no means consistent. It is legislated for in a number of places and there are differences in the definitions.

Generally, "consumer" means a natural person who is acting for purposes which are outside his business"; e.g S.I. No. 27/1995 - European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995, reg 2; or "any natural person (whether in the State or not) who is acting wholly or mainly for purposes unrelated to the person's trade, business, craft or profession - S.I. No. 343/2015 - European Union (Alternative Dispute Resolution for Consumer Disputes) Regulations 2015, reg 2; or "(a) he neither makes the contract in the course of a business nor holds himself out as doing so, and (b) the other party does make the contract in the course of a business, and (c) the

goods or services supplied under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption. (2) On— (a) a sale by competitive tender, or (b) a sale by auction —(i) of goods of a type, or (ii) by or on behalf of a person of a class defined by the Minister by order, the buyer is not in any circumstances to be regarded as dealing as consumer." – Sale of Goods and Supply of Services Act 1980

There is division in the case law in certain areas – notably Consumer Credit. In ACC Loan Management Ltd v Browne and Anor [2015] IEHC 722 Baker J held "..a person is a consumer unless it can be shown that the person is acting inside the person's business…..the legislation is drafted such that in a sense the default position is that all natural persons are consumers unless it can be shown they [are not]". But in KBC Bank Ireland Plc v Osborne [2015] IEHC 795 Barret J held that "a natural person does not benefit from any default position or presumption as to his or her status, and his opponent has no default position or presumption to overcome in this regard. The only default position arising under the Act of 1995 is that a person other than a natural person cannot, at this time, be a consumer thereunder." He held that a natural person was not a consumer in that case because he expressly agreed in the loan agreement that it was for the purpose of a business.

The Consumer Protection Code of the Irish Central Bank however extends beyond natural persons, stating: "consumer" means any of the following: a) a person or group of persons, but not an incorporated body with an annual turnover in excess of €3 million in the previous financial year (for the avoidance of doubt a group of persons includes partnerships and other unincorporated bodies such as clubs, charities and trusts, not consisting entirely of bodies corporate); or b) incorporated bodies having an annual turnover of €3 million or less in the previous financial year (provided that such body shall not be a member of a group of companies having a combined turnover greater than the said €3 million); and includes where appropriate, a potential 'consumer' (within the meaning above)".

2. REGULATORY AUTHORITIES COMPETENT FOR CONSUMER PROTECTION ISSUES

2.1 What regulatory authorities, if any, are competent for enforcing consumer protection law? Please identify them, their nature (i.e. whether they are public or private or mixed) and the nature of enforcement.

The Competition and Consumer Protection Commission, established in 2014 on the merger of the Competition Authority and the National Consumer Agency, has statutory responsibility for the enforcement of competition and most consumer protection law. As well as enforcement responsibilities, it has a responsibility to promote competition and consumer welfare. Under the Consumer Protection Act 2007 the CCPC has power to take civil proceedings for prohibition orders, to accept undertakings from businesses, to issue compliance notices, to institute criminal proceedings, to issue fixed payment notices, and to publish lists of trader names in a Consumer Protection List. This is a list of traders convicted of criminal offences, subject to court orders, bound by an undertaking, served with a compliance notice, or subject to a fixed payment notice

The Central Bank of Ireland is statutorily responsible for consumer protection as regards financial services.

The Food Safety Authority of Ireland has statutory responsibility for consumer food safety issues.

The Commission for Energy Regulation and the Commission for Communications Regulation also offer adr and intervention services for disputes and they are charged with enforcement in those sectors.

2.2 Is there a specific venue for this type of enforcement and does this limit the jurisdiction of courts/ADR fora (even if only initially)?

No. There are no special fora which limit the jurisdiction of the courts, even temporarily. A range of public ombudsmen is available for Financial Services, Public Services and Information, Pensions, which use a mix of ADR and adjudicative procedures. The Commission for Energy Regulation and the Commission for Communications Regulation also offer adr and intervention services for disputes and they are charged with enforcement in those sectors. There is a small amount of private ADR and consumer arbitration available from private operators (eg. Chartered Institute of Arbitrators) but consumers are not bound to pre-dispute arbitration clauses for disputes below €5000 in value unless they agree after the dispute arises. Only one notified ADR Entity currently exists in Ireland under the Consumer ADR Directive (www.netneutrals.eu).

Only the Circuit Court and the High Court can declare a contract term to be 'unfair' under 1993/13/EEC in Ireland.

2.3 Can criminal prosecutions be initiated for violations of consumer protection rules? How serious must the infringement be? What are the penalties and sanctions? And might these prosecutions lead to criminal penalties or sanctions? Can individual consumers piggy back on these claims (e.g. via a partie civile method)?

Yes. As regards criminal penalties, the maximum fine for a first offence is €3,000 for summary convictions and €60,000 for convictions on indictment. There are higher fines for repeat offenders. Administrative fines are possible but are more commonly used by the Central Bank than the Competition and Consumer Protection Commission. They invariable result in settlements rather than the imposition of a fine. They can be in the order of millions – eg. in 2011 Combined Insurance Company of Europe Ltd settled for €3,500,000.

2.4 Is there judicial review of decisions of consumer regulatory authorities? If so, by which court is this judicial oversight made? Is the forum an ordinary or a specialised court or tribunal?

Yes. Under the Irish Constitution the Irish High Court has the judicial review power. It is not a specialised tribunal.

2.5 Does the national legal system provide for a mechanism of cooperation between its national regulatory authorities and those of other Member States?

Source(s):

Yes:
S.I. No. 290/2006 - European Communities (Cooperation Between National Authorities Responsible for the Enforcement of Consumer Protection Laws) Regulations 2006 – implements Directive 2006/2004

Consumer Protection Act 2007, s8(3)– the agency "e) shall co-operate with other competent authorities whether in the State or elsewhere charged with responsibility for the enforcement of laws relating to consumer protection and welfare or the promotion of consumer protection and welfare."

3. LEGAL AID

3.1 Is legal aid available to consumers in: a) bringing a claim and b) defending a claim before a court?

Yes**.**

3.2 For what kinds of disputes and actions is legal aid available? (NB: legal aid might not be available for consumer or contractual disputes but be available instead for a related action, e.g. actions relating to debt, mortgage arrears, eviction etc.)

1. Family disputes – including marriage breakdown and disputes involving children;
2. Actions by the Child and Family Agency (Tusla) to take children into care or supervise them in the home;
3. Claims by injured persons for damages as a result of personal injuries which have been caused to them;
4. Claims for damages as a result of breach of a contract;
5. Property disputes in very limited cases;
6. Employment disputes with an employer (other than before the Workplace Relations Commission or Labour Court).

3.3 What requirements must be satisfied for the consumer to be entitled to legal aid? Please specify if there are any additional limitations to its availability.

Generally, annual income of less than €18,000 after taking away allowances. Disposable assets must be less than €100,000. Certain allowances are given against gross income and capital and the dwelling house is excluded in calculating capital assets.

3.4 What does legal aid encompass? (i.e. (only) general advice, (only) assistance in preparing the case, (only) assistance with negotiation of settlements, (also) representation).

Source(s): All of the above.

4. COSTS

4.1 What are the costs of different types of procedures before courts? Are there exemptions to the payment of fees and expenses? How can costs be paid?

	Individual claim of value € 0 –	Individual claim of value € 5001	Individual claim of value €	Collective claim of value € 0 –	Collective claim of value €	Collective claim of value €

	€ 5000	– € 20.000	20.001+	5000	5001-- € 20.000	20.001+
Court fees	Small Claims Procedure (claims up to 2,000) Flat fee of €25 each.	District Court (Jurisdiction for claims up to €15, 000) Orginating summons - €25-€80 depending on amount of claim. Most other events (filing affidavit, lodging documents, issue of copy documents etc cost €15 each. Taxation (review) of costs costs €70 to initiate and €8 for every €100 allowed.	Circuit Court (claims from €15,001 to €75,000) Orginating Civil Bill - €90-€130. Most other events (filing affidavit, lodging documents, issue of copy documents etc cost €15 each. Taxation (review) of costs costs €70 to initiate and €8 for every €100 allowed. High Court (jurisdiction for claims above €75,000) Most originating summons - €190. Summary summons varies from €150-€400	N/A	N/A	N/A

			depending on size of claim, Setting down for trial - €250 Notice of Motion - €60 Lodging of Affidavits €20			
Court expenses	N/A	See below. A scale operates for solicitors and barristers – solicitors fees range from €78 to €650 for civil debt claims and from €300 to €3750 for others. Barristers from €500 to €1050, but additional fees for outlay and other expenses may be expected.	See below	N/A	N/A	N/A
Exemptions		Family, Matrimonial, and Child Protection	Family, Matrimonial, and Child Protection	N/A	N/A	N/A

		matters exempt from Court Fees	matters exempt from Court Fees and also certain other constitutional or human rights applications.			

Source(s):
District Court (Fees) Order 2014 (SI 22/2014)
Circuit Court (Fees) Order 2014 (SI 23/2014)
Supreme Court and High Court (Fees) Order 2014 (SI 24/2014)
District Court Rules, Schedule 3 (www.courts.ie)

Statistics are not available for court expenses (representation, witness costs, etc) as such costs vary according to the nature and complexity of the case rather than the sums in dispute and are a matter for agreement in every case. An indicative scale of court fees is maintained under the Rules of Court which may be used to guide taxation of refunded costs.

Other than under the Small Claims Court procedure, Irish courts employ the 'indemnity principle' of costs such that the unsuccessful party must bear the other side's reasonable costs in addition to their own. This rule is not excluded in consumer cases (apart from the small claims court where each side bears its own costs.

The cost of the Small Claims Procedure is a flat fee of 25€

5. STANDING AND REPRESENTATION IN CONSUMER DISPUTES

5.1 Does national law limit the standing of the individual consumer in respect of the claim that can be made and the forum before which it can be brought?

No. Ordinary principles of locus standi apply. The obligation rests on a litigant to show (s)he has an interest in the subject matter of the dispute in legal proceedings.

5.2 Other than individual consumers, who or which bodies have standing in consumer protection disputes and for what types of claim? If the action is not brought by the individual consumer, what requirements of representation must be satisfied?

Ordinary principles of locus standi apply.

As regards Unfair Terms in Consumer Contracts, the Competition and Consumer Protection Commission, the Central Bank of Ireland and a consumer organisation whose purpose is protecting consumer rights (such as the Consumer Association of Ireland) are all bodies that have the authority to make an application under the Regulations to the Courts. The Central Bank of Ireland shares with the CCPC the authority to challenge unfair terms where they relate to regulated financial service providers. Where the financial service is provided by an unregulated financial service provider the CCPC has the authority to challenge. All this is without prejudice to the right of any consumer to rely on the provisions of the Regulations in any case "before a court of competent jurisdiction".

5.3 If a consumer wants to bring or defend an action relating to a consumer protection dispute, is there a legal (or otherwise formal) requirement that he or she has legal representation? Please specify for both judicial and ADR fora and the bodies, associations or authorities that can provide this representation.

Source(s):

Pro Se representation is permitted and legal representation is not obligatory for natural persons.
Representation in court by someone other than a licenced solicitor or barrister is not permitted save in rare and exceptional circumstances.

There is no restriction on representation in ADR fora.

6. ACTIONS BEFORE COURTS

6.1 Jurisdiction and competence of the courts in consumer disputes: General structure and special procedures aimed at protecting consumers

6.1.1 **Are ordinary courts competent to hear such claims? Is there also a specialised tribunal for consumer protection disputes?**

The ordinary courts are competent. There are no specialised tribunals outside of employment law.

6.1.2 **Which courts are competent to hear consumer protection disputes at first instance and in appeals? Please specify the court, in light of the value of the claim (and identify any other factors that are relevant in allocation jurisdiction).**

Small Claims Procedure – up to €2,000
District Court – up to €15,000
Circuit Court – between €15,000 and €75,000
High Court – above €75,000

6.1.3 **What is the nature of the procedure at first instance, e.g. is it a simplified or a summary procedure, and is there an assessment of the merits? Please specify in light of the value of the claim (and identify any other factors that are relevant in allocating jurisdiction).**

The procedure at first instance normally involves an assessment of the merits save in cases of claims which are not disputed.

6.1.4 **Please identify the formal requirements that must be satisfied for a consumer dispute to be heard before a court. These might include time limits applicable to the filing of the action/defence, representation requirements etc.**

The claim must be initiated within the limitation period imposed by the Statute of Limitations, 1957 as amended. These are, in summary, from the date of accrual of cause of action:

6 years for ordinary contract disputes
12 years for contracts under seal
6 years for Torts (but 2 years for personal injury)

There are no representation requirements.

6.1.5 **In respect of the claims and relevant procedures available in the national legal system, what kind of relief might be available in consumer protection disputes? (monetary remedies, injunctions, skimming off etc.)?**

Damages is probably the most common. Injunctions are possible in principle and are often used in civil proceedings to preserve the status quo pending final determination. Permanent injunctions are less common. The German concept of skimming off of unlawful profits or Gewinnabschopfungsanspruch is not known in Irish civil procedure.

6.1.6 **Please provide a brief overview of the role of parties and judges in civil proceedings generally (e.g. with reference to the principle of party disposition, the obligation of parties to make and prove factual allegations and to make and provide legal arguments, the possible role of the court). This overview should be brief; these issues will be dealt with in more detail in the questions that follow.**

Source(s):

Under the Irish Rules of Court, a claimant must plead its case before proving it in court. A defendant must dispute the claim or it is understood to be admitted. Where a claim is disputed the party claiming must prove their claim on the 'balance of probabilities' standard, save where a presumption in their favour is provided by law. Civil actions are tried before a judge alone (without a jury). The judge will determine both the facts and the law relative to the dispute. The judge is presumed to know the law however it is normal to open the law to the judge particularly where it is sought to interpret or expand a principle. Since 2013 judges may invite the parties to adjourn the proceedings to contemplate settlement using mediation or other forms of ADR.

6.2 Small claims

6.2.1 Does a small claims procedure exist in the Member State? If yes, is it a specialised or simplified procedure?

Yes. It is a simplified procedure of the District Court, conducted on the basis of documents only, in the first place. If necessary the Registrar may interview and negotiate with both parties to try to reach an agreement. In the event of failure to resolve the claim the small claims registrar will refer the case to the District Court.

6.2.2 What are the value thresholds for claims brought under the small claims procedure? Moreover, are there any other factors that shape the use of the small claims procedure (including the nature of the claim, the area of consumer protection law into which the claim falls etc.)?

(a) a claim for goods or services bought for private use from someone selling them in the course of a business (consumer claims);
(b) a claim for goods or services bought for business use from someone selling them in the course of a business (business claims);
(c) a claim for minor damage to property (but excluding personal injuries);
(d) a claim for the non-return of a rent deposit for certain kinds of rented properties. For example, a holiday home or a room / flat in a premises where the owner also lives;

provided that a claim does not exceed €2,000.

Excluded from the small claims procedure are claims arising from:

(a) a hire-purchase agreement
(b) a breach of a leasing agreement
(c) debts

6.2.3 What forms must be completed to raise the application? Who assists the consumer in completing these forms?

Forms for use in the Small Claims Procedure are in Schedule C to the District Court Rules. They can be accessed online at http://www.courts.ie/. They can be completed online using the Courts Service Online service at www.csol.ie.

Assistance in filling the forms is not uniformly structured. Consumers may receive assistance from a solicitor, or from the local Citizens Information Centre (over 260 centres around the country or online at www.citizensinformation.ie) or on the courts.ie website.

6.2.4 How can an application for a small claim be made (e.g. online, by post or in person)?

Online and by post.

6.2.5 **What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?**

Relaxed rules of evidence operate during the small claims process unless the claim is disputed. If the claim is accepted by the respondent the district Court will issue an order in the claimant's favour, to be paid within a short period of time. If the claim is disputed, the small claims registrar will communicate with both parties to try to reach a solution. When there is a failure to resolve the dispute through the intervention of the small claims registrar, the matter will be referred to the District Court at which time appearance in court may be necessary.

6.2.6 **Are the costs of the successful party reimbursed?**

Source(s):

Under Order 53A of the Rules of the District Court, "The claimant and the respondent shall be liable for their own legal costs and witnesses' expenses (if any) incurred in respect of any claim processed through the Small Claims Procedure."

6.3 Claims other than small claims

6.3.1 **If a consumer protection dispute does not qualify as a small claim, what other procedures are available? What are the value thresholds and other factors determining the use of such procedures?**

Civil action for damages in the ordinary courts subject to the financial thresholds outlined at para 8.1.2 above.

Private arbitration or ADR where offered in certain sectors – eg. Holiday Disputes, Car Sales, Dental Services, etc. Subject to the agreement of the parties.

There is no omnibus Consumer Ombudsman in Ireland, but there are ombudsmen in certain sectors as per paragraph 4.2 above. (See the following table from Hutchinson, "The Implementation of the Consumer ADR Directive and the ODR Regulation in Ireland" in Cortes (ed.) The New Regulatory Framework for Consumer Dispute Resolution, Forthcoming Oxford University Press)

Financial Services Ombudsman	Public	Financial Disputes – consumer must first complain to the Financial	Voluntary for Consumer	Mediation & Adjudication	>8,000 complaints per annum; 2,983 resolved by finding; 6 by mediation.[184]

[184] Financial Services Ombudsman Annual Report 2013.

		Services Provider.			
Pensions Ombudsman	Public	Pension Disputes	Voluntary for Consumer	Mediation & Investigation	>800 cases formally opened[185]
Direct Selling Association of Ireland	Private – member funded	Direct selling disputes with members of DSAI	Voluntary	Adjudication	Not Available
CIArb(Irl) Holiday Arbitration Scheme	Private	Holiday Disputes involving members of scheme	Voluntary for consumer if claim below €5,000	Arbitration	Understood to be in single figures annually[186]
Advertising Standards Authority of Ireland	Private – member funded	Advertising disputes involving members of ASAI	Voluntary for consumer	Adjudication	>800 cases annually[187]
Commission for Aviation Regulation	Public – Levy funded	Statutory Air Passenger Rights disputes from passengers using Irish airports	Voluntary for consumer	Expert Evaluation	>4,000 complaints annually,[188] approx. 1,235 leading to formal procedures.
Car Rental Council of Ireland	Private – member funded	Car-hire disputes involving members	Voluntary for consumer	Mediation	Approx. 70 cases[189]
Commission for Energy Regulation	Public	Electricity, Gas and Water Utility Disputes – consumer must first complain to the provider and have their	Voluntary for Consumer	Investigation / Adjudication	2770 contacts, 709 of which resulted in investigation and/or adjudication

[185] Pensions Ombudsman Annual Report 2013.
[186] Anecdotal evidence; official figures not published.
[187] ASAI Annual Report 2013-2014.
[188] Commission for Aviation Regulation Annual Report 2014.
[189] According to the ECC 2012 report, see note 1 above.

		complaint ruled upon			
Commission for Communications Regulation	Public – Levy and Licence Fee funded	Postal, Telecoms and Internet Supply disputes; consumer must exhaust internal complaints first	Voluntary for Consumer	Adjudication	Over 33,000 contacts; the majority resolved within 20 days through regulator intervention.[190]
CIArb / SIMI Motor Arbitration Scheme	Private	Car-sale disputes involving SIMI members	Mandatory for consumer where claim exceeds €5,000	Arbitration	Uncertain ; thought to be in the region of 14[191]
Dental Complaints Resolution Service	Private	Dental Disputes – consumer must exhaust internal complaints processes first	Voluntary for Consumer	Facilitation, Adjudication, Expert Determination	130 complaints accepted, 38 resolved[192]
Private Residential Tenancies Board	Public	Landlord and Private Tenant disputes	Voluntary for Consumers	Adjudication and Mediation , including Telephone Mediation	2,861[193]
Injuries Board Ireland	Public	Personal Injuries Claims excluding Medical Negligence	Process Mandatory for all personal injuries claimants -	Expert Assessment	10,656[194]

190 Commission for Communications Regulation Annual Report 2012.
191 See ECC Ireland 2012 report at note **Error! Bookmark not defined.** above.
192 Dental Complaints Resolution Service Annual Report 2013.
193 Private Residential Tenancies Board Annual Report 2013.
194 Injuries Board Annual Report 2013.

6.3.2 **How can such claims be made? Please specify if the applications can be made online, or by post or in person.**

Varies. Majority accept online initiation.

6.3.3 **What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?**

Rules of evidence only relevant in adjudicative processes of arbitration and adjudication where generally relaxed rules are applied in consumer disputes. Arbitrator has power to determine the admissibility, relevance, materiality and weight of evidence as per Art 19 of the UNCITRAL Model Arbitration Law as applied in Ireland by the Arbitration Act 2010.

6.3.4 **Are the costs of the successful party reimbursed?**

Varies according to the procedures adopted. Typically costs are reimbursed in arbitration.

Source(s):

6.4 Claims for the issuance of a payment order

6.4.1 **Does an order for payment procedure exist in the national system? Is it a simplified procedure?**

Yes. It is a simplified procedure.

6.4.2 **Which authorities or courts are competent to hear claims for the issuance of payment orders?**

High Court. The Master of the High Court decides upon the application.

6.4.3 **Are there any formal requirements that must be satisfied for the application for the issuance of a payment order to be made (e.g. standard forms, representation by a lawyer, the detail of description required, the need to provide written evidence etc.)?**

Standard forms are prescribed. The application is made by filling out the prescribed form as set out in Annex I of the Regulation. The court fees must be paid by the claimant who must also provide its bank details to enable the Defendant to pay the amount claimed. The rejection of the application does not prevent the claimant from making a new application or from pursuing another procedure under the law. Once the requirements are satisfied the Master shall issue a European Order for Payment using the standard form E as provided for in Annex V of the Regulation.

6.4.4 **What information is generally available to the authority or court when a claim for the issuance of a payment order is made?**

The form A in the form prescribed in Annex I to Regulation No. 1896/2006 and the Appendices to that Annex and containing all of the information required to be stated by Article 7(2) of Regulation No. 1896/2006.

6.4.5 **What opportunity is available for a defence/statement of opposition to be advanced? How should this be done and what is its effect? Please specify if the means of advancing a defence differ depending on the value of the claim and the court dealing with it.**

The European Order for Payment shall notify the Defendant to pay or to oppose the application by lodging a statement of opposition within 30 days of service of the Order with the court of origin. It is the duty of the court to ensure that the Order was served on the Defendant. The Defendant may lodge a statement of opposition within 30 days of service of the Order and the Defendant is not required to set out the grounds for opposing the application.

6.4.6 **What is the effect if the claim is uncontested, i.e. if there is a lack of defence/statement of opposition?**

If no statement of opposition is lodged the Master shall issue a European Order for Payment which is enforceable using the standard form G as provided for in Annex VII of the Regulation.

6.4.7 **If the defendant is a consumer, and he or she does not respond to or raise an objection to the issuance of the payment order, does the authority dealing with the claim for payment order proceedings have the power to examine any issue of consumer protection law of its own motion before treating the action as usual?**

There are no legislative provisions in this regard.

6.4.8 **What steps must the pursuer take in order to obtain an enforceable decision?**

See 8.4.3 above

6.4.9 **Is this decision final, or can the defendant appeal against it?**

The Defendant can apply for review (Article 20) or a refusal of enforcement (Art 22)

Source(s): Rules of the Superior Courts, Order 42C
http://www.courts.ie/rules.nsf/8652fb610b0b37a980256db700399507/8bc31ba633f0f86e80257537005a8017?OpenDocument

6.5 Appeals in consumer disputes

6.5.1 Are appeals possible in all consumer disputes? Please specify for small claims and other types of claims.

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Nature of the procedure at 1st instance	District Court	€15,000 – €75,000 Circuit Court	>€75,000 High Court	n/a	n/a	n/a
2nd instance – appeal to?	Circuit Court	High Court	Court of Appeal (or Supreme Court in exceptional circumstances)	n/a	n/a	n/a
3rd instance – appeal to?	High Court Judicial Review / Case Stated in High Court	Judicial Review / Case Stated in High Court 2nd appeal in Court of Appeal	Judicial Review / Case Stated in Supreme Court / Appeal in Supreme Court	n/a	n/a	n/a

6.5.2 **Please briefly specify the national appeal procedure, including any requirements to be satisfied for appeals. These might include, but are not limited to, conditions of admissibility, value thresholds, time-limits, the scope of review, and the impact of the appeal on enforcement (provisional enforcement). Please refer to any rules specifically applicable in respect of the claims and relevant procedures outlined above.**

1. Appeals from District Court to Circuit Court
   (Order 41 of the Circuit Court Rules / Order 101 of the District Court Rules)
   Notice of Appeal to be served with 14 days. Lodgment of same in District Court Office within the same period. Time can be extended by the District or Circuit Court judge.
   The appeal is a full rehearing de-novo. The District Court Clerk transmits the original documents to the Circuit Court for the Appeal.
   An appeal does not act as an automatic stay. If one is required it must be obtained by applying to the court.

2. Appeals from Circuit Court to High Court
   (Order 61 of the Rules of the Superior Courts)

Notice of Appeal to be served within 10 days (extendible with permission of the Master of the High Court.)
Notice of appeal does not act as a stay on the judgment so an application must be made under Order 62 of the Rules of the Superior Courts for a stay if required.
Lodgment of certified copy in the Central Office of the judgment and 2 indexed books of all pleadings, notices, and other documents required for the hearing of the appeal. Service of same on each party.

3. Appeals from High Court to Court of Appeal / Supreme Court
(Order 86A of the Rules of the Superior Courts)
Notice of Appeal served within 10 days (expedited procedures) or 28 days (ordinary procedure)
Lodgment of Appeals Book within 14 days and service on parties.
Notice of appeal is not a stay on judgment and application must be made to the court if one is required.
Motions may be made to transfer the appeal to the Supreme Court in exceptional cases.

Source(s):
District Court Rules
Circuit Court Rules
Rules of the Superior Courts
www.Courts.ie

6.6 Enforcement in consumer disputes

The CJEU has identified a number of situations concerning the enforcement stage of consumer protection disputes in which the effective and equivalent protection of EU consumer rights may be affected by national procedural rules. These include – in relation to the effectiveness and equivalency of the protection afforded by the Unfair Contract Terms Directive, for example – the enforcement of arbitration awards, the enforcement stage in the recovery of consumer credit and the enforcement of mortgages, which often links together declaratory and enforcement proceedings. As such, we focus on these situations below. However, other problematic situations exist. Please indicate if additional (and potentially problematic) situations are identifiable in your national legal system.

Moreover, if possible, please provide the reference/citation of an article that provides an overview of the way in which enforcement operates in relation to consumer protection disputes within your national legal system.

There is no unique enforcement regime for consumer disputes.
Enforcement of a consumer small claims arbitration award could be resisted on the basis that it fell below the thresholds provided in Section 31 of the Arbitration Act 2010 since Art 34 of the UNCITRAL Model Law allows a court to refuse to enforce where the composition of the tribunal or the arbitral procedure was not in accordance with law.

6.6.1 **If the assessment of a consumer protection issue has not been possible at an earlier stage of the proceedings, is it always possible – either ex officio (see section 10 below) or if the consumer raises a possible violation of consumer protection law – for this assessment to be undertaken during enforcement proceedings?**

Further enquiry is required. Consumer protection issues would normally be raised at an earlier stage of the proceedings.

6.6.2 **In the particular case of consumer protection, if a court examines consumer protection law (either ex officio or on the basis of an argument advanced by the consumer), does national procedural law provide that interim measures should 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 final decision will have full effect?**

In principle it is possible for interim measures to be adopted in such circumstances though there are no specific procedural provisions on the matter.

Source(s):

7. ACTIONS FOR COLLECTIVE REDRESS

The CJEU has considered that situations in which individual and collective actions are in some way linked are those in which the effective and equivalent protection of EU consumer rights may be affected by national procedural rules. As such, we will focus on these situations. However, other problematic situations exist. Please indicate if additional (and potentially problematic) situations are identifiable in your national legal system.

Moreover, if possible, please provide the reference/citation of an article that provides an overview of the way in which the collective redress mechanism operates within your national legal system.

7.1 Injunctive relief, linking individual and collective actions

The case law of the CJEU requires that a person or organisation with a legitimate interest in consumer protection must be able to bring an action before a national court or tribunal in respect of an alleged violation of consumer rights deriving from Union law, either for compensation or for injunctive relief, to preclude the continued violation of consumer rights[195].

[195] This derives from the EU directives. For example, in respect of the UCTD, Art.6(1), Art.7(1) and (2) UCTD, provide that the Member States must ensure 1) that unfair terms are not binding on the consumer and 2) that adequate and effective means exist to prevent the continued use of unfair terms in consumer contracts. The CJEU has held that effective implementation requires that the consequence of the finding of the violation – in the case of a finding of unfairness under the UCTD – is for the term to be declared invalid, and that the effect of this invalidity extends not only to the parties to the action for an injunction but also to those who have concluded a contract with the seller/supplier to which the same terms apply.

7.1.1 **If collective proceedings are launched, does national procedural law provide that ongoing individual claims, relating to the same dispute, should be stayed until the collective proceedings are brought to an end? Please specify if this constitutes an obligation on the part of the national judge or if it is at his or her discretion.**

There is no general rule that the individual claims must be stayed. Indeed, the scope for collective redress is limited in Irish Procedure. Only representative actions (brought with the consent of the claimants) and test cases are pemitted; and though multiple claimants or defendants can join an action there is no "class action" as such. Order 15 Rule 1 of the Rules of the Superior Courts enable courts to hear two or more related actions together. Order 15 Rule 1 provides that provides for joinder where any right to relief arising out of the same transaction or series of transactions is alleged to exist, and a common question of law or fact arises. The defendant may object on the basis that such joinder will embarrass or delay the trial of the proceedings. Alternatively, a court can order that certain matters in dispute in a number of actions be consolidated or tried together.

7.1.2 **If individual proceedings are stayed, please indicate what the effect of the court or ADR entity's decision in the collective action on those individual proceedings would be, i.e. whether the outcome of the collective action binds the consumer bringing an individual action.**

Only those who consent to a representative action are bound.

Source(s):

8. CONSUMER ALTERNATIVE DISPUTE RESOLUTION

The questions below focus on some key concerns relating to consumer disputes before ADR fora. If possible, please provide the reference/citation of an article that provides a general overview of the way in which consumer alternative dispute resolution operates within your national legal system.

8.1 Consumer disputes before ADR fora

8.1.1 **Is ADR mandatory for all parties bringing a claim related to a consumer protection dispute?**

No.

8.1.2 **Please specify if there are limitations to the use of ADR. These might include the nature of the claim (i.e. whether both individual and collective claims are possible), requirements of representation, time limits, value thresholds, etc.**

Consent of all parties to the process is required. Agreements to arbitrate are not binding on consumers in disputes under €5000 in value unless agreed to after the dispute has arisen. Arbitration procedures involving consumers where the arbitrator is selected from a panel maintained by a body to which the defendant belongs have been held to be unfair and contrary to 1993/13/EEC.

8.1.3 **Can ADR entities issue binding decisions and can they enforce those decisions? If not, please explain how they are enforced.**

If the procedure is adjudicative then it can be enforced either as an arbitrators' award or by way of a plenary contract action on the decision. No special rules exist for consumer ADR.

8.1.4 **Does national law provide that limitation periods applicable to judicial actions should be suspended while ADR is ongoing?[196]**

Yes where the procedure comes within the scope of the 2008 Mediation directive or the 2013 Consumer ADR Directive. Article 17 of S.I. No. 343/2015 - European Union (Alternative Dispute Resolution for Consumer Disputes) Regulations 2015 provides:

"Effect of ADR procedures on limitation and prescription periods

17. (1) Where parties to a dispute attempt to settle the dispute, and have in respect of such attempt had recourse to ADR procedures which have an outcome that is not binding on the parties, the parties shall not be prevented from initiating judicial proceedings in relation to that dispute by virtue of the expiry, during the period in which the ADR procedure concerned took place, of a limitation period that applies to the dispute or to a prescription period.

(2) Paragraph (1) is without prejudice to limitation or prescription periods contained in an international agreement to which the State is a party."

8.1.5 **Please specify if national law establishes rules providing for recourse to judicial action following an (unsuccessful) ADR hearing[197].**

No rules are provided, apart from suspension of limitation and prescription periods during the ADR procedure.

8.1.6 **Is there judicial review of decisions and awards made by ADR entities? If so, by which court or tribunal is this oversight made? Is it ordinary or specialised?**

Ordinary entitlements to Judicial Review arise where the process is provided under law by a public body; otherwise no special procedures are provided outside of the ordinary recourse against arbitrations and arbitrators awards under the Arbitration Act 2010.

Source(s):

[196] The Directive on Consumer ADR provides that "the existence of an effective system for collective claims and easy recourse to ADR should be complementary". Consumer ADR is relevant not only for individual claims but also for collective ones; it can provide consumer with a means to reduce costs and save time.

[197] Per Arts.10-12, Directive on Consumer ADR.

9. THE EXAMINATION OF CONSUMER PROTECTION LAW IN NATIONAL PROCEDURAL LAW: RESPECT FOR THE PRINCIPLES OF THE EFFECTIVENESS AND EQUIVALENCE OF CONSUMER PROTECTION LAW AND EX OFFICIO CONTROL

The rules of national civil procedure that could potentially affect, and indeed undermine, the effective and equivalent protection of consumer rights are various. They include but are not limited to the rules and practices of ordinary and specialised judicial procedures, rules and practices of consumer ADR, rules applicable to special types of procedure (e.g. payment order procedures), the jurisdiction of individual courts (the courts that have jurisdiction over consumer disputes), the formal requirements that have to be satisfied to bring a case, the types of legal action that are available, the need for parties to be represented, the time-limits applicable to procedural steps of the action, rules on the taking of evidence, the possibility (or lack) to consider certain issues at specific stages of the procedure, the right to appeal and review, and rules relating to the enforcement or judgements and other enforcement titles (e.g. arbitration awards, notarial deeds, including mortgages).

On the basis of the principles of equivalence and effectiveness, the CJEU has established certain requirements for the procedural protection of consumer rights deriving from EU law. In particular (and especially in relation to the protection afforded to consumers via the Unfair Contract Terms Directive[198]), the CJEU has established an obligation on national judges (and potentially other dispute resolution facilitators) to apply consumer law of their own motion (that is, ex officio), when they have available the legal and factual elements necessary for this task. Ex officio control is one type of procedural mechanism that can be utilised within the national system to promote the effective and equivalent protection of consumer law. Thus, other mechanisms of procedure within your national legal system should be highlighted and discussed where relevant. The following questions should be answered in respect of both judicial and if relevant, alternative dispute resolution.

9.1 The basis of ex officio control of consumer protection law in national law

9.1.1 **Is it clear in the national legal system when consumer protection law should be applied ex officio? Is the ex officio control of consumer protection law established as an obligation or as a (discretionary) power of the judge in national procedural law?**

It is not clear and there has been little discussion or examination of the issue.

9.1.2 **If there is an understanding of ex officio control of consumer protection law in the national legal, what is this control understood to encompass/not cover?**

N/a

9.1.3 **Is the party who claims to be a consumer required to establish his or her consumer status, the existence of a consumer contract and that consumer law applies to the dispute? Is this required even if the consumer has no legal representation?**

[198] However, the CJEU has recognised that ex officio control – and other procedural requirements, that might in themselves (or indeed, in their absence), impact the effective enforcement of consumer law – arise across the EU's consumer protection directives.

It depends on the context. There is a suggestion from some judges that there is a presumption that a natural person is acting as a consumer. See above.

9.1.4 **What information is available to judges and dispute resolution facilitators hearing consumer protection disputes? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a consumer protection dispute to be heard and b) for the court to engage in ex officio control?**

No

9.1.5 **Who is responsible for providing this information? If the necessary information is not available to the court (or dispute resolution facilitator), is he or she under an obligation to investigate in order to be able to respond to a relevant consumer protection dimension of the case?**

The only investigative function lies with the regulator or with the ombudsman in any given sector. The Financial Services Ombudsman, for example, has the power to investigate and take the initiative in ascertaining the facts and the law in relation to a given dispute. Normally it is the function of the parties to supply the requisite evidence and information. In limited cases the court may admit an amicus.

9.1.6 **Will the court provide the consumer with any assistance in gathering factual information or advancing his legal arguments before the court? Please respond for the situation where: a) the consumer has legal representation and b) the consumer has no legal representation.**

Anecdotally, the court offices are understood to be very helpful to lay litigants in the filing of their cases. Judges too are understood to be accommodating to lay litigants. There is no general or formal obligation on the courts to supply assistance or information to litigants.

Source(s):

9.2 The possibility for ex officio control of EU consumer protection law in dispute resolution proceedings

9.2.1 **Is ex officio control of consumer protection law always possible when the procedure involves a full assessment of the claim on its merits?**

The position is unclear

9.2.2 **Can ex officio control be exercised even when the procedure does not involve an assessment on the merits?**

The position is unclear

9.2.3 **Please indicate if, per national procedural law, ex officio control can be exercised at the following stages of the procedure:**

	Courts		Other dispute resolution facilitators	
	Possible to exercise ex officio control	Not possible to exercise ex officio control	Possible to exercise ex officio control	Not possible to exercise ex officio control
Ordinary proceedings				
Small claims				
Payment order				
Provisional measures				
Proceedings linked to enforcement				
Enforcement proceedings				
- Enforcement of payment order				
- Enforcement of arbitration award				
- Enforcement of mortgage				
- Enforcement of notarial deed				
Appeal proceedings (please specify:)				

9.2.4 **What does ex officio control encompass in national procedural law?**

Further enquiry required, the position is unclear.

Source(s):

9.3 Other procedural mechanisms for the equivalent and effective protection of EU consumer law

9.3.1 **Does national procedural law provide that rules of EU consumer law (as well as rules that aim to satisfy EU consumer law objectives) should be understood as having equal standing to national rules of public policy (which is to say, that for the purposes of domestic law, the consumer protection provision is understood to have equal standing to a rule that must be raised ex officio by the national court)?**

There is judicial acceptance of the requirements for equivalent and effective protection generally. See 2.5 below. There is no explicit legislation or instrument in this regard.

9.3.2 **If ex officio control is not possible in certain types of proceedings or at a certain stage of proceedings (or for any other reason), does national procedural law provide for an alternative way of assessing consumer protection law?**

Not specifically

Source(s):

9.4 Ex officio control in payment order procedures

9.4.1 **What information is available to the judge when a claim for the issuance of a payment order is made? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a claim for the issuance of a payment order to be granted and b) for the court to engage in ex officio control before a payment order is issued?**

The application is grounded upon an affidavit sworn by or on behalf of the moving party in the form specified in the Rules of Court. The affidavit claimant must satisfy the court that:

1. That the judgment/order amounts to a judgment on an uncontested claim, within the meaning of Regulation (EC) No 805/2004. This includes establishing that it is a cross-border claim;
2. That the claim is uncontested within the meaning of Article 3 of Regulation;
3. That each of the conditions set out in paragraphs (a), (b), (c) and (where appropriate) (d) of paragraph 1 of Article 6 of the Regulation is met.

9.4.2 **What considerations will be assessed ex officio by the court (or other competent authority) before a payment order is issued?**

The Legislation and Rules are not explicit on this beyond requiring the Master of the High Court to exercise the functions required by Regulation 1896/2006.

9.4.3 **How is the consumer informed about the claim to issue a payment order against him or her? Does national procedural law make any provision for steps to be taken to ensure that consumers are informed of the claim for the issuance of a payment order so that he or she can contest it?**

All defendants are notified in the same way – Order 42C(6) provides that where a European order for payment is issued by the Court, the Master shall, for the purposes of Article 12 of Regulation No. 1896/2006, cause the European order for payment (together with the materials required by Articles 12(2) and 16(1) of Regulation No. 1896/2006) to be served on the defendant. If served within the State, service shall be by registered prepaid post to the residence or place of business in the State of the defendant or personal. If served outside the State, service shall be in accordance with Order 11D (Service outside the jurisdiction). No further special steps are prescribed for consumers.

9.4.4 **If the consumer objects to the claim, what is the next step? Do the proceedings continue, in the context of which ex officio control can be exercised? Or are the proceedings transferred to ordinary proceedings for analysis on the merits of the claim?**

Where a statement of opposition is entered to a European order for payment in accordance with Regulation No. 1896/2006 and the claimant has not explicitly requested that the proceedings be terminated in that event, the Master shall cause the claimant to be notified for the purposes of Article 17(3) of Regulation No. 1896/2006, in Form No. 4 in Appendix F, Part IV,

(a) that the defendant has lodged a statement of opposition and, as the case may be:

(i) that the proceedings have been remitted to the Circuit Court or to the District Court in accordance with Regulation 8(3) of the 2008 Regulations, or

(ii) that the proceedings have been transferred to ordinary civil proceedings before the Court, and

(b) where the claimant is domiciled or habitually resident in a Member State other than the State, that the claimant should notify the Central Office of an address in the State for service of documents. (Order 42c rule 11 of the Rules of the Superior Courts)
Source(s):

Rules of the Superior Courts, Order 42C.
SI No 525/2008 European Communities (European Orders for Payment) Regulations 2008.

European Commission
An evaluation study of the impact of national procedural laws and practices on the equivalence and effectiveness of the procedural protection of consumers under EU law

JUST/2014/RCON/PR/CIVI/0082

National Report – Consumer Protection Strand

Italy

Remo Caponi and Albert Henke

ITALY: LEGAL ANALYSIS

1. NATIONAL LEGISLATION IMPLEMENTING EU CONSUMER PROTECTION INSTRUMENTS

EU legislation	Transposing national legislation	Additional notes (e.g. if there is an overlap in application of legislation etc.)
Doorstep Selling Directive 1985/577/EEC	Decreto legislativo (d. lgs.) 15 gennaio 1992, n. 50.	Now replaced by the decreto legislativo 6 settembre 2005, no. 206, consumer code, cons. code (codice del consumo).
Package Travel Directive 90/314/EEC	Decreto legislativo 17 marzo 1995, n. 111.	Now replaced by the decreto legislativo 6 settembre 2005, no. 206, consumer code (codice del consumo).
Unfair Contract Terms Directive 1993/13/EEC	Legge 6 febbraio 1996, n. 52, Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunita' europee - Legge	Now replaced by the decreto legislativo 6 settembre 2005, no. 206, consumer code (codice del consumo). Cf. Art. 1469-bis civil code

	comunitaria 1994. Art. 25.	(codice civile).
Distance Selling Directive 1997/7/EC	Decreto legislativo 22 maggio 1999, n. 185.	Now replaced by the decreto legislativo 6 settembre 2005, no. 206, consumer code (codice del consumo).
Consumer Sales and Guarantees Directive 1999/44/EC	Decreto legislativo 2 febbraio 2002, n. 24.	Now replaced by the decreto legislativo 6 settembre 2005, no. 206, consumer code (codice del consumo).
Unfair Commercial Practices Directive 2005/29/EC	Decreti legislativi 2 agosto 2007, n. 145, 146.	Decreto legislativo, 2 agosto 2007, n. 146 amending Art. 14 decreto legislativo 19 agosto 2005, no. 190 and decreto legislativo 6 settembre 2005, no. 206, consumer code (codice del consumo). Decreto legislativo, 2 agosto 2007, n. 146 concerns the professionals.
Misleading and Comparative Advertising Directive 2006/114/EC (codified version)	Decreti legislativi 2 agosto 2007, n. 145, 146.	Decreto legislativo, 2 agosto 2007, n. 146 amending Art. 14 decreto legislativo 19 agosto 2005, no. 190 and decreto legislativo 6 settembre 2005, no. 206, consumer code (codice del consumo). Decreto legislativo, 2 agosto 2007, n. 146 concerns the professionals.
Consumer Credit Agreement Directive 2008/48/EC	Decreti legislativi 13 agosto 2010, n. 141, 14 dicembre 2010, n. 218, 19 settembre 2012, n. 169.	
Timeshare Protection Directive 2008/122/EC	Decreto legislativo 23 maggio 2011, n. 79.	
Consumer Injunctions Directive 2009/22/EC (codified version).	N/A	
Consumer Rights Directive 2011/83/EU	Decreto legislativo 21 febbraio 2014, n. 21.	Amending the decreto legislativo 6 settembre 2005, no. 206, consumer code

		(codice del consumo).
ADR for Consumer Disputes Directive 2013/11/EU	Decreto legislativo 6 agosto 2015, n. 130.	Amending the decreto legislativo 6 settembre 2005, no. 206, consumer code (codice del consumo). and the decreto legislativo 8 ottobre 2007, n. 179.

Source(s): www.normattiva.it

1. CONCEPT OF THE CONSUMER

1.1 Please outline the concept of the consumer in national law, indicating whether it is intended to be a uniform concept, whether it has been legislated for and where it can found (i.e. in a legislative provision, governmental guidelines, case law etc.).

The concept of consumer is a uniform one. It can be found in a legislative provision, Art. 3, para 1, lett. a) consumer code (decreto legislativo no. 206 of 2005): "any natural person who is acting for purposes which are outside his trade, business, craft or profession".

Source(s): decreto legislativo no. 206 of 2005 (cons. code) and subsequent amendments.

2. REGULATORY AUTHORITIES COMPETENT FOR CONSUMER PROTECTION ISSUES

2.1 What regulatory authorities, if any, are competent for enforcing consumer protection law? Please identify them, their nature (i.e. whether they are public or private or mixed) and the nature of enforcement.

The main regulatory authority charged with protecting some kinds of consumer rights is the Italian Competition Authority, which was established by Law no. 287 of 1990. It is a public independent body charged with protecting consumers from unfair commercial practices, unfair contract terms, and comparative advertising which may bring discredit on competitors' products or cause confusion. It also is the authority competent for implementing regulation 2006/2004/EC of 27 October 2004 on cooperation between the national authorities responsible for enforcing consumer protection law.
As to the protection from unfair commercial practices, s. Art. 27 Cons. Code, according to which the Authority, acting on its own authority or at the request of any individual or organisation having an interest, shall prohibit any unfair commercial practices and eliminate their effects. To this end the Authority shall avail itself of the investigative and executive powers provided by the Regulation 2006/2004/EC also in relation to offences which are not of a cross-border nature. The Authority may order the provisional suspension of unfair commercial practices whenever there is a particularly urgent need. Among others, the Authority may also request businesses, organisations or private individuals in possession of information and documents to supply them if they are of relevance for the purposes of identifying infringements. The Authority may order the professional to publish its decision, or an extract of it, or a specific corrective statement, to ensure that the unfair commercial practices do not continue to procure any effects. The Authority shall also impose an administrative fine of between €5,000.00 and €5,000,000.00, to take account of

the seriousness and the duration of the infringement. If the professional fails to comply with the measures adopted, the Authority shall impose an administrative fine of between €10,000 and €5,000,000. In the event of repeated non-compliance, the Authority may order the professional to suspend trading for a period which shall not be more than thirty days. For further details, see Art. 27 Cons. Code.
As to the protection from unfair contract terms, s. Art. 37-bis Cons. Code, according to which the Competition Authority ex officio or in response to complaints may assess the unfair nature of terms that are included in contracts between professionals and consumers through the acceptance of general contract conditions or the signing of forms, models or templates. For further details, s. Art. 37-bis Cons. Code.

Source: Arts. 27, 37-bis decreto legislativo no. 206 of 2005 (cons. code) and subsequent amendments; www.agcm.it/en/

2.2 Is there a specific venue for this type of enforcement and does this limit the jurisdiction of courts/ADR fora (even if only initially)?

(a) no specific venue for this type of enforcement.
(b) no limits on the jurisdiction of courts/ADR fora.
However, has a class action suit according to Art. 140-bis, para 6 cons. code been initiated, the court may stay the proceedings, if an 'independent Authority' is holding an inquiry into the same matter.

Source: Art. 27 d. lgs. no. 206 of 2005 (cons. code) and subsequent amendments.

2.3 Can criminal prosecutions be initiated for violations of consumer protection rules? How serious must the infringement be? What are the penalties and sanctions? And might these prosecutions lead to criminal penalties or sanctions? Can individual consumers piggy back on these claims (e.g. via a partie civile method)?

The Italian criminal law does not provide for a specific protection against violations of consumer protection rules, but it provides for the protection of products and production process as well as, to a lesser extent, some service (eg. financial intermediation).

Source: G. Losappio, La tutela dei diritti dei consumatori negli ultimi sviluppi della giurisprudenza penale, in Rivista trimestrale di diritto penale dell'economia, 2011, p. 137 ff.

2.4 Is there judicial review of decisions of consumer regulatory authorities? If so, by which court is this judicial oversight made? Is the forum an ordinary or a specialised court or tribunal?

(a) yes.
(b) by the administrative courts.
(c) it is the specialised court system for the review of administrative action.

Source: decreto legislativo no. 104 of 2010, Code of Administrative Judicial Proceedings.

2.5 Does the national legal system provide for a mechanism of cooperation between its national regulatory authorities and those of other Member States?

No.
However, the Italian Competition Authority belongs to the European Competition Network (ECN) and it is one of the co-founders of the International Competition Network.

Source(s): www.agcm.it

3. LEGAL AID

3.1 Is legal aid available to consumers in: a) bringing a claim and b) defending a claim before a court?

Legal aid is generally provided for in the Italian legal system by the d.p.r. (Decree of the President of Republic) no. 115 of 2002. It does not provide for specific regulation concerning consumers. As to citizens of EU Member States (other than Denmark) and individuals who are legally resident there, the legal framework is provided for by the decreto legislativo no. 116 of 2005, enforcing the Dir. 2003/8/EC on access to justice.

Legal aid is available in both a) bringing a claim and b) defending a claim before a court.

3.2 For what kinds of disputes and actions is legal aid available? (NB: legal aid might not be available for consumer or contractual disputes but be available instead for a related action, e.g. actions relating to debt, mortgage arrears, eviction etc.).

Legal aid is available for all kinds of dispute and actions.

3.3 What requirements must be satisfied for the consumer to be entitled to legal aid? Please specify if there are any additional limitations to its availability.

Its taxable annual income should not be more than 11.528,41 Euro, as of 2015.

3.4 What does legal aid encompass? (i.e. (only) general advice, (only) assistance in preparing the case, (only) assistance with negotiation of settlements, (also) representation).

It encompasses only assistance in judicial proceedings, while individuals entitled to legal aid are exempted from the payment of mediation fees in mandatory mediation proceedings regulated by d. lg. no. 28 of 2010.

Source(s): as for the legal provisions, they are interspersed in the answers above; A. Giussani, Assistenza giudiziaria ai non abbienti (2012), in www.treccani.it

4. COSTS

4.1 What are the costs of different types of procedures before courts? Are there exemptions to the payment of fees and expenses? How can costs be paid?

Court fees should be paid at the beginning of each instance of the proceedings, when the plaintiff lodges the act instituting the proceedings into the court. There are different fees for different types of proceedings. As to the ordinary civil proceedings, see the table below. There are some exemptions, but they do not concern consumers.

Court Fees in Ordinary Civil Proceedings (2016)

Claim Value Classes	First instance	First Appeal	Second Appeal (Corte di casazione)
Up to € 1.100,00	€ 43,00	€ 64,50	€ 86,00
€ 1.100,00 / € 5.200,00	€ 98,00	€ 147,00	€ 196,00
€ 5.200,00 / € 26.000,00	€ 237,00	€ 355,50	€ 474,00
€ 26.000,00 / € 52.000,00 (and indeterminable claim value)	€ 518,00	€ 777,00	€ 1.036,00
€ 52.000,00 / € 260.000,00	€ 759,00	€ 1.138,50	€ 1.518,00
€ 260.000,00 / € 520.000,00	€ 1.214,00	€ 1.821,00	€ 2.428,00
Above € 520.000,00 (and claim value not declared)	€ 1.686,00	€ 2.529,00	€ 3.372,00

As to summary proceedings provided for by the Fourth Book of the Code of Civil Procedure, CCP (eg. payment orders and provisional measures): half the court fees concerning the ordinary proceedings**.**

Source(s): www.professionegiustizia.it

5. STANDING AND REPRESENTATION IN CONSUMER DISPUTES

5.1 Does national law limit the standing of the individual consumer in respect of the claim that can be made and the forum before which it can be brought?

Yes, in respect of judicial injunctions against the use of unfair contract terms in general terms and conditions of business. They may only be demanded by consumers' associations, associations representing professionals and chambers of commerce (art. 37 Consumer Code).

5.2 Other than individual consumers, who or which bodies have standing in consumer protection disputes and for what types of claim? If the action is not brought by the individual consumer, what requirements of representation must be satisfied?

(a) consumers' associations, associations representing professionals and chambers of commerce have (exclusive) standing for demanding judicial injunctions against the use of unfair contract terms in general terms and conditions of business (art. 37 Consumer Code).

(b) It is worth noting the standing to bring class action suits, cf. art. 140-bis para 1: "The homogeneous, individual rights of consumers and users [...], as well as collective interests can also be enforced through class action as provided for by this article. To this end, each class member can individually, or through associations to which they grant power or committees in which they participate, institute a judicial proceedings to assess liability and claim an order to pay damages and repayments".

5.3 If a consumer wants to bring or defend an action relating to a consumer protection dispute, is there a legal (or otherwise formal) requirement that he or she has legal representation? Please specify for both judicial and ADR fora and the bodies, associations or authorities that can provide this representation.

(a) Judicial proceedings: according to the Art. 82 Code of Civil Procedure (CCP), where the value of the claim does not exceed the amount of Euro 1.100, the parties may personally appear before the Giudice di Pace, without the legal representation of a counsel. However, having regard to the kind of dispute, the Giudice di Pace, may authorize the party to appear before him in person (ie. without legal representation), even if the value of the claim exceeds Euro 1.100. Before other judges, the parties may not appear unless represented by counsel.

(b) consumers can join the class action without being legally represented by counsel (art. 140-bis, para 3 Consumer Code).

(c) ADR procedures: as a rule, the parties are not obliged to retain a lawyer or a legal advisor, but they may seek independent advice or be represented or assisted by a third party at any stage of the procedure (Art. 141-quater, para. 3, lit. b, Consumer Code). However, in the mandatory mediation proceedings provided for by the d. lg. no. 28 of 2010 the claimant should be represented by a counsel (art. 5, 1-bis d. lg. no. 28 of 2010).

Source(s): Code of Civil Procedure (CCP); decreto legislativo no. 206 of 2005 (Consumer Code); decreto legislativo no. 28 of 2010.

6. ACTIONS BEFORE COURTS

6.1 Jurisdiction and competence of the courts in consumer disputes: General structure and special procedures aimed at protecting consumers

6.1.1 Are ordinary courts competent to hear such claims? Is there also a specialised tribunal for consumer protection disputes?

(a) Yes.
(b) No.
However, it is worth deepening the answer. The Italian judicial system retains the distinction between ordinary and specialised courts, although specialised courts are not as differentiated as, for example, in the German legal system

(in particular, labour and social welfare disputes are brought before the ordinary courts). Currently, ordinary courts (Giudice di pace and Tribunale at first instance and the Corte di appello at second instance; Corte di Cassazione as Supreme Court) administer justice in civil and criminal matters, other than those for which the Constitution[199] or statutory regulations[200] require a specialised court. Among the specialised courts, the administrative courts are the most important. Since 1971, they also have become more differentiated by way of the establishment of the Tribunali amministrativi regionali. According to a time-honoured dual system of judicial review of the administrative action, backed by the Constitution of 1948, ordinary civil courts had jurisdiction over violation of "subjective rights" (diritti soggettivi), while administrative courts had jurisdiction over violation of "legitimate interests" (interessi legittimi). In the last decades, the grey area linked to the distinction between rights and legitimate interests has encouraged the legislator to vest "exclusive" (ie. irrespective of this distinction) subject matter jurisdiction in single administrative matters in the administrative courts in an increasing number of cases.[201] This trend is very questionable in terms of its compliance with the Constitution,[202] as the above-mentioned Art. 103, para no. 1 Const. states that the Council of State and other organs of administrative justice have jurisdiction to protect subjective rights against the public administration, only "in specific matters" indicated by law. Examining the matters devoted to the administrative courts' "exclusive" subject matter jurisdiction, which are today listed in Art. 133 Code of Administrative Judicial Proceedings, they are anything but specific: disputes about agreements between citizens and public administration amending or replacing administrative measures, the right of access to administrative documents, breach of the duty of transparency, granting of the use of public goods, public services, procurement, urban planning and construction policy, challenging the rulings of independent agencies, and so on.

Therefore, administrative courts have jurisdiction over extensive matters in which individuals are involved as consumers or users.

This trend to broadening the scope of the administrative courts' subject matter jurisdiction makes worse the existing problems regarding the composition of the Council of State, as its members normally act also as consultants of the public administration and hold important positions in ministries, such as heads of legislative offices, heads of the ministerial staff, and so on. Italian narratives directed to a foreign readership[203] point out that in Italy "as a result of a well-known historical development, administrative courts have affirmed themselves as truly independent bodies, endowed with real courts' prestige and maintaining fundamental standards of procedural fairness"[204]. This may well be true, although it is somewhat a mystery how the dual role of the Council of State's members (as both consultants of the government and judges in the disputes between citizens and public administration) is to be reconciled with the requirement of independence. We might recall that legal provisions and bodies in charge of ensuring judicial independence differ greatly in the Italian legal system between ordinary and specialised courts, as the independence of the former is ensured by the High Council of the Judiciary (Consiglio Superiore della Magistratura), while the independence of the latter is regulated by different statutory provisions.[205]

[199] Cf. Art. 103 Constitution.
[200] Cf. V (fifth) Transitional and Final Provision of the Constitution.
[201] For the listing of these matters, see Art. 133 Code of Administrative Judicial Proceedings (D. Lgs. No. 104 of 2010).
[202] Certain legal provisions belonging to this trend were indeed invalidated by the Constitutional Court no. 204 of 2004.
[203] Cf. *M. De Cristofaro, N. Trocker* (eds.), Civil Justice in Italy, 2010, p. 19.
[204] Now codified by the Decreto legislativo, 2 July 2010, no. 104, Code of Administrative Judicial Proceedings.
[205] Cf. Art. 108, para 2 Const. As to this kind of statutory provisions, consider for example Law no. 186 of 1982.

Hence, it is no surprise that in the current scholarly discussion in Italy the proposal to establish a single ordinary courts system is once again gaining traction.[206]

6.1.2 Which courts are competent to hear consumer protection disputes at first instance and in appeals? Please specify the court, in light of the value of the claim (and identify any other factors that are relevant in allocation jurisdiction).

As to ordinary courts, Giudice di pace (up to 5000 Euro claim value as a rule) and Tribunale at first instance, Corte di appello at second instance, Corte di Cassazione as Supreme Court. As to administrative courts, regional administrative court (TAR) at first instance, Council of State (Consiglio di Stato) at second instance.

6.1.3 What is the nature of the procedure at first instance, e.g. is it a simplified or a summary procedure, and is there an assessment of the merits? Please specify in light of the value of the claim (and identify any other factors that are relevant in allocating jurisdiction).

As to the adjudication in the ordinary courts, the Italian civil procedure system does not provide for a single ordinary proceedings, but a number of different proceedings. Ordinary proceedings are not the key instrument for ensuring judicial protection of rights in Italy any longer. In fact, over the last decades, they are becoming less and less important, even residual, to that end.

In order to take a correct view of the real states of affairs in Italy, one should take into consideration a large number of "special" proceedings, which normally enable claimants to obtain effective and efficient judicial protection of rights in a wide range of situations. As of 2013, the number of cases brought to court by way of special proceedings (especially payment orders and provisional measures) was substantially higher than the number of ordinary proceedings.[207]

However, except for the class action (art. 140-bis Consumer Code), such special proceedings do not target consumer protection as such.

Ordinary proceedings still constitute the general pattern of adjudication in the Italian legal system. According to this pattern, the procedural law regulates forms and time limits of procedural activities both of the parties and the court, with limited discretionary powers conferred upon the court. The civil procedure of Italy, as well as those of other countries belonging to the Romance legal family (such as France, South American countries and, until the new code of civil procedure of 2000, Spain) originates from the Italian-canonical procedure. Based on this model, a procedural model with three different stages has developed: the written introductory phase (made up of the statement of claim, the defendant's response, and the exchange of a number of briefs between the parties); the fact-finding phase (made up of the taking of evidence by the instructing judge); and the final decision phase, where the decision on the dispute is to be issued by the instructing judge (or a judicial panel in certain cases)[208] after the parties have been given the opportunity to exchange their final briefs. The fact-finding phase often requires several hearings for the evidence to

[206] Cf., among others, *A. Proto Pisani*, L'importanza dell'articolo 113, 3° comma Costituzione, per una giustizia effettiva del cittadino contro atti della Pubblica amministrazione, in Questione giustizia, 2015, p. 149 ff.
[207] *Ministero della giustizia*, Piano della performance 2015-2017, p. 15.
[208] For these cases, see Art 50-bis Code of Civil Procedure.

be compiled. This model is characterized by a sequence of hearings and not by a concentrated main hearing, such as in Germany, England and (after the new Code of Civil Procedure, enacted in 2000) in Spain.[209]
This structure of proceedings not only enables law firms to organize their work for a significant amount of pending cases, but also makes it possible for most judges to handle their heavy workload. In these conditions, they are more comfortable with a number of hearings (where very little advances), postponements centred on a mostly written handling of the case by the parties, and a final examination of written submissions by the judge, rather than with proceedings centred on a labour-intense main hearing.
In conclusion, the current structure of ordinary proceedings coincides with the interests of law firms and the bureaucratic spirit of many judges rather than with the public interest in the administration of justice.

Should the Tribunale decide as a single judge (that is the rule: cf. Art. 50 bis and ter Code of Civil Procedure), the procedure could also be a "summary" proceedings depending on the court's choice according to Art. 183-bis Code of Civil Procedure. In choosing the procedural track, the court should take into account the degree of complexity of the dispute and the gathering of evidence.

As to the summary (in reality: simplified) proceedings, it was introduced by the Civil Justice Reform Act 2009[210] and called procedimento sommario di cognizione.[211] It has a broad scope of application: the plaintiff may apply for it in all cases where the Tribunale decides in first instance as a single judge. All kinds of actions may be brought before the Court: actions for coercive relief (azione di condanna), actions for declaratory judgment (azione di mero accertamento), actions to create, modify or extinguish a legal relationship between the parties (azione costitutiva). Except for the act instituting the proceedings (ricorso), the determination of the date of the hearing and the shorter time limits to appear before the court, the regulation of the introductory stage is based on that of the ordinary proceedings. The ricorso must contain the same elements of the citazione (the claim form for the ordinary proceedings). This in turn must be served onto the defendant (by the plaintiff) at least forty days before the date fixed for the hearing. The defendant must file his appearance at least ten days before the hearing. Within this time limits the following are subject to preclusion: procedural objections, objections on the merits of the case which may be raised only by the parties, counterclaims and joining of a third party. At the hearing, the court must determine whether to continue to deal with the case according to the summary proceedings or, instead, to transpose it to the ordinary proceedings, if it considers that the arguments presented by the parties require a "non-summary" ascertainment,[212] namely, if the case raises complex issues. If the court continues to handle the case according to the summary proceedings, "after hearing the parties, omitting any formality which is not indispensable for complying with the right of the parties to be heard, it proceeds in the way it deems more proper to accomplish the evidentiary acts which are relevant in relation to the object of the requested decision",[213] namely, in relation to the determination of the claim brought before the court. The regulation of the evidentiary stage is not entrusted to the law, but to the discretionary powers of the court, subject to compliance with the constitutional right to be heard. On the merits, the summary proceedings end with a decision that contains an order granting or denying the relief. If granted, the judgment (when it has content of coercive relief) is provisionally enforceable. If it is not appealed, the judgment becomes res judicata. In the appeal proceedings new means of evidence and new documents are admitted only when

[209] For this comparison, s. R. Stürner, 'The Principles of Transnational Civil Procedure. An Introduction to Their Basic Conceptions'*Rabels Zeitschrift*, 201, 223 (2005).
[210] The already mentioned Law no. 69 of 18th June 2009.
[211] The new proceedings are regulated in the fourth book of the Code of Civil Procedure: Art. 702-*bis*, -*ter*, -*quarter*.
[212] Art.702-*ter*, para 3 Code of Civil Procedure.
[213] Art. 702-*ter*, para 5 Code of Civil Procedure.

the Court of Appeal considers them "indispensable" (after the amendment 2012) to decide the case, or when the party proves that he/she could not offer them during the first instance due to a fortuitous event.[214]

According to the prevailing opinion, despite their name, the new summary proceedings are actually a special full evidentiary process, simplified if compared to the ordinary one, deemed to deal with "simple" disputes. In fact, the "labels" never bind the interpreter in the reconstruction of the content of the norms. Moreover, the Code of Civil Procedure of 1865 labelled as "summary" full evidentiary proceedings which were an alternative to the formal (non-summary) ones. In fact, the history of civil justice shows that summary proceedings are designed to meet specific needs: namely, procedural economy (in cases where it is likely that the counterparty will not defend his position), the need to proceed with urgency to neutralise a periculum in mora (i.e. the danger of suffering a damage unsuitable of adequate compensation), and the aim of preventing the abuse of the right of defence. However, the new summary proceedings do not have these goals. In fact, with regard to their scope and consequently the requirements of the decision granting the application, the new summary proceedings are quite atypical. Their scope cover all the cases brought before the court at first instance as a single judge. As for the type of actions that can be brought before the court, they coincide with the ordinary ones. With regard to the characteristics of the evidentiary activity, the court is called upon to perform sic et simpliciter the evidentiary acts relevant to the determination of the right, in accordance with the constitutional right to be heard. In relation to the stability of the final decision, it is res judicata. Finally, the Civil Justice Reform Act 2009 had empowered the Government to make use of the new summary proceedings by drafting the legislative decree aimed at rationalising and simplifying civil proceedings. Art. 54, para. 4, Law no. 69 of 2009 stipulates that the new summary proceedings should apply to "procedures where there is a prevailing disposition towards the simplification of the treatment of the case".

However, before the introduction of Art. 183-bis Code of Civil Procedure in 2014, the regulation of the new summary proceedings lent itself to various criticisms. The main critical aspect was the following. The court could order the transfer of a dispute from the ordinary proceedings (allegedly initiated by the plaintiff in a simple case) to the summary ones. This rigidity could be explained if one assumed that the ordinary and the summary proceedings "dwelled" in completely different worlds. On the contrary the alternative between ordinary proceedings and summary proceedings should be regulated by the law as a choice between two "track", both of them being full evidentiary proceedings. Looking ahead, the best solution is to restructure the ordinary proceedings, by articulating it into two tracks predetermined by the law. The choice between the two tracks - based on the degree of complexity of the dispute - should be entrusted to the judge dealing with the case, in collaboration with the parties.

6.1.4 Please identify the formal requirements that must be satisfied for a consumer dispute to be heard before a court. These might include time limits applicable to the filing of the action/defence, representation requirements etc.

With regard to those aspects, see above para 6.1.3.

6.1.5 In respect of the claims and relevant procedures available in the national legal system, what kind of relief might be available in consumer protection disputes? (monetary remedies, injunctions, skimming off etc.)?

Actions for coercive relief (azione di condanna), including money compensation, actions for declaratory judgment (azione di mero accertamento), and actions to create, modify or extinguish a legal relationship between the parties (azione costitutiva) are available. Skimming-off judicial proceedings are unknown in the Italian legal system. However, if a professional try to distort the economic choices of a consumer by, for instance, omitting relevant

[214] Art. 702-*quarter* Code of Civil Procedure.

information, spreading out untruthful information or even using forms of undue influence, the Italian Competition Authority may act, also via interim measure, and impose fines which could range up to 5 million euro.

6.1.6 Please provide a brief overview of the role of parties and judges in civil proceedings generally (e.g. with reference to the principle of party disposition, the obligation of parties to make and prove factual allegations and to make and provide legal arguments, the possible role of the court). This overview should be brief; these issues will be dealt with in more detail in the questions that follow.

A key element of a common political culture places the rights of the individual at the center of economic, social and legal activity. Party autonomy and party disposition are a consequence of the central position of the individual in the economic and legal system. These principles shape dispute resolution methods and their features (also) in the Italian legal system. Therefore, it is for the parties and not for the state to choose the suitable dispute resolution mechanism along with its commencement, scope and termination.

For further remarks, see also above para 6.1.3.

Source(s), besides those already quoted in the footnotes, R. Caponi, European Minimum Standards for Courts. Independence, Specialization, Efficiency. A Glance from Italy, in C. Althammer, M. Weller eds, Europäische Mindeststandards für Spruchkörper, Tübingen, Mohr-Siebeck, 2016, forthcoming; R. Caponi, “Just Settlement” or “Just About Settlement”? Mediated Agreements: A Comparative Overview of the Basics, in Rabels Zeitschrift für ausländisches und internationales Privatrecht, 2015, pp. 117–141; R. Caponi, A Masterpiece at a Glance. Piero Calamandrei, Introduzione allo Studio Sistematico dei Provvedimenti Cautelari, in L. Cadiet, B. Hess, M. Requejo Isidro (Eds.), Procedural Science at the Crossroads of Different Generations, Studies of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, Nomos, 2015, p. 373-380; R. Caponi, Zur Struktur des italienischen Zivilprozesses, in Festschrift für Rolf Stürner zum 70. Geburtstag, Tübingen: Mohr Siebeck, 2014, p. 1455 ff.; R. Caponi, Italian Civil Justice System: Most Significant Innovations in the Last Years (2009-2012), in O. G. Chase, E. Hershkoff, L. Silberman, Y. Taniguchi, V. Varano, A. Zuckerman (eds.), Civil Litigation in Comparative Context, Thomson West, Supplement 2012.

6.2 Small claims

6.2.1 Does a small claims procedure exist in the Member State? If yes, is it a specialised or simplified procedure?

The procedure before the giudice di pace (Art. 311 ff. Code of Civil Procedure) can be regarded as “the small claim procedure” in Italy. The giudice di pace (Justice of the Peace) “may be seen as the expression of a deeply rooted trend common to other European countries towards attributing to a non-professional judge competence to decide minor cases in order to offer a form of simple and speedy justice for the resolution of small claims” (N. Trocker). The Justice of the Peace are law graduates, at least thirty years old and normally admitted to the bar. They are appointed by the High Council of the Judiciary (Consiglio Superiore della Magistratura) for a term of four year, renewable only once. Their remuneration is linked to productivity; it is calculated on the basis of hearings, orders and judgments. The Justice of the Peace are non-professional or honorary judges in the sense of both not being part of a career profession of judges and not holding their posts for life.

6.2.2 What are the value thresholds for claims brought under the small claims procedure? Moreover, are there any other factors that shape the use of the small claims procedure (including the nature of the claim, the area of consumer protection law into which the claim falls etc.)?

The civil jurisdiction of the giudici di pace extends to disputes over movables with a value up to 5.000 Euros (and other disputes not immediately correlated to the consumer protection laws), cf. Art. 7 Code of Civil Procedure.

6.2.3 What forms must be completed to raise the application? Who assists the consumer in completing these forms?

However, the procedure before the justice of the peace is not as informal as one might expect. As a rule, the procedure before the Tribunale deciding as a single judge also applies in the proceedings before the giudice di pace (Art. 311 Code of Civil Procedure).

Before the giudice di pace the parties may be represented by a representative according to Art. 317 Code of Civil Procedure, who in turn needs be represented by a counsel. According to the Art. 82 Code of Civil Procedure, where the value of the claim does not exceed the amount of Euro 1.100, the parties may personally appear before the Giudice di Pace, without the legal representation of a counsel. However, having regard to the kind of dispute, the Giudice di Pace, may authorize the party to appear before him in person (ie. without legal representation), even if the value of the claim exceeds Euro 1.100.

6.2.4 How can an application for a small claim be made (e.g. online, by post or in person)?

An application for a claim before the giudice di pace is normally written, but it can also be made orally (Art. 316 Code of Civil Procedure).

6.2.5 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

The rules on the taking of evidence are the same as in the ordinary or “summary” (simplified) proceedings (s. above 8.3.3.).

The personal appearance of the parties in court may be ordered by the judge (Art. 117 Code of Civil Procedure).

6.2.6 Are the costs of the successful party reimbursed?

Yes, general rules apply (cf. Art. 91 ff. Code of Civil Procedure) .

Source(s): M. De Cristofaro, N. Trocker, Civil Justice in Italy, 2010, p. 20 f.

6.3 Claims other than small claims

6.3.1 If a consumer protection dispute does not qualify as a small claim, what other procedures are available? What are the value thresholds and other factors determining the use of such procedures?

If a consumer protection dispute does not qualify as a small claim (as the value of the claim is more than 5000 Euro), the procedures before the tribunale are available.

6.3.2 How can such claims be made? Please specify if the applications can be made online, or by post or in person.

The proceedings is started by the service of the claim form (called citazione), addressed by the plaintiff to the opponent, cf. Art. 163 Code of Civil Procedure.

6.3.3 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

In the ordinary proceedings, the fact-finding phase is made up of the taking of evidence by the instructing judge, according to forms and time limits prescribed by law (cf. Art. 191 ff. Code of Civil Procedure).

In the summary (simplified) proceedings, "after hearing the parties, omitting any formality which is not indispensable for complying with the right of the parties to be heard, it proceeds in the way it deems more proper to accomplish the evidentiary acts which are relevant in relation to the object of the requested decision" (cf. Art. 702-ter, para 5 Code of Civil Procedure). The regulation of the evidentiary stage is not entrusted to the law, but to the discretionary powers of the court, subject to compliance with the constitutional right to be heard.

The personal appearance of the parties in court may be ordered by the judge (Art. 117 Code of Civil Procedure).

6.3.4 Are the costs of the successful party reimbursed?

Yes, general rules apply (cf. Art. 91 ff. Code of Civil Procedure).

Source(s): M. De Cristofaro, N. Trocker, Civil Justice in Italy, 2010, p. 20 f.

6.4 Claims for the issuance of a payment order

6.4.1 Does an order for payment procedure exist in the national system? Is it a simplified procedure?

Yes, an order for payment procedure does exist in Italy. It is the payment order procedure (procedimento d'ingiunzione). According to Art. 633 Code of Civil Procedure, the creditor of a sum of money (which is liquidated and mature for payment), a given quantity of fungible things, or specified items of movable property may obtain a judicial payment order (decreto ingiuntivo) by way of an ex parte summary proceedings, without summoning the debtor in advance.

6.4.2 Which authorities or courts are competent to hear claims for the issuance of payment orders?

Giudice di pace or Tribunale depending whether the value of the claim is less or more than 5000 Euro.

6.4.3 Are there any formal requirements that must be satisfied for the application for the issuance of a payment order to be made (e.g. standard forms, representation by a lawyer, the detail of description required, the need to provide written evidence etc.)?

As to legal representation, the general rules apply (Art. 82 Code of Civil Procedure; see above 5.3).

The proceedings are instituted by filing a request for a payment order to the competent court, now by way of electronic means (processo civile telematico). The request takes the form of an application (ricorso). Normally, the claim ought to be supported by a kind of documentary evidence (Art. 633, para 1, no. 1 Code of Civil Procedure). However, appropriate documentary evidence is not only the categories of documents regulated in the Civil Code, ie. documents under the seal of a public officer (atti pubblici: Arts. 2699-2701 Civil Code) and private writings (scritture private: Arts. 2702-2704 Civil Code). Conversely, in the payment order proceedings claims may be supported by writings lacking of the requirements regulated in the Civil Code. In particular, may also be suitable evidence certified abstracts of the book-keeping entries (cf. Arts 2214 ff. Civil Code) concerning credits for goods or money supply, and for the services made by professionals to consumers.

Lawyers, court clerks (as well as any person having performed work in connection with judicial proceedings), notaries, and practitioners of any profession or trade having a legally approved tariff further may obtain a payment order even if their claims (concerning fees and refund of costs) are not supported by any documentary evidence (Art. 633, para 1, no. 2 and no. 3). In that case "proof" is offered by a detailed list of services rendered and expense borne prepared by the claimant accompanied by an official opinion as to the value of the services rendered issued by an appropriate professional association (Art. 636 Code of Civil Procedure).

6.4.4 What information is generally available to the authority or court when a claim for the issuance of a payment order is made?

As the payment order procedure is an ex parte proceedings, the only information available to the court is that provided for by the claimant in the act instituting the proceedings.

6.4.5 What opportunity is available for a defence/statement of opposition to be advanced? How should this be done and what is its effect? Please specify if the means of advancing a defence differ depending on the value of the claim and the court dealing with it.

The alleged debtor is notified after the payment order has been issued. Within a 40 day-deadline he may raise opposition before the judge that issued the payment order. Once the debtor has raised opposition, the proceedings evolve as ordinary proceedings. Hence, litigation is left to the initiative of the alleged debtor.

6.4.6 What is the effect if the claim is uncontested, i.e. if there is a lack of defence/statement of opposition?

In fact, most payment orders are not opposed and thus gain res judicata effect.

6.4.7 If the defendant is a consumer, and he or she does not respond to or raise an objection to the issuance of the payment order, does the authority dealing with the claim for payment order proceedings have the power to examine any issue of consumer protection law of its own motion before treating the action as usual?

Re the initial ex parte-phase of the payment order procedure the content of the relevant legal provision (Art. 640 Code of Civil Procedure) is the following: if the judge deems that the motion for payment order is not sufficiently grounded, he orders the court clerk to inform the claimant, inviting him to provide additional evidence. If the claimant does not reply to the judge's request, or does not withdraw the motion or if the motion cannot be granted, the judge denies the motion (but the denial does not prevent the claimant from re-proposing the claim, also in ordinary proceeding).

The iura novit curia-principle applies. Thus the judge has the duty to examine any issue of consumer protection law of its own motion. Cf., in this sense, Cass. (Corte di cassazione) 12 March 2014, no. 5703, as to the consumer exclusive venue.

6.4.8 What steps must the pursuer take in order to obtain an enforceable decision?

According to Art. 642 CCP ("temporary enforcement"), the "pursuer" may under certain conditions obtain a payment order that is already enforceable, ie. if the claim is grounded on a bill of exchange, bank check, bank draft, stock exchange certificate of liquidation, or deed received by a notary or another authorized public official. In each of these cases, upon pursuer's request, the judge shall order the debtor to immediately pay or deliver the things, authorizing the temporary enforcement of the payment order and scheduling a time-limit for the alleged debtor to raise an opposition.

According to Art. 647 CCP ("enforceability due to lack of opposition"), if the opposition is not filed by the 40 day-time-limit (established by Art. 641 CCP), or the opponent has not appeared before the court (cf. Arts. 165, 645 CCP), the judge, upon pursuer's request, declares the payment order be enforceable (cf. Art. 474 CCP). In the first case, the judge shall order the renewal of the service, when it appears or it is likely that the debtor did not know about the payment order.

According to Art. 648 CCP ("Temporary enforcement while the opposition proceedings are pending"), has the alleged debtor lodged an opposition, but this is based neither on written evidence nor evidence which do not need further investigation, the judge may grant temporary enforcement of the payment order, if that has not already been granted pursuant to Art. 642 CCP (see above, first para of this answer). The judge grants the partial temporary enforcement of the payment order, limited to the undisputed amounts, except where the opposition has been filed for breach of rules of civil procedure. In any event, the judge shall grant the temporary enforcement of the payment order if the pursuer offers a security (Art. 119 CCP) in relation to the amounts of money which he may have to give back, if the opposition is to be upheld.

6.4.9 Is this decision final, or can the defendant appeal against it?

According to the Art. 647, para 2 CPP, if the alleged debtor fails to lodge an opposition by the 40 day-time-limit or, once the opposition has been lodged, he fails to appear before the court, it is available the so called "late opposition"

(opposizione tardiva) according to Art. 650 CCP: The alleged debtor may lodge an opposition after the 40-day-time-limit has expired, if he is able to demonstrate that either he had not been timely informed of the payment order because the service was not regular (or because of a fortuitous or force majeure event), or, after he got knowledge of the payment order, he was not able to lodge an opposition because of a fortuitous or force majeure event. In any event, the enforcement of the payment order may be stayed. Even this "late" opposition may not be lodged after 10 days from the first enforcement act.

According to Art. 656 CCP, once the payment order has been declared enforceable pursuant to Art. 647 CCP, it may be further challenged either by motion for new proceedings in cases under Art. 395, nos. 1 (claimant's fraud), 2 (false evidence), 5 (payment order in contrast with another previous judgment final and binding upon the parties), and 6 (judge's fraud), or by third party's challenge, in cases under article 404, para 2 CCP.

Source(s):
(a) as to the legal provisions, see the text.
(b) literature: S. Grossi, C. Pagni, Commentary to the Italian Code of Civil Procedure, Oxford, 2009; M. De Cristofaro, N. Trocker, Civil Justice in Italy, 2010, p. 192-199.

6.5 Appeals in consumer disputes

6.5.1 Are appeals possible in all consumer disputes? Please specify for small claims and other types of claims.

In the Italian civil procedure first and second appeals (the latter only on points of law, before the corte di cassazione) are admissible as a rule irrespective of either the value or the type of claim.
In this context it is worth mentioning that, according to Art. 339, para 3 CCP, judgments issued by Giudice di Pace ex equo et bono according to article 113, para 2 CCP, may be appealed only for breach of (a) the provisions on the proceeding, (b) constitutional or EU law provisions, or (c) the principles governing the subject matter. Pursuant to Art. 113, para 2 CCP Giudice di Pace shall decide ex equo et bono upon claims whose value does not exceed 1,100 Euro, except claims grounded on contracts entered into by signing a form or template pursuant to Art. 1342 Civil Code (in the latter case, giudice di pace shall decide by applying the rules of law).

6.5.2 Please briefly specify the national appeal procedure, including any requirements to be satisfied for appeals. These might include, but are not limited to, conditions of admissibility, value thresholds, time-limits, the scope of review, and the impact of the appeal on enforcement (provisional enforcement). Please refer to any rules specifically applicable in respect of the claims and relevant procedures outlined above.

As for the Italian system, this subject matter corresponds to that already dealt with in the Report on mutual trust and circulation of judgments. Please refer to para 2.2. of that Report. The rules specifically applicable in respect of claims arising from consumer protection law have already been outlined above (6.5.1.). For a further overview of the Italian appellate procedures please refer to M. De Cristofaro, N. Trocker, Civil Justice in Italy, 2010, p. 226-261. After the publication of this book, the following main innovations of appellate procedures entered into force: (a) summary proceedings were introduced before the courts of second instance, leading to the refusal of appeal if there is no "reasonable prospect of success" (Art. 348-bis Code of Civil Procedure), which has certainly contributed to the decrease of the backlog of cases in the courts of appeal; (b) Art. 342, 345, 350, 351, 352 were slightly amended; (c)

powers of the Supreme Court to quash a judicial decision for defective reasoning were limited (Art. 360, para 1, no 5 Code of Civil Procedure).

Source(s):
(a) as to the legal provisions, see the text.
(b) literature: S. Grossi, C. Pagni, Commentary to the Italian Code of Civil Procedure, Oxford, 2009; M. De Cristofaro, N. Trocker, Civil Justice in Italy, 2010, p. 226-261.

6.6 Enforcement in consumer disputes

6.6.1 If the assessment of a consumer protection issue has not been possible at an earlier stage of the proceedings, is it always possible – either ex officio or if the consumer raises a possible violation of consumer protection law – for this assessment to be undertaken during enforcement proceedings?

Once the decision (judgement, arbitral award) has become res judicata, no defence can be raised which would breach the ne bis in idem principle and only facts (or legal provisions) which have allegedly take place (or entered into force) after the decision has become res judicata can be considered in the opposition against enforcement (opposizione all'esecuzione, Art. 615 CCP).
When a judicial decision is not yet res judicata, a consumer protection issue may be raised and assessed in the appeal proceedings according to the rules enshrined in Art. 345 CCP.

When the enforcement is grounded on a settlement agreement which is an enforceable title, no opposition can be based on mistakes in law (Art. 1969 Civil Code).

6.6.2 In the particular case of consumer protection, if a court examines consumer protection law (either ex officio or on the basis of an argument advanced by the consumer), does national procedural law provide that interim measures should 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 final decision will have full effect?

Yes, see in particular the Code of Civil Procedure, section on the stay of enforcement proceedings, Art. 623 ff. CCP.

Source(s):
(a) as to the legal provisions, see the text.
(b) literature: M. A. Lupoi, in M. De Cristofaro, N. Trocker, Civil Justice in Italy, 2010, p. 262-277.

7. ACTIONS FOR COLLECTIVE REDRESS

As for an article providing an overview of the Italian collective redress mechanism in the field of consumer protection, see Appendix no. 1.

7.1 Injunctive relief, linking individual and collective actions

The case law of the CJEU requires that a person or organisation with a legitimate interest in consumer protection must be able to bring an action before a national court or tribunal in respect of an alleged violation of consumer rights deriving from Union law, either for compensation or for injunctive relief, to preclude the continued violation of consumer rights[215].

7.1.1 If collective proceedings are launched, does national procedural law provide that ongoing individual claims, relating to the same dispute, should be stayed until the collective proceedings are brought to an end? Please specify if this constitutes an obligation on the part of the national judge or if it is at his or her discretion.

Consumers wishing to avail of the collective proceedings under Art. 140-bis Consumer Code can join in the class action through an act called adesione (adhesion). Class members joining the action cannot claim before the court on an individual basis, unless the proceedings terminate without decision on the merits or the class plaintiff reaches a settlement with the defendant and they do not wish to accept it. Class members joining the action do not enjoy procedural powers, nor may they appeal the final decision. However, once they have joined, they are bound by the outcome of the proceedings.

7.1.2 If individual proceedings are stayed, please indicate what the effect of the court or ADR entity's decision in the collective action on those individual proceedings would be, i.e. whether the outcome of the collective action binds the consumer bringing an individual action.

The Court ruling in the collective action under Art. 140-bis is binding upon those individuals who join the collective action. It is made without any prejudice to the single action of those individuals who do not join the collective action.

Source(s):
(a) legal provisions, see the text.
(b) R. Caponi, Italian "Class Action" Suits in the Field of Consumer Protection: 2016 Update, revised and updated version of R. Caponi, "Collective Redress in Europe: Current Developments of 'Class Action' Suits in Italy", in Zeitschrift für Zivilprozess International (ZZPInt), 16 (2011), p. 61-77, in http://globalclassactions.stanford.edu. This text has been provided as Appendix no. 1 to this Report, see below.

8. CONSUMER ALTERNATIVE DISPUTE RESOLUTION

8.1 Consumer disputes before ADR fora

8.1.1 Is ADR mandatory for all parties bringing a claim related to a consumer protection dispute?

[215] This derives from the EU directives. For example, in respect of the UCTD, Art.6(1), Art.7(1) and (2) UCTD, provide that the Member States must ensure 1) that unfair terms are not binding on the consumer and 2) that adequate and effective means exist to prevent the continued use of unfair terms in consumer contracts. The CJEU has held that effective implementation requires that the consequence of the finding of the violation – in the case of a finding of unfairness under the UCTD – is for the term to be declared invalid, and that the effect of this invalidity extends not only to the parties to the action for an injunction but also to those who have concluded a contract with the seller/supplier to which the same terms apply.

Dealing first with the matter of ADR proceedings in general (ie. besides consumer protection disputes), one can currently distinguish four/five major legal frameworks on ADR methods:

(a) contracts aiming at dispute resolution: eg., Art. 1965 ff. Civil Code;

(b) ADR within civil proceedings, eg. Arts. 185, 185-bis, 322 CCP;

(c) Decreto legislativo no 28 of 2010 ("Mediation aimed to settle civil and commercial disputes"), impementing the EC Mediation directive;

(d) Art. 141 ff. Consumer Code: general framework on ADR proceedings in the field of consumer protection, implementing the EU Consumer ADR directive;

(e) Class Action Settlement: Art. 15 d. leg. no 28 of 2010; Art. 140-bis, para 15 Consumer Code.

As a rule ADR is voluntary, but there are some exeptions.

Dealing first with the matter of ADR proceedings in general (ie. besides consumer protection disputes), it is worth mentioning Art. 5, para 1-bis d. leg. no 28 of 2010 ("Mediation aimed to settle civil and commercial disputes"). The origins of d. leg. no 28 of 2010 may be traced back to implementation of the EC Mediation Directive. All the aspects covered by the Directive were transposed: judicial mediation, enforceability of agreements resulting from mediation, confidentiality, effects of mediation on limitation and prescription periods. The new rules apply not only to cross-border disputes, but also to domestic disputes. Mediation has been promoted by the Italian Mediation Act 2010 basically as a means to reduce the courts' workload. D. leg. no 28 of 2010 had provided that mediation had compulsory to be sought prior to the commencement of the proceedings for a significant number of disputes (condominium, property rights, partition of succession or common property, "family agreements", leasing, bailment, damages from car accidents, medical malpractice, libel, insurance, bank and financial contracts). Courts were empowered to enforce this rule by ordering the stay of the proceedings in cases where mediation had not been sought prior to the commencement of the proceedings.
A decision of the Constitutional Court in 2012[216] had declared the new rules unconstitutional, as the Government (enacting them by the Legislative Decree no. 28 of 2010) was not empowered to introduce such a compulsory mediation on the basis of the Parliamentary enabling act no. 69 of 2009). Although the regulation had been declared unconstitutional for "procedural" reasons, the weak reasoning by the Court might have been influenced by the strong opposition of the Bar to the compulsory mediation. Most of the Italian legal practitioners still work in small (or medium) law firms and they are strong against conditions of competition provided by other professionals in the business of dispute resolution, as it is the case of mediation proceedings. Moreover, many commentators had criticised the provisions requiring mediation to be sought compulsorily. They observed that mediation is possible only if both parties are willing to discuss their dispute, to examine the merits of their position in good faith, and ultimately to consider reaching a compromise solution. However, it is worth mentioning the other side of the coin. Often the parties are not aware of the costs of judicial proceedings and their considerable length. Moreover, the parties frequently do not even know that there is the possibility of making use of mediation or other ADR

[216] Corte costituzionale, decision no. 272 of 24th October/6th December 2012.

proceedings The mandatory mediation could spread awareness of alternative methods of dispute resolution and thus propel the willingness of the parties to make use of them to solve their disputes.
After the decision by the Constitutional Court, mandatory mediation, although limited to a first exploratory meeting between parties and mediator, has been reinstated for an experimental period of four years by the Law no. 98 of 2013.
Mandatory mediation pursuant to Art. 5, para. 1 bis d. leg. no. 28 of 2010 does not apply to injunctions proceedings (art. 37 Consumer Code), other judicial actions promoted by Consumers' Associations in the field of consumer protection (Art. 140 Consumer Code) and class actions (Art. 140-bis Consumer Code).
Besides the mandatory mediation ahead of judicial proceedings, a kind of court-annexed-mediation may be ordered by the court in the course of judicial proceedings (Art. 5, para. 2 d. leg. no. 28 of 2010).
Further legal provisions on mandatory provisions are Art. 1, para 11 Law no. 249 of 1997 in the field of electronic communications, and Art. 2, comma 24, lit. b) Law no. 481 of 1995, in the field covered by the Regulatory Authority for Electricity Gas and Water.
According to the d. leg. no. 28 of 2010, mediation proceedings can of course also take place on a voluntary basis. Bar associations may arrange court-annexed-mediation at the courts in first instance. Out-of-court mediation proceedings run by chambers of commerce and other professional associations are also available. During mediation, confidential communications are privileged against compulsory production in judicial proceedings. The legislation provides tax benefits in relation to mediation and conciliation agreements.

8.1.2 Please specify if there are limitations to the use of ADR. These might include the nature of the claim (i.e. whether both individual and collective claims are possible), requirements of representation, time limits, value thresholds, etc.

ADR proceedings may be used in civil and commercial matters except as regards rights and obligations which are not at the parties' disposal (as to mediation, cf. Art. 2 d. leg. no 28 of 2010). As to consumers' rights, they may not be waived (cf. Art. 143 Consumer Code).
Parties need be represented by a lawyer in the mandatory mediation proceedings set out by Art. 5, para 1-bis d. leg. no. 28 of 2010.

The mediation proceedings set out by d. leg. no 28 of 2010 shall be performed within three months.

8.1.3 Can ADR entities issue binding decisions and can they enforce those decisions? If not, please explain how they are enforced.

(a) No.
(b) Where provided for by the law (eg. Art. 12 d. leg. no. 28 of 2010, which is the most important of these provision), settlement agreements may be declared as "enforceable titles" (titoli esecutivi) according to Art. 474, no 1 CCP. Thus, the creditor may institute enforcement proceedings according to the Third Book of Code of Civil Procedure (Art. 474 CCP).

8.1.4 Does national law provide that limitation periods applicable to judicial actions should be suspended while ADR is ongoing?[217]

Yes, cf. Art. 5, para 6 d. leg no. 28 of 2010 and Art. 141-quinquies Consumer Code.

8.1.5 Please specify if national law establishes rules providing for recourse to judicial action following an (unsuccessful) ADR hearing[218].

Yes, cf. Art. 141, para 10 Consumer Code and, as to the mandatory mediation proceedings, Art. 5 para 2-bis d. leg. n. 28 of 2010.

8.1.6 (a) Is there judicial review of decisions and awards made by ADR entities? (b) If so, by which court or tribunal is this oversight made? (c) Is it ordinary or specialised?

(a) Yes;
(b) (c) ordinary court system.
For further details, see below.
As to the judicial review of dispute resolution achieved within the framework of ADR proceedings, a pivotal distinction between settlement agreement, on the one side, and arbitral award, on the other side, should be made. In the former case parties together have control over the content of the act solving the dispute (they determine the terms of settlement agreements, even if a mediator has been engaged and he or she has made a proposal, eg. according to the Art. 10 d. leg. no 28 of 2010) as well as over the binding effect of it (settlements become binding for the parties after they have determined and agreed on the content of them). By contrast, in arbitration (like in judicial proceedings) the parties, as a rule, do not have control over either the content of the act solving the dispute nor over its binding effect. They are bound by the arbitral award, without being able to determine by consent the content of them. This difference explains why settlement agreements may only be challenged under the law of contract (cf., in particular, Art. 1965 ff. Civil Code as to compromise), while arbitral awards may undergo a judicial review on the motion of the losing party (cf. Art. 827 ff. CCP).

Source(s):
(a) legal provisions: see the text.
(b) literature T. Galletto, Adr e controversie dei consumatori: un difficile equilibrio, in www.judicium.it; R. Caponi, "Just Settlement" or "Just About Settlement"? Mediated Agreements: A Comparative Overview of the Basics, in Rabels Zeitschrift für ausländisches und internationales Privatrecht, 2015, pp. 117–141; R. Caponi, Italian Civil Justice System: Most Significant Innovations in the Last Years (2009-2012), in O. G. Chase, E. Hershkoff, L. Silberman, Y. Taniguchi, V. Varano, A. Zuckerman (eds.), Civil Litigation in Comparative Context, Thomson West, Supplement 2012.

[217] The Directive on Consumer ADR provides that "the existence of an effective system for collective claims and easy recourse to ADR should be complementary". Consumer ADR is relevant not only for individual claims but also for collective ones; it can provide consumer with a means to reduce costs and save time.
[218] Per Arts.10-12, Directive on Consumer ADR.

9. THE EXAMINATION OF CONSUMER PROTECTION LAW IN NATIONAL PROCEDURAL LAW: RESPECT FOR THE PRINCIPLES OF THE EFFECTIVENESS AND EQUIVALENCE OF CONSUMER PROTECTION LAW AND EX OFFICIO CONTROL

9.1 The basis of ex officio control of consumer protection law in national law.

9.1.1 Is it clear in the national legal system when consumer protection law should be applied ex officio? Is the ex officio control of consumer protection law established as an obligation or as a (discretionary) power of the judge in national procedural law?

Before dealing with the examination of consumer protection law in Italian procedural law it is worth recalling some elements concerning the substantive law. According to Art. 143, para 1 Consumer Code consumers' rights, as acknowledged by the consumer code, may not be waived. Any agreement in breach of legal provision of the code is null and void. As to the "nullity for protection of consumers", the most extensive regulation is found in Art. 36 Consumer code with regard to the unfair contract terms, where one can find a key provision regarding the ex officio control by the court: "1.Terms considered to be unfair pursuant to Articles 33 and 34 shall be null, while the remainder of the contract shall remain valid./2. Terms shall be null, even if they have been individually negotiated, where they have the purpose or effect of: a) excluding or exempting liability of the professional in the event of the death of the consumer or personal injury to the latter resulting from an act or omission of that professional; b) excluding or exempting the actions of the consumer vis-à-vis the professional or another party in the event of total or partial non-performance or inadequate performance by the professional; c) providing for an extension of the consumer's acceptance to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;/ 3. Nullity shall only operate for the benefit of the consumer and may be ascertained ex officio by the court./ 4. The vendor shall have rights of recovery from the supplier for damage suffered as a result of the declaratory judgment of nullity of the terms declared unfair./ 5. All contractual terms that have the effect of depriving the consumer of the protection given by the present Title by providing that the law applicable to the contract shall be the law of a non-Member country, shall be null, if the contract has a closer connection with the territory of a Member State of the European Union.

In judicial proceedings, general principles (in particular, iura novit curia) apply. Thus the judge has the duty to examine any issue of consumer protection law on its own motion, on the basis of the facts as alleged by the parties. Cf., in this sense, Cass. (Corte di cassazione) 12 March 2014, no 5703, as to the consumer exclusive venue. In the Code of Civil Procedure the iura novit curia-principle is worded by Art. 113, para 1: "When issuing the judgment, the judge shall apply the rules of law unless where the applicable law provisions give him the power to decide ex equo et bono". As already mentioned, pursuant to Art. 113, para 2 CCP Giudice di Pace shall decide ex equo et bono upon claims whose value does not exceed 1,100 Euro, except claims grounded on contracts entered into by signing a form or template pursuant to Art. 1342 Civil Code (in the latter case, giudice di pace shall decide by applying the rules of law). According to Art. 339, para 3 CCP, judgments issued by Giudice di Pace ex equo et bono according to article 113, para 2 CCP, may be appealed for breach of (a) the provisions on the proceeding, (b) constitutional or EU law provisions, or (c) the principles governing the subject matter. By way of Art. 339, para 3 CPC consumer protection law should be applied ex officio even when the judge enjoy the power to decide ex aequo et bono. Of

course, on the application of the law ex officio the parties have the right to be heard by the judge (cf. Art. 183, para 4 and 101, para 2 CCP).

In mediation proceedings according to the decreto legislativo n. 28 of 2010 (quoted above), when the parties are not represented by lawyers, settlement agreements can be declared as "enforceable title" (so as to enable the creditor to institute enforcement proceedings according to Art. 474 ff. CCP), only after court approval, whereby the court has to assess whether the mediated agreement does comply with mandatory rules and public policies, so as to also cover consumer protection law (cf. Art. 12 d. leg. no. 28 of 2010).

9.1.2 If there is an understanding of ex officio control of consumer protection law in the national legal order, what is this control understood to encompass/not cover?

In general terms, the answer should be positive, at least de iure. As to the substantive law, the mandatory character of consumer protection is acknowledged by the Consumer Code (s. especially Art. 36 and 143). As to the procedural law, the application of the law is guided by the iura-novit-curia principle (cf. Art. 113, para 1 CCP, quoted above). This principle covers the application of the law to the facts, as they are alleged by the parties and assessed as existent. As to the availability of evidence, see Art. 115 CCP: "Save where otherwise provided by the applicable law provisions, the judge shall base his decision on the evidence offered by the parties or by the public prosecutor, as well as on the facts which have not been specifically denied by the party who filed his appearance".

9.1.3 Is the party who claims to be a consumer required to establish his or her consumer status, the existence of a consumer contract and that consumer law applies to the dispute? Is this required even if the consumer has no legal representation?

If the consumer is legally represented by a lawyer (cf. Art. 82 CPP), the lawyer is supposed to assert and substantiate the relevant elements of fact and of law in the act instituting the proceedings (this is about the causa-petendi-requirement, cf. Art. 163, no. 4 CCP). Of course, the iura-novit-curia is supposed to be applied, so that the court has the duty to assess of its own motion that a party is a consumer, that the contract is a consumer one and that consumer law applies to the dispute (this is even more the case when the consumer can act before the court without legal representation).

9.1.4 What information is available to judges and dispute resolution facilitators hearing consumer protection disputes? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a consumer protection dispute to be heard and b) for the court to engage in ex officio control?

Courts and dispute resolution facilitators don't have the power to investigate the factual elements of the case of their own motion. The information is provided by the parties. In judicial proceedings, at least theoretically, the public prosecutor (as a 'public' party) may intervene in the cases in which he identifies a public interest at stake (cf. Art. 70, last para CCP). In this case the public prosecutor may file documents and offers evidence, according to Art. 72, para 2 CPP. However, in practice, public prosecutors are overloaded by their role in criminal proceedings and they do not have time to play a pro-active role in civil cases.

9.1.5 Who is responsible for providing this information? If the necessary information is not available to the court (or dispute resolution facilitator), is he or she under an obligation to investigate in order to be able to respond to a relevant consumer protection dimension of the case?

See answer to the preceding question.

9.1.6 Will the court provide the consumer with any assistance in gathering factual information or advancing his legal arguments before the court? Please respond for the situation where: a) the consumer has legal representation and b) the consumer has no legal representation.

See answers to the preceding questions.

Source(s):

(a) legal provisions: see the text;
(b) L. Daniele, Direttive per la tutela dei consumatori e poteri d'ufficio del giudice nazionale, in Diritto dell'Unione Europea, 2011, p. 683 ff.; R. Senigaglia, Il problema del limite al potere del giudice di rilevare d'ufficio la nullità di protezione, in Europa e diritto privato, 2010, p. 835.

9.2 The possibility for ex officio control of EU consumer protection law in dispute resolution proceedings

9.2.1 Is ex officio control of consumer protection law always possible when the procedure involves a full assessment of the claim on its merits?

Yes, according to the already mentioned general rules (iura-novit-curia principle, etc.).

9.2.2 Can ex officio control be exercised even when the procedure does not involve an assessment on the merits?

I'm not sure I have understood the question. However, as for a positive answer, Cass. (Corte di cassazione) 12 March 2014, no 5703, as to the consumer exclusive venue.

9.2.3 Please indicate if, per national procedural law, ex officio control can be exercised at the following stages of the procedure:

	Courts		Other dispute resolution facilitators	
	Possible to exercise ex officio control	Not possible to exercise ex officio control	Possible to exercise ex officio control	Not possible to exercise ex officio control
Ordinary proceedings	X			
Small claims	X			

Payment order	X			
Provisional measures	X			
Proceedings linked to enforcement	N/A			
Enforcement proceedings		X, if the enforceable title is a judgment		
Enforcement of payment order		X		
Enforcement of arbitration award		X		
Enforcement of mortgage		X, if the enforceable title i a judgment		
Enforcement of notarial deed	X			
Appeal proceedings (please specify:)	X			

9.2.4 What does ex officio control encompass in national procedural law?

See the answers to the preceding section.

Source(s):

9.3 Other procedural mechanisms for the equivalent and effective protection of EU consumer law.

9.3.1 Does national procedural law provide that rules of EU consumer law (as well as rules that aim to satisfy EU consumer law objectives) should be understood as having equal standing to national rules of public policy (which is to say, that for the purposes of domestic law, the consumer protection provision is understood to have equal standing to a rule that must be raised ex officio by the national court)?

Yes, the whole Consumer Code, which was adopted in 2005 with the purpose of giving a coherent framework to the wealth of EU directives in the field of consumer protection, inspired by the idea that EU consumer law has an equal standing to national rules of public policy (cf. especially Art. 36 and 143 Cons. Code).

9.3.2 If ex officio control is not possible in certain types of proceedings or at a certain stage of proceedings (or for any other reason), does national procedural law provide for an alternative way of assessing consumer protection law?

The only situation I can imagine similar to those envisaged in the question is the opposition against enforcement, which is promoted on the basis of the enforceable titles pursuant to Art. 474 para 1, no. 2 and no. 3 CCP (private writings with certified signature, bills, and other credit instruments). In these cases the court may undertake, at least de iure, an ex officio control concerning the consumer law protection, going beyond the points of law made by the

opponent (on the other side, if the enforcement is grounded upon a judgment pursuant to Art. 474 para 1, no. 1 CCP, ex officio control should have been performed in the course of the proceedings leading to the judgment.

Source(s):
(a) legal provisions: see the text.
(b) Codice del consumo (a commentary edited by V. Cuffaro), Milano, Giuffrè, 2015.

9.4 Ex officio control in payment order procedures.

9.4.1 What information is available to the judge when a claim for the issuance of a payment order is made? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a claim for the issuance of a payment order to be granted and b) for the court to engage in ex officio control before a payment order is issued?

As already pointed out above (see section on the payment order procedure, Art. 633 ff. CCP) this is about an ex parte proceedings. Thus, the only information available to the court is that provided for by the claimant in the act instituting the proceedings.

The proceedings are instituted by filing a request for a payment order to the competent court, now by way of electronic means (processo civile telematico). The request takes the form of an application (ricorso). Normally, the claim ought to be supported by a kind of documentary evidence (Art. 633, para 1, no. 1 Code of Civil Procedure). However, appropriate documentary evidence is not only the categories of documents regulated in the Civil Code, ie. documents under the seal of a public officer (atti pubblici: Arts. 2699-2701 Civil Code) and private writings (scritture private: Arts. 2702-2704 Civil Code). Conversely, in the payment order proceedings claims may be supported by writings lacking of the requirements regulated in the Civil Code. In particular, may also be suitable evidence certified abstracts of the book-keeping entries (cf. Arts 2214 ff. Civil Code) concerning credits for goods or money supply, and for the services made by professionals to consumers.
Lawyers, court clerks (as well as any person having performed work in connection with judicial proceedings), notaries, and practitioners of any profession or trade having a legally approved tariff further may obtain a payment order even if their claims (concerning fees and refund of costs) are not supported by any documentary evidence (Art. 633, para 1, no. 2 and no. 3). In that case “proof” is offered by a detailed list of services rendered and expense borne prepared by the claimant accompanied by an official opinion as to the value of the services rendered issued by an appropriate professional association (Art. 636 Code of Civil Procedure).

If the judge deems that the motion for payment order is not sufficiently grounded, he orders the court clerk to inform the claimant, inviting him to provide additional evidence. If the claimant does not reply to the judge’s request, or does not withdraw the motion or if the motion cannot be granted, the judge denies the motion (but the denial does not prevent the claimant from re-proposing the claim, also in ordinary proceeding).

9.4.2 What considerations will be assessed ex officio by the court (or other competent authority) before a payment order is issued?

The iura novit curia-principle applies. Thus the judge has the duty to examine any issue of consumer protection law of its own motion.

9.4.3 How is the consumer informed about the claim to issue a payment order against him or her? Does national procedural law make any provision for steps to be taken to ensure that consumers are informed of the claim for the issuance of a payment order so that he or she can contest it?

The alleged debtor is notified after the payment order has been issued. Within a 40 day-deadline he may raise opposition before the judge that issued the payment order.

9.4.4 If the consumer objects to the claim, what is the next step? Do the proceedings continue, in the context of which ex officio control can be exercised? Or are the proceedings transferred to ordinary proceedings for analysis on the merits of the claim?

Once the debtor has raised opposition, the proceedings evolve as ordinary proceedings (cf. art. 645 CCP).

Source(s):
legal provisions: see the text.

European Commission
An evaluation study of the impact of national procedural laws and practices on the equivalence and effectiveness of the procedural protection of consumers under EU law

JUST/2014/RCON/PR/CIVI/0082

National Report – Consumer Protection Strand

Latvia

Inga Kačevska

LATVIA: LEGAL ANALYSIS

1. NATIONAL LEGISLATION IMPLEMENTING EU CONSUMER PROTECTION INSTRUMENTS

EU legislation	Transposing national legislation	Additional notes (e.g. if there is an overlap in application of legislation etc.)
Doorstep Selling Directive 1985/577/EEC	Patērētāju tiesību aizsardzības likums [Consumer Rights Protection Law]. Latvijas Vēstnesis No. 104/105, 01.04.1999 at http://likumi.lv/doc.php?id=23309 (visited 05.04.2016). Noteikumi par līgumu, kas noslēgts ārpus pastāvīgās tirdzniecības vai pakalpojumu sniegšanas vietas [Regulations Regarding the Agreements concluded outside the permanent trading place or the place of provision of the services]	

	Regulations of the Cabinet of Ministers No. 254, Latvijas Vēstnesis No. 106, 02.06.2014 at http://likumi.lv/doc.php?id=266581 (visited 12.05.2016)	
Package Travel Directive 90/314/EEC	Tūrisma likums [Tourism Law]. Latvijas Vēstnesis No. 287, 07.10.1998 at http://likumi.lv/doc.php?id=50026 (visited 05.04.2016) Noteikumi par tūrisma operatora, tūrisma aģenta un klienta tiesībām un pienākumiem, kompleksa tūrisma pakalpojuma sagatavošanas un īstenošanas kārtību, klientam sniedzamo informāciju un naudas drošības garantijas iemaksas kārtību [Regulations Regarding the Rights and Duties of Tourism Operators, Tourism Agents and Clients, the Procedures for the Preparation and Implementation of a Package Tourism Service, the Information to be Provided to a Client and the Procedures for Deposition of Security Guarantee of Money].Regulations of the Cabinet of Ministers No. 353. Latvijas Vēstnesis No. 61, 16.04.2010 at http://likumi.lv/ta/id/208158-noteikumi-par-turisma-operatora-turisma-agenta-un-klienta-tiesibam-un-pienakumiem-kompleksa-turisma-pakalpojuma-sagatavosanas-u... (visited 05.04.2016)	
Unfair Contract Terms Directive 1993/13/EEC	Patērētāju tiesību aizsardzības likums [Consumer Rights Protection Law]. Latvijas Vēstnesis No. 104/105, 01.04.1999 at	

	http://likumi.lv/doc.php?id=23309 (visited 05.04.2016) Reklāmas likums [Law on Advertisement]. Latvijas Vēstnesis Nr. 7, 10.01.2000 at http://likumi.lv/doc.php?id=163 (visited 05.04.2016)	
Distance Selling Directive 1997/7/EC	Patērētāju tiesību aizsardzības likums [Consumer Rights Protection Law]. Latvijas Vēstnesis No. 104/105, 01.04.1999 at http://likumi.lv/doc.php?id=23309 (visited 05.04.2016) Noteikumi par distance līgumu [Regulations On Distance Contract] Regulations of the Cabinet of Ministers No. 255. Latvijs Vēstnesis No.102, 28.05.2014 at http://likumi.lv/ta/id/266462-noteikumi-par-distances-ligumu (visited 05.04.2016)	
Consumer Sales and Guarantees Directive 1999/44/EC	Noteikumi par līgumu, kas noslēgts ārpus pastāvīgās tirdzniecības vai pakalpojuma siegšanas vietas [On Agreement Concluded Outside Permanent Place of Trade or Service]. Regulations of the Cabinet of Ministers No. 254. Latvijas Vēstnesis No. 106, 02.06.2014 at http://likumi.lv/ta/id/266581-noteikumi-par-ligumu-kas-noslegts-arpus-pastavigas-tirdzniecibas-vai-pakalpojumu-sniegsanas-vietas (visited 05.04.2016) Noteikumi par distance līgumu [Regulations On Distance Contract] Regulations of the Cabinet of Ministers No. 255. Latvijs Vēstnesis No.102,	

	28.05.2014 at http://likumi.lv/ta/id/266462-noteikumi-par-distances-ligumu (visited 05.04.2016)	
Unfair Commercial Practices Directive 2005/29/EC	Negodīgas komercprakses aizlieguma likums [Unfair Commercial Practice Prohibition Law]. Latvijas Vēstnesis No. 1999, 12.12.2007 at http://likumi.lv/doc.php?id=167759 (visited 05.04.2016)	
Misleading and Comparative Advertising Directive 2006/114/EC	Reklāmas likums [Law on Advertisement]. Latvijas Vēstnesis Nr. 7, 10.01.2000 at http://likumi.lv/doc.php?id=163 (visited 05.04.2016)	
Consumer Credit Agreement Directive 2008/48/EC	Patērētāju tiesību aizsardzības likums [Consumer Rights Protection Law]. Latvijas Vēstnesis No. 104/105, 01.04.1999 at http://likumi.lv/doc.php?id=23309 (visited 05.04.2016) Noteikumi par patērētāju kreditēšanu [Regulations on Consumer Crediting]. Regulations of the Cabinet of Ministers No. 1219 Latvijas Vēstnesis No. 2, 05.01.2011, at http://likumi.lv/ta/id/223797-noteikumi-par-pateretaja-kreditesanu (visited 05.04.2016)	Stricter regulatory framework in Latvia as concerns the consumer crediting.
Timeshare Protection Directive 2008/122/EC	Patērētāju tiesību aizsardzības likums [Consumer Rights Protection Law]. Latvijas Vēstnesis No. 104/105, 01.04.1999 at http://likumi.lv/doc.php?id=23309 (visited 05.04.2016) Noteikumi par brīvdienu mītnes ilgtermiņa lietošanas tiesību līgumu, brīvdienu pakalpojumu ilgtermiņa līgumu, brīvdienu	

	mītnes ilgtermiņa lietošanas tiesību vai brīvdienu pakalpojumu tālākpārdošanas līgumu un brīvdienu mītnes ilgtermiņa tiesību apmaiņas līgumu [Regulations Regarding Contracts on the Right of Long-term Use of Holiday Accommodations, Long-term Contracts on Holiday Products, Contracts on the Resale of the Right of Long-term Use of Holiday Accommodations or Holiday Products and Contracts for Exchange of Long-term Right to Holiday Accommodations] Regulations of the Cabinet of Ministers No. 136. Latvijas Vēstnesisi No. 30, 23.02.2011 at http://likumi.lv/ta/id/226216-noteikumi-par-brivdienu-mitnes-ilgtermina-lietosanas-tiesibu-ligumu-brivdienu-pakalpojumu-ilgtermina-ligumu-brivdienu-mitnes-il... (visited 05.04.2016)	
Consumer Injunctions Directive 2009/22/EC	Patērētāju tiesību aizsardzības likums [Consumer Rights Protection Law]. Latvijas Vēstnesis No. 104/105, 01.04.1999 at http://likumi.lv/doc.php?id=23309 (visited 05.04.2016) Reklāmas likums [Law on Advertisement]. Latvijas Vēstnesis Nr. 7, 10.01.2000 at http://likumi.lv/doc.php?id=163 (visited 05.04.2016) Negodīgas komercprakses aizlieguma likums [Unfair Commercial Practice Prohibition Law]. Latvijas Vēstnesis No. 1999, 12.12.2007 at http://likumi.lv/doc.php?id=167759 (visited 05.04.2016)	The Directive is fully implemented but the Scope of Directive is not extended.

	Elektrisko plašsaziņas līdzekļu likums [Electronic Mass Media Law]. Latvijas Vēstnesis Nr. 118, 28.07.2010 at http://likumi.lv/doc.php?id=214039 (visited 03.10.2016) Zāļu reklamēšanas kārtība un kārtība, kādā zāļu ražotājs ir tiesīgs nodot ārstiem bezmaksas zāļu paraugus [Cabinet of Ministers' Regulations No. 378 Procedures for Advertising Medicinal Products and Procedures by Which a Medicinal Product Manufacturer is Entitled to Give Free Samples of Medicinal Products to Physicians] Latvijas Vēstnesis Nr. 78, 20.05.2011 at http://likumi.lv/doc.php?id=230392 (visited 03.10.2016).	
Consumer Rights Directive 2011/83/EU	Patērētāju tiesību aizsardzības likums [Consumer Rights Protection Law]. Latvijas Vēstnesis No. 104/105, 01.04.1999 at http://likumi.lv/doc.php?id=23309 (visited 05.04.2016) Noteikumi par līgumu, kas noslēgts ārpus pastāvīgās tirdzniecības vai pakalpojuma nsiegšanas vietas [On Agreement Concluded Outside Permanent Place of Trade or Service]. Regulations of the Cabinet of Ministers No. 254. Latvijas Vēstnesis No. 106, 02.06.2014 at http://likumi.lv/ta/id/266581-noteikumi-par-ligumu-kas-noslegts-arpus-pastavigas-tirdzniecibas-vai-pakalpojumu-sniegsanas-vietas (visited 05.04.2016)	

	Noteikumi par distance līgumu [Regulations On Distance Contract] Regulations of the Cabinet of Ministers No. 255. Latvijs Vēstnesis No.102, 28.05.2014 at http://likumi.lv/ta/id/266462-noteikumi-par-distances-ligumu (visited 05.04.2016)	
ADR for Consumer Disputes Directive 2013/11/EU	Patērētāju tiesību aizsardzības likums [Consumer Rights Protection Law]. Latvijas Vēstnesis No. 104/105, 01.04.1999 at http://likumi.lv/doc.php?id=23309 (visited 05.04.2016) Patērētāju ārpustiesas strīdu risinātāju likums [Out-of-court Consumer Dispute Resolving Law] Latvijas Vēstnesis No. 127, 02.07.2015 at http://likumi.lv/doc.php?id=275063 (visited 05.04.2016)	

Source(s):

1. CONCEPT OF THE CONSUMER

1.1 Please outline the concept of the consumer in national law, indicating whether it is intended to be a uniform concept, whether it has been legislated for and where it can found (i.e. in a legislative provision, governmental guidelines, case law etc.).

"A consumer— a natural person who expresses a wish to purchase, purchases or might purchase, or use goods or a service for a purpose, which is not related to his or her economic or professional activity" (Consumer Rights Protection Law, Article 1(3)).[219] This definition is uniform; it does not cover C2C relationship.

Taking into consideration relevant directives and ECJ practice the concept of "average consumer" is often used in practice of the courts or the Consumer Rights Protection Center. However, it is often difficult to apply the concept of "average consumer" in cases concerning groups of consumers, such as persons of older age. Also the concept of "vulnerable consumers' has been used in the practice, for instance, not only as concerns the persons with serious diseases[220] but also unemployed persons (actively seeking employment) since their income, on average, is below

[219] Patērētāju tiesību aizsardzības likums [Consumer Rights Protection Law], Latvijas Vēstnesis No 104/105, 15.04.1999.

[220] Consumer Rights Protection Centre's decision in the case No E03-REUD-31 dated 13 August 2009. Available in Latvian at http://www.ptac.gov.lv/sites/default/files/bioaktivators.pdf (visited 30.07.2016); Consumer Rights Protection Centre's decision in the case

minimal income determined by the state.[221] There are no publicly available case law or academic writings concerning dual purpose of contracts.

It is interesting that until 2005 in the light of the Consumer Rights Protection Law the consumer was considered not only a natural person, but also legal person in case the latter uses the goods or services for the purpose what is not explicitly connected with its commercial or professional activity. However, in the practice this clause created more problems because before adopting such definition it was not evaluated whether in all trade sectors the legal persons could be treated as weaker party. For example, in some of the cases the legal person claimed to be consumer challenging the unfair terms in the contract with other legal person.[222]

However, currently Article 4^1 of the Consumer Rights Protection Law provides that the provisions of Chapters III (Conformity of Goods and Services to Provisions of a Contract) and IV (Information about the Goods and Services) of the law shall be applicable to such legal regulations, which are established between a trader or a service provider and a consumer, and also any other subject who expresses a wish to purchase goods or services for a purpose which is not related to economic of professional activity of such subject. Thus, there is already protection for businesses, but only in the cases in which they are not acting in their business interests. In such cases if the dispute arises, it shall be settled in the court, not in the Consumer Rights Protection Center.

2. REGULATORY AUTHORITIES COMPETENT FOR CONSUMER PROTECTION ISSUES

2.1 What regulatory authorities, if any, are competent for enforcing consumer protection law? Please identify them, their nature (i.e. whether they are public or private or mixed) and the nature of enforcement.

As determined by the Consumer Rights Protection Law supervision and control of consumer rights protection shall be implemented by the Consumer Rights Protection Centre.[223] The Center is under the Ministry of Economics of the Republic of Latvia. The main functions of the Consumer Rights Protection Centre are inter alia to supervise and control the trade of non-food products and the sector of provision of services; to specify the correct determination of the weights and measures of food and non-food products, as well as the supervision of correct calculation of payment for purchases; to organise and co-ordinate the co-operation of non-government organisations for consumer rights protection and the supervisory and monitoring institutions for consumer rights protection involved in implementation of the State policy; to provide assistance to consumers in resolving conflicts with respect to manufacturers, traders or service providers, to require compliance with the lawful claims of consumers; to assess submissions and complaints received regarding infringements of the laws and regulations regarding consumer rights protection, taking into account the significance of the possible infringements and potential harm to the collective interests of consumers; to provide legal assistance to consumers regarding issues of consumer rights protection; to supervise compliance with consumer rights regarding draft contracts and contracts entered into between consumers and manufacturers, traders or service providers, also the performance of activities provided for in regulatory enactments in order that the manufacturer, trader or service provider make changes in draft contracts or discontinue performance of the contract terms if unfair or ambiguous contract provisions are determined in the draft contract; to supervise unfair commercial practice and advertising, except the field of medicinal products and veterinary

No E03-REUD-53 dated 10 December 2009. Available in Latvian at http://www.ptac.gov.lv/sites/default/files/izraksts.pdf (visited 30.07.2016).

[221] Consumer Rights Protection Centre's decision in the case No E03-KREUD-49 dated 16 September 2010. Available in Latvian at http://www.ptac.gov.lv/sites/default/files/lemums_nr-e03-kreud-49_sia_baltic_euroex_izraksts.pdf (visited 30.07.2016).

[222] Vītoliņa B. Patērētāju tiesību aizsardzības pamati. [Basics of Protection of Consumer Rights]. Rīga, Zvaigzne ABC, 2015, p.21.

[223] Web page: http://www.ptac.gov.lv (visited 18.04.2016).

medicinal products, in order to ensure the observance of consumer rights and economic interests; to issue a special permit (licence) for the provision of consumer credit services (Article 25 of Consumer Rights Protection Law).

Also consumers can voluntarily unite in private associations and those associations for consumer rights protections can together with Consumer Rights Protection Center participate in inspections related to compliance with the quality requirements of the goods to be manufactured and sold and the services to be provided; examine complaints and proposals of consumers, provide necessary assistance to consumers in cases where their rights have been violated; submit statements of claim to a court regarding the protection of consumer rights and interests, and to represent the interests of consumers in court; purchase goods and order services in order to perform comparative examinations of goods, services and manufactured articles; and submit proposals to the Consumer Rights Protection Centre (Articles 22-23 of the Consumer Rights Protection Law). One of such organizations is Latvian Consumer interest protection association.[224]

2.2 Is there a specific venue for this type of enforcement and does this limit the jurisdiction of courts/ADR fora (even if only initially)?

The order of the settling of the consumer disputes has been changed since 1 January 2016. Namely, the Consumer Rights Protection Center does not take any more the biding decision in individual dispute. Initially, the consumer shall turn to seller or service provider for settling the dispute and the seller or service provider shall answer to consumer's complaint within 15 days (Article 26.[1] of the Consumer Rights protection Law). If the service provide or seller do not answer or do not agree with complaint the consumer can turn to 1) Consumer Rights Protection Center to settle the dispute in mediation; 2) out-of-court dispute settlers (Consumer Rights Protection Center, private bodies); 3) the court.

2.3 Can criminal prosecutions be initiated for violations of consumer protection rules? How serious must the infringement be? What are the penalties and sanctions? And might these prosecutions lead to criminal penalties or sanctions? Can individual consumers piggy back on these claims (e.g. via a partie civile method)?

The Criminal Law[225] explicitly provides for three categories of violations when the criminal procedure can be initiated: 1) for failing to ensure the quality or 2) to observe requirements regarding safety of goods and services; 3) violation of trading provisions. For the first two violations if there is substantial harm caused to the health of the consumer, his or her property or the environment, the applicable punishment is imprisonment for up to two years or temporary imprisonment or community service, or a fine (Article 202-203 of the Criminal Law).

The same possible penalty is also for the person who fails to comply with requirements regarding the safety of goods and services set out in regulatory enactments, in technical standards documents or agreements, or in standards approved by relevant authorised State institutions, as a result of which substantial harm is caused to the health of consumers, their property or the environment (Article 203 of the Criminal Law).

The special liability is also prescribed in cases of unfair competition, misleading advertising and unfair commercial practice (Article 211 of the Criminal Law) as well as fraud and misappropriation (Articles 177 and 179 of the Criminal Law).

[224] See.: http://www.pateretajs.lv/.
[225] Krimināllikums [Criminal Law], Latvijas Vēstnesis No 199/200, 08.07.1998 at http://likumi.lv/doc.php?id=88966 (visited 19.04.2016).

The amount of the penalty depends on various factors, for example, whether a fine is as a basic punishment and then whether the criminal offense is classified as a criminal violation (an offence for which the law provides for deprivation of liberty for a term exceeding fifteen days, but not exceeding three months) or a less serious crime (an intentional offence for which this Law provides for deprivation of liberty for a term exceeding three months but not exceeding three years, as well as an offence, which has been committed through negligence and for which this Law provides for deprivation of liberty for a term up to eight years). So the fine may vary from amount of three to fifty minimum monthly wages (currently minimum monthly wage set by the state is 370,- euro).

In practice these rules of the Criminal Law has been applied very, very seldom thus no cases publicly reported.

The consumer as victim can claim compensation within the criminal proceedings but if he/she believes that the entire harm caused to him/ her has not been compensated with this compensation, victim has the right to request the compensation thereof in accordance with the procedure as laid down in the Civil Procedure Law (Article 350 of the Criminal Procedure Law).

2.4 Is there judicial review of decisions of consumer regulatory authorities? If so, by which court is this judicial oversight made? Is the forum an ordinary or a specialised court or tribunal?

The decisions of the Consumer Rights Protection Centre can be appealed to an administrative court in accordance with the Administrative Procedure Law (Article 25(1)[1]) of the Consumer Rights Protection Law).[226] As provide by the law, the decision of the first instance can be appealed to the second instance and then in cassation (Article 105 of the Administrative Procedure Law).

2.5 Does the national legal system provide for a mechanism of cooperation between its national regulatory authorities and those of other Member States?

It is only provided that the Consumer Rights Protection Center shall cooperate with international institutions and non-governmental organisation, which co-operate in the field of consumer rights protection and regulated metrology.[227]

Source(s): see in footnote

3. LEGAL AID

3.1 Is legal aid available to consumers in: a) bringing a claim and b) defending a claim before a court?

A natural person can receive the legal aid only if she/he confirms the status of vulnerable person as the State Ensured Legal Aid Law[228] provides that the state ensured legal aid is provided only for the persons who due to financial or economic situation are unable to ensure the protection of their rights. Namely, the natural persons have the right to request legal aid if: 1) they have obtained the status of a low-income or needy person in accordance with

[226] Administratīvā procesa likums [Administrative Procedure Law], Latvijas Vēstnesis No 164, 14.11.2001 at http://likumi.lv/doc.php?id=55567 (visited 25.04.2016).

[227] Patērētāju tiesību aizsardzības centra nolikums [ByLaws of the Consumer Rights Protection Centre] Regulations of the Cabinet of Ministers No 632, Latvijas Vēstnesis No 125, 08.08.2006 at http://likumi.lv/doc.php?id=141277 (visited: 12.05.2016).

[228] Valsts nodrošinātās juridiskās palīdzības likums [State Ensured Legal Aid Law] Latvijas Vēstnesis No 52, 01.04.2005 at http://likumi.lv/doc.php?id=104831 [visited 04.04.2016].

the procedures specified in the regulatory enactments regarding the recognition of a natural person as a low-income or needy person; or 2) they find themselves suddenly in a situation and material condition which prevents them from ensuring the protection of their rights (due to a natural disaster or force majeure or other circumstances beyond their control), or are on full support of the State or local government (Article 3). Basically, only when the cosumer proves above mentioned, she/he is entitled to sate ensured legal aid.

Each municipalty has different rules on requriments to obtain the status of a low-income or needy person. For instance, in Riga city the low-income person is the person whose income in last three months has been lesss that 320 euro.[229] The person shall apply to the municipality with relevant application and prove the critical economical situation.

The Legal Aid Administration shall be the institution responsible for the provision of legal aid (Article 7 of the State Ensured Legal Aid Law). A person who wishes to receive legal aid shall submit the following: an application for legal aid and the documents certifying the special situation of the person, or a document statement certifying the conformity of the person with the status of a low-income or needy person (Article 22 of the State Ensured Legal Aid Law).

The legal aid can be denied, for example, if the legal aid requested by a person is unfounded, a dispute is settled in a court of arbitration or by using other alternative mechanisms for the settlement of disputes, the costs related to the provision of legal aid are incommensurably high in comparison with the amount of the claim etc (Article 6 of the State Ensured Legal Aid Law).

The consumer can hire any other person to represent him/her in the court in accrodance to general rules of representation.

3.2 For what kinds of disputes and actions is legal aid available? (NB: legal aid might not be available for consumer or contractual disputes but be available instead for a related action, e.g. actions relating to debt, mortgage arrears, eviction etc.)

The Consumer Rights Protection Centre or other competent institution can consult, provide information and provide legal aid to consumer in the case of the dispute with service provider or manufacturer or trader but only if 1) the consumer has initially submit the complaint to the service provider or manufacturer or trader and tried to resolve the disputed and 2) the complaint or submission regarding resolving conflict with a manufacturer, trader or service provider is submitted not later than within a year from the day when the complaint or submission of a consumer is submitted to the manufacturer, trader or service provider; 3) written materials and other proofs substantiating the existence of the conflict and subject of the conflict have been appended to the complaint or submission (Article 25 of the Consumer Rights Protection Law).

The State shall ensure legal aid for the out-of-court and in-the-court settlement of matters of legal nature or for the protection of infringed or contested rights of a person or his or her interests (Article 5 of the State Ensured Legal Aid Law). As concerns extrajudicial legal aid the state shall ensure legal consultations and the drawing up of proceudral documents but during legal proceedings in a civil matter - legal consultations; the drawing up of procedural documents; and representation in court (Artcile 10-11 of the State Ensured Legal Aid Law).

[229] Par ģimenes vai atsevišķi dzīvojošas personas atzīšanu par trūcīgu vai maznodrošinātu un sociālajiem pabalstiem Rīgas pilsētas pašvaldībā [On Family's or Separately Residing Person's acknowledgment as a Low-Income or Needy Person and On Social Allowances in Riga municipality]. Latvijas Vēstnesis No 14, 21.01.2013.

3.3 What requirements must be satisfied for the consumer to be entitled to legal aid? Please specify if there are any additional limitations to its availability.

See above 5.1. There are no special rules concerning the consumers and legal aid; general rules apply.

3.4 What does legal aid encompass? (i.e. (only) general advice, (only) assistance in preparing the case, (only) assistance with negotiation of settlements, (also) representation).

State Ensured Legal Aid Law provides that the State shall ensure the following legal aid during legal proceedings in a civil matter: 1) legal consultations; 2) the drawing up of procedural documents; and 3) representation in court (Article 11).

Law on Out-of-Court Consumers' Dispute Resolution provides that the parties shall not use the services of sworn advocates or lawyers but they can use help of independent specialist (Article 9).

4. COSTS

4.1 What are the costs of different types of procedures before courts? Are there exemptions to the payment of fees and expenses? How can costs be paid?

There are the same court fees for the consumers as for other litigants in civil procedure. There are no separate fees for the consumer collective claims.

In Latvia, costs of adjudication are: the court costs; and costs related to conducting a matter. Court costs are: State fees, office fees, and costs related to adjudicating a matter (Article 33 of the Civil Procedure Law). The consumers, consumer groups or associations have no special or reduced state fees in the court. However, the persons receiving the state ensured legal aid are exempted of paying costs of adjudication. Also a court or a judge, upon considering the material situation of a natural person, shall exempt him or her partly or fully from payment of court expenses into State revenues, as well as postpone payment of court expenses adjudged into State revenues, or divide payment thereof into instalments (Article 43 of the Civil Procedure Law).

Costs related to conducting a matter are: costs related to assistance of advocates, costs related to attending court hearings, costs related to gathering evidence (Article 33 of the Civil Procedure Law). For example, only the expenses of sworn advocates (not another legal or representatives) will be reimbursed. In case the claim does not exceed 8500 euro reimbursable expenses of the advocate shall be in the actual amount but not exceeding 30 % of the satisfied part of the claim (Article 44 of the Civil Procedure Law) etc.

In the most of the cases expenses for witnesses and experts, service of the court documents, transport costs etc. shall be reimbursed in full.[230]

The party submitting the claim shall pay not only the state fees but also costs relating to the service and translation of documents, witnesses and experts (Article 40 of the Civil Procedure Law). Indeed, the party in whose favour a judgment is made shall be adjuged recovery of all court expenses paid by such party, from the opposite party (Article 41 of the Civil Procedure Law).

Overall, this system of costs prevents the consumers, consumer groups and association to litigate the consumer matters as the litigation can be costly and time consuming.

There are special rules as regards the legal costs of the state ensured legal aid but for the vulnerable persons as explained above (not necessary - consumers). Cabinet of Ministers Regulations Regarding the Amount of State-

[230] Ar lietas izskatīšanu saistīto izdevumu aprēķināšanas kārtība [Order For Calculation of Expenses Related to Examination of a Case]. Regulations of the Cabinet of Ministers No 983. Latvijas Vēstnesis No 141, 04.09.2009.

ensured Legal Aid, the Amount of Payment, Reimbursable Expenses and the Procedures for Payment Thereof[231] provides for the specific amounts to be paid for particular legal services. For example, the state shall pay for provision of a legal consultation – 20 euro per hour, for drawing up a statement of claim, an application for initiation of proceedings, a creditor's claim in insolvency proceedings, a counterclaim, an ancillary complaint or a settlement – 35 euro per hour, representing in the court hearing – 30 ,46 euro per hour etc. The state shall cover the expenses for the legal consultation for maximum of five hours per matter (Article 9). Other expenses, such as travel, can be reimbursed in accordance with states set limits.

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Court fees	- Claim up to 2134 euro – 15% from the amount claimed but not less than 71,14 euro - claim from 2135 euro to 7114 euro – 320,10 euro plus 4% of the amount claimed exceeding 2134%	See column to the right	Claim from 7115 euro to 28'457 euro- 519,30 euro plus 3,2% of the amount claimed exceeding 7114 euro etc.			
Court expenses						
Exemptions						

Source(s): Article 34 and 39 of Civil Procedure Law

5. STANDING AND REPRESENTATION IN CONSUMER DISPUTES

5.1 Does national law limit the standing of the individual consumer in respect of the claim that can be made and the forum before which it can be brought?

[231] Noteikumi par alsts nodrošinātās juridiskās palīdzības apjomu, samaksas apmēru, atlīdzināmajiem izdevumiem un to izmaksu kārtību. Latvijas Vēstnesis Nr. 206, 31.12.2009.

See also Section 4.2.

Any consumer dispute shall be settled amicably. However, if it is not possible, initially, a consumer shall submit a claim directly **to the trader or service provider** in respect of the non-conformity of goods or service with the provisions of a contract **within two years** of the day of purchase of the goods or receipt of the services and within two months from the moment when non-conformity was established (Article 27 of the Consumer Rights Protection Law). Only if the service provider or seller does not agree with claim, the consumer may choose to settle the dispute 1) in mediation organized by the Consumer Rights Protection Center; 2) in out-of-court dispute settlement proceedings organized by the Consumer Rights Protection Center or private parties; 2) in the court. Latter shall leave a claim without examination if the consumer- claimant has not compiled with the preliminary procedures for examination extrajudicially provided for the relevant category of case (Article 219 of the Civil Procedure Law). There are no special procedural rules for the consumer dispute litigation, ordinary procedure apply.

Latvia recently adopted the Law on Out-of-Court Consumers' Dispute Resolution providing that out-of-court dispute resolution can be conducted by the Commission established under the Consumer Rights Protection Center or by private parties that are included in the special list of the Consumer Rights Protection Center. This Law does not apply in cases when claims are submitted against the consumer; the disputes are among sellers and service providers etc. (Article 3 of the Law on Out-of-Court Consumers' Dispute Resolution) as well as if the dispute is less than 20 euros and more than 14.000 euros (Article 26.^{3} of the Consumer Rights Protection Law). Out-of-court dispute resolution shall be denied if the consumer had not initially addressed the seller or service provider, the dispute has been or is resolved by other out-of-court dispute institution or the court or at least one year has passed from the moment when consumer has submitted the complaint to seller or service provider. Also the out-of-court dispute resolution institution can deny to review the dispute if it is immaterial or small etc. (Article 5 of the Law on Out-of-Court Consumers' Dispute Resolution)

Law on Out-of-Court Consumers' Dispute Resolution provides that the parties shall not use the services of sworn advocates or lawyers but they can use help of independent specialist (Article 9).

5.2 Other than individual consumers, who or which bodies have standing in consumer protection disputes and for what types of claim? If the action is not brought by the individual consumer, what requirements of representation must be satisfied?

If a violation of the consumer rights has been determined, which affects group consumer interests (collective interests of consumers) and it may cause losses or harm to consumers, as well as to a particular consumer, the Consumer Rights Protection Centre, having evaluated the nature and essence of the violation, as well as other aspects, is entitled to carry out one or several following activities: 1) to propose that the manufacturer, trader or service provider makes a commitment in writing to rectify the violation within the specified time period; 2) to take a decision, by which the manufacturer, trader or service provider is required to cease the violation, and to perform specific activities in order to rectify the impact thereof and which determine the time period for the implementation of such activities; 3) to publish the decision taken either fully or partially on the home page of the Consumer Rights Protection Centre and in the newspaper Latvijas Vēstnesis [the official Gazette of the Government of Latvia] (the costs associated with the publication shall be covered by the manufacturer, trader or service provider). The Consumer Rights Protection Center performs the above mentioned activities upon its own initiative, on the basis of a submission of the association for consumer rights protection or competent institution (Article 25 of the Consumer Rights Protection Law).

The Consumer Rights Protection Law provides that also associations for consumer rights have the rights to submit statements of claim to a court regarding the protection of consumer rights and interests; and to represent the interests of consumers in court; however, there as mentioned above there are no special procedures to litigate the consumer dispute in the court and there are no special/ reduced rules as regards the court costs.

5.3 If a consumer wants to bring or defend an action relating to a consumer protection dispute, is there a legal (or otherwise formal) requirement that he or she has legal representation? Please specify for both judicial and ADR fora and the bodies, associations or authorities that can provide this representation.

As indicated in section 7.1. of this report in out-of-court dispute resolution process the parties shall not be represented by the sworn advocates or other lawyers (Article 9 of the Consumers Out-of-court Dispute Resolution) but have rights to invite third party to represent them, for example, representative of the consumer association. Obviously, the legislator's intention was to keep this dispute resolution process as simplified as possible.

In the court proceedings the parties can hire representative according to the general rules of representation. Representation of natural person shall be notarized, except for the power of attorney issued for the sworn advocate (Article 85 of the Civil Procedure Law). Only sworn advocates, not other representatives' costs can be reimbursed within civil procedure.

Source(s):

6. ACTIONS BEFORE COURTS

6.1 Jurisdiction and competence of the courts in consumer disputes: General structure and special procedures aimed at protecting consumers

6.1.1 Are ordinary courts competent to hear such claims? Is there also a specialised tribunal for consumer protection disputes?

As explained above, only if a trader has not replied to the consumer's complaint, the dispute can be brought to the court of general jurisdiction. There are no special tribunals to hear consumer disputes.

In ordinary proceedings, the statement of claim can be submitted in the first instance - city court. Within 20 days from the day of announcement of the judgment of the first instance the parties may submit the appeal – in regional court. In the appeal the party shall inter alia show to which extent the judgment is being appealed, how the error in judgment is manifested. If the party submits the new evidence, he/she shall explain why this evidence had not been submitted to the first instance court (Article 416 of the Civil Procedure Law). Appeal's subject matter or basis of an action may not be amended to include new claims that were not brought in the first instance (Article 418 of the Civil Procedure Law).

Only in limited cases the second instance's judgment can be appealed in the cassation instance – the Supreme Court. Namely, the Supreme Court may not accept the cassation case if the appellate court has decided in accordance with the previous case law of the Supreme Court or the case has no relevance in establishing new judicature (Article 464.[1] of the Civil Procedure Law).

Till 1 January 2016 the individual disputes were heard by the Consumer Rights Protection Center. The decisions by the Center could be appealed in the administrative court. As the administrative procedure was very lengthy process as the case could also go through three court instances and the court had to apply principle of objective

investigation, it was decided to introduce, firstly, out-of court dispute resolution, secondly, taking into account the civil character of such disputes, now the consumer disputes are litigated as civil case in the ordinary courts. Still, it is questionable whether the court is so accessible for the consumers.

6.1.2 Which courts are competent to hear consumer protection disputes at first instance and in appeals? Please specify the court, in light of the value of the claim (and identify any other factors that are relevant in allocation jurisdiction).

See also above Sections 2.2.1,8.2., 8.3., 8.4.

There is no specialized procedure for the consumer; ordinary or particular (such as small claims) rules of procedure apply. The city courts act as first instance court, the regional – as appellate and the Supreme Court as cassation.

The consumer contract can stipulate the competent court to hear the dispute and there are no explicit rules restricting such choice except that the jurisdiction clause cannot restrict to hear the dispute only in arbitration (Article 6 of the Consumer Rights Protection Law).

In the most of the ordinary cases the statement of claim is brought in the first instance court in the territory where there is declared address or place of residence of the natural person or legal address of the legal person. In ordinary proceedings upon receipt of the statement of claim and attachments, within seven days the court shall decide whether to accept it or not or leave it without proceeding. In the first instance the case is heard by the one judge.

As explained above a district (city) court judgment, which has not enter into lawful effect, may be appealed, in accordance with appellate procedure, to the relevant regional court (Article 414 of the Civil procedure Law). The case is heard by the three judge's collegium.

6.1.3 What is the nature of the procedure at first instance, e.g. is it a simplified or a summary procedure, and is there an assessment of the merits? Please specify in light of the value of the claim (and identify any other factors that are relevant in allocating jurisdiction).

In the consumer disputes the parties may chose ordinary procedure and national small claims procedure as well as enforcement of obligation according to warning procedures but only if the requirements of its applicability are satisfied.

All procedures are explained below.

6.1.4 Please identify the formal requirements that must be satisfied for a consumer dispute to be heard before a court. These might include time limits applicable to the filing of the action/defence, representation requirements etc.

As indicated above, the consumer shall settle the dispute amicably out-of-court, only in case when it is not possible the dispute shall be settled in the court. The trader can sue the consumer without exhausting the out-of-court proceedings.

There are no special requirements; ordinary court procedure applies (see also information above).

If a consumer is respondent then a statement of claim and attached documents are sent to the respondent without delay and the respondent can submit written explanations within 15-30 days from the day the documents were sent (Article 148 of the Civil Procedure Law).

Counter claim can be submitted up to the moment of the end of examination on the merits in a first instance court (Article 136 of the Civil Procedure Law). Any additional evidences shall be submitted at least 14 days before the hearing (Article 93 of the Civil Procedure Law).

The Consumer Protection Associations can represent the consumer in the court in order to protect his/her interests (Article 23 of the Consumer Rights Protection Law), however, there are no special rules of this representation or reduced state fees in the Civil Procedure Law and ordinary representation rules apply – the natural persons shall issue notarized power of attorney to the representative (other than sworn advocate). The authorisation of representative may be expressed by way of an oral submission in the court what is recorded in the minutes of the court hearing (Article 82 of the Civil Procedure Law).

6.1.5 In respect of the claims and relevant procedures available in the national legal system, what kind of relief might be available in consumer protection disputes? (monetary remedies, injunctions, skimming off etc.)?

As explained above, the consumer disputes shall be settled out-of-court. For instance, a consumer is entitled to submit a claim to the trader or service provider in respect of the non-conformity of goods or service with the provisions of a contract within two years of the day of purchase of the goods or receipt of the services. The consumer shall submit a claim to the trader or service provider within two months from the day when he or she has discovered the non-conformity of the goods or service with the provisions of a contract. In the cases of sold non-confirming goods the consumer can request to cure or exchange the goods (if it is reasonable and possible), decrease the price of the goods or terminate agreement and receive monies paid for the goods. The consumer may request to compensate the damages and to pay contractual penalty. The rectification and exchange of the goods shall be free of charge (Article 27 and 28 of the Consumer Rights protection Law).

In cases of providing non-confirming service, the consumer, for whom a service not conforming to the provisions of a contract has been provided, is entitled firstly to request that the service provider rectifies non-conformity with the provisions of the contract of the provided service free of charge. If it is not possible, the consumer is entitled to request that the service provider reduces the price of the service or repays the amount of money paid for the service accordingly (Article 29 of the Consumer Rights Protection Law).

If the trader has not delivered the goods or services on time, the consumer shall provide for reasonable and additional period of time but if the trader fails to fulfil the obligations within this additional time the consumer can terminate the agreement (Article 30 of the Consumer Rights protection Law).

As concerns the court proceedings, in case due to unfair term in a contract the consumer suffers damages, the consumer is entitled to initiate litigation against trader in the court and request the damages (Article 10.[1] of the Consumer Rights Protection Law).

Claims of consumers for compensation for losses and recovery of penalty shall be settled in the court in accordance with the Civil Procedure Law, taking into account that the consumer does not have specific knowledge regarding the characteristics and description of the goods purchased or the services provided (Article 32 of the Consumer Rights Protection Law).

6.1.6 Please provide a brief overview of the role of parties and judges in civil proceedings generally (e.g. with reference to the principle of party disposition, the obligation of parties to make and prove factual allegations and to make and provide legal arguments, the possible role of the court). This overview should be brief; these issues will be dealt with in more detail in the questions that follow.

The parties shall exercise their procedural rights by way of adversial proceedings (Article 10 of the Civil Procedure Law) providing that the parties also gather and submit the evidences, provide explanations and perform other procedural actions as set by the law. Each party shall prove the facts upon which they base their claims and objections and each party shall prove that their claims or objections are well-founded (Article 93 of the Civil Procedure Law).

The court shall determine the circumstances of a case by examining the evidences submitted by the parties (Article 8 of the Civil Procedure Law). However, if the court admits that in respect of any of the facts there are no evidence submit, the court shall notify the parties thereof and, if necessary, set a time period within which evidence is to be submitted (Article 93 of the Civil Procedure Law) but this initiative shall be used only to discover the truth in the case at hand or to fasten the litigation.[232]

6.2 Small claims

6.2.1 Does a small claims procedure exist in the Member State? If yes, is it a specialised or simplified procedure?

There is national and alternative small claims procedure available in Latvia in accordance with chapter 30.[3] of the Civil Procedure Law. It is rather specialised procedure but with elements of simplified procedure.

6.2.2 What are the value thresholds for claims brought under the small claims procedure? Moreover, are there any other factors that shape the use of the small claims procedure (including the nature of the claim, the area of consumer protection law into which the claim falls etc.)?

The total amount of the main debt should not exceed 2100 euro. In addition the claimant may add interests or legal penalties what is not considered as the main debt thus the total amount of the claim may be higher than set threshold. The procedure is permissible only in claims for recovery of money or recovery of the maintenance (Article 250.[19] of the Civil Procedure Law) thus it is not specially designed only for the consumer disputes. Normally these cases are reviewed in writing without holding the hearing.

There is an interesting case of the Supreme Court as regards the material scope of the national small claims procedure. Natural person K.K. submitted small claim for recovery of unpaid salary in the amount of around 427 EUR against its former employee on 10 October 2013. The procedure did not involve any international element. The first instance court refused to accept the claim, as employment disputes are not within the scope of the national small claims procedure. K.K. submitted an ancillary complaint to the second instance and in its decision dated 2 January 2014 the court agreed with the decision of the first instance. Additionally, the second instance referred to the previous case law of the Supreme Court and an article in the legal journal stating that the national small claims procedure incorporated in the Civil Procedure Law is based on the European Small Claims Regulation. Therefore, in the view of the court, the employment law was not within the scope of the Civil Procedure Law, as Article 2(2) (f) of the Regulation excludes those matters. In this case the Supreme Court as the cassation instance referred to Article 1 of the European Small Claims Regulation, stating that the European Small Claims Procedure shall be available to litigants as an alternative to the procedure existing under the laws of the Member State. A very similar provision is included in the regulatory framework of the national small claims procedure. In the case at hand judges indicated that

[232] Civilprocesa likuma komentāri. I daļa (1.-28. nodaļa) [Commentaries of the Civil Procedure Law. Part I (chapters 1-28)]. Ed. Prof. Torgāns K., TNA, 2012,.p.52.

this principle that European procedures concerning cross-border cases shall not be applied to the national similar procedures emerges from the judicature of the CJEU, namely, the Banco Español case[233]. Consequently, the national small claims procedure included in the Civil Procedure Law does not contain the restrictions that disputes arising out of employment relations are outside the scope of this procedure; therefore, the Supreme Court receded from its previous judicature and overturned the second instance's decision and sent the case for new review.[234]

6.2.3 What forms must be completed to raise the application? Who assists the consumer in completing these forms?

A statement of a small claim shall be completed in conformity with the form approved by the Cabinet of Ministers.[235] In the standard form the claimant shall identify parties and all their information, the subject of the claim, calculation of the claim (main debt, interest, or contractual penalty), court fees, and considerations supporting the claims and evidences, claims, legal basis, opinion regarding the hearing. In practice there might be difficulties to fill the box regarding the legal norms that supports the claim but there is opinion that the court has no obligation to find the applicable law and it has right to decline the claim if it is not legally supported.[236] The written evidences shall be attached to the form.

There are no rules for special assistance to consumers to complete such forms.

6.2.4 How can an application for a small claim be made (e.g. online, by post or in person)?

In accordance with the Civil Procedure Law any claims, including small claims, shall be submitted only by post or in person.

6.2.5 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

The application for a small claim shall be accompanied with all evidences proving the claim. Moreover, the claimant shall give legal grounds, including the reference to particular law, of his/her claim. In practice this requirements causes some problems as persons without legal background cannot precisely assess the legal grounds of their claim.

Formerly it was provided that if the claimant or respondent indicates that he/she wants to participate in the hearing of the small claim, the court had no choice and had to conduct the hearing, however, recent changes in force as from 01 January 2016 provide that the parties shall reason such request but it is upon the discretion of the judge whether the hearing is held or not. Moreover, the name of the chapter 30.[3] of the Civil Procedure Law was changed

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[233] CJEU judgment in case No C-618/10 Banco Español de Crédito SA v Joaquín Calderón Camino dated 14 June 2012, para. 79.

[234] Supreme Court's of Republic of Latvia decision in the case No SKC-2113/2014 dated 29 April 2014 at: http://at.gov.lv/files/uploads/files/archive/department1/2014/SKC-2113-2014.docx (seen 16.05.2016). See also: Kačevska I., Rudevska B., Buka A., Dambergs M., Fillers A. Research "The Court of Justice of the European Union and the impact of its case law in the area of civil justice on national judicial and administrative authorities" (Latvia, Hungary, Germany, Sweden and the United Kingdom). Ministry of Justice of Latvia, European Commission, 2015 at http://www.kacevska.lv/upload/Petijums_anglu.pdf (visited 05.04.2016), p. 96.

[235] Noteikumi par maza apmēra prasībā izmantojamām veidlapām [On Forms to be Used in the Small Claims]. Regulations of the Cabinet of Ministers No 783, Latvijas Vēstnesis No 164, 18.10.2011 at http://likumi.lv/ta/id/237849-noteikumi-par-maza-apmera-prasiba-izmantojamam-veidlapam (visited 25.04.2016).

[236] Civilprocesa likuma komentāri. II daļa (29.-60.[1] nodaļa) [Commentaries of the Civil Procedure Law. Part II (chapters 29.-60.[1])]. Ed. Prof. Torgāns K., TNA, 2012, p.175.

from “Cases Regarding Claims for Small Amounts” to “Revision of the Special Category Cases in Written Procedure” thus stressing that such claims shall be heard without hearing. However, if the hearing is denied the reasons shall be given in judgment (Article 250.[26] of the Civil Procedure Law).

6.2.6 Are the costs of the successful party reimbursed?

The general rules of the reimbursement of the costs are applied and the successful party is reimbursed (Article 41 of the Civil Procedure Law), .i.e. the party in whose favour a judgment is made shall be adjudged recovery of all court expenses paid by such party, from the opposite party. If a claim has been satisfied in part, the recovery of amounts shall be adjudged to the plaintiff in proportion to the extent of the claims accepted by the court, whereas the defendant shall be reimbursed in proportion to the part of the claims dismissed in the action. There are no special fee rules for consumers.

6.3 Claims other than small claims

6.3.1 If a consumer protection dispute does not qualify as a small claim, what other procedures are available? What are the value thresholds and other factors determining the use of such procedures?

There are no special court procedures for the consumer protection disputes.

Ordinary procedure is described in Section 8.1 of this report.

For all parties procedure so called “Undisputed Enforcement of Obligations” is available. Most likely this procedure will be chosen against consumer if the dispute falls within the scope of the application of this procedure. Namely, undisputed enforcement of obligation is permitted: 1) pursuant to agreements regarding obligations which are secured with a public pledge; 2) pursuant to notarially certified term agreements or term agreements of equivalent juridical effect regarding monetary payments or return of movable property mortgage or a commercial pledge; 3) pursuant to term lease or rental of property agreements, which are notarially certified or entered in a Land Register and which provide that the lessee or tenant has an obligation, due to expiry of the term, to vacate or deliver the leased or rented property (except an apartment) and to pay the lease or rental payments; 4) pursuant to a protested promissory note (Article 400 of the Civil Procedure Law). The application shall be submitted to the Land Registry of the Regional Court (Article 403 of the Civil Procedure Law).

It should be noted that term “consumer” appears single time in the Civil Procedure Law and it is in this part. Namely, Article 405 of the law provides that if the judge finds that the application for the Undisputed enforcement is unfounded or the amount of penalty indicated in the application is disproportionate to the principal debt, or the document to be enforced contains unfair contractual provisions violating consumer rights, he or she shall take a decision on dismissal thereof.

There is also procedure called ”Enfrocement of Obligations according to warning procedures” as explained below.

There are also special rules for specific categories of the cases, such as insolvency, establishment of legal facts, adoption etc but those rules does not concern consumer rights.

6.3.2 How can such claims be made? Please specify if the applications can be made online, or by post or in person.

There is no special form for the application but it shall include information as regards the obligation due and pursuant which document the creditor requests undisputed enforcement. The application only can be submitted in person or by post.

6.3.3 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

The application for the Undisputed Enforcement of Obligations shall be accompanied by the document to be enforced and the evidence that the debtor has been given a warning about initiation of the procedure. This application is decided by the judge within seven days from the day of submitting the application on the basis of application and documents, without notifying the parties. Namely, there is no classical adversial procedure and the judge decides the case based on the submitted documents of the claimant.

If the judge decides that the application is grounded, the decision becomes in force immediately and it has force of executive document (Article 404-405 of the Civil Procedure Law). If a debtor is of the opinion that the claim of the creditor is, on the merits, unfounded he or she may, within six months from the date when the true copy of the decision is sent, bring a statement of claim against the creditor to dispute the claim (Article 406 of the Civil Procedure Law). Basically, the respondent shall use the ordinary procedure and initiate new case.

6.3.4 Are the costs of the successful party reimbursed?

The general rules of the reimbursement of the costs are applied and the successful party is reimbursed (Article 41 of the Civil Procedure Law). I.e. the party in whose favour a judgment is made shall be adjudged recovery of all court expenses paid by such party, from the opposite party. If a claim has been satisfied in part, the recovery of amounts shall be adjudged to the plaintiff in proportion to the extent of the claims accepted by the court, whereas the defendant shall be reimbursed in proportion to the part of the claims dismissed in the action. There are no special rules for consumers.

6.4 Claims for the issuance of a payment order

6.4.1 Does an order for payment procedure exist in the national system? Is it a simplified procedure?

Indeed, part 50.[1] of the Civil Procedure Law provides for similar national procedure “Enforcement of Obligations According to Warning Procedures”. It can be regarded as simplified procedure.

6.4.2 Which authorities or courts are competent to hear claims for the issuance of payment orders?

The application shall be submitted to the Land Register Office of the Regional Court. The Land Register offices initially were established for the immovable properties to be entered and the rights corroborated in the Land

Register.[237] Due to the court overload now the judges of Land Register are also competent to examine applications for undisputed compulsory execution, the procedure for warning of undisputed compulsory execution of obligations and the confirmation of statements of auction.[238]

6.4.3 Are there any formal requirements that must be satisfied for the application for the issuance of a payment order to be made (e.g. standard forms, representation by a lawyer, the detail of description required, the need to provide written evidence etc.)?

This procedure can be applied in limited cases. Enforcement of Obligations according to the warning procedure is permitted only in 1) payment obligations which are justified by a document and which is due; 2) payment obligations arising out of sales of goods or provision of services which are justified by a document and for which the performance day is not specified. This procedure cannot be applied if: 1) for payments related to unperformed correlative performance; 2) if the declared place of residence or place of residence of the debtor is not known; 3) if the declared place of residence, place of residence or legal address of the debtor is not in the Republic of Latvia; 4) if the requested contractual penalty exceeds the amount of the principal debt; 5) if the requested interest exceeds the amount of the principal debt; 6) if the obligation exceeds 15'000 euro (Article 406.[1] of the Civil Procedure Law).

There are standard forms, including the application.[239] The application shall inter alia identify the document proving the obligation due but no other evidence shall be attached. The applicant shall certify that he/she has given true information and he/she is informed about criminal liability if untrue application is submitted (Article 406.[3] of the Civil Procedure Law). The court shall not review the validity or base of the claim.

6.4.4 What information is generally available to the authority or court when a claim for the issuance of a payment order is made?

See also Section 8.4.3.

The main information is provided in the application. Taking into consideration that such procedure cannot be used if debtor is not with domicile in Latvia, most likely the judge checks the Register of the Declared Addresses in order to find whether the declared address of the respondent is in Latvia.

6.4.5 What opportunity is available for a defence/statement of opposition to be advanced? How should this be done and what is its effect? Please specify if the means of advancing a defence differ depending on the value of the claim and the court dealing with it.

Before the application is brought to the court in accordance with Enforcement of Obligations According to the Warning Procedure, the applicant shall submit the warning (objections) to the defendant. The proof that such

[237] Zemesgrāmatu Likums [Law on Land Register]. Likumu un noteikumu krātuve No 38, 30.12.1937, Article 1 at http://likumi.lv/doc.php?id=60460 (visisted 26.04.2016).

[238] Likums par tiesu varu [Law on Judicial Power]. Ziņotājs No 1, 14.01.1993, Article 30 at http://likumi.lv/doc.php?id=62847 (visited 26.04.2016).

[239] Noteikumi par saistību piespiedu izpildīšanas brīdinājuma kārtībā izmantojamām veidlapām [On Use of Forms for Enforcement of Obligations according to the warning procedure] Regulations of the Cabinet of Ministers No 792, Latvijas Vēstnesis No 118, 28.07.2009, at http://likumi.lv/doc.php?id=195361 (visited 26.04.2016).

warning has been received by the defendant shall be attached to the application to the court (Article 404 of the Civil Procedure Law). Thus the defendant is informed before the submission of the application about the possible claim.

During the procedure the judge fills the standard form of the warning and it shall be serviced to the debtor upon the signature. The debtor shall pay the debt or reply with the standard form within 14 days from receipt of the warning. If the debtor denies the claim or pays, the judge dismisses the case (Article 406.[7] of the Civil Procedure Law).

If issuance of the warning to a debtor is not possible, the judge shall take a decision on leaving the application without examination (Article 406.[1] of the Civil Procedure Law).

The decision of the court shall become in force immediately and it is the writ of execution (Article 405 of the Civil Procedure Law).

If a debtor is of the opinion that the claim of the creditor is, on the merits, unfounded he or she may, within six months from the date when the true copy of the decision is sent, bring an action against the creditor to dispute the claim. The action shall be brought in such court, which examined the application (Article 406 of the Civil Procedure Law). Basically, the defendant shall commence the new proceedings according with ordinary claims procedure.

6.4.6 What is the effect if the claim is uncontested, i.e. if there is a lack of defence/statement of opposition?

If issuance of the warning to a debtor is not possible, the judge shall take a decision on leaving the application without examination. A true copy of the decision shall be sent to the applicant (Article 406.[6] of the Civil Procedure Law). However, if the debtor has received the warning but if the debtor has failed to submit objections within the time period, the judge shall, within seven days from the date of expiry of the time period for objections, take a decision on enforcement of the payment obligation specified in the application and recovery of court expenses. A true copy of the decision shall be sent to the applicant and to the debtor within three days (Article 406.[9] of the Civil Procedure Law).

If the claim is dismissed the applicant can commence ordinary court proceedings and the state fees shall be set off (Article 406.[8] of the Civil Procedure Law).

6.4.7 If the defendant is a consumer, and he or she does not respond to or raise an objection to the issuance of the payment order, does the authority dealing with the claim for payment order proceedings have the power to examine any issue of consumer protection law of its own motion before treating the action as usual?

Only of the judge finds that the application is unfounded or the amount of contractual penalty indicated in the application is disproportionate to the principal debt, or the document to be enforced contains unfair contractual provisions violating consumer rights, judge shall take a decision on dismissal of the case (Article 405 of the Civil Procedure Law).

6.4.8 What steps must the pursuer take in order to obtain an enforceable decision?

Section 8.4.3 et seq

6.4.9 Is this decision final, or can the defendant appeal against it?

The decision of the judge shall come into effect immediately; it shall have the effect of an enforcement document (Article 406.[9] of the Civil Procedure Law) and shall be enforced in accordance with ordinary provisions of enforcement of the court judgments.

However, within three months from the moment the decision is sent to the debtor can commence so called "revolutionary" claim in accordance with ordinary claim procedure (Article 406.[10] of the Civil Procedure Law). Namely, it is not appeal but commencement of new proceedings by submitting the "classic" statement of claim and paying standard court fee. Theoretically, in this process the consumer as respondent can raise the consumer law issues.

6.5 Appeals in consumer disputes

6.5.1 Are appeals possible in all consumer disputes? Please specify for small claims and other types of claims.

As indicated above there are no special procedural rules for the consumer disputes, also concerning appeals.

In the ordinary procedure appeal of the first instance court shall be submitted to the regional courts – the second instance within 20 days from the day when a tru copy of the judgment was served to the party (Article 415 of the Civil Procedure Law). In the statement of appeal the party shall indicate inter alia how the error in the first instance court is manifested (Article 416 of the Civil Procedure Law). The State fee for a notice of appeal shall be paid in conformity with the rate to be paid upon submitting a statement of claim (an application in a special adjudication procedure case), but in regard to disputes of a financial nature – with the rate calculated in conformity with the disputed amount in a first instance court. Namely, the court fee could be rather hight for the consumer. For example, if the claim is up to 2134 euro, the appellant shall pay 15% from this sum but not less than 71,14 euro (Article 34 of the Civil Procedure Law).

It shall be noted that historically the appeal for the small claims had to be submitted directly to the Supreme Court, however, taking into consideration objections of the Supreme Court's judges, now the appeal shall be submitted to the second – appellate instance court (Article 250.[27] of the Civil Procedure Law) only in cases where 1) the first instance court has wrongly applied or interpreted material law and it has led to wrongful review of the case; 2) the first instance court has breached the procedural law and it has led to wrongful review of the case; 3) the first instance court has wrongfully found the facts of the case or wrongfully examined the evidences or has given wrong legal evaluation and it has led to wrongful review of the case (Article 440.[2] of the Civil Procedure law). There is no cassation available for such procedure.

	In all disputes	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Nature of the procedure at 1st instance	Ordinary procedure	Small claims (only up to 2100 euro)	Enforcement of Obligations According to Warning Procedure (up to 15000	Undisputed Enforcement of Obligations (no monetary limit)			

			euros)				
2nd instance – appeal to?	2nd instance courts (regional courts)	2nd instances courts (Regional courts)	N/A	N/A			
3rd instance – appeal to?	Cassation (Supreme Court)	N/A	N/A	N/A			

There are no special rules as regards collective claims.

6.5.2 Please briefly specify the national appeal procedure, including any requirements to be satisfied for appeals. These might include, but are not limited to, conditions of admissibility, value thresholds, time-limits, the scope of review, and the impact of the appeal on enforcement (provisional enforcement). Please refer to any rules specifically applicable in respect of the claims and relevant procedures outlined above.

As indicated above only domestic small claims procedure allows for the appeal, however, for the procedures such as Enforcement of Obligations According to Warning Procedure and Undisputed Enforcement of Obligations appeal is not available; the debtors shall initiate ordinary claim's procedure.

As concerns ordinary appeal procedure, the appeal for the judgment of the first instance shall be submitted to the second instance within 20 days of announcement of the judgment (Article 415 of the Civil Procedure Law). In appeal the subject matter or basis of an action may not be amended to include new claims as were not brought in the first instance court (Article 418 of the Civil Procedure Law). If new evidences are submitted the party shall additionally explain why this evidence has not been submitted to the first instance court (Article 416 of the Civil Procedure Law).

Pursuant to an application of a participant in the case and taking into account the financial state of the parties or other significant circumstances, an appellate instance court is entitled to postpone the enforcement of a judgment or divide it into time periods, and to vary the form and procedures for its enforcement (Article 438 of the Civil Procedure Law).

6.6 Enforcement in consumer disputes

The CJEU has identified a number of situations concerning the enforcement stage of consumer protection disputes in which the effective and equivalent protection of EU consumer rights may be affected by national procedural rules. These include – in relation to the effectiveness and equivalency of the protection afforded by the Unfair Contract Terms Directive, for example – the enforcement of arbitration awards, the enforcement stage in the recovery of consumer credit and the enforcement of mortgages, which often links together declaratory and enforcement proceedings. As such, we focus on these situations below. However, other problematic situations exist. Please indicate if additional (and potentially problematic) situations are identifiable in your national legal system.

Moreover, if possible, please provide the reference/citation of an article that provides an overview of the way in which enforcement operates in relation to consumer protection disputes within your national legal system.

6.6.1 If the assessment of a consumer protection issue has not been possible at an earlier stage of the proceedings, is it always possible – either ex officio (see section 10 below) or if the consumer raises a possible violation of consumer protection law – for this assessment to be undertaken during enforcement proceedings?

If the judgment becomes in force and it has to be enforced without delay. Final judgment cannot be reviewed or otherwise raise any objections regarding the consumer rights violations at the enforcement stage. Re-examination of the case is possible if there are newly-discovered circumstances such as 1) essential circumstances of a case which existed at the time of examination of the proceedings but were not and could not have been known to the applicant, the acknowledgement of a norm of law applied in the adjudication of the case as not in conformity with a higher norm of law in lawful effect the party has not complied with it, the winning party can forward the case for the compulsory execution to the sworn court executor and a decision of the European Court of Human Rights or other international or transnational in such case from which it arises that court proceedings should be commenced anew (Article 479 of the Civil Procedure Law).

Application can be submitted by any of the party within three months from the day when the circumstances forming a basis for re-examination of the case have been ascertain but the application cannot be submitted if more than 10 years have elapsed since the judgment or the decision has come into effect (Article 478 of the Civil Procedure Law). Application is reviewed in written procedure and if a court determines that there are newly discovered circumstances, it shall revoke the judgment in full or as to part thereof and refer the case for it to be re-examined in a first instance court (Article 482 of the Civil Procedure Law).

Also prosecutor general may submit the protest to the Supreme Court if there is breach of significant substantive or procedural norms of law provided that not more than 10 years have elapsed since the decision entered into effect (Article 483 of the Civil Procedure Law). This protest shall be submitted if the case had been reviewed only in the first instance and it had not been appealed due to reasons independent of the parties or the infringement of the rights of state or municipality or of scuh persos as were not parties in the case (Article 484 of the Civil Procedure Law).

As concerns the assessment during enforcement proceedings the most relevant cases would be as concerns the enforcement of arbitral awards. Many disputes with consumers were resolved in arbitration until 2006.[240] Then, with the implementation of the Unfair Terms in Consumer Contracts Directive and in line with European Court of Justice practice,[241] the arbitration clause of many consumer contracts was acknowledged as unfair by the court. Accordingly, such disputes cannot be handled via arbitration anymore. However, if despite that, such dispute has been heard by the arbitration and the consumer has not object to the jurisdiction of the arbitration court, the court will assess ex officio whether the writ of execution (national equivalent of exequatur) shall be issued for arbitral award.[242] It is also confirmed by the Constitutional Court.[243] But the problem lies on the fact that there is no set aside of arbitral awards

[240] Kačevska I. A Strict Regulatory Framework for SMS Credit and Its Effectiveness in Latvia. In Learning from Neighbours' Experiences: Property Law and Consumer Credit. Juridica Journal, University of Tartu Press, 2014, p.143.

[241] ECJ Judgment in the case No C-168/05 Elisa María Mostaza Claro v. Centro Móvil Milenium SL dated 26 October 2006 ; ECJ Judgment in the case No C-40/08 Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira dated 6 October 2009.

[242] Kačevska I., Torgāns K. Šķīrējtiesas nolēmuma izpilde [Execution of Arbitral Awards] in Civilprocesa likuma komentāri.III.daļa (61.-86.nodaļa) [Commentaries of the Civil Procedure Law. Part III (Sections 61.-86.)] (Ed. Torgāns K), TNA, 2014, p. 157.

[243] Constitutional Court of the Republic of Latvia case No 2004-10-10 On Compliance of Para 3 of Section 132 (1) and Para 6 of Section 223 of Civil Procedure Law with Article 92 of the Satversme of the Republic of Latvia at http://www.satv.tiesa.gov.lv/wp-content/uploads/2004/05/2004-10-01_Spriedums_ENG.pdf (visited 16.05.2016).

procedure introduced in Latvia thus even if the court will not issue writ of execution the arbitral award will still be in force as there is no mechanism to acknowledge it void in the civil procedure.[244]

6.6.2 In the particular case of consumer protection, if a court examines consumer protection law (either ex officio or on the basis of an argument advanced by the consumer), does national procedural law provide that interim measures should 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 final decision will have full effect?

There are no special interim measures provided for the consumer disputes; ordinary procedure applies. If a debtor is of the opinion that the claim of the creditor in undisputed enforcement of obligations' procedure or in notary's issued executive act is unfounded he/she may within six months bring an action against the creditor to dispute the claim. In bringing action, the debtor may request to stay the enforcement and to grant interim measures if the creditor's claim already is satisfied (Article 406 of the Civil Procedure Law).

As a general rule, the interested party may request to secure the claim if there is a reason to believe that enforcement of the court judgment in the case may become problematic or impossible (Article 137 of the Civil Procedure Law). The party may chose different means of securing claim, including arrest of movable property and monetary funds of the defendant; prohibition for the defendant from performing certain actions, attachment of real estate etc. (Article 139 of the Civil Procedure Law).

7. ACTIONS FOR COLLECTIVE REDRESS

The CJEU has considered that situations in which individual and collective actions are in some way linked are those in which the effective and equivalent protection of EU consumer rights may be affected by national procedural rules. As such, we will focus on these situations. However, other problematic situations exist. Please indicate if additional (and potentially problematic) situations are identifiable in your national legal system.

Moreover, if possible, please provide the reference/citation of an article that provides an overview of the way in which the collective redress mechanism operates within your national legal system.

7.1 Injunctive relief, linking individual and collective actions

The case law of the CJEU requires that a person or organisation with a legitimate interest in consumer protection must be able to bring an action before a national court or tribunal in respect of an alleged violation of consumer rights deriving from Union law, either for compensation or for injunctive relief, to preclude the continued violation of consumer rights[245].

[244] Kačevska I., Torgāns K. Šķīrējtiesas nolēmuma izpilde [Execution of Arbitral Awards] in Civilprocesa likuma komentāri.III.daļa (61.-86.nodaļa) [Commentaries of the Civil Procedure Law. Part III (Sections 61.-86.)] (Ed. Torgāns K), TNA, 2014, p. 164.

[245] This derives from the EU directives. For example, in respect of the UCTD, Art.6(1), Art.7(1) and (2) UCTD, provide that the Member States must ensure 1) that unfair terms are not binding on the consumer and 2) that adequate and effective means exist to prevent the continued use of unfair terms in consumer contracts. The CJEU has held that effective implementation requires that the consequence of the finding of the violation – in the case of a finding of unfairness under the UCTD – is for the term to be declared invalid, and that the effect of

7.1.1 If collective proceedings are launched, does national procedural law provide that ongoing individual claims, relating to the same dispute, should be stayed until the collective proceedings are brought to an end? Please specify if this constitutes an obligation on the part of the national judge or if it is at his or her discretion.

There are no special rules for the collective proceedings **in the courts**. Also ordinary civil procedure rules do not specify detailed rules to collective proceedings. It is stated that the statement of claim can be submitted by several claimants against one respondent or one claimant- against several respondents and several claimants against several respondents but each co-claimant and co-respondents acts independently in relation to the other party and other co-parties. Co-parties can transfer the conducing of the case to one of the co-parties or to one joint-representative (Article 75 of the Civil Procedure Law).

Also it is possible to merge the cases if there are before a court more than one similarly constituted cases, involving the same parties, or cases where on claimant is bringing an action against several respondents, or several plaintiffs are bringing actions against on and the same respondent but only providing that merging favours quicker and a more correct examination of the case (Article 134 of the Civil Procedure Law).

As already indicated, protecting the consumers rights and interests protected by the law the Consumer Rights Protection Center shall have the right to submit the statement of claims in the court (Article 25) as well as consumer association can submit the statement of the claims to the courts to protect consumer rights and interest (Article 23 of the Consumer Rights Protection Law), however, the Civil Procedure Law does not specifically prescribe any particularities regarding consumer claims or collective proceedings.

7.1.2 If individual proceedings are stayed, please indicate what the effect of the court or ADR entity's decision in the collective action on those individual proceedings would be, i.e. whether the outcome of the collective action binds the consumer bringing an individual action.

There are no special rules for the collective proceedings in the courts. A judgment concerns only particular parties.

It should be mentioned that in accordance with Article 25(8) of the Consumer Rights Protection Law, if a violation of the consumer rights has been determined, which affects group consumer interests (collective interests of consumers) and it may cause losses or harm to consumers, as well as to a particular consumer, the Consumer Rights Protection Center, having evaluated the nature and essence of the violation, as well as other aspects, is entitled to carry out one or several following activities: 1) to propose that the manufacturer, trader or service provider makes a commitment in writing to rectify the violation within the specified time period; 2) to take a decision, by which the manufacturer, trader or service provider is required to cease the violation, and to perform specific activities in order to rectify the impact thereof and which determine the time period for the implementation of such activities; 3) to publish the decision taken either fully or partially on the home page of the Consumer Rights Protection Centre and in the newspaper Latvijas Vēstnesis [the official Gazette of the Government of Latvia] (the costs associated with the publication shall be covered by the manufacturer, trader or service provider).

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this invalidity extends not only to the parties to the action for an injunction but also to those who have concluded a contract with the seller/supplier to which the same terms apply.

8. CONSUMER ALTERNATIVE DISPUTE RESOLUTION

The questions below focus on some key concerns relating to consumer disputes before ADR fora. If possible, please provide the reference/citation of an article that provides a general overview of the way in which consumer alternative dispute resolution operates within your national legal system.

8.1 Consumer disputes before ADR fora

8.1.1 Is ADR mandatory for all parties bringing a claim related to a consumer protection dispute?

Mediation Law came into force in 18 June 2014.[246] This law provides for the mediation to be used for the settlement of disputes in pre-trial proceedings as well as in judicial proceedings (Article 2). There are no particular rules for the consumer mediation thought. The Law is based on the Directive 2008/52/EC, however, it is also applicable not only to cross-border mediations and also purely domestic, including non-commercial and criminal cases. Mediation is voluntary (Article 3).

New order for settlement of consumer disputes out-of-court was introduced as from 1 January 2016.[247] The consumer shall settled the dispute amicably with seller or service provider and only in case latter does not answer or do not agree to the claims, the consumer may choose to settle the dispute 1) in mediation conducted in Consumer Rights Protection Center; 2) out-of-court proceedings; 3) in the court (Article 26.[1] of the Consumers Rights Protection Law). Trader has obligation to participate in out-of –court proceedings.

8.1.2 Please specify if there are limitations to the use of ADR. These might include the nature of the claim (i.e. whether both individual and collective claims are possible), requirements of representation, time limits, value thresholds, etc.

There are no limitations as concerns the nature of the claim to be brought to **mediation**. The parties shall conclude mediation contract orally or in writing. If the parties have included a mediation clause in a contract or have entered into a separate mediation contract, a claim in case of a dispute may be brought to a court after: 1) one party has informed the other party in writing regarding withdrawal from the agreement included in the contract; 2) one party has rejected the proposal of the other party to settle disputes by using mediation; 3) a mediation has been terminated without agreement and the mediator has issued a certification regarding the outcome of mediation (Article 8 of the Mediation Law).

A proposal of one party to settle disputes by using mediation shall be considered as rejected if the consent by the other party to the use of mediation has not been received. Unless the parties have agreed otherwise, the time period for providing a consent shall be 30 days from the day of sending a proposal for mediation (Article 9 of the Mediation Law). No special rules as regards the representation or value thresholds are set by this law.

In out-of-court proceedings the service provider or seller shall respond to the consumer's complaint within 15 days. If the answer is not given or it is negative, the consumer may choose procedures as describe in the section 10.1.1.

Out-of court proceedings shall **not** be applied in the cases where the dispute is small and unimportant, the dispute is less than 20 euros or more than 14'000 euros, the dispute concerns health care, legal services or damages, debt collection etc. (Article 26.[3] of the Consumers Rights Protection Law).

[246] Mediācijas likums. Latvijas Vēstnesis Nr. 108, 04.06.2014.
[247] Patērētāju ārpustiesas strīdu risinātāju likums. Latvijas Vēstnesis Nr. 127, 02.07.2015.

The Consumer Rights Protection Center keeps the list of out-of-court dispute settlers. In order to be included in this list the legal or natural person shall provide such information as costs of dispute settlement, length, dispute types to be accepted and whether the decision is binding or not. For example, the Consumer Rights Protection Center has its own Dispute Resolution Commission.

When Consumers Rights Protection Center's Commission receives application for the dispute settlement in accordance with the out-of-court procedure, the Center informs service provider about the application within 3 days and the seller or service provider shall reply within 15 days to the complain of the consumer. The dispute shall be resolved within 90 days from the day when all documents necessary for taking the decision is received (Article 26.[3], 26.[7] of the Consumers Rights Protection Law, Law on Out-of Court Consumers' Dispute Resolution).

If a violation of the consumer rights has been determined, which affects group consumer interests (**collective interests of consumers**) and it may cause losses or harm to consumers, as well as to a particular consumer, Consumer Rights Protection Center, having evaluated the nature and essence of the violation, as well as other aspects, is entitled inter alia to propose that the manufacturer, trader or service provider makes a commitment in writing to rectify the violation within the specified time period (Article 25(8)). Center has published 16 such written commitments in 2015.

8.1.3 Can ADR entities issue binding decisions and can they enforce those decisions? If not, please explain how they are enforced.

The parties shall fulfil an agreement reached through mediation voluntarily and within a mutually co-ordinated time period, if such is provided for (Article 14 of Mediation Law). Mediation Law does not directly provides for the remedies if reached agreement is not executed. However, the parties may agree to make the agreement as notarial deed (Article 107.[1] of the Notarial Law) then this deed can be compulsory executed by the court executor. As result of the judicial mediation the parties may conclude settlement that can be approved by the judge (Article 226 of the Civil Procedure Law and Article 18 of the Mediation Law) and such settlement can be also compulsory executed. In all other cases the parties can initiate the ordinary court proceedings for the enforcement of the agreement or deciding the case.

Each out-of-court dispute centres included in the list of the Consumer Rights Protection Center shall identify whether the decision in the dispute is biding or not. For instance, the decision of the Out-of–Court Commission established under Consumers Rights Protection Center is **recommendatory** and it cannot be set aside or appealed within this commission. The decision shall be executed voluntarily within 30 days from the moment it became in force. The Consumers Rights Protection Center may publish information regarding non-enforcement of the decision and after request of seller or service provider this information may be accompanied by the topical information on dispute resolution in the court (Article 26.[12] of the Consumers Rights Protection Law).

If the party does not agree with the solution of the dispute and if the consumer withdraws from the out-of-court dispute resolution proceedings, the dispute can be resolved by the court (Article 12 of the Law on Out-of Court Consumers' Dispute Resolution).

8.1.4 Does national law provide that limitation periods applicable to judicial actions should be suspended while ADR is ongoing?[248]

[248] The Directive on Consumer ADR provides that "the existence of an effective system for collective claims and easy recourse to ADR should be complementary". Consumer ADR is relevant not only for individual claims but also for collective ones; it can provide consumer with a means to reduce costs and save time.

As concerns mediation procedure if after the commencement of the court proceedings the parties have agreed on mediation, the judge sets the term for length of mediation what should not be longer than 6 months. The parties shall have obligation to submit evidence about the result of mediation within 7 days after mediation (Article 4.[1] of the Civil Procedure Law). The running of the time period for bringing of an action laid down in laws and regulations shall be suspended at the time when a proposal for mediation is expressed. The running of the time period for bringing of an action shall renew from the day when a proposal for mediation is rejected or mediation in accordance with this Law is terminated (Article 11 of the Mediation Law).

The out-of-court proceedings cannot be initiated if the dispute is settled or already settled by other out-of-court dispute resolution institution or the court (Article 5 of the Law on Out-of Court Consumers' Dispute Resolution). The court shall leave the claim without examination if the claimant has not complied with the out-of-court dispute settlement procedure provided for the relevant category of the cases or has not, prior submitted the claim, resolved the dispute with the defendant as provided by the law (Article 219 of the Civil Procedure Law). Thus if the consumer has not turned to the seller or service provider first, then the court has right to leave the claim without consideration in accordance with the general rule of civil procedure.

8.1.5 Please specify if national law establishes rules providing for recourse to judicial action following an (unsuccessful) ADR hearing[249].

In case of mediation recourse to judicial action always remains an option, according to the general rules.

The decision of the Commission under the Consumer Rights Protection Center shall be voluntary executed within 30 days, however, if it is not then the dispute resolution can continue in the court (Article 26.[12] of the Consumers Rights Protection Law).

See also Section 10.1.3.

8.1.6 Is there judicial review of decisions and awards made by ADR entities? If so, by which court or tribunal is this oversight made? Is it ordinary or specialised?

Each out-of-court dispute centres included in the list of the Consumer Rights Protection Center shall identify whether the decision in the dispute is biding or not. If the decision is not binding it can be reviewed by the ordinary court.

9. THE EXAMINATION OF CONSUMER PROTECTION LAW IN NATIONAL PROCEDURAL LAW: RESPECT FOR THE PRINCIPLES OF THE EFFECTIVENESS AND EQUIVALENCE OF CONSUMER PROTECTION LAW AND EX OFFICIO CONTROL

The rules of national civil procedure that could potentially affect, and indeed undermine, the effective and equivalent protection of consumer rights are various. They include but are not limited to the rules and practices of ordinary and specialised judicial procedures, rules and practices of consumer ADR, rules applicable to special types of procedure (e.g. payment order procedures), the jurisdiction of individual courts (the courts that have jurisdiction over consumer disputes), the formal requirements that have to be satisfied to bring a case, the types of legal action that are available, the need for parties to be represented, the time-limits applicable to procedural steps of the action, rules on the taking

[249] Per Arts.10-12, Directive on Consumer ADR.

of evidence, the possibility (or lack) to consider certain issues at specific stages of the procedure, the right to appeal and review, and rules relating to the enforcement or judgements and other enforcement titles (e.g. arbitration awards, notarial deeds, including mortgages).

On the basis of the principles of equivalence and effectiveness, the CJEU has established certain requirements for the procedural protection of consumer rights deriving from EU law. In particular (and especially in relation to the protection afforded to consumers via the Unfair Contract Terms Directive[250]), the CJEU has established an obligation on national judges (and potentially other dispute resolution facilitators) to apply consumer law of their own motion (that is, ex officio), when they have available the legal and factual elements necessary for this task. Ex officio control is one type of procedural mechanism that can be utilised within the national system to promote the effective and equivalent protection of consumer law. Thus, other mechanisms of procedure within your national legal system should be highlighted and discussed where relevant. The following questions should be answered in respect of both judicial and if relevant, alternative dispute resolution.

9.1 The basis of ex officio control of consumer protection law in national law

9.1.1 Is it clear in the national legal system when consumer protection law should be applied ex officio? Is the ex officio control of consumer protection law established as an obligation or as a (discretionary) power of the judge in national procedural law?

The Consumer Rights Protection Law provides that upon resolving a dispute or carrying out other procedural actions arising from the contract entered into between a manufacturer, trader or service provider and a consumer, **the court** shall evaluate the terms of the contract and for the resolution of the dispute shall not apply the unfair terms provided for in the contract in relation to the consumer (Article 6). The ex officio evaluation is confirmed by the case law[251] and judgment of the Constitutional Court.[252]

9.1.2 If there is an understanding of ex officio control of consumer protection law in the national legal, what is this control understood to encompass/not cover?

The court practice is becoming more inclined to invoke unfairness of the contractual terms ex officio. This is due to two factors. Firstly, the line of reasoning has been approved by the Supreme Court.[253] Previously judges hesitated or were not informed about this principle, now there is an established case law by the Supreme Court. For example, the Supreme Court, interpreting Article 6(11) of the Consumer Rights Protection Law[254], established that the court

[250] However, the CJEU has recognised that ex officio control – and other procedural requirements, that might in themselves (or indeed, in their absence), impact the effective enforcement of consumer law – arise across the EU's consumer protection directives.

[251] For example, Supreme Court of the Republic of Latvia case No SKC-98/2015 dated 21 September 2015 at http://at.gov.lv/files/uploads/files/archive/department1/2015/SKC-98-2015.doc (visited 16.05.2016).

[252] Constitutional Court of the Republic of Latvia case No 2004-10-10 On Compliance of Para 3 of Section 132 (1) and Para 6 of Section 223 of Civil Procedure Law with Article 92 of the Satversme of the Republic of Latvia at http://www.satv.tiesa.gov.lv/wp-content/uploads/2004/05/2004-10-01_Spriedums_ENG.pdf (visited 16.05.2016).

[253] E.g., Civil Cases Department of the Supreme Court's judgment in the case No SKC – 94/2016 dated 3 March 2016. In this case, the Supreme Court ruled that a court must invoke invalidity of the unfair terms *ex officio*. In order to justify this conclusion, the Supreme Court referred to four cases by the CJEU: Court of Justice case No C-618/10 dated 14 June 2012; Court of Justice case No C-472/11 dated 21 February 2013; Court of Justice case No C-488/2011 dated 30 May 2013; Court of Justice case No C-169/2014 dated 17 July 2014.

[254] "Upon resolving a dispute or carrying out other procedural actions arising from the contract entered into between a manufacturer, trader or service provider and a consumer, the court shall evaluate the terms of the contract and for the resolution of the dispute shall not apply the unfair terms provided for in the contract in relation to the consumer".

shall evaluate the compliance of the terms in consumer contracts to requirements of good faith and shall not apply unfair terms, even if the consumer had challenged the term.[255] The same was confirmed by the Constitutional Court.[256] Secondly, judges become more active participants of judicial training programs in consumer law. Ex officio control concerns only unfair terms included in the consumer contract.

9.1.3 Is the party who claims to be a consumer required to establish his or her consumer status, the existence of a consumer contract and that consumer law applies to the dispute? Is this required even if the consumer has no legal representation?

The court assess whether at the case at hand there is consumer, consumer contract and unfair term. Judicature suggests that even if the consumer does not claim the relevant rule in the consumer contract is not valid, the court shall not apply this rule if it is unfair from the position of the consumer. Moreover, the court despites the opinion of the Consumer Protection Rights Center, shall have the right on its own motion to evaluate the consumer contract taking into account equality and good faith.[257]

Ex officio control is not invoked if the consumer has legal representative.

9.1.4 What information is available to judges and dispute resolution facilitators hearing consumer protection disputes? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a consumer protection dispute to be heard and b) for the court to engage in ex officio control?

The general rules of civil procedure apply. The parties shall prove their case and submit the evidences. In some cases the court may request the parties submit the evidences if the judge admits that no evidences submitted in respect of any of the facts of the case (Article 93 of the Civil Procedure Law). Also special rule is included in Consumer Rights Protection Law providing that f a manufacturer, trader or service provider maintains that the contract terms have been mutually discussed with the consumer, it is his duty to prove it (Article 6).

9.1.5 Who is responsible for providing this information? If the necessary information is not available to the court (or dispute resolution facilitator), is he or she under an obligation to investigate in order to be able to respond to a relevant consumer protection dimension of the case?

See Section 11.1.4.

General rule provides that each party shall prove the facts upon which they base their claims or objections. If it is not possible for one party submit the evidence, upon his/her request the court can require such evidence from other party (Article 93 of the Civil Procedure Law). This norm gives the judge the right (but not obligation) to show his/her own initiative but it is only to find the truth in the case if in other ways it is not possible. The judge also is entitled to require but only upon justified request of a party of the case, documentary evidence from state, municipal, natural or legal persons (Article 112 of the Civil Procedure Law). Only this general rule of civil procedure allows

[255] Civil Cases Department of the Supreme Court's judgment in the case No SKC-98/2015 dated 21 September 2015 at http://at.gov.lv/files/uploads/files/archive/department1/2015/SKC-98-2015.doc (visited 14.07.2016).

[256] The Constitutional Court's of the Republic of Latvia judgment in the case No 2004-10-01 dated 17 January 2005, para. 9.3.2 at http://www.satv.tiesa.gov.lv/wp-content/uploads/2004/05/2004-10-01_Spriedums_ENG.pdf (visited 11.07.2016).

[257] Supreme Court of the Republic of Latvia case No SKC-108/2013 dated 12 March 2013 at http://at.gov.lv/files/uploads/files/archive/department1/2013/108-skc-2013.doc (visited 16.05.2016).

kind of ex officio factual investigations by judges as the civil procedure does not give right to judge to conduct the objective investigation as for example, in administrative procedure.

9.1.6 Will the court provide the consumer with any assistance in gathering factual information or advancing his legal arguments before the court? Please respond for the situation where: a) the consumer has legal representation and b) the consumer has no legal representation.

The court can require party submit the relevant evidences as explained in Sections 11.1.4 and 11.1.5 of this report. The court shall legally assess the case only in the judgment. If the consumer is represented by the sworn advocate it is presumed that the legal advice shall be qualitative[258] thus it is presumed that legal representative gather all factual information.

9.2 The possibility for ex officio control of EU consumer protection law in dispute resolution proceedings

9.2.1 Is ex officio control of consumer protection law always possible when the procedure involves a full assessment of the claim on its merits?

The Consumer Rights Protection Law provides that upon resolving a dispute or carrying out other procedural actions arising from the contract entered into between a manufacturer, trader or service provider and a consumer, **the court** shall evaluate the terms of the contract and for the resolution of the dispute shall not apply the unfair terms provided for in the contract in relation to the consumer (Article 6). However, in Civil Procedure Law ex officio control in consumer disputes explicitly is provided only in the Undisputed Enforcement of Obligations procedure as explained above. Namely, Article 405 of the Civil Procedure Law provides that if the judge finds that the application is unfounded or the amount of penalty indicated in the application is disproportionate to the principal debt, or the document to be enforced contains unfair contractual provisions violating consumer rights, he or she shall take a decision on dismissal thereof. This is exception of the general rule that the judge does not evaluate the merits of the case.[259]

9.2.2 Can ex officio control be exercised even when the procedure does not involve an assessment on the merits?

There are no set aside or annulment of arbitral awards provided in Latvian law. However, the court shall not issue the writ of execution if the consumer dispute is resolved by arbitration and previously the arbitration clause had not been negotiated between the parties (Article 536 of the Civil Procedure Law), but in that case the arbitral award is still valid but not enforceable in Latvia.

The law does not provide for the special rules thus the general rules applies. For example, the court is not evaluating the merits of the case in the procedure of Enforcement of Obligations According to Warning Procedure, however, the judge shall not initiate this procedure if the contractual penalty or interest is higher than the main debt.

[258] The Constitutional Court's of the Republic of Latvia judgment in the case No 2013-04-01 On Compliance of Para 1 of Section 33(3) of Civil Procedure Law with Article 91 and Article 92 of the Satversme at http://www.satv.tiesa.gov.lv/wp-content/uploads/2013/03/2013-04-01_Spriedums_ENG.pdf (visited 16.05.2016).

[259] Civilprocesa likuma komentāri. II daļa (29.-60.[1] nodaļa) [Commentaries of the Civil Procedure Law. Part II (chapters 29.-60.[1])]. Ed. Prof. Torgāns K., TNA, 2012, p.662.

9.2.3 Please indicate if, per national procedural law, ex officio control can be exercised at the following stages of the procedure:

	Courts		Other dispute resolution facilitators	
	Possible to exercise ex officio control	Not possible to exercise ex officio control	Possible to exercise ex officio control	Not possible to exercise ex officio control
Ordinary proceedings	x			x
Small claims	x			x
Payment order		partially		x
Provisional measures		x		x
Proceedings linked to enforcement		partially		x
Enforcement proceedings				
- Enforcement of payment order		partially		x
- Enforcement of arbitration award	x			x
- Enforcement of mortgage	x			x
- Enforcement of notarial deed	x			x
Appeal proceedings (please specify:)	x			x

9.2.4 What does ex officio control encompass in national procedural law?

In the civil procedure law encompass limited and minimum ex officio control of judges and the Civil Procedure Law expressis verbis does not grant procedural rights for the judges to perform objective investigation of the case. The parties shall prove their case but the judge; however, shall clarify the circumstances of a case, examining evidences which have been obtained in accordance with the law (Article 8 of the Civil Procedure Law). This norm provides for the limited activity of the judge to examine the evidences on his own initiative.

As indicated above the scope of the ex officio control is defined in the Consumer Rights Protection Law stating that upon resolving a dispute or carrying out other procedural actions arising from the contract entered into between a manufacturer, trader or service provider and a consumer, the court shall evaluate the terms of the contract and for the resolution of the dispute shall not apply the unfair terms provided for in the contract in relation to the consumer (Article 6). There are no much legal writings as regards the content of this norm. The commentaries to the Article 405 of the Civil Procedure Law state that "this norm does not entrust the judge to eliminate all and any threat of the consumer rights"[260]. It could be understood that the judge only evaluates unfairness of such norm on which the creditor bases its claim.

There is also case law in applying this norm; however, it is not very deeply interpreted. In one case the Supreme Court stated that one should also evaluate the Article 1 of the Civil Law stating that rights shall be exercised and

[260] Civilprocesa likuma komentāri. II daļa (29.-60.[1] nodaļa) [Commentaries of the Civil Procedure Law. Part II (chapters 29.-60.[1])]. Ed. Prof. Torgāns K., TNA, 2012, p.665.

duties performed in good faith[261] in conjunction with the Article 5 of the Consumer Rights Protection Law providing that contract terms shall be deemed to be in contradiction with the principle of legal equality of the contracting parties if the term inter alia put the consumer in a disadvantageous position and are contrary to the requirements of good faith. The contractual terms shall be deemed unfair if they are in contradiction with the Article 5 thus it allows the court to exercise ex officio control.[262]

9.3 Other procedural mechanisms for the equivalent and effective protection of EU consumer law

9.3.1 Does national procedural law provide that rules of EU consumer law (as well as rules that aim to satisfy EU consumer law objectives) should be understood as having equal standing to national rules of public policy (which is to say, that for the purposes of domestic law, the consumer protection provision is understood to have equal standing to a rule that must be raised ex officio by the national court)?

Both Latvian material and procedural law refers to public policy only in limited occasions and only in context of the private international law (for example, in Article 24 of Civil Law[263] and Article 637 of the Civil Procedure Law[264]). Both of the norms cannot be attributed to the national civil procedure; this term has no dual understanding.[265] This concept includes catalogue of basic rights.

There is no reference in the laws to the public policy in national context. Instead Article 1415 of the Civil Law provides: an impermissible or indecent action, the purpose of which is contrary to religion, laws or moral principles, or which is intended to circumvent the law, may not be the subject-matter of a lawful transaction; such a transaction is void. This Article has been applied in several cases. For example, when the courts had to evaluate the extensive contractual penalties and the legal bases such penalty, also in consumer contracts.[266] However, there is no known case law in consumer disputes where this Article is used as a base of ex officio control.

9.3.2 If ex officio control is not possible in certain types of proceedings or at a certain stage of proceedings (or for any other reason), does national procedural law provide for an alternative way of assessing consumer protection law?

No, there are no alternative ways of assessing consumer protection law.

9.4 Ex officio control in payment order procedures

[261] Civillikums [Civil Law]. Valdības Vēstnesis No 41, 20.02.1937 at http://likumi.lv/doc.php?id=225418 (visited 16.05.2016).

[262] The Supreme Court's of Latvia judgment in case No SKC-108/2013 dated 12 March 2013 at http://at.gov.lv/files/uploads/files/archive/department1/2013/108-skc-2013.doc (visited 16.05.2016).

[263] The law of a foreign state is not applicable in Latvia if is in conflict with the social or moral ideals of Latvia, or mandatory or prohibitory norms of Latvian law

[264] A judgment of a foreign courts shall not be recognized only if [..] the recognition of the judgment of the foreign court is in conflict with the public order of Latvia [..].

[265] Rudevska B. Development tendencies of Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters in European Union and in Hague Private International Law Conference. Dissertation of University of Latvia, 2012,, p. 131.

[266] Latvijas Republikas Augstākās tiesas Tiesu prakse līgumsodu piemērošanā [Practice of the Supreme Court of the Republic of Latvia Regarding Application of Contractual Penalty], 2013, p. 73,

9.4.1 What information is available to the judge when a claim for the issuance of a payment order is made? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a claim for the issuance of a payment order to be granted and b) for the court to engage in ex officio control before a payment order is issued?

According to the Article 406.[3] of the Civil Procedure Law applicant in Undisputed Enforcement of Obligations procedure shall fill the standard form indicating the information regarding the creditor, debtor and identify the document based on which the payment is due. The description of the document shall not exceed 80 characters.

Based on the form submitted by the creditor a judge issues a warning to a debtor. Besides information provided by the creditor the warning explicitly provides that "the court has not verified the validity of the claim" (Article 406.[5] of the Civil Procedure Law). The warning is delivered to the debtor. Thus the court has authority to check whether the application of the creditor is within the scope of this procedure; another ex officio control is not performed as the court does not evaluate the case on merits.

9.4.2 What considerations will be assessed ex officio by the court (or other competent authority) before a payment order is issued?

In Undisputed Enforcement of Obligations procedure the judge does not check the validity of the claim but the court shall not to accept the application if for payment related to unperformed correlative performance, the contractual penalty or interest is higher that the main debt, if the debtor place of residence is not known or it is not in Latvia as well as if the monetary obligation exceeds 15'000 euros (Article 406.[1] of the Civil Procedure Law). A judge also refuses to accept the application if the court has no jurisdiction or the application of the creditor is not properly filled. In such case the judge takes a decision on non-acceptance of application what is not appealable, however, the creditor can submit the same application to the court after deficiencies have been eliminated or initiate ordinary proceedings (Article 406.[4] of the Civil Procedure Law)..

9.4.3 How is the consumer informed about the claim to issue a payment order against him or her? Does national procedural law make any provision for steps to be taken to ensure that consumers are informed of the claim for the issuance of a payment order so that he or she can contest it?

The judge fills the standard form of the Warning which together with answer form is sent to the debtor. The debtor shall acknowledge the receipt of the Warning with his/her signature (Article 406.[6] of the Civil Procedure Law). It is provided that the norm shall be interpreted narrowly, namely, the debtor himself shall sign the document, not the representative or family member can sign the document.[267] If the debtor does not agree with the claim the case shall be dismissed (406.[7] of the Civil Procedure Law). If the debtor has received the Warning and has failed to submit objections within the time period prescribed the judge shall take a decision on enforcement of the payment obligation (Article 406.[9] of the Civil Procedure Law).

9.4.4 If the consumer objects to the claim, what is the next step? Do the proceedings continue, in the context of which ex officio control can be exercised? Or are the proceedings transferred to ordinary proceedings for analysis on the merits of the

[267] Civilprocesa likuma komentāri. II daļa (29.-60.[1] nodaļa) [Commentaries of the Civil Procedure Law. Part II (chapters 29.-60.[1])]. Ed. Prof. Torgāns K., TNA, 2012, p.685.

See Section 11.4.3.

If a debtor is of the opinion that the claim of the applicant is, on the merits, unfounded he/she may, within three months from the date when the true copy of the decision is sent, bring an action against the creditor to dispute the claim (Article 406.[10] of the Civil Procedure Law). The claim shall be based on ordinary claim proceedings and presumable the judge can execute the ex officio control.

Source(s):

European Commission
An evaluation study of the impact of national procedural laws and practices on the equivalence and effectiveness of the procedural protection of consumers under EU law

JUST/2014/RCON/PR/CIVI/0082

National Report – Consumer Protection Strand

Lithuania

Vigita Vebraite

LITHUANIA: LEGAL ANALYSIS

1. NATIONAL LEGISLATION IMPLEMENTING EU CONSUMER PROTECTION INSTRUMENTS

EU legislation	Transposing national legislation	Additional notes (e.g. if there is an overlap in application of legislation etc.)
Doorstep Selling Directive 1985/577/EEC	Law on Consumer Protection (lit. Vartotojų teisių apsaugos įstatymas).	
Package Travel Directive 90/314/EEC	Law on Tourism (lit. Turizmo įstatymas).	
Unfair Contract Terms Directive 1993/13/EEC	Civil Code (lit. Civilinis kodeksas)	
Distance Selling Directive 1997/7/EC	Civil Code (lit. Civilinis kodeksas).	
Consumer Sales and Guarantees	Law on Consumer Protection (lit.	

Directive 1999/44/EC	Vartotojų teisių apsaugos įstatymas).	
Unfair Commercial Practices Directive 2005/29/EC	Law on prohibition of unfair commercial practices for consumer (lit. nesąžiningos komercinės veiklos vartotojams draudimo įstatymas)	
Misleading and Comparative Advertising Directive 2006/114/EC	Law on advertising (lit. Reklamos įstatymas).	
Consumer Credit Agreement Directive 2008/48/EC	Law on Consumer Credit (lit. Vartojimo kredito įstatymas).	
Timeshare Protection Directive 2008/122/EC	Law on Tourism (lit. Turizmo įstatymas)	
Consumer Injunctions Directive 2009/22/EC	Order of the justice minister on the list of institutions which can commence proceedings to protect interests of consumer according to EU legislation and it implementing national legislation (lit. teisingumo ministro įsakymas „Dėl Europos Sąjungos teisės aktų ir juos įgyvendinančių Lietuvos Respublikos teisės aktų, kuriuos pažeidus Lietuvoje veikiančių prekių ar paslaugų pardavėjų (tiekėjų) veiksmais, Europos Sąjungos valstybių narių institucijos ar organizacijos turi teisę Lietuvos Respublikos teismuose pareikšti ieškinius, sąrašo patvirtinimo)	
Consumer Rights Directive 2011/83/EU	Law on Consumer Protection.(lit. Vartotojų teisių apsaugos įstatymas).	
ADR for Consumer Disputes Directive 2013/11/EU	Law on Consumer Protection.(lit. Vartotojų teisių apsaugos įstatymas).	

Source(s):

www.e-tar.lt, database for Lithuanian legislation.

1. CONCEPT OF THE CONSUMER

1.1 Please outline the concept of the consumer in national law, indicating whether it is intended to be a uniform concept, whether it has been legislated for and where it can found (i.e. in a legislative provision, governmental guidelines, case law etc.).

Concept of consumer is found in legislation and case law. According to the Law on Consumer protection a consumer is a person who concludes a contract or aims to conclude one acting outside the scope of trade, business or Professional activity. Such concept has been confirmed in many court cases. This means that consumers are natural persons in Lithuania.
One exeption iso for instance that Lithuanian Supreme Court interpreted that if Partnership (legal person) established in apartment house concludes agreement on supply for electricity or heating it is still a consumer contract while the beneficiaries of a contract are only private persons with personal aim (case No. 3K-3-342/2009 and later). Public services financed from government or municipal budgets are not regarded as part of consumer protection. If municipality acts for commercial purposes and, for instance, rents some premises for consumers, such contract is a consumer contract (case No. 3k-3-132/2010).

Source(s):
Law on Consumer protection and case law on database of Lithuanian Supreme Court: http://www.lat.lt/lt/teismu-praktika/lat-praktika.html

2. REGULATORY AUTHORITIES COMPETENT FOR CONSUMER PROTECTION ISSUES

2.1 What regulatory authorities, if any, are competent for enforcing consumer protection law? Please identify them, their nature (i.e. whether they are public or private or mixed) and the nature of enforcement.

State consumer rights protection agency is responsible for enforcing consumer protection law. It is a public entity and it coordinates state institutions' (excluding Lithuanian Competition Council) activities on protection of consumers. State consumer rights protection agency can do inspections, impose fines or sanctions. This institution is accountable to Ministry of Justice. (Website: www.vvtat.lt)

2.2 Is there a specific venue for this type of enforcement and does this limit the jurisdiction of courts/ADR fora (even if only initially)?

Administrative penalties for some violations of rules can be given for businesses. Consumers can write notices to State consumer rights protection agency if they think consumer rights are violated and they want to inform about it. If consumers want damages or to protect their personal rights in other ways they have to try ADR or go to court with a claim.

2.3 Can criminal prosecutions be initiated for violations of consumer protection rules? How serious must the infringement be? What are the penalties and sanctions? And might these prosecutions lead to criminal penalties or sanctions? Can individual consumers piggy back on these claims (e.g. via a partie civile method)?

There is no criminal responsibility for violations of consumer protection in Lithuania if no other crimes are committed (for instance, for injury the health of a person, his or her property).

2.4 Is there judicial review of decisions of consumer regulatory authorities? If so, by which court is this judicial oversight made? Is the forum an ordinary or a specialised court or tribunal?

Decisions made by State consumer rights protection agency or other institutions (for instance Lithuanian Competition Council decides questions regarding advertising) are usually reviewed by administrative courts (especially if administrative penalties are given).

2.5 Does the national legal system provide for a mechanism of cooperation between its national regulatory authorities and those of other Member States?

No special mechanism is established in Lithuania.

Source(s):

3. LEGAL AID

3.1 Is legal aid available to consumers in: a) bringing a claim and b) defending a claim before a court?
For all consumers legal aid concerning legal advice is possible in local legal aid deparments in municipalities. Legal aid for defending a claim in court is only possible for persons whose incomes satisfy certain level defined by law on legal aid. If legal requirements are met, legal aid covers both bringing a claim and defending a claim.

3.2 For what kinds of disputes and actions is legal aid available? (NB: legal aid might not be available for consumer or contractual disputes but be available instead for a related action, e.g. actions relating to debt, mortgage arrears, eviction etc.)

Legal aid in court is available for all persons nothwithstanding their level of income in eviction cases.

3.3 What requirements must be satisfied for the consumer to be entitled to legal aid? Please specify if there are any additional limitations to its availability.

To get legal aid for defending claim today in the court person‘s yearly income has not exceed 3 500 Euros. If person has one dependant yearly income has not to exceed 4 812 Euros. If there are two dependants 6 125 Euros sum is a limit and so on. More information can be found here:
http://www.teisinepagalba.lt/ltlt/antrine/tm/preliminariosantrine/

3.4 What does legal aid encompass? (i.e. (only) general advice, (only) assistance in preparing the case, (only) assistance with negotiation of settlements, (also) representation).

According to Law on legal aid so called first legal aid which is possible for all persons consist of legal advice. Secondary legal aid which is possible not to everyone consists of assistance if preparing the case,

negotiations or mediation, representation in court. The legal aid can be terminated if further litigation has no perspectives.

Source(s):

4. COSTS

4.1 What are the costs of different types of procedures before courts? Are there exemptions to the payment of fees and expenses? How can costs be paid?

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Court fees	0	0	0	0	0	0
Court expenses	Depends on the case	Depends on the case	Depends on the case	Depends on the case	Depends on the case	Depends on the case
Exemptions	State fee	State fee	State fee	State fee	State fee	State fee

Consumers are only exempted from state fee in Lithuania. Other costs, arising in civil case before the courts, such as, costs of examination, costs for representation, costs for service of documents must be paid by consumer.
Source(s): According to Art. 83 para 1 of CPC consumers do not pay court fee for all consumer disputes.

5. STANDING AND REPRESENTATION IN CONSUMER DISPUTES

5.1 Does national law limit the standing of the individual consumer in respect of the claim that can be made and the forum before which it can be brought?

According to national law all claims by consumer can be brought before the court. Special jurisdiction rules are applied for consumer claims and according to Art. 30 para 11 of CPC all claims arising from consumer contracts can be brought in the court where consumer resides.

5.2 Other than individual consumers, who or which bodies have standing in consumer protection disputes and for what types of claim? If the action is not brought by the individual consumer, what requirements of representation must be satisfied?

According to CPC, Law on consumer protection, Law on prosecutors all consumer rights protection associations, state institutions, prosecutor are able to bring an claim to protect interest of consumers. All types of claims are possible. Claims for damages can be brought only by associations or prosecutor but not by state insitutution. If a consumer individually brings an action, he or she can do it personally or a lawyer can represent a person or an association of consumers if that person is a member of that association.

5.3 If a consumer wants to bring or defend an action relating to a consumer protection dispute, is there a legal (or otherwise formal) requirement that he or she has legal representation? Please specify for both judicial and ADR fora and the bodies, associations or authorities that can provide this representation.

There is no requirement of representation. There is no special regulation who can represent persons in ADR cases. Before the court consumers can be represented by a lawyer or by an association of consumers if that person is a member of that association (Art. 56 of CPC).

Source(s):

6. ACTIONS BEFORE COURTS

6.1 Jurisdiction and competence of the courts in consumer disputes: General structure and special procedures aimed at protecting consumers

6.1.1 Are ordinary courts competent to hear such claims? Is there also a specialised tribunal for consumer protection disputes?

Ordinary courts hear the consumer cases according to rules of jurisdiction established in CPC.

6.1.2 Which courts are competent to hear consumer protection disputes at first instance and in appeals? Please specify the court, in light of the value of the claim (and identify any other factors that are relevant in allocation jurisdiction).

Courts of general juristiction hear such cases. According to the value of the claim case can be heard in district courts (till 43 500 Euros) or in regional courts if the value is higher (Art.27 of CPC). Special jurisdiction rules can be applied for consumer claims and according to Art. 30 para 11 of CPC all claims arising from consumer contracts can be brought in the court where consumer resides.

6.1.3 What is the nature of the procedure at first instance, e.g. is it a simplified or a summary procedure, and is there an assessment of the merits? Please specify in light of the value of the claim (and identify any other factors that are relevant in allocating jurisdiction).

If a consumer does not ask to issue payment order or to use documentary proceedings, it will be a normal civil case with oral hearing and assesment of the merits. If the case value is less than 1500 Euros, small claims procedure can be used by the courts (Art.441 of CPC). In such cases court decides if to hear the case in written procedure or orally (if one of the parties ask for oral hearing, such hearing must be organised), also courts decide if preparatory stage is needed. In practice it is very difficult to find cases where national small claims procedure is used. In one questtionnaire organised by Vilnius University Faculty of Law in year 2016 44 proc. of judges answered that they try to ues written proceedings in such cases and 25 proc. told they use normal proceedings in such cases.

6.1.4 Please identify the formal requirements that must be satisfied for a consumer dispute to be heard before a court. These might include time limits applicable to the filing of the action/defence, representation requirements etc.

The consumer must file a claim which must contain (Art. 135 of CPC): the amount of the statement of claim if the statement of claim must be valued; the circumstances, on which the plaintiff bases his claim (factual grounds of the statement of claim); evidence confirming the circumstances set out by the plaintiff, the places of residence of the witnesses, and the location of other evidence; the claim of the plaintiff (subject of the statement of claim); opinion of the plaintiff concerning rendering a default judgment if no answer to the submitted statement of claim or no preliminary court document is submitted in the case; information on whether the case will be conducted through a lawyer. Also the opinion about the possibilities to conclude a settlement in the dispute of plaintiff wishes to conclude one. It is not required to have representation in the court. The issue of time limits is

considered a question of substantial law, so no claim will be considered non-admissible on such a ground (Art.1.126 of Civil Code).

6.1.5 In respect of the claims and relevant procedures available in the national legal system, what kind of relief might be available in consumer protection disputes? (monetary remedies, injunctions, skimming off etc.)?

There is no exact list of claims that can be raised by the consumer. Usually monetary compensation is asked by individual consumer. Groups of consumers in some cases ask for injunctions.

6.1.6 Please provide a brief overview of the role of parties and judges in civil proceedings generally (e.g. with reference to the principle of party disposition, the obligation of parties to make and prove factual allegations and to make and provide legal arguments, the possible role of the court). This overview should be brief; these issues will be dealt with in more detail in the questions that follow.

The main principle is that the parties have a duty to prove their arguments. Nothwithstanding this fact according to the doctrine of Lithuanian Constitutional Court (especially decision of 21st of September 2006) the court must be active in all cases where public interest requires that. Since 2011 according to Art.179 para 2 of CPC the court can collect evidences ex officio if public interest requires to protect interest of the State, Community or individual. It is widely believed that consumer cases are such cases (for instance, Žilvina Terebeiza,,Tiesos nustatymo problema šiuolaikiniame civiliniame procese“, Socialinių mokslų studijos 2011 (3).p 1015-1029).

Source(s):

6.2 Small claims

6.2.1 Does a small claims procedure exist in the Member State? If yes, is it a specialised or simplified procedure?

In Art. 441 of CPC only peculiarities on small claims (till 1500 Euros) are established. It is a simplified procedure but not really a special procedure as for instance in Small claims regulation.

6.2.2 What are the value thresholds for claims brought under the small claims procedure? Moreover, are there any other factors that shape the use of the small claims procedure (including the nature of the claim, the area of consumer protection law into which the claim falls etc.)?

It can be used for all civil claims which value is less than 1500 Euros.

6.2.3 What forms must be completed to raise the application? Who assists the consumer in completing these forms?

No special forms are used. A consumer must file a normal statement of claim. In such cases court only decides if to hear the case in written procedure or orally (if one of the parties ask for oral hearing, such hearing must be organised), also courts decide if preparatory stage is needed.

6.2.4 How can an application for a small claim be made (e.g. online, by post or in person)?

Statement of claim can be sent as normal statement of claim by electronic system or by post or in person.

6.2.5 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

Normal rules on evidences are applied. There is no finite list of possible evidence in Lithuania. According to CPC, there are quite strict rules on preclusion. Actually in practice, it is quite possible that court will admit evidence which could have been submitted earlier. Written evidence are divided into private written evidence and

official written evidence. According to Art. 197 of CPC documents issued by state and municipal authorities, approved by public officials within the limits of their competence and in accordance with requirements applied to the form of particular documents are considered official written evidence and have bigger evidential value. Circumstances indicated in official written evidences are considered fully proved until and unless they are denied by other relevant proofs except for witness evidence. If court organises oral hearing an decides that it is necessary for a party to participate in a hearing, a pursuer or defender must appear in court.

6.2.6 Are the costs of the successful party reimbursed?

Yes, they are reimbursed. If the consumer loses tha case, he or she must reimburse the costs. A party's expenses connected with the assistance of a lawyer, taking into consideration the specific complexity of the case and the expenditures of labour and time of the lawyer, are awarded in an amount no greater than that established in the payment size recommendations approved by the Minister of Justice together with the Chairman of the Council of the Lithuanian Bar Association.

Source(s):

6.3 Claims other than small claims

6.3.1 If a consumer protection dispute does not qualify as a small claim, what other procedures are available? What are the value thresholds and other factors determining the use of such procedures?

It is possible to use payment order procedure (described later) or documentary procedure (Art.424-430 of CPC) if subject of tha claim is monetary and claim can be founded on documentary evidences. The value of the claim is not important.

6.3.2 How can such claims be made? Please specify if the applications can be made online, or by post or in person.

In documentary proceedings a normal claim must be filed by electronic sytem, by post or in person and a person must indicate that he asks to use documentary proceedings. If the claim can be satisfied a court must pass a preliminary judgement within 14 days after the claim is received. Afterwards preliminary judgment is sent to a defendant and defendant must file grounded objections to the preliminary judgment and than normal civil proceedings with some small possible peculiarities If no objections are made preliminary judgment becomes res judicata and on the basis of it the plaintiff may be issued a writ of execution.

6.3.3 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

Documentary proceedings are used only for claims with written evidences and the court does not possibilities to take evidences ex officio. If court organises oral hearing an decides that it is necessary for a party to participate in a hearing, a pursuer or defender must appear in court.

6.3.4 Are the costs of the successful party reimbursed?

Yes, normal rules on reimbursment are applied. If the consumer loses tha case, he or she must reimburse the costs. A party's expenses connected with the assistance of a lawyer, taking into consideration the specific complexity of the

case and the expenditures of labour and time of the lawyer, are awarded in an amount no greater than that established in the payment size recommendations approved by the Minister of Justice together with the Chairman of the Council of the Lithuanian Bar Association.

Source(s):

6.4 Claims for the issuance of a payment order

6.4.1 Does an order for payment procedure exist in the national system? Is it a simplified procedure?
Yes, payment order exists and it is a simplified procedure. (Art. 431-440 of CPC).

6.4.2 Which authorities or courts are competent to hear claims for the issuance of payment orders?
District court are competent to issue payment order notwithstanding the values of a claim.

6.4.3 Are there any formal requirements that must be satisfied for the application for the issuance of a payment order to be made (e.g. standard forms, representation by a lawyer, the detail of description required, the need to provide written evidence etc.)?
Standard form is used to file an application for payment order and there is no need to provide written evidences. It is possible to file an online form for payment order. No representation is needed.

6.4.4 What information is generally available to the authority or court when a claim for the issuance of a payment order is made?
As it is no need to provide written evidences, the court only know the essence of the claim stated in the claim to issue a payment order. The court only checks jurisdiction if the address of a debtor is known and if a claim is not manifestly ungrounded.

6.4.5 What opportunity is available for a defence/statement of opposition to be advanced? How should this be done and what is its effect? Please specify if the means of advancing a defence differ depending on the value of the claim and the court dealing with it.
A defendent must file objection (it is possible to file ungrounded objections) within 20 days after the service of payment order. No special forms is needed. If objections are filed the payment order does not take into effect and plaintiff has to file a claim according to documentary proceedings or according to Standard contentious civil proceedings. General rules of jurisdiction are applied then. The payment order cannot be served to curator or by public announcement.

6.4.6 What is the effect if the claim is uncontested, i.e. if there is a lack of defence/statement of opposition?
If claim is uncontested payment of order becomes res judicata.

6.4.7 If the defendant is a consumer, and he or she does not respond to or raise an objection to the issuance of the payment order, does the authority dealing with the claim for payment order proceedings have the power to examine any issue of consumer protection law of its own motion before treating the action as usual?

In such case court canot examine any issue of consumer protection law. It can be possibly done before issuing payment order by saying that it cannot be issued as it is manifestly ungrounded, because courts should apply consumer protection ex officio. In practice it does not happen quite often. There are attemps to amend the law and to include in CPC that courts should have more powers in payment order procedures if it is connected with consumer protection.

6.4.8 What steps must the pursuer take in order to obtain an enforceable decision?

If no objections are filed, the payment order with res judicata is issued.

6.4.9 Is this decision final, or can the defendant appeal against it?

The decision is final and defendant can only ask to repoen proceedings according to special grounds.

Source(s):

6.5 Appeals in consumer disputes

6.5.1 Are appeals possible in all consumer disputes? Please specify for small claims and other types of claims.

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Nature of the procedure at 1st instance	Yes	yes	yes	yes	yes	Yes
2nd instance – appeal to?	Yes	yes	yes	yes	Yes	Yes
3rd instance – appeal to?	In there are grounds for cassation	In there are grounds for cassation	In there are grounds for cassation	In there are grounds for cassation	In there are grounds for cassation	In there are grounds for cassation

In Lithuania all decisions of first instance can be appealed. Cassation appeal can be filed if there are grounds for it. The value of a cassation appeal is not important.

6.5.2 Please briefly specify the national appeal procedure, including any requirements to be satisfied for appeals. These might include, but are not limited to, conditions of admissibility, value thresholds, time-limits, the scope of review, and the impact of the appeal on enforcement (provisional enforcement). Please refer to any rules specifically applicable in respect of the claims and relevant procedures outlined above.

No special rules are applied for appeals in consumer disputes. As it has been already mentioned an appeal can be lodged within thirty days of the day the judgment of the court of first instance was passed (CPC Art.307). The term for lodging an appeal can be recommenced if the court acknowledges that the term was missed due to valid reasons. The limits of appeal procedure consists of the factual and legal grounds of the appeal and the

verification of the absolute grounds for the invalidity of the judgment. Usually no enforcement procedure takes place during appeal proceedings. Only in some special cases not connected to consumer disputes judgements are enforced without delay.

Source(s):

6.6 Enforcement in consumer disputes

The CJEU has identified a number of situations concerning the enforcement stage of consumer protection disputes in which the effective and equivalent protection of EU consumer rights may be affected by national procedural rules. These include – in relation to the effectiveness and equivalency of the protection afforded by the Unfair Contract Terms Directive, for example – the enforcement of arbitration awards, the enforcement stage in the recovery of consumer credit and the enforcement of mortgages, which often links together declaratory and enforcement proceedings. As such, we focus on these situations below. However, other problematic situations exist. Please indicate if additional (and potentially problematic) situations are identifiable in your national legal system.

Moreover, if possible, please provide the reference/citation of an article that provides an overview of the way in which enforcement operates in relation to consumer protection disputes within your national legal system.

6.6.1 If the assessment of a consumer protection issue has not been possible at an earlier stage of the proceedings, is it always possible – either ex officio (see section 10 below) or if the consumer raises a possible violation of consumer protection law – for this assessment to be undertaken during enforcement proceedings?

It would be very difficult to raise this question during enforcement procedure. According to general rules of civil and enforcement procedures it would be possible to try to reopen procedure on the ground of huge legal mistake (which could be a huge mistake while applying consumer protection) in the case and this has not been heard in appeal. General prosecutor could do that even if appeal proceedings has been undergone. Also a consumer could try to appeal procedural actions of bailiff (according to chapter XXXI of CPC) and than try to raise question of consumer protection. It must be stressed that such possibilities are really quite theoretical and it is quite difficult to imagine how it would work in practice.

6.6.2 In the particular case of consumer protection, if a court examines consumer protection law (either ex officio or on the basis of an argument advanced by the consumer), does national procedural law provide that interim measures should 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 final decision will have full effect?

It would be possible to do so according to general rules of civil procedure (Art. 145 or 625 of CPC) it is possible to stay enforcement procedure as privisional measure or if proceedings are repoened in a case.

Source(s):

7. ACTIONS FOR COLLECTIVE REDRESS

The CJEU has considered that situations in which individual and collective actions are in some way linked are those in which the effective and equivalent protection of EU consumer rights may be affected by national procedural rules.

As such, we will focus on these situations. However, other problematic situations exist. Please indicate if additional (and potentially problematic) situations are identifiable in your national legal system.

Moreover, if possible, please provide the reference/citation of an article that provides an overview of the way in which the collective redress mechanism operates within your national legal system.

7.1 Injunctive relief, linking individual and collective actions

The case law of the CJEU requires that a person or organisation with a legitimate interest in consumer protection must be able to bring an action before a national court or tribunal in respect of an alleged violation of consumer rights deriving from Union law, either for compensation or for injunctive relief, to preclude the continued violation of consumer rights[268].

7.1.1 If collective proceedings are launched, does national procedural law provide that ongoing individual claims, relating to the same dispute, should be stayed until the collective proceedings are brought to an end? Please specify if this constitutes an obligation on the part of the national judge or if it is at his or her discretion.

Group action was introduced on the 1st of January 2015. So far there have been no such succesful proceedings as the system is quite complicated (for instance, judge can decide not to admit group action if it thought that it is more aprioprate and purposeful to have seperate claims). It is an opt in system and it must a group of be 20 or more plaintiffs in order to submit a group action. Such action is possible for all claims and represantation by the lawyer is mandatory for the group.

So far for judges there is no obligation to stay the proceedings. The judges may do it they think that accoriding to Art. 163 of CPC it is impossible to hear a case before another case is decided in the civil, administrative or criminal procedure. This ground can be applied only if another cases is being examined in the court.

7.1.2 If individual proceedings are stayed, please indicate what the effect of the court or ADR entity's decision in the collective action on those individual proceedings would be, i.e. whether the outcome of the collective action binds the consumer bringing an individual action.

If proceedings are stayed, decision in the collective action will bind individual case and ascertained circumstances will not be reexamined in individual case. It must be mentioned that since the 1st of Januray 2015 it is possible according to CPC in Lithuania to launch group action and in this group action also individual claims are possible. This means that each plaintiff can submit also an individual claim and to ask some monetary compensation only for himself. If group action is satisfied the court together or later decides on such individual claims (Art.441[9] of CPC).

Source(s):

[268] This derives from the EU directives. For example, in respect of the UCTD, Art.6(1), Art.7(1) and (2) UCTD, provide that the Member States must ensure 1) that unfair terms are not binding on the consumer and 2) that adequate and effective means exist to prevent the continued use of unfair terms in consumer contracts. The CJEU has held that effective implementation requires that the consequence of the finding of the violation – in the case of a finding of unfairness under the UCTD – is for the term to be declared invalid, and that the effect of this invalidity extends not only to the parties to the action for an injunction but also to those who have concluded a contract with the seller/supplier to which the same terms apply.

It is possible to read about collective redress in Lithuania in Brittish Institute of International and Comparative Law Report II on collective redress (November 2014).

8. CONSUMER ALTERNATIVE DISPUTE RESOLUTION

The questions below focus on some key concerns relating to consumer disputes before ADR fora. If possible, please provide the reference/citation of an article that provides a general overview of the way in which consumer alternative dispute resolution operates within your national legal system.

8.1 Consumer disputes before ADR fora

8.1.1 Is ADR mandatory for all parties bringing a claim related to a consumer protection dispute?

There are five institutions which act as ADR for consumers in Lithuania: Consumer disputes commisions besides State consumer rights protection agency – it is not mandatory before bringing general consumer dispute to the court; Communications regulatory Authority for disputes out of electronic communication – it is also not mandatory to apply; Bank of Lithuania for disputes arising out of financial services – its is also not mandatory to apply; State energy inspection for disputes arising out of energy services – it is mandatory to apply for most of the disputes (Art. 34 of Law on Energy); Lithuania Bar association for disputes arising out of agreements with advocates – it is not mandatory to apply. Law on consumer protection allow also other insitutions to hear consumer disputes as ADR institutions (for instance, non-governmental organisations if they meet established criteria). Online platform to resolve consumer disputes is being finalized in these days.

8.1.2 Please specify if there are limitations to the use of ADR. These might include the nature of the claim (i.e. whether both individual and collective claims are possible), requirements of representation, time limits, value thresholds, etc.

According to Law on consumer protection a consumer can apply for ADR with one year after he or she informed a seller or supplier of the services that his or her interests were breached (bussinesses have to informed during three months period after a consumer finds out about the breach of the interests if he or she does not bring a claim directly to the court). Representation is not required. ADR can be used for disputes with value more than 10 Euros. For cases with great importance for consumer law value can be less than 10 Euros. ADR institution decides if the case is of great importance.

8.1.3 Can ADR entities issue binding decisions and can they enforce those decisions? If not, please explain how they are enforced.

Since 1st of January 2016 decisions of ADR decisions are binding if they are not contested in the court. If no party submit a claim to the court within 30 days after the decision, the decision can be enforced according to enforcement procedure.

8.1.4 Does national law provide that limitation periods applicable to judicial actions should be suspended while ADR is ongoing?[269]

[269] The Directive on Consumer ADR provides that "the existence of an effective system for collective claims and easy recourse to ADR should be complementary". Consumer ADR is relevant not only for individual claims but also for collective ones; it can provide consumer with a means to reduce costs and save time.

According to Art. 29[1] of Law on consumer protection limitation periods are suspended while ADR procedures are ongoing.

8.1.5 Please specify if national law establishes rules providing for recourse to judicial action following an (unsuccessful) ADR hearing[270].

After 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 (Art.29 of Law on consumer protection). If ADR insitution does not accept a request to start ADR proceedings, such decision can be appealed to the court and its decision is binding.

8.1.6 Is there judicial review of decisions and awards made by ADR entities? If so, by which court or tribunal is this oversight made? Is it ordinary or specialised?

Courts of general jurisdiction according to rules of jurisdiction hear such disputes.

Source(s):

9. THE EXAMINATION OF CONSUMER PROTECTION LAW IN NATIONAL PROCEDURAL LAW: RESPECT FOR THE PRINCIPLES OF THE EFFECTIVENESS AND EQUIVALENCE OF CONSUMER PROTECTION LAW AND EX OFFICIO CONTROL

The rules of national civil procedure that could potentially affect, and indeed undermine, the effective and equivalent protection of consumer rights are various. They include but are not limited to the rules and practices of ordinary and specialised judicial procedures, rules and practices of consumer ADR, rules applicable to special types of procedure (e.g. payment order procedures), the jurisdiction of individual courts (the courts that have jurisdiction over consumer disputes), the formal requirements that have to be satisfied to bring a case, the types of legal action that are available, the need for parties to be represented, the time-limits applicable to procedural steps of the action, rules on the taking of evidence, the possibility (or lack) to consider certain issues at specific stages of the procedure, the right to appeal and review, and rules relating to the enforcement or judgements and other enforcement titles (e.g. arbitration awards, notarial deeds, including mortgages).

On the basis of the principles of equivalence and effectiveness, the CJEU has established certain requirements for the procedural protection of consumer rights deriving from EU law. In particular (and especially in relation to the protection afforded to consumers via the Unfair Contract Terms Directive[271]), the CJEU has established an obligation on national judges (and potentially other dispute resolution facilitators) to apply consumer law of their own motion (that is, ex officio), when they have available the legal and factual elements necessary for this task. Ex officio control is one type of procedural mechanism that can be utilised within the national system to promote the effective and equivalent protection of consumer law. Thus, other mechanisms of procedure within your national legal system should be highlighted and discussed where relevant. The following questions should be answered in respect of both judicial and if relevant, alternative dispute resolution.

[270] Per Arts.10-12, Directive on Consumer ADR.

[271] However, the CJEU has recognised that ex officio control – and other procedural requirements, that might in themselves (or indeed, in their absence), impact the effective enforcement of consumer law – arise across the EU's consumer protection directives.

9.1 The basis of ex officio control of consumer protection law in national law

9.1.1 Is it clear in the national legal system when consumer protection law should be applied ex officio? Is the ex officio control of consumer protection law established as an obligation or as a (discretionary) power of the judge in national procedural law?

According to Art. 6.228[4] para 9 of Civil Code it is an obligation for the court to apply consumer protection ex officio. It is also clearly stated in many cases of Lithuanian Supreme Court (No. 3K-3-237/2008, 3K-3-545/2013 and others). It has been emphasized that courts must be active in consumer disputes. Overall CPC does not say precisely that in consumer disputes court must be active.

9.1.2 If there is an understanding of ex officio control of consumer protection law in the national legal, what is this control understood to encompass/not cover?

Usually it is understood to encompass to control unfair contract terms and judges are not eager to understand it broader and to be active in all aspects of a case considering consumer dispute (Danguolė Bublienė, „Silpnesnės šalies apsaugos principo įgyvendinimas kontroliuojant nesąžiningas vartojimo sutarčių sąlygas“ Jurisprudencija, 2007 (9), p.44). It should encompass raising consumer law by the court. As it has been said before, court has quite broad powers to collect evidence ex officio in civil cases, including consumer disputes. Court does not have powers to raise alternative claims in consumer disputes in Lithuania. It can only use its duty of clarification and explain party that it is possible and perhaps beter to change a petitum. We believe courts simply have to change mentality to become more active in consumer cases.

9.1.3 Is the party who claims to be a consumer required to establish his or her consumer status, the existence of a consumer contract and that consumer law applies to the dispute? Is this required even if the consumer has no legal representation?

According to CPC, for the plaintiff it sis not required to establish legal aspects of the disputes. It is enough to describe facts about the case and the demands. In practice sometimes situation can be different and usually plaintiff describes legal facgts of the case in a claim.

9.1.4 What information is available to judges and dispute resolution facilitators hearing consumer protection disputes? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a consumer protection dispute to be heard and b) for the court to engage in ex officio control?

Lithuanian procedural law does not regulate how much facts is enough to admit a claim and start proceedings. If a claim and the situation is absolutely not clear for the court, it is possible to ask a plaintiff to correct a claim. Clear deficiences must be stated in such court ruling. Accoridng to Art. 135 of CPC a claim must contain: the amount of the statement of claim if the statement of claim must be valued; the circumstances, on which the plaintiff bases his claim (factual grounds of the statement of claim); evidence confirming the circumstances set out by the plaintiff, the places of residence of the witnesses, and the location of other evidence; the claim of the plaintiff (subject of the statement of claim); opinion of the plaintiff concerning rendering a default judgment if no answer to the submitted statement of claim or no preliminary court document is submitted in the case; information on whether the case will be conducted through a lawyer; opinion on possibilities of settlement in a case.

9.1.5 Who is responsible for providing this information? If the necessary information is not available to the court (or dispute resolution facilitator), is he or she under an obligation to investigate in order to be able to respond to a relevant consumer protection dimension of the case?

As it has been stated before, court should be active in consumer disputes and try to collect evidence ex officio if consumer did not provide enough information or is not able to provide it. For instance, according to Art.179 of CPC court is entitled to collect evidence ex officio then public interest requires that. Public interest is understood according to the case of Constitutional Court really broad: situations where interests of a country, community or person can be breached. We believe it definitely includes consumer protection. If judge believes that consumer dispute has no public interest, it will not possible to collect evidence ex officio (although we believe it would be a ground to appeal a judgment). According to Law on consumer protection ADR institutions are also able to get more required information from seller or supplier of services or order an examination.

9.1.6 Will the court provide the consumer with any assistance in gathering factual information or advancing his legal arguments before the court? Please respond for the situation where: a) the consumer has legal representation and b) the consumer has no legal representation.

Help to collect factual information can be provided according to general rules of CPC. Pursuant to Art. 199 of CPC information required by a court from legal or natural persons is sent directly to the court within fixed time-limits. Also court may issue a person requesting to recover written evidence a certificate entitling to obtain the evidence for submission to the court. Lawyers can be also not capable to collect all necessary information because, for instance, information is confidential. Also according to Art. 161 of CPC if court thinks that a party is (will be) incapable of adequate defence of his rights, the court may offer to look for a representative in the proceedings and adjourn the hearing for this reason. The court has no duty to help party with its legal arguments.

Source(s):

9.2 The possibility for ex officio control of EU consumer protection law in dispute resolution proceedings

9.2.1 Is ex officio control of consumer protection law always possible when the procedure involves a full assessment of the claim on its merits?

Yes, in such cases it is always possible.

9.2.2 Can ex officio control be exercised even when the procedure does not involve an assessment on the merits?

In such cases it is not always possible to control ex officio. For instance, it is difficult to exercise such contol in payment order cases.

9.2.3 Please indicate if, per national procedural law, ex officio control can be exercised at the following stages of the procedure:

	Courts	Other dispute resolution facilitators

	Possible to exercise ex officio control	Not possible to exercise ex officio control	Possible to exercise ex officio control	Not possible to exercise ex officio control
Ordinary proceedings	X		X	
Small claims	X		X	
Payment order	X (in cases where interest rates are very high and unproportionat)		-	-
Provisional measures	X		-	-
Proceedings linked to enforcement		X	--	-
Enforcement proceedings		X		
- Enforcement of payment order		X		X
- Enforcement of arbitration award		X		X
- Enforcement of mortgage		X		X
- Enforcement of notarial deed		X		X
Appeal proceedings (please specify:)	X (possible in court proceedings)			

9.2.4 What does ex officio control encompass in national procedural law?

Usually it is understood to encompass to control unfair contract terms. No specif rules are established in procedural law.

Source(s):

9.3 Other procedural mechanisms for the equivalent and effective protection of EU consumer law

9.3.1 Does national procedural law provide that rules of EU consumer law (as well as rules that aim to satisfy EU consumer law objectives) should be understood as having equal standing to national rules of public policy (which is to say, that for the purposes of domestic law, the consumer protection provision is understood to have equal standing to a rule that must be raised ex officio by the national court)?

It could be said so according to some case law of Supreme Court (for instance, 3K-3-541/2009), where court stated that rights of consumer are important to all public not only for a person who concluded a consumer

contract. That is the reason why courts must be active in consumer cases. The law has not been changed in accordance with the case law. Public interest is not the same as public policy in EU Regulations or New York Arbitration Convention.

9.3.2 If ex officio control is not possible in certain types of proceedings or at a certain stage of proceedings (or for any other reason), does national procedural law provide for an alternative way of assessing consumer protection law?

There are no specif rules on such cases.

Source(s):

9.4 Ex officio control in payment order procedures

9.4.1 What information is available to the judge when a claim for the issuance of a payment order is made? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a claim for the issuance of a payment order to be granted and b) for the court to engage in ex officio control before a payment order is issued?

According to Art.433 of CPC request form to issue payment order consists only of a demand and its factual description, information about creditor and debtor, value of a claim and a motivated request to ask for provisional measures (if creditor asks to apply them). There is no obligation to attach written evidence to a request. Such regulation means that it is almost impossible for court to engage in ex officio control. Exceptional cases are cases concerning consumer credit agreements. Supreme Court in the review of January 8th 2013 on civil cases concerning interests stated that request to apply too high interests for consumer credit cases is an abuse of rights and in such cases payment order cannot be issued as groundless.

9.4.2 What considerations will be assessed ex officio by the court (or other competent authority) before a payment order is issued?

As it is no need to provide written evidences, the court only knows the essence of the claim stated in the claim to issue a payment order. That‘s why it is very difficult to assess consumer protection ex officio. Usually payment orders are issued very quickly, still not automatically. After payment order is issued, the debtor can simply challange it, without any grounds. There is no any special regulation regarding consumer disputes in payment order procedures.

9.4.3 How is the consumer informed about the claim to issue a payment order against him or her? Does national procedural law make any provision for steps to be taken to ensure that consumers are informed of the claim for the issuance of a payment order so that he or she can contest it?

Payment order is serviced to consumer. It is impossible to service as public annoucement or to curator. The same rules are applied to consumers or other debtors. The same informatikon on how to contest a payment order is sent to all debtors.

9.4.4 If the consumer objects to the claim, what is the next step? Do the proceedings continue, in the context of which ex officio control can be exercised? Or are the proceedings transferred to ordinary proceedings for analysis on the merits of the claim?

According to Art. 439 of CPC creditor decides if to transfer case to ordinary proceedings (including documentary procedure) and has to file a claim with attached evidences and all other necessary information. If plaintiff decides to continue a case, the court will decide the case on the merits.

Source(s):

European Commission
An evaluation study of the impact of national procedural laws and practices on the equivalence and effectiveness of the procedural protection of consumers under EU law

JUST/2014/RCON/PR/CIVI/0082

National Report – Consumer Protection Strand

Luxembourg

Gilles Cuniberti and Anthi Beka

LUXEMBOURG: LEGAL ANALYSIS

1. NATIONAL LEGISLATION IMPLEMENTING EU CONSUMER PROTECTION INSTRUMENTS

EU legislation	Transposing national legislation	Additional notes (e.g. if there is an overlap in application of legislation etc.)
Doorstep Selling Directive 1985/577/EEC	Code de la consommation	
Package Travel Directive 90/314/EEC	Code de la consommation	
Unfair Contract Terms Directive 1993/13/EEC	Code de la consommation	
Distance Selling Directive 1997/7/EC	Code de la consommation	
Consumer Sales and Guarantees	Code de la consommation	

Directive 1999/44/EC		
Unfair Commercial Practices Directive 2005/29/EC	Code de la consommation	
Misleading and Comparative Advertising Directive 2006/114/EC	Loi du 23 décembre 2016 sur les ventes en soldes et sur le trottoir et la publicité trompeuse et comparative	
Consumer Credit Agreement Directive 2008/48/EC	Code de la consommation	
Timeshare Protection Directive 2008/122/EC	Code de la consommation	
Consumer Injunctions Directive 2009/22/EC	Code de la consommation	
Consumer Rights Directive 2011/83/EU	Code de la consommation	
ADR for Consumer Disputes Directive 2013/11/EU	Code de la consommation	

Source(s): Loi du 8 avril portant introduction d'un Code de la consommation (Mém. A – 69 du 12.04.2011) (hereinafter « **Code de la consommation** »);
Loi du 23 décembre 2016 sur les ventes en soldes et sur le trottoir et la publicité trompeuse et comparative (Mém. A – 267 du 27.12.2016)

Doctrine : Elise Poillot, « Le Code luxembourgeois de la consommation: étude de droit interne et de droit comparé », Journal des Tribunaux Luxembourg, no 25, décembre 2013, pp. 2-6.

1. CONCEPT OF THE CONSUMER

1.1 Please outline the concept of the consumer in national law, indicating whether it is intended to be a uniform concept, whether it has been legislated for and where it can found (i.e. in a legislative provision, governmental guidelines, case law etc.).

The concept is provided under Art. L. 010-1 Code de la consommation. It is defined as follows "any natural person who is acting for purposes which are outside his trade, business, craft or profession".

Source(s): Code de la consommation.

Doctrine : Elise Poillot, « Commentaire de la Cour d'appel du 8 octobre 2009 », Tome 35, no 1, Pasicrisie 2011, pp. 24-32.

2. REGULATORY AUTHORITIES COMPETENT FOR CONSUMER PROTECTION ISSUES

2.1 What regulatory authorities, if any, are competent for enforcing consumer protection law? Please identify them, their nature (i.e. whether they are public or private or mixed) and the nature of enforcement.

Luxembourg law is vested with a genuine "penal and administrative consumer law" (B. Bruck/P. Rauchs, p.421). The enforcement of consumer protection law is provided for under Book III of the Code de la consommation. The Ministry of Economy, Consumer Law Directorate, is the responsible authority designated in Luxembourg for the purposes of Regulation 2006/2004 on consumer protection cooperation, as well as Regulation 261/2004 on passenger rights , without prejudice to the competence of other authorities for specific matters(Art. L. 311-4 Code de la consommation). Those specific authorities are the following: 1) Commission de surveillance du secteur financier (observance of the legislation protecting consumer interests in the financial sector) 2) Commissariat aux Assurances (observance of the legislation protecting consumer interests in the insurance sector) 3) The health ministry (observance of the legislation protecting consumer interests in the field of advertisement of medicines for human consumption) 4) Commission nationale pour la protection des données (observance of the legislation protecting consumer interests in the field of protection of privacy in the sector of electronic communication) 5) Communauté des transports (observance of the legislation protecting consumer interests in the field of public transportation) (Art. L. 311-5 Code de la consommation).

2.2 Is there a specific venue for this type of enforcement and does this limit the jurisdiction of courts/ADR fora (even if only initially)?

The actions for injunction against specified violations of the Code de la consommation are introduced before the President of the tribunal d'arrondissement sitting in commercial matters, by way of summary procedure (Book III, Title 2 Code de la consommation).

2.3 Can criminal prosecutions be initiated for violations of consumer protection rules? How serious must the infringement be? What are the penalties and sanctions? And might these prosecutions lead to criminal penalties or sanctions? Can individual consumers piggy back on these claims (e.g. via a partie civile method)?

Criminal sanctions can be initiated against specified violations of consumer protection rules. Those sanctions may amount to imprisonment with regard to certain violations of the provisions on consumer credit (Art. L. 224-25, paras. 1 to 4 Code de la consommation) or monetary sanctions. Monetary sanctions can be pronounced with regard to certain violations of the provisions on price indications (Art. L. 112-9 (1) Code de la consommation) or violations of certain provisions on unfair commercial practices (Art. L. 122-8 Code de la consommation). The law provides also for a monetary sanction against the professional who invokes against the consumer a term that has been declared unfair by a final judgment against that professional (Art. L. 211-4 Code de la consommation), as well as with regard to violations of certain

provisions on consumer credit (Art. L. 224-25, paras. 5 and 6 Code de la consommation. An avertissement taxé (police sanction) may be imposed with regard to certain violations of the provisions on price indications (Art. L. 112-9 (2) Code de la consommation). The seriousness of the infringement reflects upon the type of the sanction and, in case of a monetary sanction, upon its amount.
A professional who does not respect a decision taken against him by the Ministry of Economy (Consumer Law Directorate) with reference to Regulation 261/2004 on passengers' rights, may be subject to a monetary sanction (Art. L. 311-9 Code de la consommation).
In matters in relation to unfair terms, individual consumers as well as qualified consumer associations, have standing in a civil action (partie civile) before the penal courts for those acts causing prejudice to their individual or collective, respectively, interests (Art. L. 320-3 in fine Code de la consommation).

2.4 Is there judicial review of decisions of consumer regulatory authorities? If so, by which court is this judicial oversight made? Is the forum an ordinary or a specialised court or tribunal?
The sanctions provided for under the Code de la consommation are of criminal nature. For the purposes of application of the consumer code the respective regulatory authorities provided by the law have investigating powers and may act as police officers (articles L. 311-7 and L. 311-8 Code de la consommation).

2.5 Does the national legal system provide for a mechanism of cooperation between its national regulatory authorities and those of other Member States?

The competences of the single liaison office provided for under Regulation 2006/2004 are attributed to the Ministry of Justice – Consumer Law Directorate (article L. 311-3 Code de la consommation).

Source(s): Code de la consommation
Bruck/P. Rauchs, « Rapport aux journées colombiennes sur « Le consommateur et le procès », Annales du Droit Luxembourgeois, 2007-2008, 417-437, 421

3. LEGAL AID

* There is no separate legal regime on legal aid for consumers. Please refer to the developments on legal aid under the first stand of the report (2.1.1).

3.1 Is legal aid available to consumers in: a) bringing a claim and b) defending a claim before a court?

3.2 For what kinds of disputes and actions is legal aid available? (NB: legal aid might not be available for consumer or contractual disputes but be available instead for a related action, e.g. actions relating to debt, mortgage arrears, eviction etc.)

3.3 What requirements must be satisfied for the consumer to be entitled to legal aid? Please specify if there are any additional limitations to its availability.

3.4 What does legal aid encompass? (i.e. (only) general advice, (only) assistance in preparing the case, (only) assistance with negotiation of settlements, (also) representation).

Source(s):

4. COSTS

* There are no separate rules for consumer disputes with regard to costs. Please refer to the developments under the first strand the report (2.1.1).

4.1 What are the costs of different types of procedures before courts? Are there exemptions to the payment of fees and expenses? How can costs be paid?

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Court fees						
Court expenses						
Exemptions						

Source(s):

5. STANDING AND REPRESENTATION IN CONSUMER DISPUTES

5.1 Does national law limit the standing of the individual consumer in respect of the claim that can be made and the forum before which it can be brought?

The standing in consumer disputes is governed by the general provisions on standing applicable with regard to every civil law dispute.
For further details please refer to section 6 below.

5.2 Other than individual consumers, who or which bodies have standing in consumer protection disputes and for what types of claim? If the action is not brought by the individual consumer, what requirements of representation must be satisfied?

The bodies that have standing in relation to consumer disputes are the regulatory authorities designated by the law, professional associations and the consumer associations that have been authorised to enter actions for injunctions (under Art. L. 313-1 Code de la consommation), depending on the dispute.
With regard to violations of the legal provisions on information and price indications, an action for injunction may be brought by the responsible regulatory authority (Art. L. 320-1 Code de la

consommation). The violations of the provisions on unfair commercial practices may give rise to an action for injunction initiated by every person, a group of professionals, qualified consumer associations and the responsible regulatory authorities (Art. L. 320-2 Code de la consommation). Upon demand of every person, a professional association, authorised consumer associations and the responsible regulatory authorities, the court may find a clause unfair and declare it null and non-written (article L. 320-3, al. 1 Code de la consommation). Professional associations, the regulatory authorities as well as qualified consumer associations may bring an action for injunction against the continuation of use of unfair terms in the standard contract terms offered by professionals to consumers (article L. 320-3, al. 3 Code de la consommation). An action for injunction may be brought for certain violations of the provisions of the consumer distance contracts upon demand of qualified consumer associations or the responsible regulatory authority (article L. 320-4 Code de la consommation). The same persons have standing with regard to actions for injunction against violations of legal provisions on consumer credit (L. 320-5 Code de la consommation), distance contracts pertaining to financial services, except for insurances (L. 320-6 Code de la consommation), as well as with regard to all the infringements provided for under article L. 320-7 Code de la consommation.
The actions for injunction are brought before the president of the chamber of the tribunal d'arrondissement sitting in commercial matters. Before this court the parties are not required to have legal representation (Art. 547 NCPC). The procedure is the one applicable in summary proceedings (tribunal des référés), which allows representation in person (Art. 935 NCPC).

5.3 If a consumer wants to bring or defend an action relating to a consumer protection dispute, is there a legal (or otherwise formal) requirement that he or she has legal representation? Please specify for both judicial and ADR fora and the bodies, associations or authorities that can provide this representation.

A consumer entering a declaratory action for the finding of a term as unfair before the president of chamber of the tribunal d'arrondissement sitting in commercial matters is not obliged to have legal representation (Art. L. 320-3 Code de la consommation and Art. 547 of the Luxembourg New Code of Civil Procedure "NCPC"). There is no requirement of legal representation for actions brought before the lower claim court (justice de paix) (please refer to the answers under section 6 below). Similarly, there is no requirement of legal representation with regard to claims brought before the ADR fora (please refer to the section 8 on ADR).

Source(s): Code de la consommation

6. ACTIONS BEFORE COURTS

6.1 Jurisdiction and competence of the courts in consumer disputes: General structure and special procedures aimed at protecting consumers

6.1.1 Are ordinary courts competent to hear such claims? Is there also a specialised tribunal for consumer protection disputes?

There is no specialised tribunal for consumer disputes. The competence is determined on the basis of the general rules applicable to any civil dispute.

In view of the lesser value of the claims usually involved, the jurisdiction which will in principle be competent for consumer disputes is the lower value court (justice de paix).

With respect to claims up to 2,000 EUR, the justice de paix is competent as court of last instance. For claims up to 10,000 EUR, the same jurisdiction is competent as first instance court, with its judgements subject to appeal before the tribunal d'arrondissement (Art. 2 of the Luxembourg New Code of Civil Procedure "NCPC" together with Art. 22 NCPC). Up to the same threshold, the justice de paix is competent for issuing a European payment order (Art. 49 et seq. NCPC). With regard to claims exceeding this value threshold, the competent court is the main first instance court, the tribunal d'arrondissement (le « juge de droit commun ») (Art. 20 NCPC). Against a judgment of the tribunal d'arrondissement an appeal may be lodged before the «Cour d'appel».

There are some disputes for which the justice de paix decides as last instance court up to a certain threshold and some others for which it is competent irrespective of value threshold. The disputes that are relevant for the purposes of consumer law are those pertaining to i) disputes between an owner and a tenant (mainly the performance of tenancy agreements) to the extent that they may be concluded between a professional and a consumer (the justice de paix decides as a court of last instance up to the value of 1,250 EUR and as a court of first instance irrespective of value) (Art. 3, point 3 NCPC) and ii) overindebtedness (to the extent that it concers also consumer debts) (Law of 8 january 2013 on over indebtedness - Loi du 8 janvier 2013 sur le surendettement, Mém. A – 26 du 13.02.2013).

6.1.2 Which courts are competent to hear consumer protection disputes at first instance and in appeals? Please specify the court, in light of the value of the claim (and identify any other factors that are relevant in allocation jurisdiction).

Please refer to the answer above 6.1.1

6.1.3 What is the nature of the procedure at first instance, e.g. is it a simplified or a summary procedure, and is there an assessment of the merits? Please specify in light of the value of the claim (and identify any other factors that are relevant in allocating jurisdiction).

I) The procedure before the justice de paix is a simplified one. The proceedings commence with the serving of the citation, the claim form which has to cover the elements referred to under of Art. 101 NCPC and 153 NCPC. There is no requirement for legal representation. In view of cost minimisation before the justice de paix, the serving of the citation is carried out by registered post, limiting the role of the judicial clerk ("huissier de justice") to the verification of the delivery address and to the preparation of the postal formalities (v. S. Menetrey, Procédure Civile Luxembourgeoise, para. 233). The procedure before the justice de paix is oral (Art. 110 NCPC). However, in practice, the parties submit written submissions, in the form of written notes of their pleadings ("notes de plaidories").

II) Before the tribunal d'arrondissement the procedure is written. The claimant initiates the proceedings by serving the statements of claim, the assignation (Art. 153 and 154 NCPC). The service (signification) of the document initiating the proceedings is carried out under the

responsibility of the huissier de justice, according to the formalities prescribed by the law (Art. 155 NCPC et seq.). The parties are required to have legal representation (Art. 193 NCPC). The court, has important managerial powers in order to advance the course of the proceedings(instruction juridique) (Art. 203-222 NCPC).

6.1.4 Please identify the formal requirements that must be satisfied for a consumer dispute to be heard before a court. These might include time limits applicable to the filing of the action/defence, representation requirements etc.

I) If the consumer dispute is heard before the justice de paix and the consumer is in the position of plaintiff, he will have to introduce his claim in the simplified form of citation. This claim form has to cover mainly the following elements (apart from those elements applicable to every judicial act provided for under Art. 153 NCPC): the place, date and time in which the hearing will take place; the object of the case and a summary presentation of the submissions and indication that the absence of the defendant may lead to a default judgment. The claim form mentions also the conditions under which the defendant can be represented, and if applicable, the details of the legal representation of the plaintiff (Art. 101 NCPC). The parties are not required to have legal representation, although they have the right if they wish to do so (Art. 106 NCPC). They may decide to submit written pleadings, called prétentions écrites or écritures (S. Menetrey, Procédure Civile Luxembourgeoise, para. 385). They can also be assisted by a member of their family (specified under Art. 106 NCPC) or by a person working for them. A minimum delay of eight days between the service of the citation and the hearing has to be observed, in case the defendant is a Luxembourg resident (Art. 103 NCPC). This delay can be extended to 15 days, in case the defendant is an EU resident (the so called “distance delay”) (Art. 167 NCPC).
If the consumer is in the position of the defendant, he will have to appear before the justice de paix at the date and time provided for in the citation. As it is the case for the plaintiff, legal representation is not required. If the defendant opts to be represented by a lawyer, the case will, in principle, be deferred to a subsequent hearing so as to allow for the parties to exchange their statements of case (although less formal than the statements of case called conclusions which are submitted before the tribunal d’arrondissement). The hearing will usually be deferred also in case of representation in person, unless the court decides that a hearing will still have to take place immediately in order to appreciate the level of complexity of the case and in order to raise awareness to the defendant on his procedural obligations (v. T. Hoscheit, Le droit judiciaire privé, para. 534).

II) If the consumer dispute is heard before the tribunal d’arrondissement, the consumer-plaintiff is required to have legal representation and is obliged to service to the defendant the act introducing the action, the assignation, in accordance with the legal requirements for its service , the signification (see above under 6.1.3. II). The assignation follows the formalities provided for under Art. 153 and 154 NCPC, covering in particular the object of the case and a brief exposition of the statements of case as well as the details of the counsel representing the plaintiff and the delay within which the defendant is required to obtain counsel (constitution de l’avocat) (Art. 193 NCPC).

The consumer-defendant is obliged to enter defense by notifying his legal representation within 15 days following the assignation (Art. 196, 197 and 171 NCPC). The statements of case of the parties before the tribunal d'arrondissement, the conclusions, have to be signed by a lawyer and observe the formalities provided for under Art. 171 NCPC.

6.1.5 In respect of the claims and relevant procedures available in the national legal system, what kind of relief might be available in consumer protection disputes? (monetary remedies, injunctions, skimming off etc.)?

The consumer has available the remedies provided for in the Code de la consommation transposing the respective directives, covering for instance, monetary compensation or the declaration of a contract term unfair. With regard to proceedings for injunctive relief see above5.2.

6.1.6 Please provide a brief overview of the role of parties and judges in civil proceedings generally (e.g. with reference to the principle of party disposition, the obligation of parties to make and prove factual allegations and to make and provide legal arguments, the possible role of the court). This overview should be brief; these issues will be dealt with in more detail in the questions that follow.

Luxembourg civil procedure is governed by the principle of party presentation, following mainly the French model in that regard. The subject-matter of the case is determined by the submissions of the parties (Art. 53 NCPC). The court cannot adjudicate infra petita or ultra petita (Art. 54 NCPC). Only the facts that have been adduced by the parties may inform the court's judgment, even if those facts have not been specifically invoked but form part of the file (arts. 55 and 56 NCPC). The court may invite the parties to provide the factual explanations necessary for deciding the case (Art. 57 NCPC). It is the responsibility of the parties to adduce the evidence (Art. 58 NCPC), although the court has the power to order any measure of investigation legally admissible (Art. 59 NCPC).
The principle ius novit curia is provided for under article 61 NCPC, adopting the same wording as article 12 of the French Code de Procédure Civile.
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 (Art. 65 NCPC).
The Luxembourg Cour de cassation has confirmed the obligation of the courts to substitute of their own motion a wrongly invoked legal ground of the material facts with the properly applicable legal ground, distancing itself from the stance of the French Cour de cassation in that issue (C. Cass., 10 mars 2011, No 18/11 confirmed subsequently in C. Cass. 24 octobre 2013, no 63/13 and C. Cass. 24 octobre 2013, No 62/13).

Source(s): Nouveau Code de Procédure Civile
Thierry Hoscheit, Le Droit Judiciaire Privé au Grand Duché de Luxembourg (Paul Bauler, 2012).
G. Vogel, Encyclopédie judiciaire de droit luxembourgeois (Larcier, 2016) (under « Principes généraux du droit »).
S. Menetrey, Procédure Civil Luxembourgeoise, Approche comparative (Larcier, 2016).
S. Menetrey et V. Bolard, « Le Plein Office du Juge et le Rôle des Parties » JurisNews Vol. 2 – No 3-4/2013.
Bruck/P. Rauchs, « Rapport aux journées colombiennes sur « Le consommateur et le procès », Annales du Droit Luxembourgeois, 2007-2008, 417-437

6.2 Small claims

6.2.1 Does a small claims procedure exist in the Member State? If yes, is it a specialised or simplified procedure?

There does not exist a small claims procedure distinct from the procedure applicable before the justice de paix (which has been analysed already in the above section 6.1.).

6.2.2 What are the value thresholds for claims brought under the small claims procedure? Moreover, are there any other factors that shape the use of the small claims procedure (including the nature of the claim, the area of consumer protection law into which the claim falls etc.)?
A consumer claim will be heard by the justice de paix if the value threshold falls below 10,000 EUR (unless it involves one of the matters for which the justice de paix is competent irrespective of value threshold (see above para. 6.1.1).

6.2.3 What forms must be completed to raise the application? Who assists the consumer in completing these forms?

The claim has to take the form of a citation and follow the less cumbersome (compared to a case heard before the tribunal d'arrondissement) requirements that have to be respected for any case brought before the justice de paix (see above para. 6.1.4. (I).
There is no particular assistance in establishing a citation for a consumer claim. However, if the consumer does not intend to avail himself of legal representation, he may resort for free to the European Consumer Center with regard to cross-border issues (http://cecluxembourg.lu). He may also address to a consumer association. The Union Luxembourgeoise de Consommateurs (https://www.ulc.lu/fr/) is the main consumer association in Luxembourg and provides free legal advice to its members (currently membership is subject to an annual fee of 65EUR/year). Moreover, as from 2015, consumers may address without charge to the student legal clinic operating in the framework of the Master of European Private Law of the University of Luxembourg under the supervision of Professor Elise Poillot (within certain specified conditions: http://wwwfr.uni.lu/formations/fdef/master_in_european_private_law_ll_m/clinique_du_droit, last accessed on 17/10/2017)

6.2.4 How can an application for a small claim be made (e.g. online, by post or in person)?

The application for a small claim falling under the jurisdiction of the justice de paix has to follow the less cumbersome formalities of a citation. The involvement (and the costs) of the judicial clerk (huissier de justice) is limited, given that the citation is sent by registered post (Art. 102 NCPC) (see above, para. 6.1.3 (I).

6.2.5 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

The general rule applicable is that the consumer, as it is the case with every party in litigation, has to prove the facts upon which he bases his claim or his defence (Art. 58 NCPC). The court may order any measure of investigation of its own motion, or upon request by one of the parties (Art. 59 and Art. 348 NCPC et seq.).
If the consumer-plaintiff does not have legal representation, he has to appear in person at the date of the hearing and make his case . If the claimant does not appear in court, the defendant may ask that the court decides on the case, without prejudice to the faculty of the court to reschedule the hearing (Art. 75 NCPC). The consumer-defendant will have to appear in court and enter his defense, otherwise the case will be decided by default, under the conditions provided for by law (Art. 78 et seq. NCPC).

6.2.6 Are the costs of the successful party reimbursed?

As it has been already explained in the first strand of the report (2.1.1), there are no court fees in Luxembourg. However, the costs of certain required procedural steps will be advanced by the plaintiff, but are to be borne by the party who loses the case . The court has discretion to shift part or all of them to the other party on the basis of a specifically motivated judgement to that effect (Art. 238 NCPC). The court has discretion to award other costs to any of the parties on the ground that it would be unfair for the other party to bear them (Art. 240 NCPC). The expenses which are normally excluded from reimbursement are the fees of the lawyer for the legal advice (honoraires), which should not be confused with the fees charged for the legal representation (émoluments) which are reimbursed.
An example of a case in which the shifting of the costs was decided is the judgment of the Cour d'Appel (référé), 25 octobre 2006, Coditel S.à.r.l – Union Luxembourgeoise des Consommateurs (published in Pasicrisie) in which the court confirmed the judgment of the first instance, ruling in favour of the consumer association, that it would not be fair that it bears the entirety of the costs.

Source(s): Thierry Hoscheit, Le Droit Judiciaire Privé au Grand Duché de Luxembourg (Paul Bauler, 2012).
S. Menetrey, Procédure Civil Luxembourgeoise, Approche comparative (Larcier, 2016).

6.3 Claims other than small claims

(Please refer to the responses given above under 6.1.1. to 6.1.4)

6.3.1 If a consumer protection dispute does not qualify as a small claim, what other procedures are available? What are the value thresholds and other factors determining the use of such procedures?

6.3.2 How can such claims be made? Please specify if the applications can be made online, or by post or in person.

6.3.3 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

6.3.4 Are the costs of the successful party reimbursed?

Source(s):

6.4 Claims for the issuance of a payment order

6.4.1 Does an order for payment procedure exist in the national system? Is it a simplified procedure?

An order for payment procedure can be pursued before the justice de paix with regard to monetary claims not exceeding 10,000 EUR and provided that the debtor is domiciled or has his habitual residence in Luxembourg (Art. 129 NCPC). It is a simplified procedure bearing unilateral character (v. Th. Hoscheit, Droit judiciaire privé, para. 605). The claim is formed by way of oral or written declaration in the registry of the court and it has to include the following elements: 1) the personal details of the parties; 2) the grounds and value of the claim; 3) the demand that a payment order be issued (ordonnance conditionnelle de paiement). The claimant has to adduce all the necessary supporting documents (Art. 131 NCPC). The court renders the order if it considers that the claim is well founded. In the opposite, it rejects the claim by an order which is not subject to appeal (Art. 132 NCPC).
With regard to monetary claims outside the competence of the justice de paix (monetary claims exceeding 10,000 EUR), the tribunal d'arrondissement is competent to issue a payment order pursuant to the specific procedure of the provisional measure called provision sur reqête (Art. 919 NCPC). It is also a simplified procedure modelled, to a certain extent, upon the ordonnance conditionnelle de paiement. The claim for issuing a provision sur reqête is formulated in the same way as the latter (Art. 131 NCPC). However, in the course of the procedure of provision sur requête, there are some differences in comparison to the procedure of ordonnance conditionnelle de paiement, which mainly pertain to its nature as a measure of interim relief.

6.4.2 Which authorities or courts are competent to hear claims for the issuance of payment orders?

With regard to monetary claims not exceeding 10,000 EUR the competent court to issue an ordonnance conditionnelle de paiement is the justice de paix. It has been subject to debate whether such an order can be issued for those matters for which the justice de paix is competent irrespective of the value of claim (for the exceptional competence of the justice de paix irrespective of value threshold see above answer 6.1.1). Thierry Hoscheit takes the view, that has also been followed by certain judgments, that the competence for issuing a payment order should always observe the threshold of 10,000 EUR and thus coincide with the material scope of Art. 2 NCPC (T. Hoscheit, Le droit judiciaire privé, para. 603).
For monetary claims exceeding 10,000 EUR the competence is allocated to the tribunal d'arrondissement following the specific procedure of the provisional measure called provision sur reqête (Art. 919 NCPC).

6.4.3 Are there any formal requirements that must be satisfied for the application for the issuance of a payment order to be made (e.g. standard forms, representation by a lawyer, the detail of description required, the need to provide written evidence etc.)?

The formal requirements are those described above para. 6.4.1. As it is the case with every case brought before the justice de paix, legal representation is not required. The claimant is not obliged either to have legal representation in order to apply for the issuance of a provision sur reqête.

6.4.4 What information is generally available to the authority or court when a claim for the issuance of a payment order is made?

Generally that information can be an unpaid invoice or proof of unpaid instalments of a credit contract.

6.4.5 What opportunity is available for a defence/statement of opposition to be advanced? How should this be done and what is its effect? Please specify if the means of advancing a defence differ depending on the value of the claim and the court dealing with it.

The act of serving the ordonnance conditionnelle de paiement has to reproduce mandatorily the text of Art. 135 NCPC, according to which the debtor is informed of his right to form opposition (contredit) against the order, for as long as the order has not been rendered enforceable (see below 6.4.6). The objection can be advanced by means of a simple written or oral declaration in the registry of the court by the defendant or a person representing him. It has to include a summary of the grounds on which it is based (Art. 135 NCPC). However, there is no requirement for a detailed motivation which can always be provided for at the hearing (Th. Hoscheit, Droit Judiciaire Privé, para. 605 with reference to Tribunal de paix Luxembourg, 8 juillet 1981, No 939/81; Tribunal de paix Luxembourg 6 juillet 2005, BIJ 9/2005, page 174 and Tribunal d'arrondissement Luxemburg 13 janvier 2005, BIJ 4/2005, page 74)
The opposition duly introduced, either for the entirety or a part of the claim, it suspends the enforcement proceedings of the payment order. However, certain consequences attached to the serving of the ordonnance conditionnelle de paiement are maintained. In particular, the opposition does not affect the interruption of the limitation of the claim and the interest remaining due (Art. 136 NCPC). Either party has the right to ask for a hearing. A minimum delay of eight days has to be observed between the summons and the hearing (Art. 137 NCPC). If the opposition is founded, the court adopts a decision which revokes the ordonnance conditionnelle de paiement. If the opposition is partially founded, a decision is taken against the debtor for the corresponding part of the claim. If the opposition is rejected the court takes a judgment against the debtor. If the debtor entering opposition fails to appear, he can enter an opposition against the default judgment pursuant to the generally applicable rules provided for in Art. 90 NCPC et seq governing the extraordinary means of judicial review, the opposition (Art. 138 NCPC).
As far as the provision sur requête is concerned, the objection has to take the form of a written declaration (an oral declaration is not possible as it is the case with the ordonnance conditionnelle de paiement) submitted to the registry of the court by the debtor or the person representing him. If the debtor enters defence, the progressof the proceedings does not rely upon the diligence of the parties (as it is the case with the ordonnance conditionnelle de paiement where any of the party may ask for the hearing) but it falls upon the responsibility of the court. The court will decide whether it is necessary to hold a hearing.

6.4.6 What is the effect if the claim is uncontested, i.e. if there is a lack of defence/statement of opposition?

After the elapse of the 15 days' delay within which the debtor may form a statement of opposition, the creditor may demand that the ordonnance conditionnelle de paiement be rendered enforceable. This demand will be entered before the registry of the court by a simple oral or written declaration. If the court is satisfied that the procedure has been duly observed, it will accede to this demand and adopt a second order which will no longer be conditional but it will produce the effects of a judgment by default. This order allows the creditor to secure the claim by means of judicial mortgage. If the debtor enters opposition, the decision of the court will have the effect of a contradictory judgment. The court may refuse to render the ordonnance enforceable by means of an ordonnance motivée (motivated order). The registry will inform the claimant accordingly, who has the right to appeal (in the form of requête) before the president of the tribunal d'arrondissement. The ordonnance of the president is final and immediately enforceable (Art. 139 NCPC).

In the case of provision sur requête and in the event of lack of opposition, the court renders an enforceable order which will produce the effects of an interim adversarial order in case the first provisional order has been notified to the debtor in person. Otherwise, it will produce the effects of an order issued by default (Art. 928 NCPC). Against an interim order deemed adversarial the debtor can exercise an appeal within fifteen days following its serving. Against a default order the debtor can enter opposition within eight days following its serving, delay which runs in parallel with the delay for exercising an appeal (Art. 939 NCPC). The court may order provisional enforcement of the provision sur requête at the end of the procedure. As any other measure of interim relief, the provision sur requête is not vested with res judicata (Art. 930 in combination with Art. 938 al. 1 NCPC).

6.4.7 If the defendant is a consumer, and he or she does not respond to or raise an objection to the issuance of the payment order, does the authority dealing with the claim for payment order proceedings have the power to examine any issue of consumer protection law of its own motion before treating the action as usual?

Such power is not provided explicitly by law or reported case law.

It would still appear that the court can examine such issue in the framework of the powers that it has with regard to the issuance of a payment order. The court has the power to refuse to grant the payment order if the claim does not appear to be founded. Within the remit of this power, the court could refuse to grant a payment order if it maintains doubts as to the validity of the clause on which the claim is founded. The decision to refuse to grant the payment order is not subject to appeal. In that event, the plaintiff would be invited to pursue his claim through the normal adversarial course. The order will be rendered enforceable by the court if the procedure has been properly followed. The wording of the law with reference to the proper conduct of the procedure, does not seem to exclude though the possibility of an assessment at that stage of the merits of the claim (see to that effect, Th. Hoscheit, Droit Judiciaire Privé, para. 605). The court has the power to refuse to render a payment order enforceable, by adopting a motivated order in that regard which is subject to appeal.

However, it has to be noted that when the consumer enters opposition which opens an adversarial debate, it is more likely that a consumer issue will be brought to the court's attention.

6.4.8 What steps must the pursuer take in order to obtain an enforceable decision?

Please refer to the response in 6.4.6.

6.4.9 Is this decision final, or can the defendant appeal against it?

Please refer to the response in 6.4.6.

Source(s): Title VII of the NCPC « Du recouvrement des créances par voie d'ordonnance de paiement ».
Doctrine : T. Hoscheit, Droit judiciaire privé, para. 598 et seq.

6.5 Appeals in consumer disputes

6.5.1 Are appeals possible in all consumer disputes? Please specify for small claims and other types of claims.

The claims up to 2,000 EUR introduced before the justice de paix are not subject to appeal (Art. 2 NCPC) (without prejudice to the right to appeal on grounds of incompetence of the court seized due to wrong qualification of the claim – Art. 582 NCPC). In the case of matters pertaining to tenancy (to the extent that it may also concern consumers if the tenancy agreement is concluded with a professional) the decisions of the justice de paix are not subject to appeal for claims up to the 1,250 EUR (Art. 3 point 3 NCPC) (please refer to the answers above under 6.1.2). The remaining of the disputes within the material competence of the justice de paix are subject to appeal before the tribunal d'arrondissement (Art. 22 and 114 NCPC). The appeal against the first instance judgments of the tribunal d'arrondissement is introduced before the Cour d'appel (there is only one court of appeal in Luxembourg).

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Nature of the procedure at 1st instance	Adversarial	Adversarial	Adversarial	Interim relief procedure for all injunctive actions before the President of the tribunal d'arrondissement siting in commercial matters (Title 2 " Actions en cessation" Code de la consommation)		
2nd instance – appeal to?	€ 0 – € 2000 No appeal € 0 – € 1250 No appeal within this range for the	€2001 – € 10000 Tribunal d'arrondissement €10,001+ Cour d'appel	Cour d'appel	Cour d'appel		

	cases of Art. 3 NCPC €2001 – €10000 Tribunal d'arrondissement			
3rd instance – appeal to?	The parties may appeal on a point of law before the Cour de cassation.			

6.5.2 Please briefly specify the national appeal procedure, including any requirements to be satisfied for appeals. These might include, but are not limited to, conditions of admissibility, value thresholds, time-limits, the scope of review, and the impact of the appeal on enforcement (provisional enforcement). Please refer to any rules specifically applicable in respect of the claims and relevant procedures outlined above.

The appeal is admissible against all first instance judgments except where law provides otherwise (as it is the case for small claims up to € 2000) (Art. 578 NCPC). The time-limit to lodge an appeal against a first instance judgment is forty days as from its notification. With regard to default judgments, the appeal may be lodged as from the day where opposition is no longer admissible (Art. 571 NCPC). The time-limit to enter an appeal does not have a suspensive effect upon the enforcement of the first instance judgments (see Th. Hosheit, Droit Judiciaire Privé, paras. 1179 and 1308). However, the exercise of the appeal produces a suspensive effect, unless provisional enforcement has been granted, where this is allowed (Art. 588 NCPC). The provisional enforcement is either provided by law (when for instance the claim is supported by an official document or the debt has been acknowledged) or it is left upon the discretion of the courts, eventually upon ordering the deposit of a guarantee (Art. 115 NCPC for the justice de paix and Art. 244 NCPC for the tribunal d'arrondissement).
The appeal is brought in the form of assignation which has to refer to the following elements (apart from the elements provided for under articles 153 – 153 NCPC, applicable to every type of assignation): 1) the details of the legal representation of the appellant; 2) the delay of 15 days within which the respondent is required to obtain counsel; 3) reference to the judgment against which the appeal is brought, as well as, if applicable, the parts of the judgment to which the appeal is limited (Art. 585 NCPC). The appeal has to refer explicitly to the allegations made and to the grounds upon which those allegations are founded (Art. 586 NCPC). The appeal has a devolutionary effect, which means that the dispute is transferred to the second instance as it has been presented before the first instance court (Art. 592 NCPC).
Please refer also to the response given in the first strand of the report, Section 2.2. "Appeal and third-instance"

Source(s): Nouveau Code de Procédure Civile (NCPC), Book V
Th. Hoscheit, Droit Judiciaire Privé, Partie 8 ; S. Menetrey, Procédure Civile Luxembourgeoise, paras. 640 et seq.

6.6 Enforcement in consumer disputes

6.6.1 If the assessment of a consumer protection issue has not been possible at an earlier stage of the proceedings, is it always possible – either ex officio (see section 10 below) or if the consumer raises a possible violation of consumer protection law – for this assessment to be undertaken during enforcement proceedings?

In general, in Luxembourg the enforcement requires an enforcement title (Art. 689 NCPC). The rules governing the judicial protection of the debtor at the enforcement stage apply equally for consumers. The only case where enforcement is theoretically possible without prior judicial authorisation is the provisional attachment of bank accounts (saisie-arrêt) where the claim of the plaintiff is evidenced in a written contract (Art. 693 NPPC). However, as it has already been explained above (first strand of the report under 2.4.1.(1)) the parties will typically seek for judicial authorisation. The plaintiff is required to initiate proceedings on the merits within 8 days from the attachment in order to validate the enforcement (Art. 699 NCPC), otherwise, the attachment is void (art 701 NCPC).

6.6.2 In the particular case of consumer protection, if a court examines consumer protection law (either ex officio or on the basis of an argument advanced by the consumer), does national procedural law provide that interim measures should 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 final decision will have full effect?

The law provides sufficient protection in that regard. Particularly in the framework of the most common enforcement measure of the provisional attachment of bank accounts through the procedure of saisie-arrêt, the validity of the attachment has to be confirmed by the competent court (please refer to the answer under the first strand of the report Section II, 2.4.1. 1 and 3.3.2.).

Source(s): Nouveau Code de Procédure Civile, Livre VII

Th. Hoscheit, Les saisies-arrêts et cessions spéciales, Editions Paul Bauler, 2000
Th. Hoscheit, « La saisie-exécution », Annales du droit Luxembourgeois, 2007-2008, 341-391
S. Menetrey, La validation de la saisie-arrêt sur le fondement d'une ordonnance de référé, Pasicrisie, Tome 37, 2015-2016, p. 109

7. ACTIONS FOR COLLECTIVE REDRESS

7.1 Injunctive relief, linking individual and collective actions

7.1.1 If collective proceedings are launched, does national procedural law provide that ongoing individual claims, relating to the same dispute, should be stayed until the collective proceedings are brought to an end? Please specify if this constitutes an obligation on the part of the national judge or if it is at his or her discretion.

A compensatory collective redress mechanism is not yet available in Luxembourg.
There is no comparable to the Spanish procedural context referred to in the judgment of the CJUE of 14 April 2016, Sales Sinués and Drame Ba, C-381/14 and C-385/14, EU:C:2016:252.

7.1.2 If individual proceedings are stayed, please indicate what the effect of the court or ADR entity's decision in the collective action on those individual proceedings would be, i.e. whether the outcome of the collective action binds the consumer bringing an individual action.

Please refer to the answer above.

Source(s):

8. CONSUMER ALTERNATIVE DISPUTE RESOLUTION

8.1 Consumer disputes before ADR fora

8.1.1 Is ADR mandatory for all parties bringing a claim related to a consumer protection dispute?

ADR is optional. In line with article 10, paragraph 1 of the ADR Directive, Art. L. 411-3 Code de la consommation provides that an agreement between a consumer and a trader to submit complaints to an ADR entity is not binding on the consumer if it has been concluded before the dispute has been materialised and if it has the effect of depriving the consumer of his right to seise a qualified entity, as it is defined by the law, and of his right to bring an action before the courts for the settlement of the dispute. Any other clause to the contrary shall be deemed void and not written. This nullity can however only be invoked by the consumer.

8.1.2 Please specify if there are limitations to the use of ADR. These might include the nature of the claim (i.e. whether both individual and collective claims are possible), requirements of representation, time limits, value thresholds, etc.

Recourse to ADR is possible with regard to individual consumer claims. The parties must have the right to address to the ADR entity without legal counsel, however they maintain their right to avail themselves of legal representation (Art. L. 432-10 Code de la consommation). ADR entities may maintain or introduce procedural rules which allow them to refuse to deal with a given dispute on the same grounds provided for under Art. 5, para. 4, ADR Directive (article L. 432-2 (1) Code de la consommation). In line with Art. 5, para. 4, third sentence of the same directive, the law provides that where such procedural rules are set out, they shall not significantly impair consumer's access to ADR procedures, particularly in the case of cross-border disputes (Art. L. 432-2 (2) Code de la consommation). With regard to value thresholds, in line with Art. 5, para. 5, ADR Directive, the law provides that where pre-specified monetary thresholds are established, those thresholds are not set at a level which could significantly impair consumer access to the respective procedure (Art. L. 432-2 (1) (d) Code de la consommation).

It has to be noted that Luxembourg facilitates access to ADR procedures through the establishment of the "Consumer Mediator" (Le Médiateur de la consommation, Art. L-421-1 Code de la consommation). The Consumer Mediator is a public and free service, falling under the responsibility of the Ministry of Economy. It is competent for informing consumers and professionals on the existing ADR procedures in Luxembourg, for receiving ADR requests and transmitting them to the entity eventually competent for a specific type of dispute and finally, for dealing with the complaint, in the absence of another competent entity to that effect (https://www.mediateurconsommation.lu/).

8.1.3 Can ADR entities issue binding decisions and can they enforce those decisions? If not, please explain how they are enforced.

The decisions of the ADR are neither binding nor enforceable before Luxembourg courts. The ADR entity informs the parties beforehand that they have the possibility to accept, to refuse or to follow the suggested solution (article L. 432-12 (1) (i) Code de la consommation). It also informs them on the possible legal consequences in relation to the acceptance of the solution (Art. L. 432-12 (iv) Code de la consommation).

8.1.4 Does national law provide that limitation periods applicable to judicial actions should be suspended while ADR is ongoing?[272]

The limitation periods are suspended from the date of the due reception of the demand. The suspension holds until the date where the entity informs the parties either of its decision to abstain from dealing with the demand, in accordance with the applicable provisions, or of the outcome of the process (Art. L. 432-14 Code de la consommation).

8.1.5 Please specify if national law establishes rules providing for recourse to judicial action following an (unsuccessful) ADR hearing[273].

Participation to the procedure does not preclude judicial redress (Art. L. 432-12 (1) (ii) Code de la consommation). Moreover, the parties have the right to withdraw from the procedure after informing accordingly the other party and the entity (Art. L. 432-11 Code de la consommation).

8.1.6 Is there judicial review of decisions and awards made by ADR entities? If so, by which court or tribunal is this oversight made? Is it ordinary or specialised?
This is not provided for, as the participation to the procedure does not preclude judicial redress.

Source(s): Code de la consommation

[272] The Directive on Consumer ADR provides that "the existence of an effective system for collective claims and easy recourse to ADR should be complementary". Consumer ADR is relevant not only for individual claims but also for collective ones; it can provide consumer with a means to reduce costs and save time.
[273] Per Arts.10-12, Directive on Consumer ADR.

9. THE EXAMINATION OF CONSUMER PROTECTION LAW IN NATIONAL PROCEDURAL LAW: RESPECT FOR THE PRINCIPLES OF THE EFFECTIVENESS AND EQUIVALENCE OF CONSUMER PROTECTION LAW AND EX OFFICIO CONTROL

9.1 The basis of ex officio control of consumer protection law in national law

9.1.1 Is it clear in the national legal system when consumer protection law should be applied ex officio? Is the ex officio control of consumer protection law established as an obligation or as a (discretionary) power of the judge in national procedural law?

There is no explicit provision to that effect. However, the ex officio control has already been applied by Luxembourg courts on the basis of a purposive reading of the respective provisions of the Code de la consommation pertaining to the examination of standard contract terms in combination with the Unfair Contract Terms Directive and the case-law of the Court of Justice. It is worthwhile mentioning that in fourth part of the Code de la consommation, there figures a compilation of national and Union case-law, covering also landmark judgments on the ex officio powers of the courts.

To give some illustrations of the ex officio control in Luxembourg, in a consumer credit case of the low claims court (tribunal de paix de Luxembourg, Rep.fisc. no 889/2016, judgement of 25.02.2016, unreported), the court raised of its own motion the issue of unfairness of a default rate of 17,83% stipulated in the facility agreement. The consumer-debtor did not appear nor was represented. After having invited argument by the parties (only the professional presented argument, pleading in favor of the validity of the term), the court declared the respective term unfair (Tribunal de paix de Luxembourg, Rép. fisc. No 1580/2016 du 15.04.2016).

In a case of the first instance court (Tribunal d'arrondissement, 1er chambre, jugement civil du 03/11/2011, no 307/2011, num. 13487 du rôle, non publié), the court raised of its own motion two terms of a rental agreement. The consumer did not appear nor was represented in the proceedings. The first term was a penal clause up to the amount of 15% for unpaid invoices. After having invited argument of the parties (only the professionalpresented argument), the court set aside the respective term without admitting a reduction of its amount. The second term obliged the consumer, in the event of termination of the contract attributed to his fault, to pay the entirety of the rent due until the end of the contract. The court, after having invited argument by the parties (only the professional pleaded) decided of its own motion that this clause was void, that it had to be set aside and that it could not be reduced.

The distinction between an obligation or a discretion cannot be clearly established. However, judicial discretion has to be clearly distinguished from arbitrariness. If the court will be in a position to raise a consumer law issue in view of the factual and legal elements available to it, it will exercise its power. From the interviews held with individual judges, it would appear that the main concern of the court is how to exercise the ex officio duty in such a way as not to overcome its duty of neutrality . The exercise by the courts of the ex officio obligation should not be perceived by the professional as a substitution of the submissions of the consumer by the court . For reasons of legal certainty, the judges with whom this rapporteur discussed, were all in favour of the introduction of a specific legislative provision on the ex officio duty.

9.1.2 If there is an understanding of ex officio control of consumer protection law in the national legal, what is this control understood to encompass/not cover?

Please refer to the answer given above.

9.1.3 Is the party who claims to be a consumer required to establish his or her consumer status, the existence of a consumer contract and that consumer law applies to the dispute? Is this required even if the consumer has no legal representation?

This issue is linked to the factual elements that the court possesses.
It does not appear likely that the court will pursue such qualification without the relevant information. From the interviews conducted with judges, it would appear necessary in that regard (for the court to have available all the necessary legal and factual information in order to proceed with an ex officio control) that the consumer appears in the hearing (before the tribunal de paix) and defends his case even in plain terms. This will facilitate the judicial task in raising an issue that may be deduced on the face of the allegations of the "weaker" party.

9.1.4 What information is available to judges and dispute resolution facilitators hearing consumer protection disputes? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a consumer protection dispute to be heard and b) for the court to engage in ex officio control?

Please refer to the response above

9.1.5 Who is responsible for providing this information? If the necessary information is not available to the court (or dispute resolution facilitator), is he or she under an obligation to investigate in order to be able to respond to a relevant consumer protection dimension of the case?

The court may rely on the factual information adduced by any of the parties (the contract for instance adduced by the professional).
A power to investigate in that regard does not appear to be clear.

9.1.6 Will the court provide the consumer with any assistance in gathering factual information or advancing his legal arguments before the court? Please respond for the situation where: a) the consumer has legal representation and b) the consumer has no legal representation.

The oral proceedings before the juge de paix allow for more leeway in the conduct of the proceedings. This means that the judge may make the necessary questions and ask for the appropriate clarifications which will allow for the consumer law issue to become part of the adversarial debate. In case of a judgment by default, if the court raises a consumer law issue of its own motion, it would be obliged to invite the submissions of the parties. However, the courts do not seem ready to compensate for the total passivity of the consumer. It does not appear likely that the court will assume such role when the party has legal representation.

Source(s): National case-law : Trib. d'arr. Lux, 1er chambre, jugement civil du 03.11.2011, no du rôle 13487, non publié; Tribunal de paix de Luxembourg, jugement du 25.02.2016, rep.fisc. no 889/2016, non publié; Tribunal de paix de Luxembourg, jugement du 15.04.2016, rep.fisc. no 1580/2016, non publié
Interviews of the author with individual judges of the Tribunal de paix de Luxembourg.

9.2 The possibility for ex officio control of EU consumer protection law in dispute resolution proceedings

9.2.1 Is ex officio control of consumer protection law always possible when the procedure involves a full assessment of the claim on its merits?

It will be possible under certain circumstances before the justice de paix (please refer to response under9.1). By contrast, the proceedings before the Tribunal d'arrondissement require legal representation and it does not seem likely that a court would proceed upon an ex officio assessment in the presence of counsel for both parties. However, the situation appears to be different when the consumer fails to appear. In its judgment of 03.11.2011 referred to above, the tribunal d'arrondissement has raised of its own motion the unfairness of a penalty clause figuring in a consumer contract, after having invited argument of the professional.

9.2.2 Can ex officio control be exercised even when the procedure does not involve an assessment on the merits?
Please refer to response above under 6.4.7.

9.2.3 Please indicate if, per national procedural law, ex officio control can be exercised at the following stages of the procedure:

There is no specific provision in Luxembourg civil procedural law.

	Courts		Other dispute resolution facilitators	
	Possible to exercise ex officio control	Not possible to exercise ex officio control	Possible to exercise ex officio control	Not possible to exercise ex officio control
Ordinary proceedings				
Small claims				
Payment order				
Provisional measures				
Proceedings linked to enforcement				
Enforcement proceedings				
- Enforcement of payment order				
- Enforcement of arbitration award				

- Enforcement of mortgage				
- Enforcement of notarial deed				
Appeal proceedings (please specify:)				

9.2.4 What does ex officio control encompass in national procedural law?

Please see response above under9.1

Source(s):

9.3 Other procedural mechanisms for the equivalent and effective protection of EU consumer law

9.3.1 Does national procedural law provide that rules of EU consumer law (as well as rules that aim to satisfy EU consumer law objectives) should be understood as having equal standing to national rules of public policy (which is to say, that for the purposes of domestic law, the consumer protection provision is understood to have equal standing to a rule that must be raised ex officio by the national court)?

There is no such provision.

9.3.2 If ex officio control is not possible in certain types of proceedings or at a certain stage of proceedings (or for any other reason), does national procedural law provide for an alternative way of assessing consumer protection law?

There is no such provision .

Source(s):

9.4 Ex officio control in payment order procedures

Please refer to the responses above under6.4.

9.4.1 What information is available to the judge when a claim for the issuance of a payment order is made? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a claim for the issuance of a payment order to be granted and b) for the court to engage in ex officio control before a payment order is issued?

9.4.2 What considerations will be assessed ex officio by the court (or other competent authority) before a payment order is issued?

9.4.3 How is the consumer informed about the claim to issue a payment order against him or her? Does national procedural law make any provision for steps to be taken to ensure that consumers are informed of the claim for the issuance of a payment order so that he or she can contest it?

9.4.4 If the consumer objects to the claim, what is the next step? Do the proceedings continue, in the context of which ex officio control can be exercised? Or are the proceedings transferred to ordinary proceedings for analysis on the merits of the claim?

European Commission
An evaluation study of the impact of national procedural laws and practices on the equivalence and effectiveness of the procedural protection of consumers under EU law

JUST/2014/RCON/PR/CIVI/0082

National Report – Consumer Protection Strand

Malta

Marisa Vella, Francesca Galea Cavallazzi and Rya Gatt

MALTA: LEGAL ANALYSIS

1. NATIONAL LEGISLATION IMPLEMENTING EU CONSUMER PROTECTION INSTRUMENTS

EU Legislation	Transposing National Legislation	Additional notes
Doorstep Selling Directive 1985/577/EEC	Consumer Rights Regulations – Part III (Subsidiary Legislation 378.17)	The Doorstep Contracts Act was repealed by Act VI of 2014 and the provisions thereof transferred to the Consumer Rights Regulations (Subsidiary Legislation 378.17)
Package Travel Directive 90/314/EEC	Package Travel, Package Holidays and Package Tours Regulations (Subsidiary Legislation 409.01)	

	Injunctions for the protection of the interests of consumers (package travel and protection of buyers in contracts for time sharing of immovable property) Regulations (Subsidiary Legislation 409.17)	
Unfair Contract Terms Directive 1993/12/EEC	The Consumer Affairs Act - Part VII (Chapter 378 of the Laws of Malta)	
Distance Selling Directive 1997/7/EC	Consumer Rights Regulations – Part III (Subsidiary Legislation 378.17) With respect to financial services, Distance selling (retail financial services) Regulations (Subsidiary Legislation 330.07)	The Distance Selling Regulations were revoked by Legal Notice 439 of 2013 and the provisions thereof were transferred to the Consumer Rights Regulations (Subsidiary Legislation 378.17)
Consumer Sales and Guarantees Directive 1999/44/EC	The Consumer Affairs Act - Part X (Chapter 378 of the Laws of Malta)	
Unfair Commercial Practices Directive 2005/29/EC	The Consumer Affairs Act - Part VIII Unfair commercial practices and illicit schemes	
	Title I - Unfair commercial practices Title II - Illicit schemes	
Misleading and Comparative	The Consumer Affairs Act - Part VIII	

Advertising Directive	The Commercial Code – Title II, Sub-title I	
Consumer Credit Agreement Directive 2008/48/EC	The Consumer Credit Regulations (Subsidiary legislation 378.12)	
Timeshare Protection Directive 2008/122/EC	Protection Of Consumers (Timeshare, Long-Term Holiday Product, Resale And Exchange Contracts) Regulations (Subsidiary legislation 409.02)	
Consumer Injunctions Directive 2009/22/EC	Injunctions for the protection of the interests of consumers (package travel and protection of buyers in contracts for time sharing of immovable property) regulations (Subsidiary legislation 409.17)	
Consumer Rights Directive 2011/83/EU	Consumer Rights Regulations (Subsidiary Legislation 378.17)	
ADR for Consumer Disputes Directive 2013/11/EU	Consumer Alternative Dispute Resolution (ADR) (General) Regulations (Subsidiary legislation 378.18) The Consumer Affairs Act - Part VI: Consumer Alternative Dispute Resolution	

1. CONCEPT OF THE CONSUMER

1.1 Please outline the concept of the consumer in national law, indicating whether it is intended to be a uniform concept, whether it has been legislated for and where it can be found.

Article 2 of the Consumer Affairs Act defines the term “Consumer” as follows:

"**Consumer**" means –

(i) any individual who in transactions and other matters covered by this Act or any regulations made thereunder, is acting for purposes which are not related to his trade, business, craft or profession; and

(ii) any other individual not being the immediate purchaser or beneficiary, and whether or not a member of the consumer’s household, who having been expressly or tacitly authorised or permitted by the consumer, may have consumed, used or benefited from any goods or services provided to the consumer by a trader acting in the course of a trade, business, craft or profession, including goods or services provided as part of gift schemes and similar or analogous inducements; and

(iii) any other class or category of persons whether natural or legal as may, from time to time, be designated as "consumers" for all or for any of the purposes of this Act by regulations made by the Minister after consulting the Council:

(iv) Provided that for the purposes of Title I of Part VIII of this Act, the definition of "consumer" shall only consist of paragraph (i) above (Unfair commercial practices and illicit schemes);

Prior to the enactment of the Consumer Affairs Act, it was held by the Court of Appeal that if an individual is not a trader in terms of the definition provided in the Commercial Code (Chapter 13 of the Laws of Malta), then that individual shall be deemed to be a consume (Dr. Giovanni Bonello noe vs. Paul Bugeja decided by the Court of Appeal on 21 June 1976).

2. REGULATORY AUTHORITIES COMPETENT FOR CONSUMER PROTECTION ISSUES

2.1 What regulatory authorities, if any, are competent for enforcing consumer protection law? Please identify them, their nature (i.e. whether they are public or private or mixed) and the nature of enforcement.

The regulatory authority competent for enforcing consumer protection law is the Malta Competition and Consumer Affairs Authority (MCCAA) which is established under Chapter 510 of the Laws of Malta (Malta Competition and Consumer Affairs Authority Act). The MCCAA is split into two offices; one dealing with competition related matters and the other with consumer affairs. The office for consumer affairs comprises three directorates, one of them being the Enforcement Directorate which focuses on the enforcement of consumer protection legislation. It is

tasked with investigating unfair trading practices and unfair contract terms and takes the necessary measures for the suppression and prevention of such practices, which may be detrimental to the interests of consumers. Furthermore, it ensures price transparency and compliance with other information requirements and monitors trading practices relating to the provision of goods and services to consumers.

2.2 Is there a specific venue for this type of enforcement and does this limit the jurisdiction of courts/ADR fora (even if only initially)?

The consumer always has the option of bringing a claim before the ordinary courts and can do so without having to go through the MCCAA or any other prior procedures. However, the consumer wishes to bring a claim before the Consumer Claims Tribunal – assuming it has jurisdiction over such claim - the consumer must as a first step register a complaint against the trader with the MCCAA, specifically with the Complaints and Conciliation Directorate. Following this, assuming the claim is justified, a brief mediation or conciliation process will take place whereby the Complaints and Conciliation Directorate contacts the trader informing him of the complaint and of his respective legal obligations in respect thereof, and allows him a brief period of time to respond. If the process fails to find an amicable solution, the consumer may choose to submit a claim before the Consumer Affairs Tribunal or simply withdraw the complaint. Therefore, if the consumer wishes to proceed before the tribunal, it is, at least initially, obligated to try and settle the matter amicably and it is only if the parties cannot find a solution that the claim can be brought before the tribunal.

Consumer related claims which do not fall within the jurisdiction of the tribunal, such as claims relating to misleading advertising, may also be brought directly before the ordinary courts. However, the consumer would also have the option of bringing the complaint to the attention of the Director General for Consumer Affairs who will then carry out an investigation of the alleged breach. However, even though the matter may fall within the remit of the Director General, this does not prevent the consumer from proceeding directly before the ordinary courts.

2.3 Can criminal prosecutions be initiated for violations of consumer protection rules? How serious must the infringement be? What are the penalties and sanctions? And might these prosecutions lead to criminal penalties or sanctions? Can individual consumers piggy back on these claims (eg: via a parte civile method)?

If a trader is considered to have acted in breach of the Consumer Affairs Act, the Director General for Consumer Affairs can request the initiation of criminal proceedings before the court of magistrates and where the trader is found to be in breach, a maximum fine of €47,000 may be imposed by the said court.

The concept of Parte Civile is found in article 410(1) of the Criminal Code which provides that in any proceedings instituted by the Executive Police on the complaint of the injured party, “it shall be lawful for the complainant to be present at the proceedings, to engage an advocate or a legal procurator to assist him, to examine or cross-examine witnesses and to produce, in support of the charge, such other evidence as the

court may consider admissible".

2.4 Is there judicial review of decisions of consumer regulatory authorities? If so, by which court is this judicial oversight made?

Decisions of the Director General may be appealed before the Competition and Consumer Appeals Tribunal which is a specialised tribunal established under Chapter 510 of the Laws of Malta[6] set up specifically for purposes of reviewing the decisions of the Director General of Consumer Affairs and the Director General of Competition, and more generally, of the MCCAA.

2.5 Does the national legal system provide for a mechanism of cooperation between its national regulatory authorities and those of other Member States?

The national legal system does not specifically provide for such a mechanism.

3. LEGAL AID

3.1 Is legal aid available to consumers in: a) bringing a claim and b) defending a claim before a court?

Article 911 of Chapter 12of the Laws of Malta[7] provides that the benefit of legal aid shall only be available to persons appearing before the Superiour Courts and the Inferior Courts, and also in arbitration proceedings which are compulsory by law. This means that persons appearing before tribunals, including consumers bringing a claim before the Consumer Claims Tribunal or the Small Claims Tribunal, cannot benefit from legal aid. However, consumers bringing claims before the Court of Magistrates, the Civil Courts and the Courts of Appeal would be entitled to legal aid.

The same as (a) above. The law allows legal aid regardless of whether the consumer is bringing or defending the claim.

3.2 For what kinds of disputes and actions is legal aid available? (NB: legal aid might not be available for consumer or contractual disputes but be available instead for a related action e.g. actions relating to debt, mortgage arrears, eviction, etc.)

The law does not exclude claims based on their nature; the applicability of legal aid is dependent on the particular court before which the claim is brought and the means of the individual seeking it.

3.3 What requirements must be satisfied for the consumer to be entitled to legal aid? Please specify if there are any additional limitations to its availability.

Legal aid is applied if certain criteria are met, namely, that the applicant (i) confirms on oath that he has reasonable grounds for taking or defending, continuing or being a party to proceedings, and (ii) satisfies the means test[8].

3.4 What does legal aid encompass? (i.e. (only) general advice, (only) assistance in preparing the case, (only) assistance with negotiation of settlements, (also) representation).

The law does not specify the type of assistance, or rather the extent to which it can be offered. However there is some doubt as to whether this would extend to assistance with negotiation of settlements since the law seems to imply that legal aid is available to persons bringing or defending actions before the Courts.

4. COSTS

4.1 What are the costs of different types of procedures before courts? Are there exemptions to the payment of fees and expenses? How can costs be paid?

	Individual claim of Eur 0 – Eur 5,000	**Individual claim of Eur 5001 – Eur 20,000**	**Individual claim of Value Eur 20,000 +**	**Collective claim of Eur 0 – Eur 5,000**	**Collective claim of Eur 5001 – Eur 20,000**	**Individual claim of Value Eur 20,000 +**
Court Fees	**Small Claims** €40 + €7.20 each notification	**Court of Magistrates Claim of €10,000**	**First Hall Civil Court Claim of €20,000**	**Court of Magistrates Claim[9] of €10,000**	**Court of Magistrates Claim[10] of €10,000**	**First Hall Civil Court Claim[11] of €20,000**

	Consumer Claims	€ 355.50 + € 120 + €7.20 each service	€ 605.50 + € 120 + €7.20 each service **First Hall Civil Court Claim of €30,000** € - + € 120 + €7.20 each service	€ 355.50 + € 120 + €7.20 each service	€ 355.50 + € 120 + €7.20 each service	€ 605.50 + € 120 + €7.20 each notification **First Hall Civil Court Claim of €30,000** € - + € 120 + €7.20 each service
Court Expenses	LP[12]: € 77.25	LP: €127.34	LP: € 227.50	LP: € 77.25	LP: €127.34	LP: € 227.50
Exemptions						

5. STANDING AND REPRESENTATION IN CONSUMER DISPUTES

5.1 Does national law limit the standing of the individual consumer in respect of the claim that can be made and the forum before which it can be brought?

National law limits the standing of the individual in respect of the value and type of claim. A consumer may bring a claim before the Consumer Claims Tribunal only where the claim does not exceed the value of €3,500 and if it relates to the purchase or hire of goods from, or the provision of services by, a trader. Before the ordinary courts however the limitation is only with respect to the value of the claim in the sense that the value will determine which court (or tribunal) has the necessary competence.[13] Needless to say, the general rules of standing under national law, such as necessary interest in the cause, would also apply to consumer related claims.

5.2 Other than individual consumers, who or which bodies have standing in consumer protection disputes and for

what types of claim? If the action is not brought by the individual consumer, what requirements of representation must be satisfied?

Individual consumers have a standing in consumer protection disputes.

5.3 If a consumer wants to bring or defend an action relating to a consumer protection dispute, is there a legal (or otherwise formal) requirement that he or she has legal representation? Please specify for both judicial and ADR fora and the bodies, associations or authorities that can provide this representation.

In proceedings before the Consumer Claims Tribunal, the parties may opt to have legal representation; however this is not a formal requirement. If the party chooses to engage legal representation, the costs of such representation must be borne by said party regardless of whether the case is won or lost. Similarly, parties may initiate proceedings before the Small Claims Tribunal[14] and before the Court of Magistrates without legal

~~With regard to ADR proceed~~ings, the parties may be represented or assisted by persons of their choice.

6. ACTIONS BEFORE THE COURT

6.1 **Jurisdiction and competence of the courts in consumer disputes: General structure and special procedures aimed at protecting consumers**

6.1.1 Are ordinary courts competent to hear such claims? Is there also a specialised tribunal for consumer protection disputes.

As stated in question 4.2, the ordinary courts are generally competent to hear consumer claims and consumers may proceed to bring their claims directly before such courts.[15] However, there is a specialised forum established under the Consumer Affairs Act, namely the Consumer Claims Tribunal which is tasked with handling consumer related disputes. The competence of this tribunal is limited however with respect to both the nature and value of the claim in that it is only those claims which do not exceed the amount of €3,500 and which arise out of the purchase or hire of goods from, or the provision of services by, a trader that can be brought before this tribunal.

6.1.2 Which courts are competent to hear consumer protection disputes at first instance and in appeals? Please

specify the court, in light of the value of the claim (and identify any other factors that are relevant in allocating jurisdiction).

The following courts are competent to hear claims at first instance:

6.2 The Consumer Claims Tribunal – claims not exceeding €3,500

6.3 Small Claims Tribunal – claims not exceeding €5,000

6.4 Court of Magistrates – claims not exceeding €15,000

6.5 First Hall of the Civil Court – claims above €15,000

The following courts are competent to hear claims at appeals stage:

- Court of Appeal (Inferior Jurisdiction) – Reviews decisions the Consumer Claims Tribunals, the Small Claims Tribunal and the Court of Magistrates

- Court of Appeal (Superior Jurisdiction) – Reviews decisions of the First Hall of the Civil Court

- The Competition and Consumer Affairs Tribunal – Reviews decisions of the Director General for Consumer Affairs

6.1.3 What is the nature of the procedure at first instance e.g. is it simplified or a summary procedure, and is there an assessment of the merits? Please specify in light of the value of the claim (and identify any other facts that are relevant in allocating jurisdiction)

The procedure before the Consumer Claims Tribunal and that before the Small Claims Tribunal are summary procedures in that, as far as is reasonably possible, the hearings take place in one sitting and the case is decided on the same day of the hearing.[16] In both tribunals, an assessment of the merits is made. The adjudicators presiding over these tribunals are not bound by the formalities which burden the ordinary courts and will generally regulate the proceedings as they deem fit in accordance with the rules of natural justice.

The Court of Magistrates hears civil cases which exceed the competence of the Small Claims Tribunal but which do not fall within the competence of the First Hall of the Civil Court. Proceedings before this court are ordinary proceedings.

The First Hall of the Civil Court is the superior court which deals with all matters, civil and commercial, which are not by special provision of law assigned to be tried and determined by another court. Broadly speaking, all claims where the amount involved exceeds €15,000 fall to be tried by the First Hall of the Civil Court. It is also competent to hear those cases where the claim cannot be quantified in terms of value. Proceedings before the First Hall of the Civil Court are ordinary proceedings. The exception to this is in relation to claims where the demand is solely (i) for the recovery of a debt which is certain, liquid and due and does not consist in the performance of an act, and (ii) for eviction of a person from property.

6.1.4 Please identify the formal requirements that must be satisfied for a consumer dispute to be heard before a court. These might include time limits applicable to the filing of the action/defence, representation requirements, etc.

A consumer wishing to bring the claim before the Consumer Affairs Tribunal must follow the procedure described in ~~4.2 above. In terms of formal~~ requirements however, with respect to the sale of goods and/or provision of services by a trader, the Consumer Affairs Act provides that, in order to benefit from the remedies available at law, a consumer must notify the trader of any lack of conformity in writing within two months from the date on which the consumer detected such lack of conformity. Furthermore, the trader will only be liable for lack of conformity for two years from delivery of the goods, meaning that the consumer would have to initiate the action within this period. Similarly if the action is brought directly before the Civil Court under the provisions of sale in the Civil Code[17], the consumer must initiate the action within two years from the date of formation of the contract.

In addition, there are certain formalities which must be observed with respect to the application required for initiating a claim. For instance, claims brought before the Consumer Affairs Tribunal must be made using a standard application form known as a "Notice of Claim" in which the consumer must set out the facts of the case and the remedy sought. The Notice of Claim must also be accompanied by a note from the MCCAA stating that the claim has been referred to the Director General or to the registered consumer association as the case may be and that subsequent to such reference no settlement was achieved on the issues in dispute.

Claims brought before the First Hall of the Civil Court must be made by sworn application and must include in a notice, printed in a clear manner, that whoever is in receipt of the application must file a sworn reply within 20 days from the date of service. Therefore, if it is the trader that initiatives the claim before the ordinary courts, then the consumer must reply within 20 days from service upon him of the sworn application. Furthermore, before the First Hall of the Civil Court, parties must have legal representation and all written pleadings must be signed by a warranted lawyer.

With regards to appeals, the application must be filed in the registry of the Court of Appeal within twenty days from the date of the decision whether from the Consumer Claims Tribunal or the ordinary courts at first instance, whatever the case may be.[1]

6.1.5 In respect of the claims and relevant procedures available in the national legal system, what kind of relief

might be available in consumer protection disputes? (monetary remedies, injunctions. skimming off etc.)

Under Maltese law it is possible to obtain both monetary remedies and injunctive relief. The remedies available to a consumer are numerous and vary depending on the particular breach. For instance, where the claim, brought under the provision of the Consumer Affairs Act, relates to the sale of goods by a trader, and the goods are non-conforming, the consumer may request by way of remedy that the trader either repair or replace the goods at no cost to the consumer, and, where this is not possible, the consumer may request a rescission of the contract or reduction of the price. Similarly, in claims brought under the provisions of sale in the Civil Code, where the goods are not of the quality promised, the consumer may reject the goods and demand damages or accept the goods and demand a reduction in the price.

With respect then to injunctive relief, in terms of the Consumer Affairs Act, the Director General for Consumer Affairs, has the power to order interim measures where he considers that the action of a trader may cause serious and immediate harm to the collective interest of consumers. More generally, procedural law allows persons to request injunctions from the ordinary courts to prevent or restrain a person from doing something which could cause serious and irreparable harm. This procedure would presumably be available to a consumer too; however it must be noted that the court will not issue such injunction where the person requesting it has an alternative means of redress; in other words, the harm caused must be irreparable. Therefore, if the harm which is being alleged by the consumer can be remedied in some way by the trader, injunctive relief is not likely to be granted.

~~6.1.6 Please provide a brief~~ overview of the role of parties and judges in civil proceedings generally (e.g. with reference to the principle of party disposition, the obligation of parties to make and prove factual allegations and to make and provide legal arguments, the possible role of the court). This overview should be brief; these issues will be dealt with in more detail in the questions that follow.

As a general principle, the burden of proving a fact rests, in all cases, on the party alleging it. It is therefore on the person initiating the action to support the facts of his claim with the necessary evidence. The parties will also have the opportunity to make legal arguments following the submission of evidence stage.

With regards to the role of the court, generally speaking, the court ought to hear the evidence submitted and the legal arguments put forward and determine the matter based solely on such evidence and arguments; in principle it ought not to make inferences or arguments on behalf of either party. However, a court may intervene in certain circumstances, for instance, by raising certain pleas ex officio, such as that of prescription. Furthermore, the court may, at any stage of the examination or cross-examination of a witness, put to the witness such questions as it may deem necessary or expedient.

6.2 **Small Claims**

6.2.1 Does a small claims procedure exist in the Member State? If yes is it a specialised or simplified procedure?

A small claims procedure is available. Proceedings before the Small Claims Tribunal are summary / simplified proceedings.

6.2.2 What are the thresholds for claims brought under the small claims procedure? Moreover are there any other factors that shape the use of the small claims procedure (including the nature of the claim, the area of consumer protection law into which the claim falls, etc.)?

It is only those claims which do not exceed the amount of €5,000 that can be brought before the Small Claims Tribunal. However, claims involving questions of ownership of immovable property or rights annexed thereto, whether or not the claim exceeds €5,000, as well as claims relating to ejectment and eviction from immovable property, fall outside the competence of the Small claims Tribunal.

With respect to consumer disputes, where the claim relates to the sale of goods and / or the provision of services by a trader and the value of the claim does not exceed the amount of €5,000, such claim may be brought before the Small Claims Tribunal.

6.2.3 What forms must be completed to raise the application? Who assists the consumer in completing these forms?

In order to bring an action before the Small Claims Tribunal, the claimant must fill in the claim form which can be found in the First Schedule of the Small Claims Tribunal Rules.[19] The MCCAA would presumably be available to assist the consumer should it require assistance in completing this form.

6.2.4 How can an application for a small claim be made (e.g. online, by post or in person)?

An application can be submitted either electronically/online or in person at the registry of the tribunal.

6.2.5 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

The parties may present either documentary or oral evidence, or both, in support of their case. In accordance with its rules the Small Claims Tribunal shall not be bound by the rules of best evidence or the rules relative to hearsay evidence if the adjudicator is satisfied that the evidence before him is sufficiently reliable to reach a conclusion.[20]

In terms of the rules of the tribunal, the claimant is naturally expected to appear for the hearing. If the claimant fails to appear, the tribunal will adjourn the hearing for another date; however if the claimant fails to appear a second time, the tribunal will dismiss the cause and the claimant will have to bear the costs.[21] Where on the other hand the defendant fails to appear, the tribunal may proceed to determine the case in his absence.

6.2.6 Are the costs of the successful party reimbursed?

Unless special circumstances warrant otherwise, the losing party shall be ordered to pay the costs of the party in whose favour the decision is awarded. These costs shall be limited to actual expenses directly made in connection with the case by the party in whose favour the payment of costs is awarded.

6.3 Claims other than small claims

6.3.1 If a consumer protection dispute does not qualify as a small claim, what other procedures are available? What are the value thresholds and other factors determining the use of such procedures?

If such claim exceeds the amount of €5,000 but is less than €15,000 the consumer may bring the claim before the Court of Magistrates, and, if the claim exceeds the amount of €15,000, it may bring the claim before the First of the Hall Civil Court.

6.3.2 How can such claims be made? Please specify if the applications can be made online or by post or in person.

All claims brought before the Court of Magistrates, the First Hall of the Civil Court and the Court of Appeal must be made by application which is to be presented in person in the registry of the respective court.

6.3.3 What are the rules on taking of evidence? When is it necessary for the pursuer or defender to appear in court?

Evidence before the ordinary courts shall be heard directly by the court or by means of an affidavit, except in those

cases where the nature of the case requires proof by a technical referee, who shall as far as possible assist the court when evidence is heard by it viva voce. Where the need arises, such evidence may be heard by the referee, also with the assistance of a legal referee or a judicial assistant.

As a general principle the Court shall require the best evidence that the party may be able to produce. The court shall disallow any evidence which it considers to be irrelevant or superfluous or which it does not consider to be the best which the party can produce. The Court may also require the party tendering the evidence to state the object of such evidence.

With regards to appearance in court, the rules on civil procedure hold that if, after the a cause is called three times, the contending parties or their advocates fail to appear, it shall be lawful for the court to order the cancellation of the cause from the list at the expense of the plaintiff. If only the defendant or his legal representative appears, he shall be entitled to demand that the plaintiff be non-suited with costs.

In practice therefore, since the claimant and defendant can appear through their legal representatives, without being present themselves, if one of the parties requires the other to give evidence, the party requiring it should file a witness summons.

6.3.4 Are the costs of the successful party reimbursed?

As a general rule, the court will award costs against the party cast, the matter of costs remains subject to the court's discretion. Additionally, the court may order that the costs will not be taxed as between party and party, when either party has been case in some of the points at issue, or when the matter at issue involves difficult points of law, or where there is any other good cause.

6.4 **Claims for the issuance of a payment order**

6.4.1 Does an order for payment procedure exist in the national system? Is it a simplified procedure?

An order for payment procedure does exist under Maltese law. Creditors seeking the recovery of a debt, which does not consist in the performance of a specific act, can obtain an executive title in respect of such debt by means of a judicial letter issued under article 166A of Chapter 12 of the Laws of Malta. However, this procedure is available only in those instances where the claim does not exceed the value of €25,000, and is one which is certain, liquidated and due.

6.4.2 Which authorities or courts are competent to hear such claims for the issuance of payment orders?

The First Hall of the Civil Court is competent to hear such claims.

6.4.3 Are there any formal requirements that must be satisfied for the application for the issuance of a payment order to be made (e.g. standard forms, representation by a lawyer, the details of description, the need to provide written evidence, etc.)?

In order to use the action under article 166A, the debt has to be certain, liquidated and due and must not exceed the value of €25,000. The content of the judicial letter must be confirmed on oath by the creditor, either before the registrar or a legal procurator. The letter shall contain the reasons why the claim should be upheld, and a statement of the facts in support of the claim. It must also contain, on pain of nullity, an intimation on the debtor that if he does not reply within thirty days from service upon him of said letter, such letter will constitute an executive title. In support of the claim, the creditor may, together with the letter, submit documents, such as invoices and statements of accounts, as evidence of the outstanding amounts.

6.4.4 What information is generally available to the authority or court when a claim for the issuance of a payment order is made?

As noted in 8.4.3 above, when such claim is made, creditor shall state that the debt is certain, liquidated and due, and that such debt does not consist in the performance of an act. The creditor must also state the amount due, and give a brief overview of the facts. Any documentary evidence in support of the claim should be submitted together with the judicial letter.

6.4.5 What opportunity is available for a defendant/statement of opposition to be advanced? How this should this be done and what is its effect? Please specify if the means of advancing a defence differ depending on the value of the claim and the court dealing with it.

When a claim is made under article 166A, the debtor is given an opportunity to refute the claim by presenting a note in the record of the judicial letter, which note may be signed by the debtor himself without the signature of an advocate or legal procurator. The debtor must present this note within 30 days from the date of service upon him of the judicial letter. The purpose and effect of presenting this note is of course to rebut the claim and also to interrupt, or prevent, the creditor from obtaining an executive title. In such case, the creditor would not be able to proceed again under article 166A in respect of the same matter and would therefore have to initiate court proceedings in order to obtain an executive title over the debt.

6.4.6 What is the effect if the claim is uncontested, i.e. if there is a lack of defence/statement of opposition?

If the claim is uncontested the judicial letter will constitute an executive title with respect to the debt and the creditor may proceed to enforce it using the executive acts, such as warrants, available at law.

6.4.7 If the defendant is a consumer, and he or she does not respond to or raise an objection to the issuance of the payment order, does the authority dealing with the claim for payment order proceedings have the power to examine any issue of consumer protection law of its own motion before treating the action as usual?

There does not appear to be any specific duty on the part of the authority or court dealing with these proceedings to raise objections where the defendant is a consumer, nor to examine any issue of consumer protection law of its own motion.

6.4.8 What steps must the pursuer take in order to obtain an enforceable decision?

The claimant, or pursuer, must register the judicial letter as an executive title by presenting to the Registrar of the Court a legal copy of the said letter, including evidence of service and a copy of any response received thereto, if any. The registrar shall then examine the documents presented and if such documents satisfy the conditions for the registration of the judicial letter as an executive title he shall proceed to register the documents presented in the Register of Judicial Letters as Executive Titles.

6.4.9 Is this decision final, or can the defendant appeal against it?

There is no appeal as such from the decision; however the executive title can be rescinded and declared null and void by the court if upon application filed by the debtor within 20 days from service upon him of any executive warrant or other judicial act, the Court is satisfied that (i) the debtor was unaware of the said judicial letter because he was not duly notified; or (ii) the judicial letter did not contain the formalities laid down in the law. The application shall be appointed for hearing within two weeks.

6.5 **Appeals in consumer disputes**

6.5.1 Are appeals possible in all consumer disputes? Please specify for small claims and other types of claims.

	Individual claim	**Individual**	**Individual**	**Collective**	**Collective**	**Individual**

	of Eur 0 – Eur 5,000	claim of Eur 5001 – Eur 20,000	claim of Value Eur 20,000 +	claim of Eur 0 – Eur 50,000	claim of Eur 5001 – Eur 20,000	claim of Value Eur 20,000 +
Nature of the procedure at 1st Instance	Up to Eur 3,500 - Consumer Claims Tribunal Up to Eur 5,000 - Small Claims Tribunal Simplified/summary proceedings	Up to Eur 15,000 - Court of Magistrates Ordinary Procedure	Exceeds Eur 15,000 First Hall Civil Court Oridnary Procedure	Up to Eur 3500 Consumer Claims Tribunal Up to Eur 5,000 Small Claims Simplified proceedings	Up to Eur 15,000 Court of Magistrates (Inferior Jurisdiction) Ordinary Proceedings	Exceeds Eur 15,000 First Hall Civil Court Ordinary Proceedings
2nd Instance – appeal to?	Court of Appeal (Inferior Jurisdiction)	Court of Appeal (Inferior Jurisdiction)	Court of Appeal (Superior Jurisdiction)	Court of Appeal (Inferior Jurisdiction)	Court of Appeal (Inferior Jurisdiction)	Court of Appeal (Superior Jurisdiction)
3 rd Instance -Appeal to?	As such, there is no 3rd instance under national law. The exception to this is the right of retrial.					

6.5.2 Please briefly specify the national appeal procedure, including any requirements to be satisfied for appeals. These might include, but are not limited to, conditions of admissibility, value thresholds, time-limits, the scope of review, and the impact of the appeal on enforcement (provisional enforcement). Please refer to any rules specifically applicable in respect of the claims and relevant and relevant procedures outlined above.

In order to appeal from a judgment, whether from the ordinary courts or the Consumer Claims Tribunal, the appeal application must be filed within 20 days from the date of the judgment. Such application must contain a request that the judgment appealed from or any part thereof be reversed or varied. The party on which the application is served will have 20 days to file a reply. With regards to the grounds for appeal, decisions of the Consumer Claims Tribunal can be appealed only on grounds of jurisdiction of the tribunal, on matters of prescription, and where the tribunal has acted contrary to the rules of natural justice and such action has prejudiced the rights of the appellant. On the other hand, appeals from judgments of the ordinary court can be made on points of law and of fact.

With reference to provisional enforcement, except in very limited circumstances, a judgment which does not constitute a res judicata shall not be enforceable unless, on the demand of the interested party, such judgment has been declared by the court to be provisionally enforceable. In cases where the judgment relates to maintenance, or provides redress against infringement of an individual's right to life, or illegal arrest or forced labour, such judgments are provisionally enforceable.

6.6 **Enforcement in consumer disputes**

6.6.1 If the assessment of a consumer protection issue has not been possible at an earlier stage of the proceedings, is it always possible – either ex officio or if the consumer raises a possible violation of consumer protection law – for this assessment to be undertaken during enforcement proceedings?

National law does not specifically provide for this. However, the rules of procedure allow persons, against whom executive acts have been issued, to make an application to the relevant court requesting that such executive act be revoked, either totally or partially, for any reason valid at law. Therefore, if an issue is not raised at an earlier stage, it could seemingly be raised during enforcement proceedings.

6.6.2 In the particular case of consumer protection, if a court examines consumer protection law (either ex officio or on the basis of an argument advanced by the consumer), does national procedural law provide that interim measures should be adopted while this examination is undertaken in order to ensure that the final decision will have full effect?

The law does not specifically provide for this. However, the Director General (Consumer Affairs) has the power to issue interim measures whilst investigations are being carried out. Therefore where a complaint by a consumer has been made, or where the Director General of his own motion initiates an investigation in connection with a breach of consumer protection laws by a trader, interim measures may be issued until the investigation is concluded.

7. ACTIONS FOR COLLECTIVE REDRESS

7.1.1 If collective proceedings are launched, does national procedural law provide that ongoing individual claims relating to the same dispute should be stayed until the collective proceedings are brought to an end? Please specify if this constitutes an obligation on the part of the national judge or is it is at his discretion.

In terms of article 17 of the Collective Proceedings Act, the Court, on its own initiative or on the application of a party or class member, may stay any proceeding related to the collective proceedings before it, on such terms as it considers appropriate. However, 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.

7.1.2 If individual proceedings are stayed, please indicate what the effect of the court or ADR entity's decision in the collective action on those individual proceedings would be, i.e. whether the outcome of the collective action binds the consumer bringing and individual action.

Article 18 of the Collective Proceedings Act[22] provides that a judgment on the common issues for the represented persons or a sub-class of represented persons will bind the represented persons, or those within the sub-class, as the case may be. However, the law is silent with respect to the effect which such proceedings would have on the individual proceedings.

8. CONSUMER ALTERNATIVE DISPUTE RESOLUTION

8.1 Consumer Disputes Before ADR Fora

8.1.1 Is ADR mandatory for all parties bringing a claim related to a consumer protection dispute?

To some extent, yes. The first step in a consumer protection related dispute is for the consumer to register a complaint against the trader with the MCCAA; more specifically with the Complaints and Conciliation Directorate. Once this is registered, it is evaluated to see if it is justified at law and falls within the remit of the MCCAA in the first place. If it does, a brief mediation or conciliation process will take place whereby the MCCAA contacts the trader informing him of the complaint and his respective legal obligations in respect thereof. If the process fails to find an amicable solution, the consumer may choose to submit a claim before the Consumer Affairs Tribunal or simply withdraw the complaint.[23]

This being said, a claim related to consumer protection can be brought immediately before the Courts. As noted in 7.1 above, the jurisdiction of the Tribunal is not exclusive; the consumer may choose to bring an action against a trader before the Tribunal or before the ordinary courts. However, this option is given only to the consumer; a trader would necessarily have to bring an action before the courts. If this route is chosen, there is no obligation on either the consumer or the trader to resolve the matter through ADR.

Therefore, it is only in cases where the consumer wishes to bring the claim before the Tribunal rather than the ordinary courts, that ADR becomes mandatory, and this because the MCCAA, upon receiving a complaint, will try to settle the matter amicably through a mediation or conciliation process, before the consumer can proceed before the Tribunal.

8.1.2 Please specify if there are limitations to the use of ADR. These might include the nature of the claim, (i.e. whether both individual and collective claims are possible), requirements of representation, time limits, value thresholds, etc.

~~As noted in 7.1 above, the Tri~~bunal has jurisdiction to hear and determine claims by consumers against traders where the value of the claim does not exceed €3,500 and where the claim relates to the purchase or hire of goods by a consumer from a trader or the provision of services by a trader to a consumer. Therefore, this mandatory mediation / conciliation process described in 10.1.1 above is applied only where the claim is below the value of €3,500. Claims above this value must be brought before the ordinary courts and would not be subject to the same procedure. In this respect therefore there is an indirect limitation in the sense that if the claim cannot be brought before the Tribunal then it will not be subject to the ADR process which the MCCAA would carry out.

With respect to other limitations, an ADR entity such as the Complaints and Conciliation Directorate, which is an established ADR entity in terms of the Consumer Alternative Dispute Resolution (General) Regulations, will generally deal with all disputes arising out of sales contracts or services contracts between a trader and a consumer. An ADR entity may refuse to deal with a given dispute on the following grounds:

(a) the consumer did not attempt to contact the trader concerned in order to discuss his complaint and seek, as a first step, to resolve the matters directly with the trader;

(b) the dispute is frivolous or vexatious;

(c) the dispute is being or has previously been considered by another ADR entity or by a competent court or tribunal;

(d) the value of the claim falls below or above a pre-specified monetary threshold;

(e) the consumer has not submitted the complaint to the ADR entity within a pre-specified time limit, which shall not be set at less than one year from the date upon which the consumer submitted the complaint to the trader; and

(f) dealing with such a type of dispute would otherwise seriously impair the effective operation of the ADR entity.

However, before an ADR entity can refuse to deal with a complaint it must first obtain authorisation from the Consumer Affairs Council.

8.1.3 Can ADR entities issue binding decisions and can they enforce those decisions? If not, please explain how they are enforced.

ADR entities may determine their own procedure. In terms of regulation 8 of the Consumer Alternative Dispute Resolution (General) Regulations, an ADR entity shall make publicly available on its website all relevant information concerning the ADR procedure, which information shall include the legal effect of the outcome of the ADR procedure, including the penalties for non-compliance in the case of a decision having binding effect on the parties, and the enforceability of the ADR decision.

There are two types of ADR procedures, those which aim at resolving the dispute by proposing a solution, and those which aim at resolving the dispute by imposing a solution. With respect to the former, the ADR entity must inform the parties that they have the choice as to whether or not to agree to, or follow, the proposed solution and that participation in the procedure does not preclude the possibility of seeking redress through court proceedings. The parties must also be informed of the legal effects of agreeing to, or following, such proposed solution.

With regards then to procedures which aim to resolve the dispute through imposing a solution, the solution imposed may be binding on the parties only if such parties were informed beforehand of its binding nature and they specifically accepted this. However, if the procedural rules of the ADR entity provide that solutions are binding on the trader, specific acceptance of the trader is not required.

8.1.4 Does national law provide that limitation periods applicable to judicial actions should be suspended while ADR is on-going?

In terms of article 13 of the Consumer Alternative Dispute Resolution (General) Regulations, parties who, in an attempt to settle a dispute, have recourse to an ADR procedure the outcome of which is not binding on them, are not subsequently prevented from initiating judicial proceedings in relation to that dispute as a result of the expiry of limitation or prescription periods as provided for under national law during the ADR procedure. In fact, article 2125 of the Civil Code provides that prescription is suspended

"where a consumer who has a dispute with a trader, has recourse to an ADR procedure in accordance with the Consumer Affairs Act, the outcome of which procedure is not binding on either party, until such time when the ADR procedure is brought to a conclusion."

8.1.5 Please specify if national law establishes rules providing for recourse to judicial action following an (unsuccessful) ADR hearing.

The Consumer Alternative Dispute Resolution (General) Regulations provide that parties have the right to initiate judicial proceedings following an unsuccessful ADR hearing. In fact, ADR entities are obligated to inform the parties that participation in the ADR procedure does not preclude the possibility of seeking redress through court proceedings.

8.1.6 Is there judicial review of decisions and awards made by ADR entities? If so, by which court or tribunal is this oversight made? Is it ordinary or specialised?

If the procedure established by the ADR entity does not specifically state that the decisions are binding, then the parties may take their claim before the ordinary courts. In any case, the decisions of the ADR entity can be appealed before the Competition and Consumer Appeals Tribunal.

9. THE EXAMINATION OF CONSUMER PROTECTION LAW IN NATIONAL PROCEDURAL LAW: RESPECT FOR THE PRINCIPLES OF THE EFFECTIVENESS AND EQUIVALENCE OF CONSUMER PROTECTION LAW AND EX OFFICIO CONTROL.

9.1 The basis of ex officio control of consumer protection law in national law

9.1.1 Is it clear in the national legal system when consumer protection law should be applied ex officio? Is the ex officio control of consumer protection law established as an obligation or as a discretionary power of the judge in national procedural law?

National law does not address the issue of whether consumer protection law should be applied ex officio nor does it place any obligation on the court in this respect. However, the Director General for Consumer Affairs has the power to initiate investigations of his own motion of any breach of consumer protection law.

9.1.2 If there is an understanding of ex officio control of consumer protection law in the national legal system, what is this control understood to encompass/not cover?

There is an understanding of ex officio control only with respect to the power of the Director General who may initiate investigations in connection with any breach of consumer protection law.

9.1.3 Is the party who claims to be a consumer required to establish his or her consumer status, the existence of a consumer contract and that consumer law applies to the dispute? Is this required even if the consumer has no legal representation?

When a consumer brings a claim before the ordinary courts, the consumer must give a statement of the facts and also state the legal basis of the claim. Where however the claim is brought before the Consumer Claims Tribunal where no legal representation is required, it is sufficient for the consumer to give an overview of the facts without stating the legal basis, and where possible, to support the claim with documentary evidence, such as fiscal receipt as proof of purchase.

9.1.4 What information is available to judges and dispute resolution facilitators hearing consumer protection disputes? Does national procedural law provide for rules as to the minimum factual information that must be available: (a) for a consumer protection dispute to be heard and (b) for the court to engage in ex officio control?

Please refer to question 8.1.4. regarding the information which must be submitted by claimant. National law does not distinguish between consumer protection disputes and any other claims heard before the ordinary courts.

9.1.5 Who is responsible for providing this information? If the necessary information is not available to the court is he or she under an obligation to investigate in order to be able to respond to a relevant consumer protection dimension of the case?

The Consumer is responsible for providing the information to the court or the dispute resolution facilitator, as the case may be. Nor the court, or the tribunal, is under any obligation to investigate further if the information is not provided by the consumer.

9.1.6 Will the court provide the consumer with any assistance in gathering factual information or advancing his legal arguments before the court? Please respond for the situation where (a) the consumer has legal representation and (b) the consumer has no legal representation.

In proceedings before the Consumer Claims Tribunal where a consumer does not need to have legal representation, the adjudicator will not assist the consumer in gathering information or making legal arguments; however it will usually assist the parties in trying to reach an acceptable solution. Before the ordinary courts however, where the consumer would have legal representation, no such assistance will be given to either of the parties.

9.2 The possibility for ex officio control of EU consumer protection law in dispute resolution proceedings.

9.2.1 Is ex officio control of consumer protection law always possible when the procedure involves a full assessment of the claim on its merits?

National law does not specifically address this issue.

9.2.2 Can ex office control be exercised even when the procedure does not involve an assessment on the merits?

Please refer to question 11.1.1.

9.2.3 Please indicate if, per national procedural law, ex officio control can be exercised at the following stages of the procedure:

	Courts		Other dispute resolution facilitators	
	Possible to exercise exofficiocontrol	possible toexercisee xofficiocontrol	Possible toexercise exofficiocontrol	possible toexercisee xofficiocontrol
Ordinary proceedings	X			
Small claims	X			
Payment order		X		
Provisional measures		X		
Proceedings linked to enforcement		X		
Enforcement proceedings		X		
- Enforcement of payment order		X		
- Enforcement of arbitration award		X		
- Enforcement of mortgage		X		
- Enforcement of notarial deed		X		

Appeal proceedings (please specify:)	Vide 11.2.4		Vide 11.2.4	

9.2.4 What does ex office control encompass in national procedural law?

There are various instances when a court will raise an issue of its own motion; more specifically, there are pleas which by their very nature must be raised by the court ex officio, including the following:

- Pleas of jurisdiction and competence
- Pleas relating to issues of public policy
- Pleas of lack of juridical interest
- Pleas of res judicata
- Pleas of lis alibi pendens (litis pendentia)
- Pleas of prescription
- Pleas of nullity of judicial acts
- Plea of lack of capacity of parties

9.3 Other procedural mechanisms for the equivalent and effective protection of EU Consumer Law

9.3.1 Does national procedural law provide that rules of EU consumer law should be understood as having equal standing to national rules of public policy?

National procedural law does not provide this.

9.3.2 If ex office control is not possible in certain types of proceedings or at certain stage of proceedings, does national procedural law provide for an alternative way of assessing consumer protection law?

Not to our knowledge.

9.4 Ex officio control in payment order procedures

9.4.1 What information is available to the judge when a claim for the issuance of a payment order is made? Does national procedural law provide for rules as to the minimum factual information that must be available (a) for a claim for the issuance of a payment order to be granted and (b) for the court to engage in ex officio control before a payment order is issued?

When a claim is made under article 166A (as explained in question 8.4.1) the plaintiff shall state that the debt is certain, liquidated and due, and such debt does not consist in the performance of an act. The claimant shall also state the amount of the claim and provide a brief statement of the facts.

To our knowledge, the court would not engage in ex officio control before in reaching its decision.

9.4.2 What considerations will be assessed ex officio by the court (or other competent authority) before a payment order is issued?

Please refer to question above.

9.4.3 How is the consumer informed about the claim to issue a payment order against him

or her? Does national procedural law make any provision for steps to be taken to ensure that consumers are informed of the claim for the issuance of a payment order so that he or she can contest it?

The consumer would be notified with the claim in the same manner and by the same methods of service as any other person. Proper notification is however a matter over which the court has ex officio control. However, national law makes no distinction with respect to consumers in this regard, nor does it offer special protection to consumers facing claims for payment orders.

9.4.4 If the consumer objects to the claim, what is the next step? Do the proceedings continue in the context of which ex officio control can be exercised? Or are the proceedings transferred to ordinary proceedings for analysis on the merits of the claim.

If the consumer objects to the claim, this will interrupt the executive title as explained in question 8.4.5 and the claimant will have no option but to resort to ordinary proceedings where the claim will be assessed on the merits.

European Commission
An evaluation study of the impact of national procedural laws and practices on the equivalence and effectiveness of the procedural protection of consumers under EU law

JUST/2014/RCON/PR/CIVI/0082

National Report – Consumer Protection Strand

The Netherlands

Xandra Kramer

THE NETHERLANDS: LEGAL ANALYSIS

1. NATIONAL LEGISLATION IMPLEMENTING EU CONSUMER PROTECTION INSTRUMENTS

EU legislation	Transposing national legislation	Additional notes (e.g. if there is an overlap in application of legislation etc.)
Doorstep Selling Directive 1985/577/EEC		
Package Travel Directive 90/314/EEC	Stb. 1993 360.	Changes the following articles of the civil code: 7:500 through 7:512.
Unfair Contract Terms Directive 1993/13/EEC	Wet van 28 oktober 1999	Changes the following articles of the civil code:

		6:231, 6:238, 6:240.
Distance Selling Directive 1997/7/EC	Wet van 21 december 2000	Changes the following articles of the civil code: 7:2, 7.1.9A.1 through 7.1.9A.10 (currently 7:46a-7:46j)
Consumer Sales and Guarantees Directive 1999/44/EC	Implementatiewet Richtlijn Concusmentenrechten	Changes the following articles of the civil code: 7:5, 7:6, 7:6a, 7:17, 7:18, 7:19, 7:21, 7:22, 7:23, 7:25.
Unfair Commercial Practices Directive 2005/29/EC	Implementatie Richtlijn oneerlijke handelspraktijken	Changes the following articles of the civil code: 3:305d, 6:193a through 6:193j, 7:7(2).
Misleading and Comparative Advertising Directive 2006/114/EC	Not yet implemented. Implementation of 97/55/EC, update apparently not considered necessary.	Directive 97/55/EC, changes in Art. 6:194 and 195, introduction 6:194a
Consumer Credit Agreement Directive 2008/48/EC	Wijzigingswet Burgerlijk Wetboek Boek 7, enz. (implementatie richtlijn nr. 2008/48/EG en intrekking Richtlijn 87/102/EEG)	Changes the following articles of the civil code: 7:57 through 7:73, 7:550 and 7A:1576e.
Timeshare Protection Directive 2008/122/EC	Wijzigingswet Burgerlijk Wetboek Boek 7, enz. (consumentenbescherming m.b.t. bepaalde [...] lange duur, doorverkoop en uitwisseling) (PbEU L 33/10))	Changes the following articles of the civil code: 7:2, 7:26, 7:50a through 7:50i, 7:230a.
Consumer Injunctions Directive 2009/22/EC	Implementation Directive 98/27/EC Further joint implementation with ADR Directive (see below)	New provisions 3:305c and d resulting from 98/27/EC
Consumer Rights Directive 2011/83/EU	Implementatiewet Richtlijn Concusmentenrechten	Changes the following articles of the civil code: 6:193f, 6:230m, 6:193i, 6:193j, 6:230g through

		6:230z, 7:2, 7:5, 7:6, 7:9, 7:11, 7:19a, 7A:1576m.
ADR for Consumer Disputes Directive 2013/11/EU	Wet van 16 April 2015	Implementation Act to implement and clarify provisions, some changes to other existing laws (Law on consumer protection and Law on Financial Supervision).

Source(s): various. Hondius & Rijken, Handboek Consumentenrecht 2015, governmental websites.

1. CONCEPT OF THE CONSUMER

1.1 Please outline the concept of the consumer in national law, indicating whether it is intended to be a uniform concept, whether it has been legislated for and where it can found (i.e. in a legislative provision, governmental guidelines, case law etc.).

The consumer sale is defined in Art. 7:5(1): By a 'consumer sale' is understood in this Title: 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.

2. REGULATORY AUTHORITIES COMPETENT FOR CONSUMER PROTECTION ISSUES

2.1 What regulatory authorities, if any, are competent for enforcing consumer protection law? Please identify them, their nature (i.e. whether they are public or private or mixed) and the nature of enforcement.

This is the Autoriteit Consument en Markt, Authority Consumer and Markets (ACM) which can enforce consumer law. It has distinguishable competence in oversight and enforcement, which are regulated in the Implementation Act ACM under chapter 3. The ACM is a public institution, and its main goal is to act when consumer law violations are infringing the public domain. The most executed power is that of ordering a retailer or service provider to cease their actions that are violating consumer law. The ACM has two important instruments: the penalty (which increases in amount until the infringing actions are ceased) and the

administrative fine. The other regulatory authority is the Autoriteit Financiële Markten, the Authority for the Financial Markets (AFM) that supervises the operation of the financial markets (savings, investment, insurance and loans). As is clear from the interviews, the activities of the ACM are considered very important for the enforcement of consumer law.

2.2 Is there a specific venue for this type of enforcement and does this limit the jurisdiction of courts/ADR fora (even if only initially)?

The actions taken by the ACM are sanctions under administrative law. Therefore, any decision made by the ACM containing a penalty or an administrative fine are subjected to initial appeal ('bezwaar') by the ACM itself. The ACM has a separate Advisory Board of Appeal, which hears appeals to administrative ACM decisions, and advises the ACM whether the initial decision should be upheld. If the decision is upheld, appealing to the district court, administrative sector is possible. Appeal in second instance is possible at the Trade and Industry Appeals Tribunal.
The AFM has a complaint procedure for consumers. For financial products there is also a separate ADR body, Kifid, where a procedure can be initiated. It is also possible to start a court procedure.

2.3 Can criminal prosecutions be initiated for violations of consumer protection rules? How serious must the infringement be? What are the penalties and sanctions? And might these prosecutions lead to criminal penalties or sanctions? Can individual consumers piggy back on these claims (e.g. via a partie civile method)?

Violations of consumer law are not prosecuted under criminal law.

2.4 Is there judicial review of decisions of consumer regulatory authorities? If so, by which court is this judicial oversight made? Is the forum an ordinary or a specialised court or tribunal?

As mentioned under 4.2, administrative decisions are subject to appeal through administrative law. Appealing decisions is possible at the district court. Appeal in second instance is possible at the Trade and Industry Appeals Tribunal.

2.5 Does the national legal system provide for a mechanism of cooperation between its national regulatory authorities and those of other Member States?

The ACM is part of the CPC, the Consumer protection Cooperation. In this cooperation, members of the CPC alert each other of violations of European consumer law, can ask their counterparts to take measures, and coordinate their approach.

https://www.acm.nl/nl/organisatie/samenwerking/internationale-samenwerking-consumentenrecht/. In one of the interviews, it was mentioned that the international collaboration could be improved.

Source(s): see the websites and links for basic information.

3. LEGAL AID

3.1 Is legal aid available to consumers in: a) bringing a claim and b) defending a claim before a court?

In both instances legal aid is available. However, the claim must exceed the value of €250 if simple legal advice is requested, while it must exceed €500 if other legal advice, including legal representation, is requested.

3.2 For what kinds of disputes and actions is legal aid available? (NB: legal aid might not be available for consumer or contractual disputes but be available instead for a related action, e.g. actions relating to debt, mortgage arrears, eviction etc.)

Legal aid is available for all civil cases, including consumer cases (consumer cases are not excluded under article 8 Legal Aid Resolution (Besluit Rechtsbijstand)).

3.3 What requirements must be satisfied for the consumer to be entitled to legal aid? Please specify if there are any additional limitations to its availability.

The claim to which it relates should not be fully unfunded or have expired. Also if more than one legal adviser has already provided advice, it is just attended to delay execution or the claim does not have any chance of success considering recent case law, legal aid will not be provided (Art. 3 Legal Aid Resolution).

The following table applies to the financial abilities:

1 person household	Fee to be paid	2 person household
Fiscal year income		Fiscal year income
Up to €18.400	€196	Up to €25.600
€18.401 to €19.100	€360	€25.601-26.000
€19.101 to €20.100	€514	€26.601 to €27.900
€20.101 to €22.000	€669	€27.901 to €31.100
€22.001 to €26.000	€823	€31.101 to €36.800

Above €26.000	No legal aid	Above €36.800

The following table is used when simple legal advice is requested:

1 person household	Fee to be paid	2 person household
Fiscal year income		Fiscal year income
Up to €18.400	€340	Up to €25.600
€18.401 to €19.100	€412	€25.601-26.000
€19.101 to €20.100	€566	€26.601 to €27.900
€20.101 to €22.000	€720	€27.901 to €31.100
€22.001 to €26.000	€849	€31.101 to €36.800
Above €26.000	No legal aid	Above €36.800

So, for incomes above €26.000 (for 1 person households) and €36.800 (for 2 person households) no legal aid is available. There is also a maximum amount of capital one can have. No legal aid is provided if the capital held two years prior (for 2016, in 2014) was more than €21.139. Also, if the money which is eventually received due to the claim (this is not necessarily equal to the claim value) exceeds €12.219.

3.4 What does legal aid encompass? (i.e. (only) general advice, (only) assistance in preparing the case, (only) assistance with negotiation of settlements, (also) representation).

The legal aid encompasses advice, preparing the case, and especially representation. However, it does not encompass the legal costs made by the other party and these have to be reimbursed if one loses the case.

Source(s): Legal Aid Resolution (Besluit Rechtsbijstand).

4. COSTS

4.1 What are the costs of different types of procedures before courts? Are there exemptions to the payment of fees and expenses? How can costs be paid?

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+

Court fees	€79 if value is <€500, €223 otherwise	€223 if value <12.500, €471 otherwise.	Below €25.000: €471, otherwise €885 if value is <100.000, otherwise €1.548.	€79 if value is <€500, €471 otherwise	€471	Below €25.000: €471, otherwise €288 if value is <100.000, otherwise €1.548.
Court expenses						
Exemptions – for people with a low income	€79	€79	€79	€79	€79	€79

Source(s):https://www.rechtspraak.nl/Hoe-werkt-het-recht/Kosten-rechtszaak/Griffierecht/Paginas/Griffierecht-kanton.aspx for cases with a claim value of less than €12.500, and https://www.rechtspraak.nl/Hoe-werkt-het-recht/Kosten-rechtszaak/Griffierecht/Paginas/Griffierecht-civiel.aspx for cases with a claim value of more than €12.500.

5. STANDING AND REPRESENTATION IN CONSUMER DISPUTES

5.1 Does national law limit the standing of the individual consumer in respect of the claim that can be made and the forum before which it can be brought?

If the claim is heard by the sub-district sector of the district court ('kantonrechter'), i.e. generally if the claim value does not exceed €25.000 (and consumer credit up to €40.000, as well as tenancy of immovable property without financial limit), standing of individual consumers is permitted (article 79(1) DCCP). If the claim is of a higher value, the claim is heard by the civil sector of the district court, and representation by a lawyer is required (article 79(2) DCCP).

5.2 Other than individual consumers, who or which bodies have standing in consumer protection disputes and for what types of claim? If the action is not brought by the individual consumer, what requirements of representation must be satisfied?

An injunctive collection action can be brought by a representative foundation or association that represents consumer interests (e.g. the Consumentenbond – Consumer Association) pursuant of Art. 3:305a Civil Code.
In addition, the Collective Settlement of Mass Claims Act (Wet collectieve afhandeling massaschade or WCAM) allows consumer organisations to negotiate a settlement with parties that have breached consumer law on behalf of consumers on an opt-out basis.

5.3 If a consumer wants to bring or defend an action relating to a consumer protection dispute, is there a legal (or otherwise formal) requirement that he or she has legal representation? Please specify for both judicial and ADR fora and the bodies, associations or authorities that can provide this representation.

Representation is only required before the District court if the claim value exceeds €25.000 and does not fall under the jurisdiction of the sub-district department (see question 7.1), and in appeal cases. When it comes to ADR boards, no representation is required.

Source(s): Asser Procesrecht/Giesen 1 2015/40, Civil Code, Code of Civil Procedure

6. ACTIONS BEFORE COURTS

8.1 Jurisdiction and competence of the courts in consumer disputes: General structure and special procedures aimed at protecting consumers

8.1.1 Are ordinary courts competent to hear such claims? Is there also a specialised tribunal for consumer protection disputes?

Consumer claims are brought before the district court. Claims are heard by the civil sector, or – if the claim is of 25.000 EUR or less – by the sub-district sector (sector kanton). The claim is also heard by the sub-district sector if it concerns a consumer credit with a value less than 40.000 EUR. See Article 93 Wetboek van Burgerlijke Rechtsvordering, Dutch Code of Civil Procedure (DCCP).

8.1.2 Which courts are competent to hear consumer protection disputes at first instance and in appeals? Please specify the court, in light of the value of the claim (and identify any other factors that are relevant in allocation jurisdiction).

At first instance, district courts are competent to hear consumer disputes, as outlined in 8.1.1, and for cases falling under its competence the sub-district department (sector kanton) in particualr. In

appeal cases, the Courts of Appeal are competent (art. 332(1) DCCP), though no appeal is possible if the claim is less than 1750 EUR.

8.1.3 What is the nature of the procedure at first instance, e.g. is it a simplified or a summary procedure, and is there an assessment of the merits? Please specify in light of the value of the claim (and identify any other factors that are relevant in allocating jurisdiction).

In case the defendant does not appear before the court, the court will adjudicate the claim, unless the claim appears to be ungrounded or unlawful. If the defendant does appear, he will react to the summons with a conclusion of answer. Next, parties will be invited before the court to be persuaded by the court to settle the case (art. 87 DCCP) or give additional information to the court (art. 88 DCCP). If the case is absolutely clear at this point, the court may give its judgment right away (art. 132(2) DCCP), though if this is not the case, both parties will make one last statement, outlining their view. If the court deems the case clear, a verdict will be given. If it does not, the court will order the parties to come up with evidence backing up their views. In principle, the way parties present evidence is free, though art. 156 DCCP does give some examples: documents, witnesses, witness-expert reports, DNA tests and video or surveillance footage.

8.1.4 Please identify the formal requirements that must be satisfied for a consumer dispute to be heard before a court. These might include time limits applicable to the filing of the action/defense, representation requirements etc.

A case is started by issuing a summons (art. 45 and 111 DCCP). This summons should contain certain essential elements, such as the defendant's name and address (see art. 111(2) DCCP). It must be served by a bailiff. Under 25,000 EUR or other cases within the competence of the sub-district department of the legal representation is not mandatory. The statute of limitation for contractual disputes is generally 5 years. For consumer sales the limitation period is 2 years for the professional party.

8.1.5 In respect of the claims and relevant procedures available in the national legal system, what kind of relief might be available in consumer protection disputes? (monetary remedies, injunctions, skimming off etc.)?

In principle, consumers will claim damages. These damages can be awarded by the court; so in that sense, monetary remedies are available. If the court rules in favour of the consumer, the court may decide that some of the costs of the procedure must be paid by the opposing party. These costs may include the costs of the court, the court fees, travel and accommodation costs if

the consumer was not represented by an attorney, attorney costs if the consumer was represented by an attorney, bailiff costs, and expert witness costs (see articles 237 to 245 DCCP).

8.1.6 Please provide a brief overview of the role of parties and judges in civil proceedings generally (e.g. with reference to the principle of party disposition, the obligation of parties to make and prove factual allegations and to make and provide legal arguments, the possible role of the court). This overview should be brief; these issues will be dealt with in more detail in the questions that follow.

Either party that claims any relevant fact, should in principle prove this fact (art. 150 DCCP). The court may order either party to present documents that may be deemed relevant (art. 162 DCCP). The plaintiff may at any point, before the court's decision, lower their claim (art. 129 DCCP). The plaintiff may also alter or increase their claim, though the defendant may object to this alteration if it violates trial order. The court will decide whether the alteration is allowed, even if no objection is raised (article 130 DCCP).
After the summons are served to the defendant, the defendant will respond with a written conclusion of answer. Then, during trial, both parties will respond to each other's comments. The court has an active role in managing the procedure, and may order expert witnesses to present a report regarding the claim.

Source(s): Hondius & Rijken, Handboek Consumentenrecht 2015, pp. 504-506

8.2 Small claims

8.2.1 Does a small claims procedure exist in the Member State? If yes, is it a specialised or simplified procedure?

The Netherlands does not have a specific small claims procedure as such, but has a simplified and more informal procedural regime for procedures that come under the competence of the sub-district department of the District court (first instance court). See 7.1 for its competence (generally, cases under 25.000 EUR). The main advantage is that no representation is required before the sub-district sector, while this is required before the civil sector of the District Court. Furthermore, the court fees of the sub-district court range from 79 to 471 EUR, while the fees for the civil sector start at 885 EUR, and can be as high as 1548 EUR if the claim is more than 100.000 EUR.

8.2.2 What are the value thresholds for claims brought under the small claims procedure? Moreover, are there any other factors that shape the use of the small claims procedure (including the nature of the claim, the area of consumer protection law into which the claim falls etc.)?

As mentioned under 8.2.1, any claim that is below the value of 25.000 EUR, or below 40.000 EUR in consumer credit cases, can be heard before the sub-district sector of the court (article 93 DCCP). Also, if the value of the claim is not yet known, but is likely to not exceed the amount of 25.000 EUR, the sub-district sector is competent to hear the claim as well. No additional requirements exist.

8.2.3 What forms must be completed to raise the application? Who assists the consumer in completing these forms?

As almost all cases will involve a damage claim, the case will be started by summons procedure (art. 78 DCCP). To do so, a bailiff must serve the defendant with the summons (art. 45 DCCP) containing general information (names, addresses), the claim and its grounds, evidence, court and date and place of hearing, the consequences if the defendant does not appear before the court, whether legal fees must be paid. The bailiff will also send a copy of the summons to the court. In 2014, the 'ekantonrechter' was introduced, a digital procedure for certain disputes. However, this is only available when both parties agree to use this procedure and when there the case is not factually or legally complicated.

8.2.4 How can an application for a small claim be made (e.g. online, by post or in person)?

The summons can be send to the court by post, in person or electronically (art. 125(3) DCCP) and needs to be served to the defendant through the bailiff (judicial officer). If parties agree on the 'ekantonrechter' (see 8.2.3), the claim and all relevant documents can be filed online.

8.2.5 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

Facts that are claimed by either party should be proven by that party (art. 150 DCCP). In principle, all means of evidence are allowed, unless provided otherwise (art. 152 DCCP). After the defendant has responded to the summons, the court will in principle order both parties to appear before the court (art. 131 DCCP), with the aim to come to a settlement or to obtain further information from parties, unless the court considers that such meeting is not suitable in a particular case.

8.2.6 Are the costs of the successful party reimbursed?

See also under 8.1.5. In principle the loser pays principle applies and thus the successful party is reimbursed. These costs may include the costs of the court, the court fees, travel and

accommodation costs, attorney costs, bailiff costs, and expert witness costs (see articles 237 to 245 DCCP). Costs that are unnecessarily incurred will not be reimbursed, and the lawyer costs as well as costs made by judicial officers (eg service of documents and other official acts) are limited to a maximum set by the law. The court may also limit other out-of-court collection costs.

Source(s): Dutch Code of Civil Procedure; handbooks civil procedure.

8.3 Claims other than small claims

8.3.1 If a consumer protection dispute does not qualify as a small claim, what other procedures are available? What are the value thresholds and other factors determining the use of such procedures?

See 8.1.1. If the claim exceeds 25.000 EUR, or 40.000 EUR in consumer credit cases, the civil sector of the district court will hear the case. This means that representation by an attorney is required, and that the court fees will be higher.

8.3.2 How can such claims be made? Please specify if the applications can be made online, or by post or in person.

Same as under 8.2.3. As almost all cases will involve a compensation claim, the case will be started by summons procedure (art. 78 DCCP). To do so, a bailiff must serve the defendant with the summons.

8.3.3 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

Same as under 8.2.5. Any fact stated by either party should be proven by that party (art. 150 DCCP). In principle, all means of evidence are allowed, unless dictated otherwise (art. 152 DCCP). After the defendant has responded to the summons, the court will in principle order both parties to appear before the court (Art. 131 DCCP).

8.3.4 Are the costs of the successful party reimbursed?

See also under 8.1.5 and 8.2.6.

Source(s): Dutch Code of Civil Procedure.

8.4 Claims for the issuance of a payment order

8.4.1 Does an order for payment procedure exist in the national system? Is it a simplified procedure?

An order for payment procedure as such does not exist in domestic cases. If a party issues a claim, and the defendant does not appear before the court, the claim will automatically be granted, unless the claim is manifestly unjust in a default judgment (art. 139 DCCP). This default procedure is in fact a very quick, standard procedure, but the introduction of the procedure (including the requirement to substantiate the claim, to service through a bailiff and to pay ordinary court fees) is the same as for an ordinary procedure. Research carried out on request of the Ministry of Justice with had as one of the aims to see whether a special order for payment procedure (eg extension of the scope of the European procedure) concluded that legal protection would be less in such procedure and it would not or hardly be faster. See (Kramer, Tuil & Tillema, Min. of Justice Report 2012). The Ministry of Justice decided not to introduce such procedure as a result of this report.

8.4.2 Which authorities or courts are competent to hear claims for the issuance of payment orders?

Same as in other cases, as the default procedure is an ordinary procedure. See question II.2.3.

8.4.3 Are there any formal requirements that must be satisfied for the application for the issuance of a payment order to be made (e.g. standard forms, representation by a lawyer, the detail of description required, the need to provide written evidence etc.)?

No other requirements than those listed under 8.2 and 8.3.

8.4.4 What information is generally available to the authority or court when a claim for the issuance of a payment order is made?

Not applicable.

8.4.5 What opportunity is available for a defence/statement of opposition to be advanced? How should this be done and what is its effect? Please specify if the means of advancing a defence differ depending on the value of the claim and the court dealing with it.

Against a default judgment, opposition can be lodged, resulting in a full appreciation of the case. See question II.2.3.

8.4.6 What is the effect if the claim is uncontested, i.e. if there is a lack of defence/statement of opposition?

As mentioned under 8.4.1, if the claim is uncontested, the claim will be granted, unless it appears to be manifestly unjust.

8.4.7 If the defendant is a consumer, and he or she does not respond to or raise an objection to the issuance of the payment order, does the authority dealing with the claim for payment order proceedings have the power to examine any issue of consumer protection law of its own motion before treating the action as usual?

The court can and does apply consumer law ex officio in the default procedure, though without any opposition and relevant information in this regard, it will be factually limited to determine whether indeed it considers a consumer contract and what the precise circumstances are.

8.4.8 What steps must the pursuer take in order to obtain an enforceable decision?

In case of non-appearance, the decision may be declared enforceable immediately by the court. The non-appearing party may oppose the decision within four weeks after it was issued (art. 143(2) DCCP). If the decision was not yet declared enforceable, it will be enforceable if no opposition is lodged.

8.4.9 Is this decision final, or can the defendant appeal against it?

If the defendant did appear, appeal is possible at one of the Court of Appeal. If the defendant did not appear, opposition is possible, within four weeks after the judgment was served. Appeal is not possible if the value of the claim does not exceed 1750 EUR.

Source(s): Dutch Code of Civil Procedure

8.5 Appeals in consumer disputes

8.5.1 Are appeals possible in all consumer disputes? Please specify for small claims and other types of claims.

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 –	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- €	Collective claim of value € 20.001+

		€ 20.000			20.000	
Nature of the procedure at 1st instance	At the sub-district sector of the district court	At the sub-district sector of the district court	For claims under €25.000, sub-district sector, above District Court.	At the sub-district sector of the district court	At the sub-district sector of the district court	For claims under €25.000, sub-district sector, above District Court
2nd instance – appeal to?	Only for claims of and over €1750. Court of Appeal	Court of Appeal	Court of Appeal	Only for claims of and over €1750. Court of Appeal	Court of Appeal	Court of Appeal
3rd instance – appeal to?	Supreme Court.	Supreme Court	Supreme Court	Supreme Court.	Supreme Court	Supreme Court

8.5.2 Please briefly specify the national appeal procedure, including any requirements to be satisfied for appeals. These might include, but are not limited to, conditions of admissibility, value thresholds, time-limits, the scope of review, and the impact of the appeal on enforcement (provisional enforcement). Please refer to any rules specifically applicable in respect of the claims and relevant procedures outlined above.

Appeal is should be lodged within 3 months after judgment and is available for claims of and over €1750. In the provisional procedure (kort geding) the limit is 4 weeks. These are initiated by summons, to be served by the bailiff. The review is limited to what either party disputes (non ultra petites). If the judgement of the district court was declared privsionally enforceable, enforcement is not suspended. If the Court of Appeal reverses the decision, any funds paid have to be restored. In appeal, parties always need legal representation.

Source(s): Dutch Code of Civil Procedure; https://www.rechtspraak.nl/Hoe-werkt-het-recht/Hoger-beroep/Handelszaak#6d266345-db0f-493c-b95b-4df5c9cba0f00

8.6 Enforcement in consumer disputes

8.6.1 If the assessment of a consumer protection issue has not been possible at an earlier stage of the proceedings, is it always possible – either ex officio (see section 10

below) or if the consumer raises a possible violation of consumer protection law – for this assessment to be undertaken during enforcement proceedings?

Yes, it is always possible. Consumer law is applied ex officio; only in default cases the court might not have sufficient information to give full effect. The defendant can lodge an opposition against such decision and the case will be fully reviewed.

8.6.2 In the particular case of consumer protection, if a court examines consumer protection law (either ex officio or on the basis of an argument advanced by the consumer), does national procedural law provide that interim measures should 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 final decision will have full effect?

It is possible for the court to order interim provisions, though this is only possible at the request of either party (art. 223 DCCP).

Source(s): Dutch Code of Civil Procedure, case law.

9. ACTIONS FOR COLLECTIVE REDRESS

The CJEU has considered that situations in which individual and collective actions are in some way linked are those in which the effective and equivalent protection of EU consumer rights may be affected by national procedural rules. As such, we will focus on these situations. However, other problematic situations exist. Please indicate if additional (and potentially problematic) situations are identifiable in your national legal system.

Moreover, if possible, please provide the reference/citation of an article that provides an overview of the way in which the collective redress mechanism operates within your national legal system.

9. Injunctive relief, linking individual and collective actions

The case law of the CJEU requires that a person or organisation with a legitimate interest in consumer protection must be able to bring an action before a national court or tribunal in respect

of an alleged violation of consumer rights deriving from Union law, either for compensation or for injunctive relief, to preclude the continued violation of consumer rights[274].

9.1 If collective proceedings are launched, does national procedural law provide that ongoing individual claims, relating to the same dispute, should be stayed until the collective proceedings are brought to an end? Please specify if this constitutes an obligation on the part of the national judge or if it is at his or her discretion.

So far, only an injunctive collective action is available (Art. 3:305a DCCP), this will naturally not stay (compensatory) individual actions. In a proposal to extend this provision to compensatory collective action, the staying of individual actions is prescribed for parties that opted in. A draft bill was published for consultation in 2014 (http://conflictoflaws.net/2014/dutch-draft-bill-on-collective-action-for-compensation-a-note-on-extraterritorial-application/) for this purpose. A group of experts and stakeholders have advised on this draft and it is to be expected that a legislative proposal will be published in 2016.
If a request to declare a settlement binding under the WCAM settlement system is lodged, individual procedures are stayed, following art. 1015 DCCP. This stay is mandatory, unless one of the exemptions under art. 1015(2) are in place (in particular an opt out).

9.2 If individual proceedings are stayed, please indicate what the effect of the court or ADR entity's decision in the collective action on those individual proceedings would be, i.e. whether the outcome of the collective action binds the consumer bringing an individual action.

In principle, the decision in a collective procedure can be declared binding to all individuals (art. 7:907 Civil Code). Each person (victim/interested person on behalf of whom the settlement is concluded) can however opt out, by submitting a declaration within a term of a least three months (to be declared by the judge) that he wishes not to be bound by the collective settlement (art. 7:908(2) Civil Code). During the procedure at the Amsterdam Court of Appeal to declare the settlement binding, individual claims are suspended (Art. 1015(1) DCCP). Should a party opt out, the individual case will be continued. In case an

[274] This derives from the EU directives. For example, in respect of the UCTD, Art.6(1), Art.7(1) and (2) UCTD, provide that the Member States must ensure 1) that unfair terms are not binding on the consumer and 2) that adequate and effective means exist to prevent the continued use of unfair terms in consumer contracts. The CJEU has held that effective implementation requires that the consequence of the finding of the violation – in the case of a finding of unfairness under the UCTD – is for the term to be declared invalid, and that the effect of this invalidity extends not only to the parties to the action for an injunction but also to those who have concluded a contract with the seller/supplier to which the same terms apply.

interested party does not opt out, the suspended individual case will be discharged (Art. 1015(4) DCCP).

Source(s): Code of Civil Procedure; Civil Code; recent literature on the WCAM: Krans, The Dutch Act on Collective Settlement of Mass Damages; Kramer, Securities Collective Action and Private International Law Issues in Dutch WCAM Settlements: Global Aspirations and Regional Boundaries.

10. CONSUMER ALTERNATIVE DISPUTE RESOLUTION

10.1 Consumer disputes before ADR fora

10.1.1 Is ADR mandatory for all parties bringing a claim related to a consumer protection dispute?

ADR is possible, though not mandatory in most cases. Only financial institutions are bound to bring their disputes before the dispute resolution board (Geschillencommissie) Kifid. Consumers are always free to either go to the designated dispute board, provided that the business is associated with one of the dispute resolution boards (for financial disputes this is obligatory) or to go to court. The dispute resolution board generally gives a ‘binding advice’, which may be challenged in court.

10.1.2 Please specify if there are limitations to the use of ADR. These might include the nature of the claim (i.e. whether both individual and collective claims are possible), requirements of representation, time limits, value thresholds, etc.

Consumer ADR (dispute resolution board) are available provided that the trader involved is a member of/associated with the board in that specific sector (there are some 50 DRB in the NL, covering many areas), unless it concerns a financial dispute, The procedures before a dispute board are more informal than in a court. Depending on the specific board, legal fees may be asked; these are relatively small amounts (eg 35 EUR). Representation is not required, but this is also not required when bringing a claim before the sub-district sector of the District Court. Usually, the time between filing and receiving a claim is a little longer when compared to the sub-district department of the District Court. Claim can only be brought before the boards if the opposing party is a member of an organisation which has declared to be a party to the dispute board. Otherwise, the claim can only be brought if the opposing party specifically recognises jurisdiction of the dispute board.

10.1.3 Can ADR entities issue binding decisions and can they enforce those decisions? If not, please explain how they are enforced.

The decisions made by dispute boards are usually 'binding advices'. These are regulated in articles 7:900-906 of the Dutch Civil Code. The boards are not entitled to enforce their decisions. In practice, most parties obey the binding advice of the board. If one of the parties does not, the court may enforce the advice.

10.1.4 Does national law provide that limitation periods applicable to judicial actions should be suspended while ADR is ongoing?[275]

Yes, see Art. 3:316 DCCP.

10.1.5 Please specify if national law establishes rules providing for recourse to judicial action following an (unsuccessful) ADR hearing[276].

Any binding advice given by a dispute board may be brought before the district court to be subjected to dissolution. This dissolution will be ranted if a severe error has been made during the ADR procedure. Examples included in case law are:

d. Unfair hearing of either party (HR 24 September 1993 RvdW 1993/182)
e. Not all evidence has been presented to either party (HR 18 juni 1993 RvdW 1993/137)
f. Witnesses have been heard without either party present
g. An expert witness has not (fully) carried out their dedicated research.

10.1.6 Is there judicial review of decisions and awards made by ADR entities? If so, by which court or tribunal is this oversight made? Is it ordinary or specialised?

There is no automatic or systematic review. The decisions can be brought before the district court, as mentioned under 10.1.5, in case a party wishes to pursue a case in court following a 'binding advice' by the ADR board.

Source(s): Hondius & Rijken, Handboek Consumentenrecht 2015, chapter 15

[275] The Directive on Consumer ADR provides that "the existence of an effective system for collective claims and easy recourse to ADR should be complementary". Consumer ADR is relevant not only for individual claims but also for collective ones; it can provide consumer with a means to reduce costs and save time.
[276] Per Arts.10-12, Directive on Consumer ADR.

11. THE EXAMINATION OF CONSUMER PROTECTION LAW IN NATIONAL PROCEDURAL LAW: RESPECT FOR THE PRINCIPLES OF THE EFFECTIVENESS AND EQUIVALENCE OF CONSUMER PROTECTION LAW AND EX OFFICIO CONTROL

11.1 The basis of ex officio control of consumer protection law in national law

11.1.1 Is it clear in the national legal system when consumer protection law should be applied ex officio? Is the ex officio control of consumer protection law established as an obligation or as a (discretionary) power of the judge in national procedural law?

The law does not explicitly regulate this, but the courts follow the case law of the CJEU, and a working group report was published in 2010 and a revised version in 2014 (Ambtshalve toetsing II (Ex officio review/application), Herzien rapport van de LOVCK werkgroep, November 2014) providing guidelines for the judiciary. An important ruling by the Dutch Supreme Court giving further guidance to Dutch practice on this point is Hoge Raad, 3 September 2013, ECLI:NL:HR:2013:691 (Heesakkers/Voets).

There are two ways in which the court may do so:

i. Art. 6:233 of the Civil Code states certain conditions under which clauses may be annulled if parties request this. However, art. 3:40(2) Civil Code provides a way to circumvent this. The articles states that a clause that constitutes a violation of a statutory provision which aims to protect one party is voidable (no ex officio control possible), unless the scope of the provision dictates otherwise, in which case the clause is automatically void. This constitutes a possibility for the judge to perform ex officio control, even though such a thing has not yet been applied in case law.
ii. Art. 6:248 Civil Code provides another way for the judge to apply ex officio control. Any clause that violates the principles of reasonableness and fairness can be declared void ex officio. The workgroup that investigated the ex officio possibilities indicates that the first option more closely resembles the system that the CJEU had in mind, though it also notes that ex officio control via art. 6:248 has been applied previously in case law.[277]

11.1.2 If there is an understanding of ex officio control of consumer protection law in the national legal, what is this control understood to encompass/not cover?

[277] HR 20-02-1976 ECLI:NL:HR:1976:AC5695, HR 25-04-1986, ECLI:NL:HR:1986:AC9329, HR 08-07-1991, ECLI:NL:HR:1991:ZC0315.

This control is understood to encompass any violation of the principles laid down in art. 6:233 of the civil code, which mainly deals with Terms and Conditions. The Report on Ex officion application 2014 (see 11.1.1) explicates the case of the ECJ, that it entails an obligation and that it is not only limited to unfair contract terms. It provides an approach in six steps, ranging from the determination of the applicability of European law, whether a specific rule applies in the given case and a reasonability test where appropriate.

11.1.3 Is the party who claims to be a consumer required to establish his or her consumer status, the existence of a consumer contract and that consumer law applies to the dispute? Is this required even if the consumer has no legal representation?

For the articles mentioned under 11.1.2 to be applicable, the party that claims to be consumer should fit the description of article 7:5 Civil Code; the person should not have concluded the contract in the context of his business or professional activities.

11.1.4 What information is available to judges and dispute resolution facilitators hearing consumer protection disputes? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a consumer protection dispute to be heard and b) for the court to engage in ex officio control?

The information available is that information that is submitted by either party. If the dispute involves a contract, the contract should be provided by either party. Any party that wishes information to be seen by the court should send it to the court (art. 149 DCCP). If the court may request that either party provides information that it possesses (art. 162 DCCP). If the court wants to engage in ex officio control because it believes that a contract clause violates national consumer law, it should have a copy of that contract.

11.1.5 Who is responsible for providing this information? If the necessary information is not available to the court (or dispute resolution facilitator), is he or she under an obligation to investigate in order to be able to respond to a relevant consumer protection dimension of the case?

The information should be provided by the party that claims its existence (art. 149 DCCP), unless the court orders either party to provide information (art. 162 DCCP).

11.1.6 Will the court provide the consumer with any assistance in gathering factual information or advancing his legal arguments before the court? Please respond for the

situation where: a) the consumer has legal representation and b) the consumer has no legal representation.

In principle not, the judge is passive as regards the facts of the case. The consumer should provide the information that he wants to present to the court. Only if the consumer claims that he does not have relevant information, but the opposing party does, the court may order the opposing party to provide this information (art. 162 DCCP). In practice, the judge may, within the limits of neutrality, give the unrepresented consumer some guidance to secure equality of arms.

Source(s): Van den Berg e.a., Ambtshalve toepassing van Europees consumentenrecht, February 2010. and revised version 2014, A.G.F. Ancery, Ambtshalve toepassing van EU-recht, Deventer: Kluwer, 2012.

11.2 The possibility for ex officio control of EU consumer protection law in dispute resolution proceedings

11.2.1 Is ex officio control of consumer protection law always possible when the procedure involves a full assessment of the claim on its merits?

Yes, it is always possible.

11.2.2 Can ex officio control be exercised even when the procedure does not involve an assessment on the merits?

Even in a default case, where the court will only dismiss clearly unfounded claims, some ex officio control is exercised (eg as regards jurisdiction, interests or legal costs claimed), within the confines of the facts provided, which may be limited in absence of a defended.

11.2.3 Please indicate if, per national procedural law, ex officio control can be exercised at the following stages of the procedure:

	Courts		Other dispute resolution facilitators	
	Possible to exercise ex officio control	Not possible to exercise ex officio control	Possible to exercise ex officio control	Not possible to exercise ex officio control

Ordinary proceedings	x		x	
Small claims	x		x	
Payment order – no payment order, only default cases	x			
Provisional measures	x			
Proceedings linked to enforcement	x			
Enforcement proceedings		x		
- Enforcement of payment order				
- Enforcement of arbitration award				
- Enforcement of mortgage				
- Enforcement of notarial deed				
Appeal proceedings (please specify:)	x			

11.2.4 What does ex officio control encompass in national procedural law?

If a clause is deemed voidable under art. 6:233 Civil Code, and the party that is protected by these provisions does not invoke his rights, the court may proceed to do so ex officio.

Source(s): see above

11.3 Other procedural mechanisms for the equivalent and effective protection of EU consumer law

11.3.1 Does national procedural law provide that rules of EU consumer law (as well as rules that aim to satisfy EU consumer law objectives) should be understood as having equal standing to national rules of public policy (which is to say, that for the purposes of domestic law, the consumer protection provision is understood to have equal standing to a rule that must be raised ex officio by the national court)?

This is not explicitly regulated, though it is clear that the ex officio application of the law by the court also encompasses EU law.

11.3.2 If ex officio control is not possible in certain types of proceedings or at a certain stage of proceedings (or for any other reason), does national procedural law provide for an alternative way of assessing consumer protection law?

At any point, the consumer may always invoke all statutory provisions that encompass protection.

Source(s): see above

11.4 Ex officio control in payment order procedures

11.4.1 What information is available to the judge when a claim for the issuance of a payment order is made? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a claim for the issuance of a payment order to be granted and b) for the court to engage in ex officio control before a payment order is issued?

No payment order under national law available, see II.2.3 and III.8.4. In the EOP, the control is extremely limited or even absent (only jurisdiction).

11.4.2 What considerations will be assessed ex officio by the court (or other competent authority) before a payment order is issued?

See 11.4.1.

11.4.3 How is the consumer informed about the claim to issue a payment order against him or her? Does national procedural law make any provision for steps to be taken to ensure that consumers are informed of the claim for the issuance of a payment order so that he or she can contest it?

See 11.4.1.

11.4.4 If the consumer objects to the claim, what is the next step? Do the proceedings continue, in the context of which ex officio control can be exercised? Or are the proceedings transferred to ordinary proceedings for analysis on the merits of the claim?

See 11.4.1.

European Commission
An evaluation study of the impact of national procedural laws and practices on the equivalence and effectiveness of the procedural protection of consumers under EU law

JUST/2014/RCON/PR/CIVI/0082

National Report – Consumer Protection Strand

Poland

Karol Weitz and Agnieszka Golab

POLAND: LEGAL ANALYSIS

1. NATIONAL LEGISLATION IMPLEMENTING EU CONSUMER PROTECTION INSTRUMENTS

EU legislation	Transposing national legislation	Additional notes (e.g. if there is an overlap in application of legislation etc.)
Doorstep Selling Directive 1985/577/EEC	The Act of 30 May 2014 on consumer rights http://isap.sejm.gov.pl/DetailsServlet?id=WDU20140000827	Translation of the Act is available at: https://www.uokik.gov.pl/consumer_protection.php
Package	The Act of 29 August 1997 on tourist	

Travel Directive 90/314/EEC	services http://isap.sejm.gov.pl/DetailsServlet?id=WDU20160000187	
Unfair Contract Terms Directive 1993/13/EEC	The Act of 30 May 2014 on consumer rights http://isap.sejm.gov.pl/DetailsServlet?id=WDU20140000827 and other acts, e.g. The Polish Civil Code	Translation of the Act is available at: https://www.uokik.gov.pl/consumer_protection.php
Distance Selling Directive 1997/7/EC	The Act of 30 May 2014 on consumer rights http://isap.sejm.gov.pl/DetailsServlet?id=WDU20140000827 and other acts, e.g. The Polish Civil Code (e.g. art. 43^1)	Translation of the Act is available at: https://www.uokik.gov.pl/consumer_protection.php
Consumer Sales and Guarantees Directive 1999/44/EC	The Act of 30 May 2014 on consumer rights http://isap.sejm.gov.pl/DetailsServlet?id=WDU20140000827 The Polish Civil Code (cf. art. 543^1, 546^1, 556^2)	Translation of the Act is available at: https://www.uokik.gov.pl/consumer_protection.php
Unfair Commercial Practices Directive 2005/29/EC	The Act of 16 February 2007 on the protection of competition and consumers http://isap.sejm.gov.pl/DetailsServlet?id=WDU20150000184	Translation of the Act is available at: https://www.uokik.gov.pl/consumer_protection.php
Misleading and Comparative Advertisin	The Act of 16 April 1993 on combating unfair competition http://isap.sejm.gov.pl/DetailsServlet?id=WDU20031531503	Translation of the Act is available at: https://www.uokik.gov.pl/consumer_protection.php

g Directive 2006/114/EC		
Consumer Credit Agreement Directive 2008/48/EC	The Act of 12 May 2011 on consumer credit http://isap.sejm.gov.pl/DetailsServlet?id=WDU20140001497	
Timeshare Protection Directive 2008/122/EC	The Act of 16 September 2011 on timeshare http://isap.sejm.gov.pl/DetailsServlet?id=WDU20112301370	
Consumer Injunctions Directive 2009/22/EC	The Act of 16 February 2007 on the protection of competition and consumers http://isap.sejm.gov.pl/DetailsServlet?id=WDU20150000184	Translation of the Act is available at: https://www.uokik.gov.pl/consumer_protection.php
Consumer Rights Directive 2011/83/EU	The Act of 30 May 2014 on consumer rights http://isap.sejm.gov.pl/DetailsServlet?id=WDU20140000827	Translation of the Act is available at: https://www.uokik.gov.pl/consumer_protection.php
ADR for Consumer Disputes Directive 2013/11/EU	The governmental draft of the Act on the out-of-court settlement of consumer disputes. http://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=630	A draft, not yet enacted.

1. CONCEPT OF THE CONSUMER

1.1 Please outline the concept of the consumer in national law, indicating whether it is intended to be a uniform concept, whether it has been legislated for and where it can found (i.e. in a legislative provision, governmental guidelines, case law etc.).

The concept of consumer appears in several pieces of Polish legislation. Most notably the definition of a consumer is enacted in article 22^1 of the Polish Civil Code. According to this regulation, the concept of consumer was limited to natural persons who perform a legal act with an entrepreneur, provided that this legal act is not directly related to the economic or professional activity of the natural person.
Legal persons and entities are excluded from the abovementioned definition.

Article 22^1 of the Polish Civil Code does not define the model of the consumer, nor the specific characteristic traits of a consumer. However, in the literature and the judicature, a consumer is generally defined as: judicious, conscious and critical. The consumer is viewed as someone who can correctly understand the content that is addressed to him. The Supreme Court has also stated that there are no grounds to grant an overly privileged status to the consumer – especially to the extent where he or she would be totally excused from performing legal actions without basic due diligence that is generally expected from a reasonable person (cf. judgement of the Polish Supreme Court of 13 June 2012, II CSK 515/11; judgement of the Court of Appeals in Warsaw of 26 January 2016, I Aca 612/15).

The concept of consumer defined in article 22^1 of the Polish Civil Code often serves as a direct point of reference to other legal acts, for example article 4 point 12 of the Act of 16 February 2007 on protection of competition and consumers; article 5 item 1 of the Act of 12 May 2011 on consumer credit; article 2 point 2 of the Act of 23 August 2007 on combating unfair market practices.

2. REGULATORY AUTHORITIES COMPETENT FOR CONSUMER PROTECTION ISSUES

2.1 What regulatory authorities, if any, are competent for enforcing consumer protection law? Please identify them, their nature (i.e. whether they are public or private or mixed) and the nature of enforcement.

As far as regulatory authorities are concerned, the leading role belongs to the Office of Competition and Consumer Protection (Urząd Ochrony Konkurencji i Konsumentów - UOKiK). As a central government administration body responsible for implementing the consumer protection policy and acting in the public interest, it initiates administrative proceedings concerning infringements of collective consumer interests. Such practices are defined as unlawful activities of a trader causing harm to the interests of an unspecified number of people, i.e. all potential (current and future) customers of a given company. The Act of 16 February 2007 on competition and consumer protection enumerates three examples of practices infringing collective consumer interests: application of standard contract terms that have been entered in the Register of Prohibited Clauses; distributing inaccurate, false or incomplete information; unfair commercial practices or acts of unfair competition.

The Office of Competition and Consumer Protection performs regular investigations into the standard contracts used in B2C transactions in many sectors – language courses, non-public schools, tourist services, insurance, banks, cable TV and gas suppliers. Consequently, various cases are filed to the Court of Competition and Consumer Protection by the President of the Office.

Proceedings concerning infringements of collective consumer interests - as in case of practices restricting competition - are instituted ex officio. However, anyone may submit a written notification constituting a basis for intervention.

In consequence, the President of the Office may issue a decision recognizing the practice as infringing collective consumer interests and impose a fine of up to 10% of the trader's revenue in the preceding year. If a trader fails to conform to the decision, the President of the Office may impose a fine of up to 10 000 euro per each day of the delay.

The President of the Office of Competition and Consumer Protection is also entitled to monitor standard contract terms used by traders in transactions with consumers (which means all documents such as rules, regulations and pricelists, defining rights and obligations of the parties).

By the Act of 5 August 2015 (Polish Journal of Laws: Dz.U. 2015, item 1634), which

came into force on 17 April 2016, a new system of control of illicit contract clauses was introduced. From now on the President of the Office of Consumer and Competition Protection (UOKiK) will rule in an administrative decision that a standard contract term (contained in a template) is abusive and that its use will be prohibited. Prior to the entrance into force of the Act of 5 August 2015, it was the Court of Competition and Competition Protection (SOKiK) that passed rulings on the abusive character of contract terms.

The clauses which have been found abusive are entered into the Register of Prohibited Clauses (available on the UOKiK's website) and as of this moment cannot be used in relations with consumers. The application of such clauses may be regarded as an infringement of collective consumer interests and may result in a fine of up to 10% of the trader's revenue.

2.2 Is there a specific venue for this type of enforcement and does this limit the jurisdiction of courts/ADR fora (even if only initially)?

See information above.

The court may stay civil proceedings ex officio if the adjudication of a case depends on the outcome of other pending civil proceedings or if the adjudication of a case depends on a prior decision by a public administration body (article 177 § 1 point 1 and 3 of the Polish Code of Civil Procedure).

2.3 Can criminal prosecutions be initiated for violations of consumer protection rules? How serious must the infringement be? What are the penalties and sanctions? And might these prosecutions lead to criminal penalties or sanctions? Can individual consumers piggy back on these claims (e.g. via a partie civile method)?

Penal provisions with regard to infringement of consumer protection rules are included in several pieces of legislation, for instance:

- articles 132-139 of the Code of infringements (infringements against interests of consumers; for example art. 138c § 1 states that an entrepreneur who concludes a contract on consumer credit with blatant disregard for his obligation to inform the consumer about the content of the contract, is liable to a fine);

- article 25 item 1 of the Act of 16 April 1993 on combating unfair competition: "whoever marks or does not mark goods or services in a way which misleads the consumer as to their origin, quantity, quality or content or does not not notify the consumer of the risk associated with their use and exposes the consumer to suffer damage, is subject to the penalty of arrest or fine".
- Penal Code (for example article 304 on usury: whoever exploits a coercive situation of another person imposing an obligation of performance that is incommensurate with the reciprocal performance, is subject to deprivation of liberty for up to 3 years).

2.4 Is there judicial review of decisions of consumer regulatory authorities? If so, by which court is this judicial oversight made? Is the forum an ordinary or a specialised court or tribunal?

The decisions of consumer regulatory authorities are reviewed by a specialized court, i.e. The Court of Competition and Consumer Protection (division of the Regional Court in Warsaw) – cf. article 479^{28} of the Polish Code of Civil Procedure.

2.5 Does the national legal system provide for a mechanism of cooperation between its national regulatory authorities and those of other Member States?

The Office of Competition and Consumer Protection is actively acting within international forums. Detailed information is provided at the website of the Office of Competition and Consumer Protection: https://uokik.gov.pl/consumer_protection32.php
No further, detailed information - apart from the link – can be provided.

3. LEGAL AID

3.1 Is legal aid available to consumers in: a) bringing a claim and b) defending a claim before a court?

There are a number of institutions in Poland providing free legal assistance to consumers. At the local level, there are around 370 municipal and district consumer ombudsmen which provide free consumer advice, mediation and legal assistance in court proceedings. According to article 63^3 the Polish Code of Civil Procedure, in cases related to the protection of consumer rights, the municipal consumer ombudsman may bring actions on behalf of citizens as well as join the proceedings at any stage, subject to

the plaintiff's consent.

Consumer NGO's provide consumers with free advice and legal support, release publications, organize information campaigns, etc. Two biggest consumer NGO's, co-financed by the State Budget, are the Polish Consumer Federation and the Association of Polish Consumers.

Moreover, according to article 61 of the Polish Code of Civil Procedure non-governmental organizations may, within the scope of their statutory duties, bring actions on behalf of a natural person, upon receiving his or her written consent, in matters concerning consumer protection.
In these cases, non-governmental organizations may also, within the scope of their statutory duties and upon receiving a written consent of a natural person, join the consumer in pending proceedings.

Moreover, parties having poor financial situation may apply for legal aid (article 117 ff Polish Code of Civil Procedure) – for additional details see point 5.2., 5.3 and 5.4 below.

3.2 For what kinds of disputes and actions is legal aid available? (NB: legal aid might not be available for consumer or contractual disputes but be available instead for a related action, e.g. actions relating to debt, mortgage arrears, eviction etc.)

In every civil case a party may apply to have an attorney or legal advisor appointed. A petition will be successful provided that requirements stipulated in article 117 Polish Code of Civil Procedure are met:

- a natural person may request to be appointed an attorney or legal advisor, if he/she submits a statement to the effect that he/she is not in a position to bear the costs of an attorney or legal advisor's fee without affecting the necessary basic needs of himself and his family.
- a legal person may request to be appointed an attorney or legal advisor if it is able to prove that it does not have sufficient funds to bear the costs of an attorney or legal advisor's fee.

In order to satyisfy these requirements, a party shall submit an application in writing or orally at the hearing. In the application a party should provide factual allegations in support of the claim.

3.3 What requirements must be satisfied for the consumer to be entitled to legal aid? Please specify if there are any additional limitations to its availability.

When a party files an application to be granted legal assistance, it has to be proved that he or she does not have sufficient funds to bear the costs of an attorney or legal advisor's fee (article 117 Polish Code of Civil Procedure). According to article 118 of the Polish Code of Civil Procedure, appointment of an attorney or legal advisor by the court shall produce the same effects as granting power of attorney by a party (see also point 5.2).

3.4 What does legal aid encompass? (i.e. (only) general advice, (only) assistance in preparing the case, (only) assistance with negotiation of settlements, (also) representation).

According to article 91 of the Polish Code of Civil Procedure, legal representation allows by virtue of law to:
1) conduct all and any procedural actions related to a case, including counter-lawsuits; file petitions to reopen a case etc.
2) conduct all and any actions related to interim remedies and enforcement;
3) pass power of attorney to another attorney or legal advisor;
4) reach a settlement, relinquish a claim or acknowledge the claim, provided that it was not decided otherwise;
5) collect court costs from the adverse party.

According to the Act of 17 December 2004 on legal aid in civil proceedings taking place in Member States (implementation of Council Directive 2002/8/EC of 27 January 2003 (Polish Journal of Laws 2005, No. 10, item 67), legal aid encompasses the following (article 5 point 1-3):

1. Exemption from court fees;
2. Appointment of an attorney or legal advisor – speaking in language that is understandable to the petitioner, if possible. The role of the attorney or legal advisor is to provide necessary legal assistance and representing the party in the proceedings before the court.
3. Covering by the State Treasury the necessary travel cost ensuing from the obligatory personal presence of a petitioner, ordered by the court – if hearing him in a different way is not possible.

For additional details see point 5.1.

4. COSTS

4.1 What are the costs of different types of procedures before courts? Are there exemptions to the payment of fees and expenses? How can costs be paid?

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Court fees	Up to € 250 (see general rules below the table)	Up to € 1000	Starting from € 1000,05	Up to € 100	Up to € 400	Starting from € 400,02
Court expenses	Depending on individual case	Depending on individual case	Depending on individual case	Depending on individual case	Depending on individual case	Depending on individual case
Exemptions	Successful application for exemption (court fees)	Successful application for exemption	Successful application for exemption	Not available	Not available	Not available

As regards the general information:
The lawsuit fee in an individual pecuniary case amounts to 5% of the value of the subject matter, however no less than 30 Polish zloty and no more than 100 000 Polish zloty.

The lawsuit fee in group action amounts to 2% of the value of the subject matter, however no less than 30 and no more than 100 000 zloty.

In non-pecuniary matters and in selected pecuniary cases the fee constitutes a fixed amount, regardless of the value of the subject matter. For instance, in eviction cases the fixed amount equals 200 Polish zloty.

In some cases, a plaintiff is exempted from the fee, for instance a person filing maintenance claims or a person filing for the declaration of abusive contract terms.

A party can apply for exemption from the court costs.

The court fees can be paid:
1). via a bank transfer;
2). by cash at the court check out;
3). by buying so-called "stamps of court fee" that are later sticked on the pleading.

Source(s): Act of 28 July 2005 on court fees in civil matters (with further amendments)

5. STANDING AND REPRESENTATION IN CONSUMER DISPUTES

5.1 Does national law limit the standing of the individual consumer in respect of the claim that can be made and the forum before which it can be brought?

No.

5.2 Other than individual consumers, who or which bodies have standing in consumer protection disputes and for what types of claim? If the action is not brought by the individual consumer, what requirements of representation must be satisfied?

According to article 8 of the Polish Code of Civil Procedure, non-governmental organizations whose statutory duties do not involve economic activities may bring an action and participate in pending proceedings with a view to protect citizen rights, as provided by the provisions of law.

There are three direct ways in which non-governmental organizations may take part in proceedings regarding protection of consumers interests:

- filing lawsuits on behalf of consumers

- entering the proceedings that is already underway
- presenting a legal point of view that is important for the examination of the case.

According to article 63^3 the Polish Code of Civil Procedure, in cases related to the protection of consumer rights, the municipal consumer ombudsman may bring actions on behalf of citizens as well as join the proceedings at any stage, as long as the plaintiff granted his or her consent.

Moreover, according to article 61 of the Polish Code of Civil Procedure non-governmental organizations may, within the scope of their statutory duties, bring actions on behalf of a natural person, accompanied with this person's written consent, in matters concerning consumer protection.
In these cases, non-governmental organizations may also, within the scope of their statutory duties and upon receiving a written consent of a natural person, join the consumer in pending proceedings.
A complaint or letter whereby a non-governmental organization joins a natural person in proceedings shall be accompanied by the natural person's written consent.

5.3 If a consumer wants to bring or defend an action relating to a consumer protection dispute, is there a legal (or otherwise formal) requirement that he or she has legal representation? Please specify for both judicial and ADR fora and the bodies, associations or authorities that can provide this representation.

There is no formal requirement for the consumer to have legal representation. Only when it comes to filing a cassation and other pleadings in relation to the proceedings that takes place before the Supreme Court, a party must have professional legal representation.

6. ACTIONS BEFORE COURTS

6.1 Jurisdiction and competence of the courts in consumer disputes: General structure and special procedures aimed at protecting consumers

6.1.1 Are ordinary courts competent to hear such claims? Is there also a specialized tribunal for consumer protection disputes?

Courts of general jurisdiction are competent to hear consumer protection disputes.

6.1.2 Which courts are competent to hear consumer protection disputes at first instance and in appeals? Please specify the court, in light of the value of the claim (and identify any other factors that are relevant in allocation jurisdiction).

In the first instance, consumer protection disputes are examined either by district courts or regional courts, depending on the value of the subject matter.
If the value of subject matter of the dispute surpasses 75 000 zloty (circa 17 000 euros) the dispute is heard in the first instance by a regional court.
The first instance decisions of district courts can be appealed to the regional courts, while the first instance decisions of regional courts can be appealed to the appellate courts.

As far as the general rules of competence are concerned, an action shall be brought before the court of the first instance in whose region the defendant's place of residence is located. However, there are also some other options that a plaintiff can choose from. For instance, actions in the case of claims for maintenance may be instigated on the basis of the place of residence of a person who is deemed entitled to these claims. Moreover, pecuniary claims against an entrepreneur may be instigated before a court within whose region the headquarters or a branch is located, if a claim is in connection with the operations of the given headquarters or branch. In addition to that, actions for executing a contract, determining its contents, amending a contract, as well as determining the existence of a contract, or the performance, termination or invalidation thereof, as well as for damages for default of contract may be brought before the court in place of the performance of the contract. In case of doubt, the place of performance of the contract shall be confirmed by a document.

6.1.3 What is the nature of the procedure at first instance, e.g. is it a simplified or a summary procedure, and is there an assessment of the merits? Please specify in light of the value of the claim (and identify any other factors that are relevant in allocating jurisdiction).

See the section below on small claims procedure (articles 505^{1} – 505^{14} PCCP) and procedure by writ of payment in the Polish national law (articles 497^{1} – 505 PCCP). If the provisions of these two separate proceedings are not applicable, the consumer dispute is examined according to general rules. There are no special provisions with regard to the stance of consumers in civil proceedings.

A. Ordinary proceedings

As far as the ordinary proceedings is concerned, it is based on the classic principles of adversarial proceedings and free disposition of the parties (the latter being controlled by the court to a certain extent).

The plaintiff is required to specify the claim and present the factual allegations and evidence in suport of the claim. A defendant may file an answer to lawsuit before the first hearing – generally it is not obligatory, unless the presiding judge orders to the defendant to do so in a specific time limit.

Before the first hearing is scheduled, the presiding judge may oblige the parties to file further pleadings, determine the order for filing them, and the circumstances to be clarified. In pending cases, the exchange of pleadings takes place only if the court decides so, unless a pleading includes only a petition with regard to evidence proceedings.

The court disregards late allegations or evidence, unless the party proves that 1). he/she failed to report them in lawsuit or in the answer to the lawsuit or other pre-trial pleading due to no fault of his own; 2). taking late allegations and evidence into consideration will not delay the examination of the case; 3). there are other exceptional circumstances.
The court will also disregard allegations and evidence if they are only brought as a stalling tactic or if the disputed circumstances have already been sufficiently explained.

In addition to factual allegations and evidence, the parties may also present the legal grounds of their respective claims and requests (but it is not obligatory).

The court is bound by the claim and cannot adjudicate ex officio ultra petita partium.

Where reasonably required, the presiding judge may give the parties essential instructions and, depending on the circumstances, instruct them on the advisability of appointing a representative ad litem.

B. Specific proceedings:
   - proceedings by writ of payment (art. 484^{1} – 497 PCCP)
   - electronic proceedings by writ of payment (art. 505^{28} – 505^{37} PCCP)
   - simplified proceedings (art. 505^{1} – 505^{14} PCCP)

For details regarding the specific proceedings – see the section below.

As far as proceedings by writ of payment are concerned – the scope of review is limited (however, the full review of the merits of the claim will take place if the defendant effectively contests the order for payment, i.e. files a proper measure against it).
The scope of review is limited in order of payment procedures, becuase the the court shall issue an order for payment if the facts in support of the claim are proven by the following items enclosed to the lawsuit:
1) official document,
2) bill accepted by the debtor,
3) call for payment and debtor's written acknowledgement of the debt,
4) request for payment approved by the debtor but returned by the bank unpaid due to lack of sufficient funds in the bank account.

The order for payment procedure takes place in camera.

6.1.4 Please identify the formal requirements that must be satisfied for a consumer dispute to be heard before a court. These might include time limits applicable to the filing of the action/defence, representation requirements etc.

As far as formal requirements are concerned, there are no specific requirements with regard to consumers.
The consumer must meet the general requirements of the Polish Code of Civil Procedure when filing a consumer-related claim.
The lawsuit should contain information with regard to the claim, value of the subject matter, factual allegations and evidence; it should include the designation of the parties and be filed with the competent court. The Polish Code of Civil Procedure does not regulate any specific time limits for consumer claims, nor any specific rules of representation. A party may be represented by a professional, but there is no obligation in this sphere.
It is worth mentioning that in some cases, a consumer is supposed to obligatorily take the path of out-of-court complaint and redress procedure with the provider of the service, before filing a lawsuit. If a consumer does not comply with this requirement, the lawsuit will be rejected (for example article 94 of the Act of 23 November 2012 on postal services).
Additionally, article 187 § 1 point 3 PCCP specifies that a lawsuit should contain information whether the parties have tried mediation or any other method of out-of-

court settlement, and if no such attempts have been made, the explanation of the reasons of such omission.

6.1.5 In respect of the claims and relevant procedures available in the national legal system, what kind of relief might be available in consumer protection disputes? (monetary remedies, injunctions, skimming off etc.)?

The consumer may demand any relief provided by the substantive and procedural law. These may include various forms of monetary and non-monetary measures. Taking advantage of all types of lawsuits is also possible.

Furthermore, by way of example, article 753 of the Polish Code of Civil Procedure stipulates that in cases involving maintenance obligations, security may be provided by obliging the obligor to make one-off or periodic payments to the obligee. In such cases, the only basis for security shall be substantiation of the existence of claims.
The rule set in article 753 applies accordingly to the security of claims involving, for example: quality guarantee or warranty obligations, or contractual damages as well as obligations due to inconsistence of a consumer product with a retail sales agreement, against an entrepreneur, of up to twenty thousand Polish zlotys; rent or lease obligations, including obligations related to charges payable by the lessee and charges related to the use of residential or business premises - up to the amount of twenty thousand Polish zloty.

6.1.6 Please provide a brief overview of the role of parties and judges in civil proceedings generally (e.g. with reference to the principle of party disposition, the obligation of parties to make and prove factual allegations and to make and provide legal arguments, the possible role of the court). This overview should be brief; these issues will be dealt with in more detail in the questions that follow.

According to the principle of adversarial proceedings, the parties are obliged to present factual allegations and evidence in order to establish facts from which they derive legal consequences (article 232 sentence 1 PCCP).
As a general rule, facts and evidence may be presented up to the end of a trial (article 217 § 1 PCCP). However, the principle of concentration of procedural material requires the parties to present the procedural material in due time (i.e. as early as possible) – otherwise the court will disregard the belated material. The exceptions to this rule are as follows: 1). a party proves that she failed to present the material in due time through no fault of her own; 2). accepting late allegations and evidence will not

delay the examination of the case; 3). there are other exceptional circumstances (article 217 § 2 PCCP).

Before the first session scheduled for the trial, the presiding judge may oblige the parties to file additional pleadings by specifying the circumstances that need additional clarification (207 § 3 sent. 1 PCCP). In pending cases, the exchange of pleadings takes place only if the court decides so, unless a pleading only includes an application with regard to the taking of evidence (207 § 3 sent. 2 PCCP).

At the hearing, the court, by asking questions to the parties, strives to induce them to present or supplement allegations or evidence in support of these allegations and provide explanations necessary to determine the factual basis of a claim. In the same manner, the court strives to clarify the relevant, disputable circumstances of the case (article 212 § 1 PCCP).

The court may exceptionally admit ex officio the evidence which has not been presented by a party (art. 232 sentence 2 PCCP). This may happen especially in cases: where the public interest is at stake; if a court suspects that the proceedings were instigated with a fictitious intent; also when a party is disproportionately week or helpless (the issue sparks controversy).

6.2 The parties may perform disposition acts, such as: reaching a settlement, withdrawing a claim, acknowledging a claim. These acts are controlled by the court who may consider these activities as inadmissible if the circumstances of the case suggest that the said actions would be against the law or social norms, or intended to circumvent the law (cf. art. 203 § 4 PCCP).**Small claims**

6.2.1 Does a small claims procedure exist in the Member State? If yes, is it a specialised or simplified procedure?

Small claims procedure exists in Poland and it is a simplified procedure.

6.2.2 What are the value thresholds for claims brought under the small claims procedure? Moreover, are there any other factors that shape the use of the small claims procedure (including the nature of the claim, the area of consumer protection law into which the claim falls etc.)?

The provisions of simplified procedure apply to the following cases:
1) contractual claims, if the value of the matter at issue does not exceed ten thousand Polish zlotys, and in claims arising from a warranty, guarantee, quality guarantee or

non-compliance of consumer goods with a consumer sales contract, if the value of the subject of the agreement does not exceed the same amount,
2) payment of rent for the lease of housing units and charges payable by the lessee as well as charges for the use of housing units in a housing cooperative irrespective of the value of the matter at issue.

However, if the court decides that a case is particularly complicated or that its examination requires special knowledge, the court shall continue hearing that case without using provisions of the small claims procedure (article 505^7).

6.2.3 What forms must be completed to raise the application? Who assists the consumer in completing these forms?

In simplified small claims procedure, the lawsuit, answer to the lawsuit, motion to set aside a default judgment and pleadings containing evidence shall be filed using official forms. The Minister of Justice determines in a regulation how the official forms should look like and the methods for making them accessible, compliant with the requirements related to pleadings, containing all the necessary instructions for the parties as regards filling in and submitting such forms, and the consequences of non-compliance with such requirements. Official forms are available to parties in court offices and on the Internet, free of charge and in editable format (art. 125 § 3).
In practice, court clerks provide assistance when it comes to filling in the forms. It should be added that the templates of the forms contain annotations (in round brackets) with a view to reduce ambiguity and to facililate filling in the form in a correct way.

6.2.4 How can an application for a small claim be made (e.g. online, by post or in person)?

Small claims lawsuit can be sent by post or submitted in the building of the court. As of 8 September 2016, it will also be possible to file an application for a small claim via an electronic system specially designed for the purpose of judicial proceedings (cf. art. 125 PCCP).

6.2.5 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

The small claims procedure – having simplified nature – requires that pleadings containing evidence be filed on official forms (art. 505^2 PCCP). In small claims procedure, it is inadmissible for the court to take advantage of the expert's opinion

(art. 505^6 § 2 PCCP) – if the court comes to the conclusion that the case is complicated and requires expert's opinion, it will be referred to examination in ordinary civil proceedings (art. 505^7 PCCP).

The parties should present factual allegations and evidence in due time (i.e. as early as possible), because otherwise the court will disregard the belated procedural material, unless the party proves that she 1) failed to report certain facts or pieces of evidence in due time through no fault of her own, or that 2) taking the late allegations and evidence into consideration will not delay the examination of the case, or that 3) there are other exceptional circumstances.

As far as the small claims appellate proceedings are concerned, the court shall not conduct any evidence proceedings, apart from document evidence (art. 505^{11} § 1 PCCP). An exception to this rule is allowed, if the appeal is based on facts or evidence discovered at a later date, which the party could not have presented before the court of first instance (art. 505^{11} § 2 PCCP).

6.2.6 Are the costs of the successful party reimbursed?

Yes. General rules described under point 2.1. apply.

6.3 Claims other than small claims

6.3.1 If a consumer protection dispute does not qualify as a small claim, what other procedures are available? What are the value thresholds and other factors determining the use of such procedures?

If the small claims procedure is excluded, the court evaluates the possibility of issuing an order for payment (article 484^1 ff. PCCP).
Order for payment proceedings fall under the jurisdiction of district and regional courts – the value of the subject matter is decisive: if it is above 75 000 zloty, the regional court will deal with the case. The court shall hear cases in order for payment proceedings at the written request submitted by the plaintiff in the lawsuit. The case will be exmined in camera.

According to article 485 PCCP the court will issue an order for payment if the plaintiff seeks financial claims or other changeable items and the facts justifying the claim are proven by one of the following instruments enclosed thereto:

1) official instrument,
2) bill accepted by the debtor,
3) call for payment and debtor's written acknowledgement of debt,
4) request for payment approved by the debtor but returned by the bank unpaid due to lack of sufficient funds in the bank account.

When issuing an order for payment, the court will rule that the defendant shall satisfy the entire claim as well as pay the related costs within two weeks from being served with the order or – alternatively – that he will contest the order for payment and file his allegations within the same time limit.
A notice of objections is filed with the court that issued an order for payment. The defendant shall specify in the notice whether he is appealing the whole or part of the order while also presenting his oppositions, which shall be reported before defending on the merits of the case or else be forfeited, as well as facts and evidence. The court disregards late allegations and evidence, unless the party proves he failed to report them in the objections due to no fault of his own, or that taking the late allegations and evidence into consideration will not delay the examination of the case, or that there are other exceptional circumstances.

According to article 492^1 PCCP, if an order for payment cannot be served either because the place of stay of the defendant is not known or because the order for payment may not be served on the defendant in Poland, the court shall ex officio set aside the order for payment, andn the presiding judge shall take appropriate action.
If after the issuing an order for payment, it turns out that the defendant did not have the capacity to be a party or to perform procedural deeds, and such defaults were not corrected within a determined time limit, the court will ex officio set aside such order for payment.

Apart from the payment of order procedure (described above), the Polish Code of Civil Procedure also regulates the procedure by writ of payment (artl 497^1 ff. PCCP).
A writ of payment will be issued if the plaintiff pursues pecuniary (cash) claims (art. 498 § 1 PCCP).
However, a writ of payment cannot be issue if the content of the complaint suggests that:
1) the claim is evidently unfounded;
2) the facts brought raise some doubts;

3) the satisfaction of the claim depends on a reciprocal performance;
4) the place of stay of the defendant is not known or the order may not be served on the defendant in Poland (cf. 499 § 1 PCCP).

The defendant is served with a writ of payment together with the lawsuit and instructions on the procedure for filing objections.
A notice of objections is filed with the court that issued writ of payment. The defendant shall specify in the notice whether he is appealing the order as a whole or in part, and will present his oppositions (charges), which shall be reported before entering into the merits of the case, as well as facts and evidence.
The court will disregard late allegations and evidence, unless the party proves that 1). he failed to report them in the objections due to no fault of his own or 2). taking the late allegations and evidence into consideration will not delay the examination of the case, or 3). that there are other exceptional circumstances.

If objections are duly filed, the order for payment will lose effect and the presiding judge will schedule a hearing and order the objections to be served on the plaintiff together with summons.
At a defendant's request, the court or court clerk issues in camera a decision declaring that the writ of payment lost effect (art. 505 PCCP).

According to article 502^1 PCCP, if a writ of payment cannot be served for reasons described in article 499 (4) (see above), the court shall ex officio set aside the order for payment.
Likewise, if - after issuing a writ of payment - it is discovered that the defendant did not have the capacity to be a party to court proceedings or to conduct court proceedings – and such defaults were not corrected within a determined time limit in accordance with the provisions of the Code of Civil Procedure - the court shall ex officio set aside the writ for payment.

6.3.2 How can such claims be made? Please specify if the applications can be made online, or by post or in person.

As far as the procedure by writ of payment is concerned – by post or by submitting them directly in the court. As far as electronic procedure by writ of payment is concerned – online, by the electronic system.

6.3.3 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

As far the procedure by writ of payment is concerned, the court examines the claim in camera. The court examines the content of the claim and checks if the negative conditions prohibiting acceptance of the claim exist (these conditions were already presented above).

6.3.4 Are the costs of the successful party reimbursed?

Yes.

6.4 Claims for the issuance of a payment order

6.4.1 Does an order for payment procedure exist in the national system? Is it a simplified procedure?

Order for payment procedure exists in the national system. As opposed to the procedure by writ of payment, it is not the obligatory proceedings and takes place on the application of a plaintiff.

6.4.2 Which authorities or courts are competent to hear claims for the issuance of payment orders?

District courts and regional courts.

6.4.3 Are there any formal requirements that must be satisfied for the application for the issuance of a payment order to be made (e.g. standard forms, representation by a lawyer, the detail of description required, the need to provide written evidence etc.)?

Article 485 PCCP:
§ 1. The court shall issue an order for payment if the plaintiff seeks financial claims or other fungible items and the facts justifying the claims sought are proven by the following instruments enclosed thereto:
1) official instrument,
2) bill accepted by the debtor,
3) call for payment and debtor's written acknowledgement of debt,
4) request for payment approved by the debtor but returned by the bank unpaid due

to lack of sufficient funds in the bank account.
§ 2. The court shall also issue an order for payment against the drawee of a correct bill of exchange, warrant or bill of debt whose authenticity and content do not raise any doubts. If rights under a bill of exchange, cheque, warrant or bill of debt are transferred to the plaintiff, in order to have an order for payment issued the plaintiff shall be obliged to present documents in support of his claims, unless the transfer of such rights results directly from the bill of exchange, cheque, warrant or bill of debt.
§ 2a. The court issues an order for payment on the basis of a contract, proof of reciprocal non-cash performances and proof of delivery of a bill or invoice to the debtor enclosed with the complaint, if the plaintiff seeks payment of cash benefits or interest under commercial transactions specified in the Act on Payment Dates in Commercial Transactions of 12 June 2003 (Journal of Laws item 403) or the amount referred to in Article 10.1 of this Act as well as on the basis of documents confirming the incurred debt recovery costs, if the plaintiff also seeks recovery of the costs referred to in Article 10.2 of this Act.
§ 3. The court may issue an order for payment if a bank pursues claims on the basis of a banking ledger excerpt signed by persons authorised to make statements within the subject-matter and scope of the bank's property obligations and stamped with the bank's seal, and a proof of delivery of a written call for payment to the debtor.
§ 4. If the original of a bill of exchange, cheque, warrant or bill of debt, or documents referred to in § 3 are not enclosed, the presiding judge shall request the plaintiff to submit it. If a plaintiff fails to do so, the complaint will be returned in accordance with Article 130 PCCP.

6.4.4 What information is generally available to the authority or court when a claim for the issuance of a payment order is made?

See previous answer.

6.4.5 What opportunity is available for a defence/statement of opposition to be advanced? How should this be done and what is its effect? Please specify if the means of advancing a defence differ depending on the value of the claim and the court dealing with it.

Article 493 PCCP
§ 1. A notice of objections is filed with the court that issued an order for payment. The defendant shall specify in the notice whether he is appealing the the order as a whole or partially, while also presenting his objections, which shall be reported

before contesting the merits of the case. He should also present facts and evidence. The court shall disregard late allegations and evidence, unless the party proves that she failed to report them in the objections due to no fault of her own, or that taking late allegations and evidence into consideration will not delay the examination of the case, or that there are other exceptional circumstances.

Article 495 PCCP:
§ 1. If allegations are duly filed, the presiding judge shall schedule a trial and order the allegations to be served on the defendant.
§ 2. New claims may not be brought instead of or alongside the original ones in the course of proceedings. However, if circumstances change, the plaintiff may claim the value of the original object of proceedings or another object.

Article 496 PCCP
After the trial, the court shall issue a judgment upholding or setting an order for payment aside as a whole or in part, and shall rule on the claims of the complaint; alternatively, if the proceedings were inadmissible, the court will issue a decision setting the order for payment aside and or terminating the proceedings.

6.4.6 What is the effect if the claim is uncontested, i.e. if there is a lack of defence/statement of opposition?

The order for payment becomes final and is enforceable.

6.4.7 If the defendant is a consumer, and he or she does not respond to or raise an objection to the issuance of the payment order, does the authority dealing with the claim for payment order proceedings have the power to examine any issue of consumer protection law of its own motion before treating the action as usual?

No.

6.4.8 What steps must the pursuer take in order to obtain an enforceable decision?

The pursuer should file for a declaration of enforceability.

6.4.9 Is this decision final, or can the defendant appeal against it?

According to article 494§2 an order for payment which was not effectively appealed against, shall have the same effects as a final judgment.

6.5 Appeals in consumer disputes

6.5.1 Are appeals possible in all consumer disputes? Please specify for small claims and other types of claims.

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Nature of the procedure at 1st instance						
2nd instance – appeal to?						
3rd instance – appeal to?						

It is possible to appeal every first instance judgment in consumer cases – there are no limitations.

6.5.2 Please briefly specify the national appeal procedure, including any requirements to be satisfied for appeals. These might include, but are not limited to, conditions of admissibility, value thresholds, time-limits, the scope of review, and the impact of the appeal on enforcement (provisional enforcement). Please refer to any rules specifically applicable in respect of the claims and relevant procedures outlined above.

a). Appeal in general civil proceedings

Every judgment on the merits, passed by the court of first instance, is subject to an appeal (cf. art. 367-391 PCCP). The appeal must be lodged within two weeks since the date when an appealing party was served with the judgment and its reasons. Once the appeal is served on the opposite party, the court of first instance sends the appeal to the court of second instance. The opposite party may bring a response directly to the court of appeal within two weeks since the service of the appeal.

The appeal proceedings allow for a full review of facts and law – the review takes place within the borders of the appeal; however, the invalidity of the proceedings is examined ex officio within the extent of the appeal (i.e. the extent to which the ruling was appealed – in part or as a whole). The court of appeals fully reviews – within the borders of the appeal – all aspects connected with the application of substantive law and is not bound by the objections formulated by the party with regard to the application of substantive law. However, the court of appeals is bound by the objections raised in an appeal with regard to the application of procedural law.

The appeal proceedings is based on the concept of appellatio cum beneficio novorum. The court of appeal passes a ruling based on the procedural material gathered both by the court of first instance as well as in the appeal proceedings. The parties may present new pieces of evidence and adduce new factual allegations, but the court of appeal may omit them, if a party could have evoked them in the proceedings before the court of first instance (unless the need to evoke them appeared at a later stage of proceedings).

b). Appeal in the small claims procedure (art. 505^9 ff PCCP):

As regards the small claims procedure, an appeal may be founded on the following allegations:
1) breach of substantive law by misinterpretation or misapplication,
2) infringement of the rules of the procedure, where such infringement could have significantly affected the outcome of the case.

An appeal in small claims procedure shall be heard by a single judge. The court

may examine an appeal in camera, unless a party requested a hearing.
The court of the second instance shall not conduct any evidentiary proceedings apart from document evidence. An exception to this rule exists if an appeal is founded on facts or evidence discovered at a later date and consequently that a party was not able to adduce them in the proceedings before the court of the first instance.
If the court of the second instance determines that a breach of substantive law has taken place, and the available evidence is not sufficient to change the judgment, the court shall set the contested judgment aside and refer the case for reconsideration.
The court of the second instance shall also dismiss an appeal if the contested judgment, despite being in breach of substantive law or the rules of procedure, may viewed as compliant with the law.
If the court of the second instance did not conduct any evidence proceedings, the motivation of a judgment should present only the legal basis of the judgment and a reference to relevant legal provisions.
The second instance court shall justify ex officio only decisions repealing the contested decision.

6.6 Enforcement in consumer disputes

The CJEU has identified a number of situations concerning the enforcement stage of consumer protection disputes in which the effective and equivalent protection of EU consumer rights may be affected by national procedural rules. These include – in relation to the effectiveness and equivalency of the protection afforded by the Unfair Contract Terms Directive, for example – the enforcement of arbitration awards, the enforcement stage in the recovery of consumer credit and the enforcement of mortgages, which often links together declaratory and enforcement proceedings. As such, we focus on these situations below. However, other problematic situations exist. Please indicate if additional (and potentially problematic) situations are identifiable in your national legal system.

Moreover, if possible, please provide the reference/citation of an article that provides an overview of the way in which enforcement operates in relation to consumer protection disputes within your national legal system.

6.6.1 If the assessment of a consumer protection issue has not been possible at an earlier stage of the proceedings, is it always possible – either ex officio (see section 10

below) or if the consumer raises a possible violation of consumer protection law – for this assessment to be undertaken during enforcement proceedings?

The applicable law is applied ex officio at every instance (i.e. both I and II instance proceedings). If consumer law was violated during the first instance proceedings, the party can raise this violation in the appellate measure. The court of appeals should examine this question – within the borders of the appeal – also ex officio, because in the Polish appellate proceedings the court is not bound by the charges regarding substantive law (as opposed to charges ensuing from procedural law).

At the enforcement stage, objections regarding the claim are admissible if the grounds on which they are based occurred after the point in time until which they could have been brought by the parties in the main court proceedings (cf. so called counter-execution action, art. 840 PCCP).

When a notary deed constitutes the basis of execution, art. 840 § 1 point 1 PCCP is applicable. According to this regulation, a debtor may bring an action to limit or cancel the enforceability of an enforceable title in its entirety or in part, if he denies facts on the basis of which a writ of execution was issued, and in particular if he questions the existence of an obligation stated by an enforcement order other than a court ruling, or if he questions the transfer of an obligation despite the existence of a formal document asserting that transfer.

6.6.2 In the particular case of consumer protection, if a court examines consumer protection law (either ex officio or on the basis of an argument advanced by the consumer), does national procedural law provide that interim measures should 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 final decision will have full effect

In the event of the counter-execution claim (art. 840 PCCP, see above point 8.6.1.), it is possible to suspend the execution proceedings as a means of a security measure.

7. ACTIONS FOR COLLECTIVE REDRESS

The CJEU has considered that situations in which individual and collective actions are in some way linked are those in which the effective and equivalent protection of EU consumer rights may be affected by national procedural rules. As such, we will focus on these situations. However, other problematic situations exist. Please indicate if additional (and potentially problematic) situations are identifiable in your national legal system.

Moreover, if possible, please provide the reference/citation of an article that provides an overview of the way in which the collective redress mechanism operates within your national legal system.

7.1 Injunctive relief, linking individual and collective actions

The case law of the CJEU requires that a person or organisation with a legitimate interest in consumer protection must be able to bring an action before a national court or tribunal in respect of an alleged violation of consumer rights deriving from Union law, either for compensation or for injunctive relief, to preclude the continued violation of consumer rights[278].

7.1.1 If collective proceedings are launched, does national procedural law provide that ongoing individual claims, relating to the same dispute, should be stayed until the collective proceedings are brought to an end? Please specify if this constitutes an obligation on the part of the national judge or if it is at his or her discretion.

There is no such obligation on the part of the court.

7.1.2 If individual proceedings are stayed, please indicate what the effect of the court or ADR entity's decision in the collective action on those individual proceedings would be, i.e. whether the outcome of the collective action binds the consumer bringing an individual action.

There is no biding effect.

8. CONSUMER ALTERNATIVE DISPUTE RESOLUTION

The questions below focus on some key concerns relating to consumer disputes before ADR fora. If possible, please provide the reference/citation of an article that provides a general overview of the way in which consumer alternative dispute resolution operates within your national legal system.

[278] This derives from the EU directives. For example, in respect of the UCTD, Art.6(1), Art.7(1) and (2) UCTD, provide that the Member States must ensure 1) that unfair terms are not binding on the consumer and 2) that adequate and effective means exist to prevent the continued use of unfair terms in consumer contracts. The CJEU has held that effective implementation requires that the consequence of the finding of the violation – in the case of a finding of unfairness under the UCTD – is for the term to be declared invalid, and that the effect of this invalidity extends not only to the parties to the action for an injunction but also to those who have concluded a contract with the seller/supplier to which the same terms apply.

8.1 Consumer disputes before ADR fora

8.1.1 Is ADR mandatory for all parties bringing a claim related to a consumer protection dispute?

According to the general rule, ADR is not mandatory for claims related to consumer protection disputes, but a lawsuit should contain information whether the parties have tried mediation or any other out-of-court settlement method, and if no such attempts have been made, it should provide explanation of the reasons (article 187 § 1 point 3 PCCP).

According to article 183^1 § 1 PCCP mediation is always voluntary. However, according to article 202^1 PCCP, if the parties have concluded a mediation agreement before instituting proceedings in court, the court shall refer the parties to mediation upon a plea filed by the defendant before defending on the merits of the case.

Exceptionally, in cases specified by law, a consumer is supposed to obligatorily take the path of out-of-court complaint and redress procedure with the provider of the service, before filing a lawsuit. If a consumer does not comply with this requirement, the lawsuit will be rejected (example: article 94 of the Act of 23 November 2012 on postal services).

8.1.2 Please specify if there are limitations to the use of ADR. These might include the nature of the claim (i.e. whether both individual and collective claims are possible), requirements of representation, time limits, value thresholds, etc.

There are no limitations with regard to individual and collective claims, requirements of representation, time limits, value thresholds etc.

8.1.3 Can ADR entities issue binding decisions and can they enforce those decisions? If not, please explain how they are enforced.

1). According to article 183[14] of the Polish Code of Civil Procedure, if a settlement is reached before a mediator, the court shall, at the request of a party, take action to validate the settlement reached before the mediator. If a settlement is subject to enforcement, the court shall validate it by issuing a writ of execution; otherwise the court shall validate the settlement in camera. The court shall refuse to declare a settlement enforceable or validate a settlement reached before a mediator in whole or in part, if the settlement is contrary to the law or social norms, or intends to circumvent the law, or if it is incomprehensible or contradictory. A settlement reached before a mediator, once validated by the court, has binding effect of a settlement reached before the court. A settlement reached before a mediator that was validated by issuing a writ of execution is an enforceable title.

2). If the parties decide to have their case adjudicated by the arbitral tribunal, a final arbitral award must be declared enforceable by the court. According to article 1212 of the Polish Code of Civil Procedure, a judgment of an arbitration court or a settlement reached before an arbitration court have the same legal effect as a court judgment or a settlement reached before a court upon their recognition or confirmation of their enforcement by the court. According to article 1213, the court recognizes a judgment of an arbitration court or a settlement reached before an arbitration court or declares them enforceable on the motion of a party.

8.1.4 Does national law provide that limitation periods applicable to judicial actions should be suspended while ADR is ongoing?[279]

According to article 123 of the Polish Civil Code:
§ 1. The course of limitation shall be interrupted:
1) by any act before a court of law or other authority appointed to try cases or to enforce claims of a given kind or before an arbitration court, if the activity is taken up directly to pursue, establish, satisfy or secure a claim;
(…)
3) by taking up mediation.

8.1.5 Please specify if national law establishes rules providing for recourse to judicial action following an (unsuccessful) ADR hearing[280].

[279] The Directive on Consumer ADR provides that "the existence of an effective system for collective claims and easy recourse to ADR should be complementary". Consumer ADR is relevant not only for individual claims but also for collective ones; it can provide consumer with a means to reduce costs and save time.
[280] Per Arts.10-12, Directive on Consumer ADR.

According to article 183^6 § 3 of the Polish Code of Civil Procedure, if a party brings an action for a claim which has been covered by mediation, within three months from the day:
1) in which the mediator or the other party made a statement as a result of which the mediation has not been initiated or
2) following the lapse of one week from the date of service of the petition for mediation, if neither the mediator nor the other party has made the statement referred to in point 1)
– effects related to the initiation of mediation shall take place with regard to the claim.

8.1.6 Is there judicial review of decisions and awards made by ADR entities? If so, by which court or tribunal is this oversight made? Is it ordinary or specialised?

The Polish Code of Civil procedure regulates the motion to set aside an arbitral award (art. 1205 ff. PCCP).

According to article 1206 PCCP a party may file a motion to set aside an arbitral award if:
1) there was no arbitration clause, or an arbitration clause is void, invalid or has expired according to relevant law,
2) a party was not duly notified of the appointment of an arbitrator or proceedings before an arbitration court, or was otherwise deprived of the possibility to defend his rights before an arbitration court,
3) a judgment of an arbitration court concerns a dispute which is not covered by an arbitration clause or falls beyond the subject-matter and scope of that clause, however, if adjudication in matters covered by an arbitration clause may be separated from adjudication in matters not covered by that clause or falling beyond the subject-matter and scope of that clause, a judgment may only be set aside insofar as it concerns those matters which are not covered by the arbitration clause or fall beyond the subject-matter and scope of that clause; the fact that a judgment falls beyond the subject-matter and scope of an arbitration clause may not be a basis to set that judgment aside if a party who attended proceedings did not raise allegations against the hearing of claims falling beyond the subject-matter and scope of the arbitration clause,
4) requirements concerning the composition of an arbitration court or the basic principles of proceedings before that court, as provided for by this Act or determined by the parties, were not met,
5) a judgment was achieved by means of an offence or on the basis of a false or falsified document,

6) a non-appealable court judgment has been issued in the same case between the same parties.

Moreover, according to art. 1206 § 2 PCCP, an arbitral award will be set aside if the court determines that:
1) the dispute cannot be settled by an arbitration court;
2) a judgment of an arbitration court is contrary to the basic principles of the legal order of the Republic of Poland (the public order clause).

It is worth underlining that the draft of the Act on out-of-court settlement of consumer disputes (concerning implementation of ADR directive) aims at adding point 3) in art. 1206 § 2. This new point is going to read as follows:

„3) in case of a contract related dispute, when a consumer is a party to this contract, an arbitral award deprives a consumer of protection granted to him by ius cogens of the law appliacble to this contract; and if the law chosen by the parties constitutes the applicable law to this contract – the protection granted to the consumer by ius cogens which would be applicable if the specific law had not been chosen".

A motion to set aside an arbitral award should be filed with a court of appeal in the region of which the court which would have been competent to examine the case is located within two months from the date of service of the judgment (cf. Art., 1208 PCCP).
If a motion to set aside the arbitral award is founded on the basis referred to above in Article 1206 § 1 (5) or (6), the time limit to file a motion commences on the day on which a party became aware of that basis. However, a party may not request a judgment of an arbitration court to be set aside after five years from the day of service of the judgment of the arbitration court.

A judgment issued in the proceedings following a motion to set aside an arbitral award is subject to cassation proceedings. It is also possible to request resumption of proceedings on repealing an arbitral award, as well as declaring a final judgment as unlawful (cf. Art. 1208 § 2 PCCP).

9. THE EXAMINATION OF CONSUMER PROTECTION LAW IN NATIONAL PROCEDURAL LAW: RESPECT FOR THE PRINCIPLES OF THE EFFECTIVENESS AND EQUIVALENCE OF CONSUMER PROTECTION LAW AND EX OFFICIO CONTROL

The rules of national civil procedure that could potentially affect, and indeed undermine, the effective and equivalent protection of consumer rights are various. They include but are not limited to the rules and practices of ordinary and specialised judicial procedures, rules and practices of consumer ADR, rules applicable to special types of procedure (e.g. payment order procedures), the jurisdiction of individual courts (the courts that have jurisdiction over consumer disputes), the formal requirements that have to be satisfied to bring a case, the types of legal action that are available, the need for parties to be represented, the time-limits applicable to procedural steps of the action, rules on the taking of evidence, the possibility (or lack) to consider certain issues at specific stages of the procedure, the right to appeal and review, and rules relating to the enforcement or judgements and other enforcement titles (e.g. arbitration awards, notarial deeds, including mortgages).

On the basis of the principles of equivalence and effectiveness, the CJEU has established certain requirements for the procedural protection of consumer rights deriving from EU law. In particular (and especially in relation to the protection afforded to consumers via the Unfair Contract Terms Directive[281]), the CJEU has established an obligation on national judges (and potentially other dispute resolution facilitators) to apply consumer law of their own motion (that is, ex officio), when they have available the legal and factual elements necessary for this task. Ex officio control is one type of procedural mechanism that can be utilised within the national system to promote the effective and equivalent protection of consumer law. Thus, other mechanisms of procedure within your national legal system should be highlighted and discussed where relevant. The following questions should be answered in respect of both judicial and if relevant, alternative dispute resolution.

9.1 The basis of ex officio control of consumer protection law in national law

9.1.1 Is it clear in the national legal system when consumer protection law should be applied ex officio? Is the ex officio control of consumer protection law established as an obligation or as a (discretionary) power of the judge in national procedural law?

The ex officio application of consumer protection law, as any other substantive law, is established as an obligation in national procedural law. There are no special rules with regard to applying substantive law ex officio in consumer cases.

9.1.2 If there is an understanding of ex officio control of consumer protection law in the national legal, what is this control understood to encompass/not cover?

[281] However, the CJEU has recognised that ex officio control – and other procedural requirements, that might in themselves (or indeed, in their absence), impact the effective enforcement of consumer law – arise across the EU's consumer protection directives.

The court always applies substantive law ex officio (iura novit curia). This rule encompasses the entirety of substantive law regulations, including those pertaining to consumer law.

9.1.3 Is the party who claims to be a consumer required to establish his or her consumer status, the existence of a consumer contract and that consumer law applies to the dispute? Is this required even if the consumer has no legal representation?

The court evaluates the status of consumer ex officio based on the factual allegations and proofs provided by a party in the lawsuit.

9.1.4 What information is available to judges and dispute resolution facilitators hearing consumer protection disputes? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a consumer protection dispute to be heard and b) for the court to engage in ex officio control?

According to article 187 PCCP, a lawsuit shall:
1) specify the claim and the value of the subject matter at issue;
2) describe the actual circumstances that justify the claim.

Other than that, the national law provides no specific rules as to the minimum factual information that must be available in consumer disputes, nor places any sort of obligation on the court to engage in ex officio control specifically with regard to consumer protection cases.

9.1.5 Who is responsible for providing this information? If the necessary information is not available to the court (or dispute resolution facilitator), is he or she under an obligation to investigate in order to be able to respond to a relevant consumer protection dimension of the case?

According to the principle of adversarial proceedings, the parties are supposed to present all factual allegations and evidence that are deemed necessary to obtain protection. Based on the material provided by the parties, the court applies the substantive law ex officio. As a general rule, the court has no obligation to investigate the case ex proprio motu in order to discover consumer protection dimension of the case. However, according to article 207 § 3 of the Polish Code of Civil Procedure, before the first hearing, the presiding judge may oblige the parties to file further pleadings and determine the circumstances that need further clarification.

Exceptionally, the court may also admit ex officio the evidence which has not been presented by a party (art. 232 sentence 2 PCCP). This may happen especially in cases: where the public interest is at stake; if a court suspects that the proceedings were instigated with a fictitious intent; also when a party is disproportionately week or helpless (the issue sparks controversy).

According to article 212 § 1 PCCP, at the hearing, the court, by asking questions to the parties, strives to induce the parties to present or supplement allegations or evidence supporting these allegations and provide explanations necessary to determine the true factual basis of a claim. In the same manner, the court strives to clarify the relevant, disputable circumstances of the case.

9.1.6 Will the court provide the consumer with any assistance in gathering factual information or advancing his legal arguments before the court? Please respond for the situation where: a) the consumer has legal representation and b) the consumer has no legal representation.

If the consumer has legal representation, the court will not provide the consumer with assistance in gathering factual information or advancing legal arguments.

If the consumer acts without legal representation and if the justified need arises, the court may provide the parties with necessary instruction with regard to procedural acts (article 5 of the Polish Code of Civil Procedure).

9.2 The possibility for ex officio control of EU consumer protection law in dispute resolution proceedings

9.2.1 Is ex officio control of consumer protection law always possible when the procedure involves a full assessment of the claim on its merits?

The ex officio control of consumer protection law is possible when the court is provided with relevant factual material.

9.2.2 Can ex officio control be exercised even when the procedure does not involve an assessment on the merits?

If the procedure does not involve an assessment on the merits, the ex officio control of consumer law is not possible.

9.2.3 Please indicate if, per national procedural law, ex officio control can be exercised at the following stages of the procedure:

	Courts		Other dispute resolution facilitators	
	Possible to exercise ex officio control	Not possible to exercise ex officio control	Possible to exercise ex officio control	Not possible to exercise ex officio control
Ordinary proceedings	X			
Small claims	X			
Payment order	X			
Provisional measures	X			
Proceedings linked to enforcement		X		
Enforcement proceedings		X		
- Enforcement of payment order		X		
- Enforcement of arbitration award		X		
- Enforcement of mortgage		X		
- Enforcement of notarial deed	X			
Appeal proceedings (please specify:)	X			

9.2.4 What does ex officio control encompass in national procedural law?

The ex officio control encompasses application of substantive law by the judge. The factual allegations adduced by the parties in the lawsuit and in the course of the proceedings as well as the relevant legal provisions constitute the basis for this evaluation.
However, sometimes the ability of the court to control the application of law is limited. For example, in the cassation proceedings the Supreme Court is bound by the objections that a party presents with regard to the (mis)application or (mis)interpretation of substantive law by the court of second instance. Therefore, the ex officio control of substantive law is limited in the cassation proceedings.

9.3 Other procedural mechanisms for the equivalent and effective protection of EU consumer law

9.3.1 Does national procedural law provide that rules of EU consumer law (as well as rules that aim to satisfy EU consumer law objectives) should be understood as having equal standing to national rules of public policy (which is to say, that for the purposes of domestic law, the consumer protection provision is understood to have equal standing to a rule that must be raised ex officio by the national court)?

As of today, there is no explicit regulation in the Polish law to the effect that "rules of EU consumer law should be understood as having equal standing to national rules of public policy".

However, in light of the governmental draft of the Act on out-of-court settlement of consumer disputes (prepared with a view to implement the ADR directive), it can be claimed that – once this Act is passed – consumer protection law will – to a certain extent – acquire a status remotely comparable to the public policy exception.
This assertion is based on the content of two new provisions that – according to the draft - will be introduced to the Polish Code of Civil Procedure.
Firstly, article 1206 § 2 will be supplemented with point 3 to the following effect:
"art. 1206 § 2 Setting aside an arbitral award also takes place, when the court stated that:
(…)
3) in case of a dispute arising out of a contract to which a consumer was a party, the arbitral award deprived the consumer of the protection that is granted to him by ius cogens of the law applicable to the contract; and when the law applicable to the contract was chosen by the parties – the protection granted to the consumer by the ius cogens of the law which would have been applicable, if the other law had not been chosen."

The public policy exception is an alternative ground for setting an arbitral award aside (cf. art. 1206 § 2 point 2 PCCP).

Secondly, article 1214 § 3 will be supplemeted with point 3 to the following effect:
„art. 1214 § 3 The court shall refuse to recognise or state the enforceability of an arbitral award or a settlement reached before an arbitration tribunal if:
(…)
3). in case of a dispute arising out of a contract to which a consumer was a party, the arbitral award or a settlement reached before an arbitral tribunal deprived the consumer of the protection that is granted to him by ius cogens of the law applicable to the contract; and when the law applicable to the contract was chosen by the parties

– the protection granted to the consumer by the ius cogens of the law which would have been applicable, if the other law had not been chosen."

The public policy exception is a separate, alternative ground for the refusal of recognition and the statement of enforceability of arbitral award or a settlement reached before an arbitral tribunal (cf. art. 1214 § 3 point 2 PCCP).

9.3.2 If ex officio control is not possible in certain types of proceedings or at a certain stage of proceedings (or for any other reason), does national procedural law provide for an alternative way of assessing consumer protection law?

See remarks to point 11.3.1.

9.4 Ex officio control in payment order procedures

9.4.1 What information is available to the judge when a claim for the issuance of a payment order is made? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a claim for the issuance of a payment order to be granted and b) for the court to engage in ex officio control before a payment order is issued?

The information is the same as the information provided in a lawsuit (cg. art.187 § 1 PCCP). The plaintiff should:
1) specify the claim and, in cases for property rights, also the value of the matter at issue, unless the subject-matter of a case is a specific amount of money;
2) describe the actual circumstances (causa petendi) that justify the claim and, if need be, also the court's competence.

9.4.2 What considerations will be assessed ex officio by the court (or other competent authority) before a payment order is issued?

In general terms the court will check the formal and fiscal requirements of the lawsuit as well as the conditions specified below.
When investigating a claim in payment order procedure, the scope of substantive examination of the claim is limited to the conditions specified below. However, if a

defendant effectively contests the order for payment by filing appropriate measures against it, the court will proceed with the full examination of the case.

As far as **payment order procedure** is concerned, according to article 485 of the Polish Code of Civil Procedure the court shall issue an order for payment if the plaintiff pursues a pecuniary claim or other changeable items and the facts justifying the claim are proven by the following instruments enclosed thereto:
1) official instrument,
2) bill accepted by the debtor,
3) call for payment and debtor's written acknowledgement of debt,
4) request for payment approved by the debtor but returned by the bank unpaid due to lack of sufficient funds in the bank account.

According to article 486, if there are no grounds (cf. art. 485) to issue an order for payment, the judge will schedule a hearing.

As far as the **procedure by writ of payment** (art. 497^1 ff.) is concerned, an order for payment shall be issued if the plaintiff pursues pecuniary (cash) claims. If there are no grounds to issue an order for payment, the presiding judge shall schedule a hearing.

According to article 499 a writ of payment cannot be issued if the content of the claim suggests that:
1) the claim is evidently unfounded;
2) the facts brought raise some doubts;
3) the satisfaction of the claim depends on a reciprocal performance;
4) the place of stay of the defendant is not known or the order may not be served on the defendant in Poland.

9.4.3 How is the consumer informed about the claim to issue a payment order against him or her? Does national procedural law make any provision for steps to be taken to ensure that consumers are informed of the claim for the issuance of a payment order so that he or she can contest it?

According to article 491 § 3 an order for payment is served on the parties; the defendant is served the order together with the lawsuit and enclosures. The parties are informed that the court disregards late allegations and evidence, unless the party proves that he/she failed to report them in the objections due to no fault of his/her own, or that taking the late allegations and evidence into consideration will not delay

the examination of the case, or that there are other exceptional circumstances (article 493 § 1 sentence 3 PCCP).

As far as procedure by writ of payment is concerned, the defendant is served an order for payment together with the lawsuit and instructions on the procedure for filing objections.

9.4.4 If the consumer objects to the claim, what is the next step? Do the proceedings continue, in the context of which ex officio control can be exercised? Or are the proceedings transferred to ordinary proceedings for analysis on the merits of the claim?

If a defendant (not only consumer, but any defendant) objects to the order of payment issued in:

- **the order for payment procedure** (art. 484^{1} ff PCCP), then if the objection is filed correctly, the presiding judge shall schedule a hearing and serve the objections on the plaintiff. At this stage of the proceedings, new claims cannot be formulated. However, if circumstances change, the plaintiff may claim an equivalent of the value of the original object of the dispute. Moreover, in cases concerning recurring performances, original claim may be extended so that it covers payment for forthcoming periods (art. 495 PCCP).
  After the hearing, the court shall issue a judgment either upholding (as a whole or in part) the order of payment or setting it aside and adjudicating on the claim. If the proceedings turned out to be inadmissible, the court sets the order for payment aside and terminates the proceedings.
- **the procedure by writ of payment** (art. 497^{1} ff. PCCP) - if objections are filed correctly, the order for payment shall lose effect and the presiding judge shall schedule a trial and order the objections to be served on the plaintiff together with the summons (art. 505 § 1 PCCP). An order for payment shall lose effect insofar as it is objected (art. 505 § 2 sentence 1 PCCP).
- **electronic procedure by writ of payment** (art. 505^{28} ff PCCP) - in case of appropriate submission of an objection, the writ of payment shall entirely loose effect, and the court shall refer the case to a court of general jurisdiction (art. 505^{36} PCCP).
- **European order for payment procedure** (art. 505^{15} ff. PCCP) – if an objection is filed in accordance with regulation No. 1896/2006, the European order for payment shall lose effect, whereupon the court shall hear the case according to the adequate procedure (art. 505^{19} § 1 PCCP). If, in accordance with regulation No. 1896/2006, the plaintiff requested to end the proceedings in the event that an objection, the court

shall terminate the proceedings and award costs in the same manner as in the event of a withdrawal of a complaint (cf. art. 505[19] § 4 PCCP and art. 203 § 2 and 3 PCCP).

European Commission
An evaluation study of the impact of national procedural laws and practices on the equivalence and effectiveness of the procedural protection of consumers under EU law

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National Report – Consumer Protection Strand

Portugal

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PORTUGAL: LEGAL ANALYSIS

1. NATIONAL LEGISLATION IMPLEMENTING EU CONSUMER PROTECTION INSTRUMENTS

EU legislation	Transposing national legislation	Additional notes (e.g. if there is an overlap in application of legislation etc.)
Doorstep Selling Directive 1985/577/EEC	Decree-Law 272/87, of 3 July, transposed Directive 85/577/EEC, of the Council, of 20 December 1985, to protect the consumer in respect of contracts negotiated away from business premises.	
Package Travel Directive	Decree-Law 198/93, of 27 May,	

90/314/EEC	established the rules on the taking up and pursuit of the business of travel and tourism agencies, and also the penalties and fines applicable to breaches of the respective provisions, transposing into Portuguese internal law Council Directive 90/314/EEC, of 13 June.	
Unfair Contract Terms Directive 1993/13/EEC	This was transposed into Portuguese internal law by Decree-Law 220/95, of 31 August, which amended Decree-Law 446/85, of 25 October (establishing the legal rules on general contractual clauses).	
Distance Selling Directive 1997/7/EC	Decree-Law143/2001, of 26 April, amended by Decrees-Law 57/2008, of 26 March, 82/2008, of 20 May and 317/2009, of 30 October, transposed Directive 97/7/EC into Portuguese law. Decree-Law 143/2001 expressly repealed Decree-Law 272/87, of 3 April (which transposed Council Directive 85/577/EEC, of 20 December 1985).	
Consumer Sales and Guarantees Directive 1999/44/EC	Decree-Law 67/2003, of 8 April, as amended by Decree-Law 84/2008, of 21/05, transposed into Portuguese law Directive 1999/44/EC, of the European Parliament and the Council, of 25 May, on certain aspects of the sale of consumer goods and associated guarantees.	

Unfair Commercial Practices Directive 2005/29/EC	Decree-Law 57/2008, of 26 March, established the legal rules applicable to unfair commercial practices in dealings with consumers, before, during or after a commercial transaction concerning goods or services, transposing into Portuguese law Directive 2005/29/EC, of the European Parliament and the Council, of 11 May, concerning unfair business-to-consumer commercial practices in the internal market. Decree-Law 57/2008, of 26 March was subsequently amended by Decree-Law 205/2015, of 23 September, which clarified the transposition of Directive 2005/29/EC, of the European Parliament and the Council, of 11 May 2005.	
Misleading and Comparative Advertising Directive 2006/114/EC		This Directive has not been transposed into internal Portuguese law, probably because the subject matter is regulated in Articles 10 (Principle of veracity), 11 (Misleading advertising) and 16 (Comparative advertising) of the Advertising Code (approved by Decree-Law 330/90, of 23 October), subsequently amended several times, on the last occasion by Decree-Law

		66/2015, of 29 April.
Consumer Credit Agreement Directive 2008/48/EC	Directive 2008/48/CE, of the Parliament and the Council, of 23 April, concerning consumer credit agreements was transposed into Portuguese law by Decree-Law 133/2009, of 02 June 2009, amended by Decree-Law 42-A/2013, of 28 March.	
Timeshare Protection Directive 2008/122/EC	Decree-Law 37/2011, DR 49 Series I of 10 March 2011, transposed into Portuguese law Directive 2008/122/EC, of the European Parliament and the Council, of 14 January 2009, corrected by Rectification 55/2009, of 31 July, subsequently amended by Decree-Law 245/2015 of 20 October, which clarified the transposition of the Directive.	
Consumer Injunctions Directive 2009/22/EC	Law 25/2004, of 08 July (consumer protection injunctions), transposed into Portuguese Law Directive 98/27/EC, of the European Parliament and the Council, of 19 May. This Directive underwent successive amendments which were then codified in Directive 2009/22/EC, on injunctions for the protection of consumers' interests, which repealed Directive 98/27/CE.	
Consumer Rights Directive 2011/83/EU	Decree-Law 24/2014, of 14 February, transposed into Portuguese law Directive 2011/83/EU, instituting a series	

	of rules applicable to distance and offpremises contracts, and repealed Decree-Law 143/2001, of 26 April (which transposed Directive 97/7/EC), amended by Decrees-Law 57/2008, of 26 March, 82/2008, of 20 May, and 317/2009, of 30 October. Decree-Law 24/2014, of 14 February was subsequently amended by Law 47/2014, of 28 July, which also transposed into Portuguese law Directive 2011/83/EU, of the European Parliament and the Council, of 25 October 2011.	
ADR for Consumer Disputes Directive 2013/11/EU	Law 144/2015 of 8 September, transposed Directive 2013/11/EU, of the European Parliament and the Council, of 21 May 2013, on ADR for consumer disputes, establishing a new legal framework for extra-judicial resolution procedures for consumer disputes and setting up the Consumer Arbitration Network in Portugal.	

Source(s):

1. CONCEPT OF THE CONSUMER

1.1 Please outline the concept of the consumer in national law, indicating whether it is intended to be a uniform concept, whether it has been legislated for and where it can found (i.e. in a legislative provision, governmental guidelines, case law etc.).

In general terms, the Consumer Protection Law (Law 24/96, of 31 July, with several amendments, the last resulting from Law 7/2014, of 28 July) defines consumer as follows (art. 2.1):

"A consumer is deemed to be any person to whom goods are supplied, services are rendered or any rights transferred, intended for non-professional use, by a person carrying on a gainful business on a professional basis."

This definition is incorporated in other legislation: in some cases, through simple reproduction, as in art. 1-B(a) of Decree-Law 67/2003, of 8 April (amended by Decree-Law 84/2008, of 21 May), referring to certain aspects of the sale of consumer goods and related guarantees; in other cases, by means of an express legal reference to this definition: art. 3(b) of Decree-Law 134/2009, of 2 June (amended by Decree-Law 72-A/2010, of 18 July), on the rules applicable to call centres.

However, the concept of consumer is not uniform. Other legal sources enshrine other concepts (broader or more restrictive), for the purpose of their respective rules. In particular:

- Decree-Law 29/2006, of 15 February (last amended by Decree-Law 178/2015, of 27 August), establishing rules for the internal electricity market, defines consumer as the "end customer [for electricity]" (art. 3/l));
- Decree-Law 95/2006, of 29 May – legal rules on distance contracts relating to financial contracts concluded with consumers – (amended by Decree-Law 134/2009, of 2 June, by Law 46/2011, of 24 June, by Law 14/2012, of 26 March and by Decree-Law 242/2012, of 7 November), defines consumers (art. 2(e)) as "any natural person who, in distance contracts, acts with aims unconnected to his commercial or professional business" ;
- Decree-Law 57/2008, of 26 March (rules applicable to unfair commercial practices), amended by Decree-Law 205/2015, of 23 September, deems a consumer to be (art. 3(a)) "(…) any natural person who, in the commercial practices referred to in this decree-law, acts with aims unconnected to his commercial, industrial, trade or professional business";
- Decree-Law 133/2009, of 2 June (last amended by Decree-Law 42-A/2013, of 28 March) (legal rules on consumer credit agreements): defines a consumer (art. 4(1)(a)) as "a natural person who, in the legal transactions provided for in this decree-law, acts with aims unconnected to his commercial or professional business";

- Decree-Law 24/2014, of 14 February (amended by Law 47/2014, of 28 July), on distance contracts and offpremises contracts, establishes the following definition of consumer, for the purpose of application of its rules (art. 3(c)): "a natural person who acts with aims unconnected to his commercial, industrial, trade or professional business";
- Law 144/2015, of 8 September, containing the legal framework for ADR procedures for consumer disputes, lays down that, for the purposes of its provisions, a consumer is deemed to "a natural person when acting with aims unconnected to his commercial, industrial, trade or professional business" (art. 3(c)).

Source(s):

- Law 24/96, of 31 July
- Decree-Law 67/2003, of 8 April
- Decree-Law 29/2006, of 15 February
- Decree-Law 95/2006, of 29 May
- Decree-Law 57/2008, of 26 March
- Decree-Law 133/2009, of 2 June
- Decree-Law 134/2009, of 2 June
- Decree-Law 24/2014, of 14 February
- Law 144/2015, of 8 September

2. REGULATORY AUTHORITIES COMPETENT FOR CONSUMER PROTECTION ISSUES

2.1 What regulatory authorities, if any, are competent for enforcing consumer protection law? Please identify them, their nature (i.e. whether they are public or private or mixed) and the nature of enforcement.

The regulatory authorities competent for enforcing consumer protection laws are the following public law bodies, which have the nature of independent administrative authorities:

- Autoridade da Concorrência (Competition Authority).
- Autoridade da Mobilidade e dos Transportes (AMT) (Mobility and Transport Authority).
- Autoridade de Segurança Alimentar e Económica (ASAE) (Food and Business Safety Authority). This is a criminal police authority.

- Autoridade de Supervisão de Seguros e Fundos de Pensões (ASF)(Insurance and Pension Fund Supervisory Authority)
- Autoridade Nacional de Aviação Civil (ANAC) (National Civil Aviation Authority);
- Autoridade Nacional de Comunicações (ANACOM) (National Communications Authority)
- Autoridade Nacional do Medicamento e Produtos de Saúde, I. P (INFARMED) (National Medicinal and Health Products Authority).
- Banco de Portugal (Bank of Portugal)
- Comissão do Mercado de Valores Mobiliários (CMVM) (Securities Market Commission)
- Entidade Reguladora da Saúde (ERS) (Health Regulatory Authority)
- Entidade Reguladora dos Serviços de Águas e Resíduos (ERSAR) (Water and Waste Services Regulatory Authority)
- Entidade Reguladora dos Serviços Energéticos (ERSE) (Energy Services Regulatory Authority)
- Instituto dos Mercados Públicos, do Imobiliário e da Construção, I.P. (IMPIC, I.P.) (Public Markets, Property and Construction Institute)
- Turismo de Portugal (Tourism Authority)

In addition to their powers of regulation, oversight, inspection and audit, these bodies also have the power to apply sanctions. After investigating offences resulting from breach of the applicable legal and regulatory rules, they are required to bring and document the corresponding proceedings for penalties and civil offences, applying fines and the other sanctions established in law to the offenders.

Source(s):

The list of regulatory bodies responsible for enforcing consumer law was obtained from the Portal do Consumidor (Consumer's Portal) of the Direcção-Geral do Consumidor (at www.consumidor.pt).

Law 67/2013, of 28 August (Framework law on independent administrative authorities with regulatory powers over economic activities in the private, public and cooperative sectors, published in Diário da República, 1st series — No. 165 — 28 August 2013).

The information on the legislation governing the different regulator authorities was obtained from the respective websites.

2.2 Is there a specific venue for this type of enforcement and does this limit the jurisdiction of courts/ADR fora (even if only initially)?

As mentioned above, the fines and administrative sanctions in general are applied by the bodies of the regulatory authorities themselves, through autonomous procedures which they organise, in keeping with the adversarial principle; respondents are assured the right to defence. These procedures do not limit the jurisdiction of the Courts, which have powers to review the decisions of the regulatory authorities, as explained in 4.4.

2.3 Can criminal prosecutions be initiated for violations of consumer protection rules? How serious must the infringement be? What are the penalties and sanctions? And might these prosecutions lead to criminal penalties or sanctions? Can individual consumers piggy back on these claims (e.g. via a partie civile method)?

a) Yes, criminal prosecutions may be initiated for violations of consumer protection rules (e.g. arts. 22 ff. DL 28/84, of 20 de January (Offenses against the economy and public health) and arts. 282 and 283 CP). But there are also misdemeanours (contra-ordenações) (administrative offence) against the economy and public health (e.g. arts. 57 ff. DL 28/84).

b) Crimes against health may be:
(i) of damage, injury or result (e.g. physical impairment or murder);
(ii) of concrete danger for a number of legal assets and of result (e.g. arts. 282 and 283 CP); or
(iii) of abstract danger and mere activity (arts. 22 ff. DL 28/84).

c) Such crimes are punishable by:
(i) imprisonment (e.g. arts. 282 and 283 CP);
(ii) imprisonment and/or fine (e.g. arts. 22 ff. DL 28/84); and, also,
(iii) supplementary penalties (art. 8 ff. DL 28/84): loss of property; guarantee of good conduct; judicial injunctions; temporary prohibition of professional activity, etc.

Misdemeanours are punished by fines and supplementary penalties (arts. 56 and 57 ff. DL 28/84).

a) Consumers may take part in criminal proceedings as partie civile even for public crimes (art. 68(1)(a) CPP) and may exercise their right to compensation (arts. 129º-130 CP and arts. 71 ff. CPP). Such rules are subsidiary law to the

system of administrative offenses and administrative proceedings (arts. 32 and 41 DL 433/82).

2.4 Is there judicial review of decisions of consumer regulatory authorities? If so, by which court is this judicial oversight made? Is the forum an ordinary or a specialised court or tribunal?

The decisions of consumer protection regulatory authorities may be challenged in the courts by the private parties affected. The court competent to judge disputes relating to the application of penalties for administrative offences is the court specialised in competition, regulation and oversight, whilst procedures of an administrative nature brought by the competent bodies of the regulatory authorities are subject to the jurisdiction of the administrative courts.

2.5 Does the national legal system provide for a mechanism of cooperation between its national regulatory authorities and those of other Member States?

The monitoring of the application of European Union (EU) legislation protecting the economic interests of consumers was improved in 2004, with the approval of Regulation (EC) 2006/2004 of the European Parliament and the Council, of 27 October 2004, on cooperation between national authorities responsible for the enforcement of consumer protection laws (CPC Regulation). This single framework brings together all the national authorities in all EU Member States which apply European legislation in connection with consumers policy, stipulating the terms on which the competent authorities designated in the Members States as responsible for application of this legislation are to cooperate with each other and the Commission, in order to ensure that this legislation is enforced and that the internal market functions correctly, and to strengthen protection for the economic interests of consumers.

Source(s):

Information provided by Direcção-Geral do Consumidor (Directorate-General for Consumer Affairs)[282].

3. LEGAL AID

[282] http://www.consumidor.pt

3.1 Is legal aid available to consumers in: a) bringing a claim and b) defending a claim before a court?

Yes, legal aid (protecção jurídica) is available to consumers in (a) bringing a claim and (b) defending a claim before a court, according (amongst others) to:

- Law 34/2004, of 29 July (which has also partially transposed Directive No 2003/8/CE, of the Council, of 27 January), regulated by Portaria [Ministerial Decree] no. 10/2008, of 3 January (amended by Portaria no. 210/2008, of 29 February, Portaria No 654/2010, of 11 August, and by Portaria No 319/2011, of 30 December), and also regulated by Portaria No 11/2008, of 3 January;
- Decree-Law 71/2005, of 17 March, concerning cross-border disputes (which has transposed Directive No 2003/8/CE, of the Council, of 27 January);
- Law 83/95, 31 August, rectified by the Rectification No 4/95, 12 December, and altered by the Decree-Law 214-G/2015, 2 October, regulating the right of procedural participation and the popular action/class action (acção popular).

3.2 For what kinds of disputes and actions is legal aid available? (NB: legal aid might not be available for consumer or contractual disputes but be available instead for a related action, e.g. actions relating to debt, mortgage arrears, eviction etc.)

Legal aid is available for all kinds of disputes, in case it is involved a question or a judicial cause, specific or susceptible of specification/being materialised, in which the applicant has an interest of his own and which involves rights directly affected or threatened of being affected.

Moreover, legal aid is also available for disputes involving the protection of collective or diffuse interests.

3.3 What requirements must be satisfied for the consumer to be entitled to legal aid? Please specify if there are any additional limitations to its availability.

In order to be entitled to legal aid, a person (including a consumer) must prove to be under economical insufficiency (insuficiência económica) (art. 7), which is considered to be the case when the applicant for legal aid, considering its income, assets and the permanent expenditure of his familiar aggregate, does not have objective conditions to bear eventual costs of a lawsuit (art. 8).

The economical insufficiency of physical persons is appreciated according to the following criteria:

- the applicant whose familiar aggregate has a relevant income, for the purpose of legal aid, equal or inferior to three quarters of the Social Support Index (indexante de apoios sociais) does not have the objective conditions to bear any amount related to the costs of a lawsuit, and should, also, benefit from the appointment of an Enforcement Agent (agente de execução) and from gratuitous juridical consultation;
- the applicant whose familiar aggregate has a relevant income, for the purpose of legal aid, superior to three quarters or inferior to twice and a half the value of the Social Support Index has objective conditions to bear the costs of a juridical consultation subject to the previous payment of a fee, but does not have the necessary conditions to bear eventual costs of a lawsuit and, for that reason, the applicant benefits from judiciary support in the modalities of split / phased payment and of appointment of an Enforcement Agent;
- the applicant whose familiar aggregate has a relevant income, for the purpose of legal aid, superior to twice and a half the Social Support Index is not under economical insufficiency.

For the purpose of the calculations above, the "relevant income", for the purpose of legal aid, is the amount which results from the difference between the value of the complete net income of the familiar aggregate and the value of the relevant deduction for the purpose of legal aid. This "relevant income" is calculated in the terms and according to the calculi and formula in the Annex attached to Law 34/2004, abovementioned.

For this purpose, all persons living under common economy together with the legal aid applicant are considered as belonging to his familiar aggregate.

The applicant can request, exceptionally and under justified reasoning, that the decision on the economical insufficiency has in consideration solely the income, the assets and the expenses of the applicant or of some members of his familiar aggregate which have a permanent nature.

In case of litigation with one or more members of the familiar aggregate, the decision on the economical insufficiency only considers the income, assets and permanent expenses of the applicant or of him and of some elements of his familiar aggregate, provided he requests it so.

If, in face of a specific case, the director (in the sense of: last person to have the power of decision) of the social security services competent to the decision on the legal aid considers that the application of the abovementioned criteria leads to a manifest denial of the right to access the Law and the Courts, he may, through an especially reasoned decision and without possibility of delegation, decide otherwise.

Provided that Law 47/2007, of 28 August, has revoked the art. 21 of Law 34/2004, of 29 July, at the present date, the appointment of a representative / an attorney by the Portuguese Bar Association to file a lawsuit does not depend on a previous decision over the existence of legal reasoning of the claim, made under the terms of legal advice (consulta jurídica).

3.4 What does legal aid encompass? (i.e. (only) general advice, (only) assistance in preparing the case, (only) assistance with negotiation of settlements, (also) representation).

Legal aid (protecção jurídica) encompasses two modalities:
(i) legal advice (consulta jurídica);
(ii) judicial aid (apoio judiciário) (art. 6 of Law 34/2004).

Legal advice consists in the technical advice on the applicable law to questions or specific cases under which legitimate personal interests are at stake or a full / own right which was damaged or threatened. Within the scope of legal advice falls as well the extra-judicial proceedings which come directly from the legal advice given or that are essential to clear the question which has been made.

Judicial aid comprehends the following types:
(i) exemption of court fees (taxa de justiça) and of other charges with the lawsuit;
(ii) appointment and payment of the representative's compensation;
(iii) payment of compensation of the official representative (defensor oficioso);
(iv) phased payment of the court fees (taxa de justiça) and of other charges with the lawsuit;
(v) appointment and phased payment of the representative's compensation;
(vi) phased payment of the official representative (defensor oficioso) compensation;
(vii) appointment of an Enforcement Agent (agente de execução).

In case of a popular action (acção popular), legal aid generically and automatically consists in the exemption of payment of expenses for proceedings (preparos (para despesas)) and in the exemption of payment of the judicial costs (custas (judiciais)) in case the claim is successful even if only in part.

In case of the claim is unsuccessful in toto, the plaintiff is condemned by the judge in an amount between 1/10 and ½ of the judicial costs which would normally be due, having in consideration its economic situation and the formal or substantial reasoning of the final decision (also according to the Regulation on the Judicial Costs,

the party is responsible for the judicial costs' payment, in case it is to conclude that the claim was manifestly unjustified).

In case of an injunction for protection of consumers' interests, the consumer is also generically exempt of judicial costs (custas).

Source(s):

- Law 34/2004, of 29 July
- Decree-Law 71/2005, of 17 March
- Law 83/95, of 31 August, all according to the alterations and subject to the regulations above mentioned
- Decree-Law 34/2008, of 26 February, whose last amendment (the thirteenth) was made by Law 7-A/2016, of 30 March

4. COSTS

4.1 What are the costs of different types of procedures before courts? Are there exemptions to the payment of fees and expenses? How can costs be paid?

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	**Collective** claim of value € 0 – 5000	**Collective** claim of value € 5001-- € 20.000	**Collective** claim of value € 20.001+
Court fees	From €102 to €204 as court fee (taxa de justiça) in principle, in a declaratory lawsuit. / In case of a lawsuit in a Julgado de Paz, Court fees	From €102 to €204 as court fee (taxa de justiça) in principle, in a declaratory lawsuit. / In case of a lawsuit in a Julgado de Paz, Court fees	From €408 until €1.632 (for lawsuits whose value ranges from € 250.000,01 to €275.000) notwithstanding the liquidation and payment a posteriori of additional fees in case the value of the	Exemption of court fees for popular actions, unless the claim was manifestly unjustified (please see above answer to point 5.4).	Exemption of court fees for popular actions, unless the claim was manifestly unjustified (please see above answer to point 5.4). /	Exemption of court fees for popular actions, unless the claim was manifestly unjustified (please see above answer to point 5.4). /

	of €70 (a first payment of €35 with the initial filing / opposition; a second one in the end of the lawsuit in case of lost – the winning party does not have to pay the 2nd amount and the first €35 should be reimbursed)	of €70 (a first payment of €35 with the initial filing / opposition; a second one in the end of the lawsuit in case of lost – the winning party does not have to pay the 2nd amount and the first €35 should be reimbursed)	lawsuit surpasses €275.000		In case of injunctions for the protection of consumers' interests (acções inibitórias) (whose value is considered to be equivalent to €30.000 plus €0,01), the process is exempt from costs.	In case of injunctions for the protection of consumers' interests (acções inibitórias) (whose value is considered to be equivalent to €30.000 plus €0,01), the process is exempt from costs.
Court expenses	Depending on the lawsuit and on the proceedings requested under the same.	Depending on the lawsuit and on the proceedings requested under the same.	Depending on the lawsuit and on the proceedings requested under the same.	Depending on the lawsuit and on the proceedings requested under the same. In principle, parties would also be exempt of expenses for proceeding	Depending on the lawsuit and on the proceedings requested under the same. In principle, parties would also be exempt of expenses for proceeding	Depending on the lawsuit and on the proceedings requested under the same. In principle, parties would also be exempt of expenses for proceeding

				s (preparos (para despesas)).	s (preparos (para despesas)).	s (preparos (para despesas)).
Exemptions	In principle, no specific exemptions for consumers qua tale, except in case of legal aid (please see above). / In Julgados de Paz, in case the lawsuit ends in an agreement through negotiation, the court fees are reduced to €50, being returned to each party the amount of €10.	In principle, no exemptions for consumers qua tale, except in case of legal aid (please see above). / Concerning Julgados de Paz please see the 1st column.	In principle, no exemptions for consumers qua tale, except in case of legal aid (please see above).	Please see above "Court fees" and "Court expenses".	Please see above "Court fees" and "Court expenses".	Please see above "Court fees" and "Court expenses".

The costs above can be paid by bank transfer to a payment reference provided in a document called DUC (Documento Único de Cobrança), in case of court fees.

In case of Julgados de Paz [Justices of the Peace], normally a bank reference (IBAN) is provided to the consumer, which can also pay through bank transfer.

Source(s):

- Decree-Law 34/2008, of 26 February, in its last version amended (thirteenth amendment) by Law 7-A/2016, of 30 March.

5. STANDING AND REPRESENTATION IN CONSUMER DISPUTES

5.1 Does national law limit the standing of the individual consumer in respect of the claim that can be made and the forum before which it can be brought?

Under Portuguese law, as a general rule, the consumer is not discriminated, so that, in principle, it suffices that all procedural requirements concerning the court and the parties, including their legitimacy, are met.

Concerning consumer injunctions (acções inibitórias), the consumer which has suffered direct damage is entitled to move a legal action, destined to prevent, correct or cease a practice which is prejudicial to his rights, namely those which (a) prejudice his health or physical safety; (b) consist in the use of contractual general clauses forbidden by law (art. 10 of Law 24/96 and art. 13(b), of Law 24/96, cf. also the art. 16 of the Decree-Law 57/2008, of 26th March, and the arts. 25 and ff. of the Decree-Law 446/85, of 25th October). The consumer which has not been directly harmed can also move a popular injunction (art. 13(b), of Law 24/96). The consumer which is simultaneously a non-qualified or non-institutional investors also granted the right of class / popular action (acção popular) for the protection of homogeneous individual or collective interests of non-qualified investors in financial instruments (art. 31 of Decree-Law 486/99, of 13th November, altered until the Law 148/2015, of 7th July).

Concerning Courts of Peace (julgados de paz), their competence – alternative or optative regarding regular judicial Courts (cf. the Uniformization Ruling (Acórdão de Uniformização de Jurisprudência) of Portuguese Supreme Court of 24th May of 2007) other than being restricted to declaratory actions (art. 6 of Law 78/2001) is also restricted to matters whose value does not exceed €15.000 (art. 8 of the same Law), as well as to the following matters:

(a) actions destined to the execution of obligations, except those whose object is a pecuniary obligation and concern a subscription contract;

(b) actions for the delivery of movable goods;

(c) actions resulting from rights and duties of co-owners in a condominium, whenever the General Meeting has not approved a resolution on the mandatory nature of arbitration for disputes between co-owners;

(d) action to resolve disputes between owners of buildings concerning a momentary forced passage, natural flow of waters, works for the protection from waters, sharing of ditches, irrigation and pits, opening of windows, doors, balconies and similar works, fall of water, plantation of waters and bushes, and walls;

(e) claim of ownership, of possession, usucapio, accession and division of common good;

(f) claims concerning the right of use and administration of co-ownership and time-sharing;

(g) claims concerning urban lease, except eviction orders; (h) claims concerning contractual liability and tort liability;

(i) claims concerning the contractual default, except those of labor contracts and rural lease;

(j) claims concerning the general guarantee of obligations.

5.2 Other than individual consumers, who or which bodies have standing in consumer protection disputes and for what types of claim? If the action is not brought by the individual consumer, what requirements of representation must be satisfied?

Other than consumers (directly harmed or not; in case their rights are not directly harmed, it would be applicable Law 83/95, of 31 August), the following entities are entitled to move injunctions aimed at the prevention, correction or ceasing acts harmful to consumer rights: (a) consumer associations; or (b) Public Prosecutor (Ministério Público) and General Directorate of the Consumer (Direcção-Geral do Consumidor) when in face of individual homogeneous, collective or diffuse interests (art. 13 of Law 24/96, of 31 July); (c) or, in the context of injunctions destined to the abstention of the use of general contractual clauses, the union associations, professional associations or associations of economic interests when acting within the scope of their competences (art. 26(1)(b)), of Decree-Law 446/85, of 25 October).

Transnational injunctions aimed to prevent, correct or cease practices which are harmful to the consumers' rights, namely to their health and public safety, concerning the use of contractual general clauses, commercial practices forbidden by law (art. 10 of Law 24/96, of 31 July, amended lastly by the Law 47/2014, of 28 July), as well as for civil popular/class actions (acções populares) (art. 12(1), of Law 83/95, amended lastly by the Decree-Law 214-G/2015, of 2 October), can be moved by Portuguese entities (as well as transnational) which are entitled to move and intervene in lawsuit and protective orders (providências cautelares), in case they are registered in the list of the Consumer Institute (Instituto do Consumidor) (art. 1 to 3 of Law 25/2004, of 8 July, on consumer protection injunctions).

5.3 If a consumer wants to bring or defend an action relating to a consumer protection dispute, is there a legal (or otherwise formal) requirement that he or she has legal representation? Please specify for both judicial and ADR fora and the bodies, associations or authorities that can provide this representation.

The consumer (notwithstanding the practice of procedural acts which do not involve quaestiones iuris) cannot exercise per se the right of action in a judicial court in the following matters under which the appointment of an attorney is mandatory:

(a) in matters of the competence of court whose sphere of competence (alçada) allows ordinary appeal (as a general rule, being the value of the sphere of competence of 1st instance courts, of which someone appeals, of €5.000 (art. 44(1) of Law 62/2013, of 26 August), which is the value of a lawsuit until which it is not mandatory the appointment of a lawyer);

(b) in matter under which appeal is always admissible, independently of their value;

(c) in appeals and lawsuits moved in superior courts (art. 40 CPC).

In case of a lawsuit in a Court of Peace (Julgado de Paz), in principle representation by a lawyer, trainee lawyer or enforcement agents, and therefore the parties must be personally present in Court, although they can always appoint some of the persons above for representation. Assistance is only mandatory when the party is (a) illiterate; (b) does not know Portuguese; (c) or by any other reason is manifestly in a position of inferiority, in which case the judge can evaluate the situation according to a prudent judgement. The appointment of a lawyer is also mandatory in case of appeal (art. 38 of Law 78/2001, of 13 July, amended by Law 54/2013, of 31 July), admissible over rulings in lawsuits whose value exceeds half of the value of the value of the sphere of competence (alçada) of the 1st instance courts (i.e., in general, €2.500; cf. art. 62(1) of Law 78/2001, of 13 July, amended by Law 54/2013, of 31 July).

Also in case of mediation, the parties can stand personally or be represented in the mediation, in case they want to, by lawyers, trainee-lawyers or enforcement agents (art. 18 of Law 29/2013, of 19 April).

Concerning the legitimacy of consumer associations, public prosecutor and Direcção-Geral do Consumidor, please see answer to question 7.2. above.

Source(s):

- Law 144/2015, of 8 September
- Law 78/2001, of 13 July

- Decree-Law 446/85, of 25 October
- Law 24/96, of 31 July, Law 25/2004, of 8 July
- Decree-Law 57/2008, of 26 March
- Law 83/95, of 31 August
- Law 148/2015, of 7 July

6. ACTIONS BEFORE COURTS

6.1 Jurisdiction and competence of the courts in consumer disputes: General structure and special procedures aimed at protecting consumers

6.1.1 Are ordinary courts competent to hear such claims? Is there also a specialised tribunal for consumer protection disputes?

Consumer disputes are a matter for ordinary courts.

6.1.2 Which courts are competent to hear consumer protection disputes at first instance and in appeals? Please specify the court, in light of the value of the claim (and identify any other factors that are relevant in allocation jurisdiction).

Jurisdiction at first instance for consumer protection disputes is determined by the value of the claim and also its track. Common track cases whose value exceed €50.000 are heard before the Secção de Competência Cível da Instância Central do Tribunal de Comarca (art. 117(1)(a) LOSJ). Special track cases and those whose value is under €50.000 are heard before the Secções de Competência Genérica da Instância Local do Tribunal de Comarca (art. 130(1)(a) LOSJ).

6.1.3 What is the nature of the procedure at first instance, e.g. is it a simplified or a summary procedure, and is there an assessment of the merits? Please specify in light of the value of the claim (and identify any other factors that are relevant in allocating jurisdiction).

Since the 2013 CPC reform, all common track cases (ação declarativa comum) follow the same procedure, regardless of their value or subject-matter (art. 548 CPC). Under national law, territorial jurisdiction for consumer disputes is not determined by special rules. In a case where the plaintiff seeks to enforce a contractual obligation, asks a compensation for noncompliance or wishes to terminate the contract, the territorially competent court is that of the defendant's domicile (art. 71(1) CPC); this rule corresponds to the same general criterion under Portuguese procedural law

contained in art. 80 CPC). Yet, when the plaintiff is a legal person, the creditor may initiate proceedings in the court of the place where the obligation should be performed (art. 71(1) CPC). Thus, a consumer may choose to file a claim in the courts of his counterparty's domicile or in the courts of the place of performance of the obligation.

6.1.4 Please identify the formal requirements that must be satisfied for a consumer dispute to be heard before a court. These might include time limits applicable to the filing of the action/defence, representation requirements etc.

a) General rules

In common actions for declaratory relief, given that there are no specific legal rules for consumer disputes, the right of action is not conditional on meeting formal requirements.

Under the general rules, the parties are required to appoint legal counsel in actions with a value of more than 5,000€ (art. 40 CPC), and are free to do so or not in other cases (art. 42 CPC).

The respondent is required to file his defence within 30 days of being served with summons (art. 569(1), 1st part) on pain of the facts alleged by the claimant being deemed confessed (art. 567(1) CPC).

b) Special procedures

In special actions for declaratory relief for enforcing pecuniary obligations arising from contracts (cf. the annex to Decree-Law 269/98, of 1 September; injunctions, also provided for in this same Decree-Law, are not heard before courts), pecuniary obligations - payable, certain and assessed - arising from a contract may be claimed, provided their value is no greater than 15,000€[283]. In such actions, neither the claim nor the defence have to be filed in the form of pleadings (art. 1.3, RPOP [Rules of Procedure for Enforcement of Pecuniary Obligations]). The evidence is presented at the final hearing, even if the parties are able to do so when filing the respective pleading (art. 3(4), RPOP).

The respondent is required to submit his defence within 15 days (if the value of the claim is no greater than 5,000€) or 20 days (when the value of the claim is greater

[283] Applicability of the rules depends on the value of the credit, not of the contract; Decree-Law 62/2013, of 10 May, which establishes measures against late payments in commercial transactions and transposes Directive 2011/7/EU, of the European Parliament and the Council, of 16 February 2011, allows these procedures to be used irrespective of the value of the obligation. However, these rules do not apply to contracts concluded with consumers (art. 2(2)(a), Decree-Law 62/2013).

than 5,000€)(art. 1(2), RPOP). As a rule, failure to submit a defence results in the claim becoming effectively enforceable (art. 2 RPOP).

See also 8.4.

6.1.5 In respect of the claims and relevant procedures available in the national legal system, what kind of relief might be available in consumer protection disputes? (monetary remedies, injunctions, skimming off etc.)?

On a common track case (ação declarativa comum), the court can award any remedy or relief. By contrast, on a special track case (ação declarativa especial para o cumprimento de obrigações pecuniárias) only an enforcement order can be issued.

6.1.6 Please provide a brief overview of the role of parties and judges in civil proceedings generally (e.g. with reference to the principle of party disposition, the obligation of parties to make and prove factual allegations and to make and provide legal arguments, the possible role of the court). This overview should be brief; these issues will be dealt with in more detail in the questions that follow.

Party disposition is a prevailing principle in civil proceedings: plaintiff and defendant are free to dispose of their claims, shaping the proceedings as to the parties involved and the subject-matter of the dispute. In general terms it is up to the parties to put forward the facts on which the court will ground its judgment. The party who stands to gain from certain facts has a duty to allege them and provide supporting evidence. Failing to do so may render them inadmissible at a later stage or lead to the proof of the contrary. (art. 342(1), (2) CC and 414 CPC).

While the plaintiff is not required to invoke, in a single case, all possible causes of action justifying his claim, 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 point in time, as the facts pleaded by the plaintiff are deemed to be accepted by agreement (art. 574(2); the court is not, nevertheless, precluded from subsequently raising points of law). By contrast, when the defendant does not enter into appearance the facts pleaded by the plaintiff are usually considered tacitly confessed (art. 567 CPC)

Source(s):

- Decree-Law 269/98, of 1 September
- CASTRO MENDES/TEIXEIRA DE SOUSA, Direito Processual Civil (forthcoming), § 57.

– TEIXEIRA DE SOUSA, "Regime da injunção: um País, uma Europa, dois sistemas?", available at: http://goo.gl/xqVnnt

6.2 Small claims

6.2.1 Does a small claims procedure exist in the Member State? If yes, is it a specialised or simplified procedure?

The Portuguese Legal System does not have any simplified judicial procedure designed to settle domestic consumer disputes in any way parallel to the European Small Claims Procedure provided for in Regulation (EC) 861/2007 of the European Parliament and the Council, of 11 July 2007, establishing a European small claims procedure applicable to cross-border civil or commercial disputes where the value of the claim is no greater than €2.000.

6.2.2 What are the value thresholds for claims brought under the small claims procedure? Moreover, are there any other factors that shape the use of the small claims procedure (including the nature of the claim, the area of consumer protection law into which the claim falls etc.)?

Not applicable.

6.2.3 What forms must be completed to raise the application? Who assists the consumer in completing these forms?

Not applicable.

6.2.4 How can an application for a small claim be made (e.g. online, by post or in person)?

Not applicable.

6.2.5 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

Not applicable.

6.2.6 Are the costs of the successful party reimbursed?

Not applicable.

Source(s):

- Regulation (EC) 861/2007 of the European Parliament and the Council, of 11 July 2007

6.3 Claims other than small claims

6.3.1 If a consumer protection dispute does not qualify as a small claim, what other procedures are available? What are the value thresholds and other factors determining the use of such procedures?

In the absence of a simplified small claims procedure, consumers may avail themselves of the following procedures:

- Filing a common action for declaratory relief with the judicial courts;
- Submission of the dispute to an alternative consumer disputes settlement body, under Law 144/2015, of 8 September. These bodies conduct mediation, conciliation and arbitration of consumer disputes, using procedures which are faster and less time-consuming for the consumer.

If a consumer dispute is taken to the common courts, there is no value threshold or upper limit for their submission to or consideration by the courts.

Alternative disputes settlement bodies may set lower and upper limits on the value of disputes submitted for an ADR procedure.

6.3.2 How can such claims be made? Please specify if the applications can be made online, or by post or in person.

Consumer disputes submitted to the judicial courts are subject to the general rules contained in the Portuguese Code of Civil Procedure. The consumer is required to file a statement of claim, setting out the essential facts and the grounds in law for his or her claim. This statement of claim can only be filed online, using the Citus portal.

If the dispute is taken to an ADR body, the body in question determines the procedural rules applicable, in its own regulations.

ADR bodies often require consumers to take preliminary steps prior to using ADR procedures. A common example is requiring the consumer first to contact the supplier of the goods or service provider, seeking a settlement for the dispute. It is also common for a conciliation procedure to be required before a dispute can be settled by arbitration.

ADR bodies generally provide a draft claim form on their websites, which can be submitted online or in person at the ADR body's offices.

6.3.3 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

If the dispute is brought before the judicial courts, the rules on the taking of evidence are those contained in the Portuguese Civil Code and the Code of Civil Procedure.

This means that all the forms of evidence provided for in law are admissible, including documentary and testimonial evidence, expert evidence, depositions by the party, statements by the party and the findings of court-approved non-judicial investigators.

Under the Portuguese Code of Civil Procedure, the claimant must be represented by legal counsel when the value of the claim exceeds €5,000 (five thousand euros).

The rules of procedure of ADR bodies generally allow submission of all the types of evidence permitted by law.

Claimants are not required to appoint legal counsel for ADR procedures, irrespective of the value of the claim. The consumer may attend conciliation hearings and the taking of evidence, and may also be accompanied by a third party (including legal counsel).

6.3.4 Are the costs of the successful party reimbursed?

The successful party may be partially reimbursed in respect of the costs of judicial proceedings. In this case, his or her costs are paid by the losing party, depending on the degree to which the decision goes against such party. In principle, the costs which each party has caused are borne by that party.

ADR procedures are either free of charge or else a small charge is payable, which in principle is not repayable.

Source(s):

- Law 24/96, of 31 July, amended by Law 47/2014, of 28 July, Consumer protection law (Lei de defesa do consumidor)
- Decree-Law 67/2003, of 08 April, Sale of consumer goods and related guarantees (Venda de bens de consumo e das garantias a ela relativas)
- Law 144/2015, of 08 September

6.4 Claims for the issuance of a payment order

6.4.1 Does an order for payment procedure exist in the national system? Is it a simplified procedure?

The Portuguese legal system has an order for payment (injunção) procedure which consists of a measure designed to confer enforceability on a claim for performance of pecuniary obligations arising from contracts with a value of no more than € 15,000.00 (fifteen thousand euros) or obligations arising from commercial transactions (defined as transactions between enterprises or between enterprises and public bodies for the supply of goods or services for valuable consideration, under the terms of art. 3 (b) of Decree-Law 62/2013, of 10 May) – art. 7 of the Rules attached to Decree-Law 269/98, of 1 September.

This is a simplified procedure, designed specifically for situation where, a priori, the debtor is not expected to contest the claim. When the claim has been submitted and not contested, it becomes enforceable by having an enforcement order appended, allowing the claimant to proceed immediately to file an action for enforcement and attachment of the debtor's assets, in summary proceedings (art. 550(2)(b) CPC, approved by Law 41/2013, of 26 June).

We may also point to a special action for declaratory relief for performance of pecuniary obligations arising from contracts with a value of no more than € 15,000.00 (fifteen thousand euros), for which the procedure is simplified in relation to the common action for declaratory relief provided for in the Code of Civil Procedure (statement of claim, defence and trial hearing held within 30 days – arts. 1 to 4 of the Rules attached to Decree-Law 269/98, of 1 September). When an order for payment procedure is contested, it is converted into the latter form of action, following the respective procedural steps.

6.4.2 Which authorities or courts are competent to hear claims for the issuance of payment orders?

For the purpose of the order for payment procedure, an office has been set up (Balcão Nacional de Injunções, National Orders for Payment Office) with exclusive powers throughout Portuguese territory to process orders for payment (arts. 1 and 3 of Ministerial Order (Portaria) 220-A/2008, of 4 March).

If, having been notified, the respondent does not oppose the claim, the enforcement order is appended by the secretary of the National Orders for Payment Office (art. 14 of Decree-Law 269/98, of 1 September).

In the case of special actions for declaratory relief for enforcement of pecuniary obligations arising from contracts, the dispute is considered by the competent court of first instance, which will uphold or dismiss the claim, depending on the evidence produced in court. The same applies if an order for payment procedure is contested, in which case, as indicated above, the procedure is converted into a special action for declaratory relief.

6.4.3 Are there any formal requirements that must be satisfied for the application for the issuance of a payment order to be made (e.g. standard forms, representation by a lawyer, the detail of description required, the need to provide written evidence etc.)?

To apply for an order for payment, the claimant has to complete the relevant application form approved by order of the Minister of Justice (Ministerial Order 808/2005, of 9 September, corrected by Rectification 72/2005, of 11 October).

Given that this is not a judicial procedure, applicants for orders for payment are not required to appoint a lawyer as legal representative, irrespective of the amount at stake (cfr. art. 10(5) of the Rules attached to Decree-Law 269/98, of 1 September, which provides for the possibility, but not a mandatory requirement, of the application being signed by a legal representative and art 16 of Ministerial Order 220-A/2008, of 4 March, creating arrangements for applications to be submitted by persons or entities without access to the Citius system - the platform for accessing and managing judicial proceedings, used by attorneys and the courts).

With regard to the claim and the causes of action, the application form for an order for payment requires only a brief description of the facts forming the grounds for the claim, and formulation of the claim itself, detailing the outstanding principal, accrued interest and other amounts owing; no documentary evidence need be attached (art. 10 of the Rules attached to Decree-Law 269/98, of 1 September).

In the case of a special action for declaratory relief for performance of pecuniary obligations, the claimant submits a statement of claim, succinctly setting out the claim and respective grounds, without needing to be drafted in articles (art. 1 of the Rules attached to Decree-Law 269/98, of 1 September).

6.4.4 What information is generally available to the authority or court when a claim for the issuance of a payment order is made?

When an application for an order for payment has been submitted, the National Orders for Payment Office has access to the following information: identification of the court registry to which it is addressed; identification of the parties; identification of the place where notice should be served, mentioning the agreed domicile, if any; the claim and cause of action; court fee paid; classification of the transaction as commercial, when this is the case; applicant's domicile; email address when the applicant wishes to receive notices by email; statement of intention as to whether the case file be submitted for distribution to the court, if efforts to serve notice on the respondent are frustrated; the court competent if the case is taken to the judicial courts; statement of intention that notice will be served by a solicitor (solicitador) or legal representative; appointment of legal representative, if applicable; applicant's signature (art. 10 of the Rules attached to Decree-Law 269/98, of 1 September).

In the case of a special action for declaratory relief for performance of pecuniary obligations, the court has access to all the information contained in the Statement of Claim.

6.4.5 What opportunity is available for a defence/statement of opposition to be advanced? How should this be done and what is its effect? Please specify if the means of advancing a defence differ depending on the value of the claim and the court dealing with it.

In the procedure for orders for payment, the respondent may oppose the order, as provided for in art. 12(1) of the Rules attached to Decree-Law 269/98, of 1 September.

The respondent is required to pay or file his defence within 15 days of signing the receipt slip on the notice sent by the National Orders for Payment Office.

In this case, the order for payment procedure is forwarded for distribution to the courts by the secretary of the National Orders for Payments Office (art. 16 of the Rules attached to Decree-Law 269/98, of 1 September), and is converted into a special action for declaratory relief for performance of pecuniary obligations, which will involve a trial hearing (art. 17 of the Rules attached to Decree-Law 269/98, of 1 September).

In the case of special actions for declaratory relief for performance of pecuniary obligations, the defendant is served with summons to contest the action within 15 days, if the value of the action is no greater than the upper limit for final judgements

by the court of 1st instance, or within 20 days, in other cases (art. 1 of the Rules attached to Decree-Law 269/98, of 1 September).

When a statement of defence is filed, the action proceeds to a trial hearing (arts. 3 and 4 of the Rules attached to Decree-Law 269/98, of 1 September).

Once again, a defence can be filed irrespective of the value of the claim, provided the relevant requirements are met (art. 1 of Decree-Law 269/98, of 1 September).

6.4.6 What is the effect if the claim is uncontested, i.e. if there is a lack of defence/statement of opposition?

If the respondent does not contest an order for payment application, an enforcement order is appended to the application which the applicant can then use as enforceable title.

However, in this case, if enforcement proceedings are filed, the debtor may submit its defence in the course of these proceedings by means of objections, and any of the grounds which could be invoked in proceedings for declaratory relief, under art. 731 CPC, will be admitted.

In the case of a special action for declaratory relief for performance of pecuniary obligations, where the action is unopposed by the defendant, the judge will confer enforceability on the claim, with the status of a judgment, and the claimant accordingly will have enforceable title (art. 2 of the Rules attached to Decree-Law 269/98, of 1 September). This will only not happen in the event of evident dilatory objections, or if the claim is manifestly groundless (art. 2 of the Rules attached to Decree-Law 269/98, of 1 September).

6.4.7 If the defendant is a consumer, and he or she does not respond to or raise an objection to the issuance of the payment order, does the authority dealing with the claim for payment order proceedings have the power to examine any issue of consumer protection law of its own motion before treating the action as usual?

A stated above, if the procedure is unopposed, an enforcement order is appended to the order for payment application, and the secretary of the National Orders for Payment Office does not have powers to assess any legal issues, including those relating to consumer protection.

As stated above, if a special action for declaratory relief for performance of pecuniary obligations is unopposed, the judge merely confers enforceability on the claim, in the form of an enforceable judgment. This will not happen if the judge finds that the claim is manifestly groundless. The judge may find that the claim is

manifestly groundless as the result of investigation, interpretation and application of consumer protection rules.

6.4.8 What steps must the pursuer take in order to obtain an enforceable decision?

The pursuer must submit an order for payment application and then wait for the respondent to oppose the application or for the secretary of the National Orders for Payment Offices to append the enforcement order.

If the application is opposed, the claim then follows the procedure for special actions for declaratory relief for enforcement of pecuniary obligations. In this case, the claimant will only have an enforceable judgment after the trial hearing and only if his claim is upheld (arts. 3 and 4 of the Rules attached to Decree-Law 269/98, of 1 September, by operation of art. 17 of the same Rules).

When the claim is unopposed, the pursuer obtains enforceable title (arts. 14 and 21 of the Rules attached to Decree-Law 269/98, of 1 September and art. 703 CPC).

6.4.9 Is this decision final, or can the defendant appeal against it?

In the case of an order for payment procedure, the appending of an enforcement order is not a judicial decision, so the issue of appealability does not apply.

However, if the order for payment procedure is converted into a special action for declaratory relief for performance of pecuniary obligations, or if such a special action is brought in the first place, a judicial ruling will be issued, subject to appeal on the general terms of the law (art. 44 LOSJ and art. 629 CPC).

Source(s):

- Decree-Law 269/98, of 1 September (Procedimentos para cumprimento de obrigações emergentes de contratos. Injunção)
- Decree Law 62/2013, of 10 May (Medidas contra os atrasos no pagamento de transacções comerciais)
- Ministerial Decree (Portaria) 220-A/2008, of 9 September[284]
- Law 62/2013, of 26 August (Lei da Organização do Sistema Judiciário)
- Decree-Law 34/2008, of 26 February (Regulamento das Custas Processuais)
- Ministerial Decree (Portaria) 808/2005, of 9 September[285]

[284] Available at https://goo.gl/997ExV
[285] Available at https://goo.gl/hGfpwe

– Ruling of the Constitutional Court No 264/2015 Acórdão do Tribunal Constitucional 264/2015[286]

6.5 Appeals in consumer disputes

6.5.1 Are appeals possible in all consumer disputes? Please specify for small claims and other types of claims.

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Nature of the procedure at 1st instance	common track (art. 548 CPC); a special track/simplified procedure is available for claims up to 15.000€ (although injunctions cannot be appealed; DL 269/98[287]; see 8.1.4)		common track (art. 548 CPC)			
2nd instance – appeal to?*	✕	✓	✓	✕	✓	✓
3rd instance – appeal to?*	✕	✕	> 30.000€	✕	✕	> 30.000€

(*) See arts. 629 CPC and 44 LOSJ.

6.5.2 Please briefly specify the national appeal procedure, including any requirements to be satisfied for appeals. These might include, but are not limited to, conditions of admissibility, value thresholds, time-limits, the scope of review, and the impact of the appeal on enforcement (provisional enforcement). Please refer to any rules

[286] Available at http://goo.gl/NiVFGt
[287] Available at http://goo.gl/JmTAF8

specifically applicable in respect of the claims and relevant procedures outlined above.

Ordinary appeals (those against a decision that has not yet become res judicata) are admissible on the basis of a miscarriages of justice, a notion that covers errors as to the facts or as to points of law. Decisions that cannot be appealed are an exception (art. 627(1) CPC) which can be traced back to one of five factors:

(i) the court's alçada (the value to which the contested decision is final): when the value of a cause is smaller than the court's alçada, that court's judgment is, as a rule, final (art. 629(1) CPC). This value is €5.000 for first instance courts and €30.000 for second instance courts (art. 44 LOSJ).
(ii) the value the party has loss (relative to what was claimed): the contested decision is unfavourable to the appellant in excess of half the court's alçada (that is €2.500 for first instance courts and €15.000 for second instance courts).
(iii) legal exclusion (art. 630 CPC)
(iv) waiver of appeal (art. 632(4) CPC)
(v) expiry of the limitation period for the appeal: as a rule, an appeal can be lodged within 30 days after the service of the decision.

Source(s):

- CASTRO MENDES/TEIXEIRA DE SOUSA, Direito Processual Civil (forthcoming), § 50.
- ANTÓNIO SANTOS ABRANTES GERALDES, Recursos no Novo Código de Processo Civil, 3rd ed., Almedina, 2016.

6.6 Enforcement in consumer disputes

The CJEU has identified a number of situations concerning the enforcement stage of consumer protection disputes in which the effective and equivalent protection of EU consumer rights may be affected by national procedural rules. These include – in relation to the effectiveness and equivalency of the protection afforded by the Unfair Contract Terms Directive, for example – the enforcement of arbitration awards, the enforcement stage in the recovery of consumer credit and the enforcement of mortgages, which often links together declaratory and enforcement proceedings. As such, we focus on these situations below. However, other problematic situations exist. Please indicate if additional (and potentially problematic) situations are identifiable in your national legal system.

Moreover, if possible, please provide the reference/citation of an article that provides an overview of the way in which enforcement operates in relation to consumer protection disputes within your national legal system.

6.6.1 If the assessment of a consumer protection issue has not been possible at an earlier stage of the proceedings, is it always possible – either ex officio (see section 10 below) or if the consumer raises a possible violation of consumer protection law – for this assessment to be undertaken during enforcement proceedings?

Not applicable

6.6.2 In the particular case of consumer protection, if a court examines consumer protection law (either ex officio or on the basis of an argument advanced by the consumer), does national procedural law provide that interim measures should 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 final decision will have full effect?

Not applicable

Source(s):

7. ACTIONS FOR COLLECTIVE REDRESS

The CJEU has considered that situations in which individual and collective actions are in some way linked are those in which the effective and equivalent protection of EU consumer rights may be affected by national procedural rules. As such, we will focus on these situations. However, other problematic situations exist. Please indicate if additional (and potentially problematic) situations are identifiable in your national legal system.

Moreover, if possible, please provide the reference/citation of an article that provides an overview of the way in which the collective redress mechanism operates within your national legal system.

7.1 Injunctive relief, linking individual and collective actions

The case law of the CJEU requires that a person or organisation with a legitimate interest in consumer protection must be able to bring an action before a national court or tribunal in respect

of an alleged violation of consumer rights deriving from Union law, either for compensation or for injunctive relief, to preclude the continued violation of consumer rights[288].

7.1.1 If collective proceedings are launched, does national procedural law provide that ongoing individual claims, relating to the same dispute, should be stayed until the collective proceedings are brought to an end? Please specify if this constitutes an obligation on the part of the national judge or if it is at his or her discretion.

Under Portuguese civil procedure law, collective proceedings for settlement of a consumer dispute only do not prevent individual actions being filed by a consumer concerning the same dispute to the extent that the pre-conditions for lis pendens are not met (arts. 580(1) and 581(1) CPC). Insofar as the identity of the parties is determined on the basis of their legal position (qualidade jurídica) (art. 581(2) CPC) and the persons competent to bring collective proceedings represent, for procedural purposes, consumers in the exercise of their protected rights and interests (art. 2(1) of Law 25/2004, of 8 July and art. 14 of Law 83/95, of 31 August, referred to as "Collective Proceedings Law"), this means that the filing of an individual action by a consumer represented in collective proceedings does not avoid the objection of lis pendens from arising, which prevents the merits of his or her claim from being assessed (arts. 577(i) and 278(e) CPC).

However, this will not be the case in situations where the party filing an individual claim is not represented by the body or organisation competent to bring collective proceedings or to seek an injunction. This will happen in respect of the consumers who have exercised their right of exclusion from legal representation within the time limit set by the judge in the collective proceedings and indicated in the summons, issued by announcement or advertisement published in any media outlet or by public notice, depending on whether the interests at stake are widely shared or geographically localised (art. 15(1) of the Collective Proceedings Law). Silence on the part of the consumers is deemed to constitute acceptance of legal representation by the body or organisation competent to bring collective proceedings (art. 15(1), final part, of the Collective Proceedings Law). It should be noted that the claim filed by consumers who have opted for exclusion from representation in the

[288] This derives from the EU directives. For example, in respect of the UCTD, art.6(1), art.7(1) and (2) UCTD, provide that the Member States must ensure i) that unfair terms are not binding on the consumer and ii) that adequate and effective means exist to prevent the continued use of unfair terms in consumer contracts. The CJEU has held that effective implementation requires that the consequence of the finding of the violation – in the case of a finding of unfairness under the UCTD – is for the term to be declared invalid, and that the effect of this invalidity extends not only to the parties to the action for an injunction but also to those who have concluded a contract with the seller/supplier to which the same terms apply.

collective proceedings may however be subject to stay of proceedings, if the court believes there are good grounds for awaiting a decision from the collective proceedings, for example, because this depends on assessment of the same legal issue (art. 272 CPC).

7.1.2 If individual proceedings are stayed, please indicate what the effect of the court or ADR entity's decision in the collective action on those individual proceedings would be, i.e. whether the outcome of the collective action binds the consumer bringing an individual action.

As stated in the answer to the previous question, the admissibility of an individual action presupposes that the claimant is not legally represented by the body or organisation competent to file the collective proceedings or seek the injunction. In Portuguese civil procedural law, the reach of res judicata resulting from the decision rendered in the collective proceedings is determined on the basis of legitimacy to protect the collective interests of consumers. So the general rule is that the decision rendered in the collective proceedings binds the consumers represented in them, unless the claim is rejected due to lack of evidence - in other words, if the decision on the merits has been delivered on a non liquet basis (art. 414 CPC) - or unless the judge is required to reach a different decision based on the specific grounds of the concrete case (art. 19(1) of the Collective Proceedings Law). This means that consumers represented for procedural purposes in the collective proceedings not only benefit from res judicata in their favour, but can also see their claim contested on the basis of unfavourable res judicata, unless the claim has been rejected on the grounds of the rules concerning the burden of proof, in other words, when the judge has not formed a sufficient conviction concerning the cause of action[289].

On the other hand, consumers who have exercised their right to exclusion from legal representation are not bound by the effects of the decision rendered in the collective proceedings[290]. Indeed, the exclusion of the effect of material res judicata is one of the reasons for excising the right of opting out (art. 15(1) of the Collective Proceedings Law).

Source(s):

[289] MIGUEL TEIXEIRA DE SOUSA, *A legitimidade popular na tutela dos interesses difusos*, Lex, Lisbon, 2003, p. 276.
[290] MIGUEL TEIXEIRA DE SOUSA, *A legitimidade..., cit.*, pp. 269 *et seq.*, applying the solution of exclusion of *res judicata* even in situations where the consumer has filed an individual claim prior to the filing of the collective proceedings.

8. CONSUMER ALTERNATIVE DISPUTE RESOLUTION

The questions below focus on some key concerns relating to consumer disputes before ADR fora. If possible, please provide the reference/citation of an article that provides a general overview of the way in which consumer alternative dispute resolution operates within your national legal system.

8.1 Consumer disputes before ADR fora

8.1.1 Is ADR mandatory for all parties bringing a claim related to a consumer protection dispute?

Under art. 3(i) of Law 144/2015, of 8 September, alternative dispute resolution procedures are deemed to be mediation, conciliation and arbitration.

There is no legal duty to seek mediation or conciliation as a pre-condition for filing a claim in the relevant court. But this duty may result from an agreement between the parties, which, when concluded prior to the dispute arising, cannot deprive consumers of the right to submit the dispute to the consideration and decision of a judicial court (art. 13(1) of Law 144/2015, of 8 September).

As regards the nature of the effects of the decision reached in the course of an alternative dispute resolution procedure, conciliation and mediation are not binding on the parties, who may accept and adopt the decision, or else reject it; participation in an alternative dispute resolution procedure cannot prevent them from having recourse to the relevant courts to settle the dispute.

In contrast, an award from an arbitral tribunal is binding and enforceable on the same terms as a ruling from a State court (art. 13(2) of Law 144/2015, of 8 September and art. 42(7) LAV[291]).

8.1.2 Please specify if there are limitations to the use of ADR. These might include the nature of the claim (i.e. whether both individual and collective claims are possible), requirements of representation, time limits, value thresholds, etc.

Portuguese law contains no specific limits on exercise of the right of recourse to an alternative disputes resolution procedure between consumers and traders, and

[291] *Voluntary Arbitration Law* (*Lei da Arbitragem Voluntária*), approved by Law 63/2011, of 14 December.

leaves it for each of the bodies competent to conduct these procedures to set the rules to be applied as to the nature and scope of the disputes they are competent to handle, including possible value thresholds, which are to be adequately disclosed on their websites (art. 9(1)(g) of Law 144/2015).

For example, the Centro Nacional de Informação e Arbitragem de Conflitos de Consumo[292], the only body operating nationwide on the list drawn up by the Directorate-General of Consumer Affairs of entities able to conduct alternative dispute resolution procedures between consumers and traders, sets no limits on the value of claims submitted to it, but requires parties to be represented by legal counsel when the value of the claim exceed the upper limit for final judgements by the courts of first instance (currently set at €5,000.00). In terms of subject matter, the Centro de Informação de Consumo e Arbitragem do Porto[293] is able to handle consumer disputes relating to the acquisition of goods or provision of services in the Porto Metropolitan Area. The Centro de Arbitragem de Conflitos de Consumo de Lisboa[294] applies different rules: it is competent to consider consumer claims arising from disputes relating to the acquisition of goods and services in the Lisbon Metropolitan Area with a value no greater than €5,000.00.

The law contains no time limits for mediation procedures, and merely states that the procedures should be conducted as quickly as possible and with the minimum possible number of sessions (art. 21 of Law 29/2013, of 19 April). In some cases, extra-judicial dispute resolution bodies include in their rules specific provisions concerning time limits for procedures: for example, the Rules of Procedure of the Centro Nacional de Informação e Arbitragem de Conflitos de Consumo set a time limit of 90 days, which can be extended in exceptional situations (art. 13(1)).

With regard to arbitration, Portuguese law allows an arbitral tribunal to be assigned jurisdiction to settle disputes involving material interests, and also non-material interests provided they do not correspond to disposable rights (art. 1(2) LAV). Collective proceedings take the form of common proceedings for declaratory relief (art. 12(2) of the Collective Proceedings Law), and cannot be brought in arbitral tribunals.

8.1.3 Can ADR entities issue binding decisions and can they enforce those decisions? If not, please explain how they are enforced.

[292] http://www.arbitragemdeconsumo.org
[293] http://www.cicap.pt
[294] http://www.centroarbitragemlisboa.pt

Mediation and conciliation procedures are voluntary, meaning that the proposal for an out-of-court settlement prepared by the mediator is only binding on the parties if they accept or accede to this proposal (art. 4(1) of Law 29/2013, of 19 April).

The parties may desist at any time from conciliation or mediation procedures (art. 12(2)(a), of Law 144/2015, of 8 September, and art. 4(2) of Law 29/2013, of 19 April). However, if they reach an agreement, this agreement is, in general terms, the source of obligational effects and is enforceable. In conciliation procedures, the parties may conclude a contract intended to prevent a judicial dispute from arising, by making mutual concessions: the out-of-court settlement provided for in arts.1248 to 1250 of the Civil Code. An agreement reached through mediation is also binding and can be enforced in the courts irrespective of judicial ratification when certain requirements are met, in particular, it must have been reached through the offices of a disputes mediator included in the list of disputes mediators drawn up by the Ministry of Justice (art. 9(1)(e) of Law 29/2013, of 19 April).

In contrast, an award from an arbitral tribunal belonging to the consumer arbitration network is binding on the parties on the same terms as a decision rendered by a State court. An arbitral award is enforceable and can be enforced through the judicial courts, with a view to obtaining the material acts needed to effectively satisfy the creditor's right (art. 705 CPC).

Extra-judicial consumer dispute resolution bodies may also establish accessory consequences for failure to comply with a decision they issue. For instance, in art. 16(5) of its Rules of Procedure, the Centro Nacional de Informação e Arbitragem de Conflitos de Consumo lays down that, if the trader fails to comply with the decision reached by the arbitrator, he will be barred from using the Centre's symbol and will be excluded from lists of entities subscribing to its services.

8.1.4 Does national law provide that limitation periods applicable to judicial actions should be suspended while ADR is ongoing?[295]

Under Portuguese law, limitation periods are suspended for the duration of mediation procedures, starting from the date on which the mediation agreement is signed or, in the case of mediation through public mediation systems, the date on

[295] The Directive on Consumer ADR provides that “the existence of an effective system for collective claims and easy recourse to ADR should be complementary”. Consumer ADR is relevant not only for individual claims but also for collective ones; it can provide consumer with a means to reduce costs and save time.

which the parties agreed to go to mediation (art. 13(2) of Law 29/2013, of 19 April). A mediation process can be suspended in exceptional circumstances where reasonable grounds exist, without this affecting the suspension of limitation periods (art. 22(2) of Law 29/2013, of 19 April).

The limitation period recommences on conclusion of the mediation procedure due to refusal by one of the parties to continue the procedure, expiry of the limit on the duration of the procedure or when the mediator declares the procedure terminated (art. 13(3) of Law 29/2013, of 19 April).

8.1.5 Please specify if national law establishes rules providing for recourse to judicial action following an (unsuccessful) ADR hearing[296].

In the event of mediation proving unsuccessful, either of the parties may file their claim for consideration and decision by a State court, under the general terms of the law. Portuguese law contains no specific mechanism for recourse to the State courts when a mediation or conciliation procedure is unsuccessful. However, the rules of procedure of the extra-judicial disputes resolution contain special provisions in this regard. For example, art. 20(1) of the Rules of Procedure of the Centro Nacional de Informação e Arbitragem de Conflitos de Consumo state that "when mediation is unsuccessful, the Information and Mediation Service notifies the claimant to apply for arbitration, if he so wishes, within 10 days."

8.1.6 Is there judicial review of decisions and awards made by ADR entities? If so, by which court or tribunal is this oversight made? Is it ordinary or specialised?

The awards of an arbitral tribunal in the course of a dispute between a consumer and a trader may be contested, with due grounds, by two means: appeal and annulment proceedings. An arbitral award can only be appealed against if this is expressly established by the parties in the arbitration agreement and when the cause has not been judged on the basis of equity or through amicable settlement (art. 39(4) LAV).

However, if any procedural rules have been breached which cause the arbitral award to be invalid (cf. art 46(3) LAV), the interested party may apply to the State courts to have the award set aside. Annulment proceedings must be filed with the Appeal Court of the district where the arbitration venue is located (art. 59(1) LAV).

[296] Per arts.10-12, Directive on Consumer ADR.

Source(s):

- Rules of Procedure of the Centro Nacional de Informação e Arbitragem de Conflitos de Consumo, available at http://goo.gl/LbTgkf

9. THE EXAMINATION OF CONSUMER PROTECTION LAW IN NATIONAL PROCEDURAL LAW: RESPECT FOR THE PRINCIPLES OF THE EFFECTIVENESS AND EQUIVALENCE OF CONSUMER PROTECTION LAW AND EX OFFICIO CONTROL

The rules of national civil procedure that could potentially affect, and indeed undermine, the effective and equivalent protection of consumer rights are various. They include but are not limited to the rules and practices of ordinary and specialised judicial procedures, rules and practices of consumer ADR, rules applicable to special types of procedure (e.g. payment order procedures), the jurisdiction of individual courts (the courts that have jurisdiction over consumer disputes), the formal requirements that have to be satisfied to bring a case, the types of legal action that are available, the need for parties to be represented, the time-limits applicable to procedural steps of the action, rules on the taking of evidence, the possibility (or lack) to consider certain issues at specific stages of the procedure, the right to appeal and review, and rules relating to the enforcement or judgements and other enforcement titles (e.g. arbitration awards, notarial deeds, including mortgages).

On the basis of the principles of equivalence and effectiveness, the CJEU has established certain requirements for the procedural protection of consumer rights deriving from EU law. In particular (and especially in relation to the protection afforded to consumers via the Unfair Contract Terms Directive[297]), the CJEU has established an obligation on national judges (and potentially other dispute resolution facilitators) to apply consumer law of their own motion (that is, ex officio), when they have available the legal and factual elements necessary for this task. Ex officio control is one type of procedural mechanism that can be utilised within the national system to promote the effective and equivalent protection of consumer law. Thus, other mechanisms of procedure within your national legal system should be highlighted and discussed where relevant. The following questions should be answered in respect of both judicial and if relevant, alternative dispute resolution.

9.1 The basis of ex officio control of consumer protection law in national law

[297] However, the CJEU has recognised that ex officio control – and other procedural requirements, that might in themselves (or indeed, in their absence), impact the effective enforcement of consumer law – arise across the EU's consumer protection directives.

9.1.1 Is it clear in the national legal system when consumer protection law should be applied ex officio? Is the ex officio control of consumer protection law established as an obligation or as a (discretionary) power of the judge in national procedural law?

Under Portuguese procedural law, the judicial courts are required to consider ex officio all peremptory exceptions which the court may consider of its own motion, such as, for instance, the nullity of a contractual provision.

Consequently, under art. 16 of the Consumer Protection Law[298], the court is required to consider as null and void any agreement or contractual provision which excludes or restricts the rights conferred by this law.

This power of the court corresponds to a legal duty and, in order to protect the consumer's rights, this nullity can only be relied on by the consumer or his/her representative. Even so, as an alternative, the consumer or his/her representative may opt to maintain the contract when some of its clauses are void (cfr. art. 16, paras. 1 and 2 of the Consumer Protection Law). Articles 26 and 27 of the Consumer Credit Law[299] result in provisions to the same effect.

In view of the nature and importance of the public interest underlying the protection conferred by Directive 93/13 on consumers, art. 6 should be deemed a provision equivalent to the national rules classed, within the internal legal system, as public policy rules (§52 Asturcom Comunicaciones Judgment, C-40/08)[300].

Article 6(1) of Directive 93/13/EC is a mandatory provision which seeks to substitute the formal balance which the contract establishes between the rights and obligations of the parties with a real balance capable of restoring equality between them (§36 Mostaza Claro Judgment, C-168/05, § 25 Pannon Judgment, C-243/08).

In order to assure the protection intended by Directive 93/13, the Court of Justice has repeatedly underlined that a situation of imbalance between a consumer and a professional can only be offset by positive intervention, from outside the parties to the contract, i.e. from the national judge (§39 Pohotovost Judgment, C-76/10). This intervention consists of ex officio examination of the contract by the judge, in order to assess whether the contract complies with Community requirements on consumer protection against unfair terms.

In addition, the national court is required to assess, ex officio, the unfair character of a contractual term falling within the scope of application of the Directive and thereby make good the imbalance between the consumer and the professional,

[298] Approved by Law 24/96, of 31 July and successively amended by Law 85/98, of 16 December, Decree-Law 67/2003, of 8 August, Law 10/2013, of 28 January and Law 47/2014, of 28 July.
[299] Approved by Decree-Law 133/2009, of 2 June, as a result of transposition of Directive 87/102/EEC.
[300] This classification should be deemed to extend to all the provisions of the directive essential for achieving the aim pursued by the said art. 6 (cf. § 44 *Dirk Frederic Asbeek Brusse* Judgment, C- 488/11).

provided it has the necessary legal and factual elements for this purpose (§46 Aziz Judgment, C-415/11, § 41 Banco Popular Español Judgment, C-537/12, §27 Joros Judgment, C-397/11, §40 Dirk Frederik Asbeek Brusse Judgment, C-488/11).

The possibility of the judge assessing ex officio the unfair character of a clause is an appropriate means for achieving the outcome established in art. 6 of Directive 93/13, i.e. of preventing an individual consumer from being bound by unfair terms, and at the same time helping to achieve the objective of art. 7, insofar as this assessment may have a deterrent effect, helping to put an end to the use of unfair terms in contracts concluded with consumers by a professional (cf. §32 Cofidis Judgment, C-473/00, §27 Mostaza Claro Judgment, C-168/05).

The aim pursued by art. 6 could not be achieved if the consumers were themselves obliged to raise the issue of the unfairness of contractual terms, and effective protection can only be assured if the national courts enjoy ex officio powers to assess contractual terms (§ 23 Pannon Judgment, C-243/08). Ex officio assessment of the unfairness of contractual terms is a means which the national courts should use in order to ensure the effectiveness of the protection intended by the provisions of the Directive (§32 Pannon Judgment, C-243/08).

This power is deemed necessary in order to assure effective protection for consumers, taking into account, in particular, the not insignificant risk that the consumer may be unaware of his or her rights or have difficulty in exercising them. So the protection of the Directive is extended to cases where the consumer entered into a contract, with a professional, which contract includes unfair terms, but the consumer fails to invoke the unfairness of the terms, either because he is unaware of the effects or else because he is deterred from doing so by the costs of taking a claim to court (§34 Cofidis Judgment). In other words, art. 6(1) should be interpreted to mean that unfair contractual terms are not binding on a consumer and that, for this purpose, the consumer is not required first to challenge these terms successfully (§28 Pannon Judgment, C- 243/08).

It follows from this case law that in order for the protection established by Directive 93/13 to be fully effective, the national judge who has ruled ex officio that contractual terms are unfair must be able to draw the full consequences of this ruling, without waiting for the consumer, once informed of his rights, to apply to have the terms voided (cf. § 28 Banif Plus Bank Judgment, C-472/11, § 42 Jorös Judgment, C-397/11).

As a result of art. 6, the national judge should draw the full consequences, under national law, of his ruling that the contractual terms in question are unfair, in order to confirm that the consumer is not bound by these terms - §63 Banco Español de Crédito Judgment, C-618/10.

In keeping with the requirements that national law be interpreted in a way consistent with the Directive and that consumer rights be effectively protected, the national court is required to apply - as far as possible - the internal procedural rules in order to attain the outcome established in art. 6(1). The Directive should be interpreted to the effect that the national court which ex officio rules contractual terms to be unfair is required, as far as possible, to apply internal procedural rules so as to draw the full consequences which, under national law, derive from recognition of the unfair nature of the terms, in order to confirm that the consumer is not bound by these terms (§53 Jorös Judgment, C-397/11).

In this regard, the Court of Justice has specified that, when the national judge deems contractual terms to be unfair, he is obliged not to apply them, unless the consumer, after being informed by the judge, opposes this (cf. §35 Pannon Judgment, C-243/08).

However, the adversarial principle requires a national judge who has ex officio ruled contractual terms to be unfair to inform the parties to the dispute of this and to offer them the possibility of debating this, in keeping with adversarial process, using the forms established for this purpose in national law (§31 Banif Plus Bank Judgment, C-472/11, § 52 Dirk Frederik Asbeek Brusse Judgment, C-488/11). In effect, the requirements of effective jurisdictional protection enjoyed by people under Union law, guaranteed by art. 47 of the Charter of Fundamental Rights of the European Union, demand that the adversarial principle be respected.

As a result of the mandatory character of art. 6(1) and given that this should be deemed a rule equivalent to national rules classed, in the internal legal system, as public policy rules, it follows that "where the national court has the power, under internal procedural rules, to annul of its own motion a term which is contrary to public policy or to a mandatory statutory provision the scope of which warrants such a sanction (...), it must also annul of its own motion a contractual term which it has found to be unfair in the light of the criteria laid down by the directive" - §51 Dirk Frederik Asbeek Brusse Judgment, C-488/11.

The aim pursued by art. 6, obliging Member States to provide that unfair terms are not binding on consumers, cannot be attained if, when hearing an appeal against an arbitral award, the court is prevented from assessing the nullity of the award, on the simple grounds that the consumer failed to invoke the nullity of the arbitration agreement in the course of the arbitration proceedings (§30 Mostaza Claro Judgment, C-168/05, of 26.10.2006). It follows from this that the right of defence is a Community public policy concept.

In the grounds for the judgment, the Court drew on various familiar arguments, in particular the doctrine from the Eco Swiss Judgment. It was stressed that the

importance of consumer protection led the Community legislator to establish, in art. 6.1 of the Directive, that unfair terms contained in a contract concluded with a consumer by a professional "are not binding on the consumer". This is a mandatory provision which, in view of the inferiority of one of the contractual parties, seeks to replace the formal balance established by the contract between the rights and obligations of the parties with a real balance able to re-establish equality between them. It underlined that the directive, designed to increase consumer protection, was an essential measure for discharging the missions entrusted to the Community and, in particular, to raise living standards and the quality of life throughout its territory (cfr. art. 3(1)(t) of the Treaty). Lastly, it was emphasised that the nature and importance of the public interest on which the protection provided by the directive assures for consumers is based explain why the national judge is required to assess the unfair character of contractual term ex officio, and thereby attenuate the imbalance existing between the consumer and the professional.

It should be noted that the Court of Justice's interpretation of a provision of Community law is limited to clarifying and identifying its precise meaning and scope, as it should be understood and applied as from the moment it took effect - cfr. Judgement of 24 September 1998, Commission / France, Court Reports p. I-5325, no. 46. In other words, the Court of Justice interprets Community law authentically, using referrals for preliminary rulings to develop Community law, which results in a sharing of the legislative task between legislators and judges. The Court's interpretation is incorporated in the provision interpreted, and may only be questioned in the event of a subsequent change in the law or change in the interpretation proclaimed by the Court itself.

9.1.2 If there is an understanding of ex officio control of consumer protection law in the national legal, what is this control understood to encompass/not cover?

As stated above, control by the judicial courts of consumer protection law encompasses analyses of any agreement of contractual term which excludes or restricts the rights conferred by this law and, also all and any term which is deemed unfair and, as such, contrary to Community public policy (cfr. art. 16 of the Consumer Protection Law).

Contractual terms so identified are deemed void.

9.1.3 Is the party who claims to be a consumer required to establish his or her consumer status, the existence of a consumer contract and that consumer law applies to the dispute? Is this required even if the consumer has no legal representation?

Under Portuguese procedural law, consumers have to allege a minimum set of facts from which the judicial courts may conclude that they are consumers and that the Consumer Protection Law applies.

In the light of the iura novit curia principle, the consumer is not required to allege expressly its capacity as consumer, or the applicable legal rules (cfr. art. 5(3) of the Code of Civil Procedure, in other words, the judge is not tied to the parties' allegations with regard to the investigation, interpretation and application of the rules of law).

Nonetheless, the court is limited by the claim filed by the consumer, which is why it cannot adapt or shape the effects sought by the consumer if they have not been expressly formulated. Any judicial decision which oversteps the claim filed by the consumer is void under the terms and for the purposes of the provisions of art. 615(1)(e) CPC.

9.1.4 What information is available to judges and dispute resolution facilitators hearing consumer protection disputes? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a consumer protection dispute to be heard and b) for the court to engage in ex officio control?

The information available to courts and arbitrators should be derived, to a minimum extent, from the statement of claim or application. This document must contain the essential facts showing that the claimant is a consumer, and showing the contractual terms entered into and now disputed.

The absence of this minimum content from which the consumer's rights derive (which rights, we repeat, the consumer does not have to classify as such), cause the statement of claim or application to be invalid due to omission or absence of cause of action [cfr. Art. 186(2)(a) CPC].

In ADR, the Rules of Procedure of the Centro Nacional de Informação e Arbitragem de Conflitos ao Consumo ("CNIACC") require the consumer's claim to indicate the following: (a) identity and domicile of the claimant; (b) identity and domicile of the respondent(s); (c) Description of the subject matter of the dispute; (d) indication of claim and respective grounds; (e) evidence offered; (f) signature of the claimant or his representative [cfr. art. 10(1) of the CNIACC Regulations].

For this purpose, the CNIACC provides claim forms which allow claimants to present their claims more accurately and effectively [cfr. art. 10(2) of the CNIACC Regulations].

In cases where the claim is manifestly groundless or lies outside the scope of mediation, the consumer is informed that CNIACC is not able to hold the

proceedings, information being provided on the possibility of following other avenues [cfr. art. 10(3) of the CNIACC Regulations].

9.1.5 Who is responsible for providing this information? If the necessary information is not available to the court (or dispute resolution facilitator), is he or she under an obligation to investigate in order to be able to respond to a relevant consumer protection dimension of the case?

Responsibility for providing this information to the Court lies with the consumer, under the general rules on the burden of proof [cfr. art. 5(1) and art. 552(1)(d) of the Code of Civil Procedure and art. 342(1) of the Civil Code].

In any case, the judicial court may even so invite the consumer to correct its pleading, under the terms and for the purposes of the provisions of art. 590(2)(d) CPC. This prerogative on the part of the court is both a power and a duty, and exists whenever it is confronted with insufficiencies or a lack of precision in the description or specification of the alleged matter of fact; the court is required to set a time limit for the consumer to present a new pleading in which he completes or correct that originally submitted.

In the specific case of ADR, the CNIACC's Information and Mediation Service is also required to ensure respect for the principles of independence, impartiality, transparency, adversarial process, effectiveness, legality, freedom, representation and equity, in accordance with the provisions of Recommendation 2001/310/CE, of 4 April. From which it follows that it cannot place the consumer in a position of advantage in relation to the service provider or supplier of goods.

Nonetheless, in the case of mediation conducted by the CNIACC, the Mediator may take into consideration any elements useful for due settlement of the consumer dispute, even if not expressly invoked by the parties, and may to this end, and at any time, request from them information it deems relevant [cfr. art. 12(6) of the CNIACC Regulations].

9.1.6 Will the court provide the consumer with any assistance in gathering factual information or advancing his legal arguments before the court? Please respond for the situation where: a) the consumer has legal representation and b) the consumer has no legal representation.

In view of the principle of equality of arms, the judicial court may not place the consumer in a better position than that of the other party.

In any case, under art. 14 of the Consumer Protection Law, in order to ensure the right to legal protection and to accessible and prompt justice, the agencies and

departments of the public administrative authorities are required to promote creation of and support arbitration centres for settling consumer disputes; consumers are also exempted from preliminary procedural fees when seeking protection of their interests or rights, a judgment against a supplier of goods or provider of services for non-performance, or relief for losses and damages resulting from unlawful facts or from strict liability defined in accordance of the law provided the value of the action is no higher than the upper limit for final judgements by the courts of first instance.

The claimants in the proceedings indicated in the preceding paragraph are exempted from paying court costs if their claim is partially upheld.

Likewise, under art. 9-D of the Consumer Protection Law, consumers are provided with a range of information and other services. A helpline is provided for any legal consumer issues: this service is provided free of charge, except for the basic call rate charged by telecommunications operators.

These prerogatives apply irrespective of whether the consumer has legal representation.

In the specific case of ADR, CNIACC's Information and Mediation Service can screen cases as they arrive, pointing consumers where appropriate towards more suitable avenues [cfr. art. 2(a) of the CNIACC Regulations], and provide information, allowing easier and faster access to general information on consumer affairs [cfr. art. 2(b) of the CNIACC Regulations); help settle disputes through mediation [cfr. art. 2(c) of the CNIACC Regulations]; or initiate proceedings before the Arbitral Tribunal [cfr. art. 12(d) of the CNIACC Regulations].

In addition, in the case of mediation conducted by the CNIACC, the Mediator may take into consideration any elements useful for due settlement of the consumer dispute, even if not expressly invoked by the parties, and may to this end, and at any time, request from them information it deems relevant [cfr. art. 12(6) of the CNIACC Regulations].

Source(s):

- Code of Civil Procedure
- Regulations of the Centro Nacional de Informação e Arbitragem de Conflitos ao Consumo
- Civil Code
- Consumer Protection Law
- Consumer Credit Law
- Directive 93/13/CE
- ECJ Case Law.

9.2 The possibility for ex officio control of EU consumer protection law in dispute resolution proceedings

9.2.1 Is ex officio control of consumer protection law always possible when the procedure involves a full assessment of the claim on its merits?

The answer is yes, in accordance with the Code of Civil Procedure and the CNIACC Regulations.

9.2.2 Can ex officio control be exercised even when the procedure does not involve an assessment on the merits?

The answer is no.

In the case of the CNIACC Regulations, replies to information requests should be general in content, and preferably standardised and uniform; answers should be educational, informing people of their rights and duties in relation to the matter and how these rights and duties should be exercised, referring, when possible, to documentation on the matter [cfr. art. 5 of the CNIACC Regulations].

9.2.3 Please indicate if, per national procedural law, ex officio control can be exercised at the following stages of the procedure:

	Courts		Other dispute resolution facilitators	
	Possible to exercise ex officio control	Not possible to exercise ex officio control	Possible to exercise ex officio control	Not possible to exercise ex officio control
Ordinary proceedings	X		X	
Small claims	X		X	
Payment order	X		X	
Provisional measures	X		X	
Proceedings linked to enforcement	X		X	
Enforcement proceedings	X		X	
- Enforcement of payment order	X		X	
- Enforcement of arbitration award	X		X	

- Enforcement of mortgage	X		X	
- Enforcement of notarial deed	X		X	
Appeal proceedings (please specify:)	If a decision on the merits has already been taken by the First Instance Court		If a decision on the merits has already been taken by the First Instance Court	

9.2.4 What does ex officio control encompass in national procedural law?

As stated above, ex officio control of consumer protection law under national law determines: (1) a ruling that unfair contractual terms or terms which exclude or restrict the rights conferred by law are null and void and (2) creation and support for arbitration centres to settle consumer disputes.

Source(s):

- Code of Civil Procedure
- Regulations of the Centro Nacional de Informação e Arbitragem de Conflitos ao Consumo
- Civil Code
- Consumer Protection Law
- Consumer Credit Law
- Directive 93/13/CE
- ECJ Case Law

9.3 Other procedural mechanisms for the equivalent and effective protection of EU consumer law

9.3.1 Does national procedural law provide that rules of EU consumer law (as well as rules that aim to satisfy EU consumer law objectives) should be understood as having equal standing to national rules of public policy (which is to say, that for the purposes of domestic law, the consumer protection provision is understood to have equal standing to a rule that must be raised ex officio by the national court)?

The answer is yes, through application of the Mostaza Claro Judgment, C-168/05, of 26.10.2006 and also the content of art. 16 of the Consumer Protection Law and art. 26 and 27 of the Consumer Credit Law.

9.3.2 If ex officio control is not possible in certain types of proceedings or at a certain stage of proceedings (or for any other reason), does national procedural law provide for an alternative way of assessing consumer protection law?

No alternative way is provided for controlling consumer protection rights in cases where there is no assessment on the merits.

Nonetheless, under the CNIACC Regulations, its Information and Mediation Service can screen cases as they arrive, pointing consumers where appropriate towards more suitable avenues [cfr. art. 2(a) of the CNIACC Regulations], and provide information, allowing easier and faster access to general information on consumer affairs [cfr. art. 2(b) of the CNIACC Regulations); help settle disputes through mediation [cfr. art. 2(c) of the CNIACC Regulations]; or initiate proceedings before the Arbitral Tribunal [cfr. art. 2(d) of the CNIACC Regulations].

Source(s):

- Code of Civil Procedure
- Regulations of the Centro Nacional de Informação e Arbitragem de Conflitos ao Consumo
- Civil Code
- Consumer Protection Law
- Consumer Credit Law
- Directive 93/13/CE
- ECJ Case Law

9.4 Ex officio control in payment order procedures

9.4.1 What information is available to the judge when a claim for the issuance of a payment order is made? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a claim for the issuance of a payment order to be granted and b) for the court to engage in ex officio control before a payment order is issued?

As stated above, under the Code of Civil Procedure, the Judicial Court must be provided with the essential facts which show the claimant to be a consumer, the contractual agreements reached and now disputed.

The absence of this minimum content from which the consumer's rights derive (which rights, we repeat, the consumer does not have to classify as such), cause the statement of claim or application to be invalid due to omission or absence of cause of action [cfr. art. 186(2)(a) of the Code of Civil Procedure].

In ADR, the Rules of Procedure of the Centro Nacional de Informação e Arbitragem de Conflitos ao Consumo ("CNIACC") require the consumer's claim to indicate the following: (a) identity and domicile of the claimant; (b) identity and domicile of the respondent(s); (c) Description of the subject matter of the dispute; (d) indication of claim and respective grounds; (e) evidence offered; (f) signature of the claimant or his representative [cfr. Art. 10.1 of the CNIACC Regulations].

For this purpose, the CNIACC provides claim forms which allow claimants to present their claims more accurately and effectively [cfr. art. 10(2) of the CNIACC Regulations].

In cases where the claim is manifestly groundless or lies outside the scope of mediation, the consumer is informed that CNIACC is not able to hold the proceedings, information being provided on the possibility of following other avenues [cfr. art. 10(3) of the CNIACC Regulations].

9.4.2 What considerations will be assessed ex officio by the court (or other competent authority) before a payment order is issued?

Judicial courts or arbitral tribunals only assess the merits of the action filed by the service provider or supplier of goods.

However, in the case of goods transferred by legal transaction for which all or part of the price is outstanding, the creditor may have the goods attached, without needing to prove reasonable fear or loss of financial guarantee. (cfr. art. 396 CPC].

9.4.3 How is the consumer informed about the claim to issue a payment order against him or her? Does national procedural law make any provision for steps to be taken to ensure that consumers are informed of the claim for the issuance of a payment order so that he or she can contest it?

Under Portuguese national law, there is no additional guarantee for service of summons or notification of consumers.

Nonetheless, in cases where Regulation (EU) 1215/2012, of 12 December 2012, applies, due to the dispute involving multiple locations, the consumer must be informed of his right to contest the court's jurisdiction (in the event of it being incompetent) and of the consequences of entering an appearance, or not, in court [cfr. art. 26(2) of Regulation (EU) 1215/2012]. This prerogative is not extended to non-consumers.

9.4.4 If the consumer objects to the claim, what is the next step? Do the proceedings continue, in the context of which ex officio control can be exercised? Or are the proceedings transferred to ordinary proceedings for analysis on the merits of the claim?

If the consumer contests the claim, the proceedings follow the normal steps in accordance with the Code of Civil Procedure, as no specific procedural rules apply on the basis of one party being a consumer.

Source(s):

- Code of Civil Procedure
- Regulations of the Centro Nacional de Informação e Arbitragem de Conflitos ao Consumo
- Civil Code
- Consumer Protection Law
- Consumer Credit Law
- Directive 93/13/CE
- ECJ Case Law
- Regulation (EU) 1215/2012

European Commission
An evaluation study of the impact of national procedural laws and practices on the equivalence and effectiveness of the procedural protection of consumers under EU law

JUST/2014/RCON/PR/CIVI/0082

National Report – Consumer Protection Strand

Romania

Elena Alina Ontanu

ROMANIA: LEGAL ANALYSIS

1. NATIONAL LEGISLATION IMPLEMENTING EU CONSUMER PROTECTION INSTRUMENTS

EU legislation	Transposing national legislation	Additional notes (e.g. if there is an overlap in application of legislation etc.)
Doorstep Selling Directive 1985/577/EEC	Government Ordinance No. 106/1999 regarding the contracts concluded outside of the commercial premises, now abrogated by Government Emergency Ordinance No. 34/2014	
Package Travel Directive	Government Ordinance No.	

90/314/EEC	107/1999 regarding the selling of touristic package travels, republished Order of the Tourism Ministry No. 236/2001 regarding the insurance of tourists for the insolvency or bankruptcy of the tourism agency	
Unfair Contract Terms Directive 1993/13/EEC	Law No. 193/2000 regarding the unfair contractual terms in the agreements concluded between professionals and consumers, republished	
Distance Selling Directive 1997/7/EC	Government Ordinance No. 85/2004 regarding consumers protection in concluding and executing distance selling agreements regarding financial services Government Emergency Ordinance No. 111/2011 regarding the electronic communication	
Consumer Sales and Guarantees Directive 1999/44/EC	Government Emergency Ordinance No. 34/2014 on consumers' rights in contracts concluded with professionals as well as the modification and amendment of other legislative acts Law No. 449/2003 on products selling and the guarantees associated to these products Government Ordinance No. 21/1992 regarding consumers' protection, republished	
Unfair Commercial Practices Directive 2005/29/EC	Law No. 363/2007 on fighting unfair commercial practices in relation to consumers and the	

	harmonisation with the European legislation regarding consumers' protection	
Misleading and Comparative Advertising Directive 2006/114/EC	Law No. 158/2008 regarding the misleading and comparative advertising	
Consumer Credit Agreement Directive 2008/48/EC	Government Emergency Ordinance No. 50/2010 regarding consumers' credit agreements	
Timeshare Protection Directive 2008/122/EC	Government Emergency Ordinance No. 14/2011 for the protection of consumers during the conclusion and execution of contracts on timeshare right of one or more accommodation spaces during a determined period, on long-term holiday products, resale and exchange contracts	
Consumer Injunctions Directive 2009/22/EC	Government Decision No. 1553/2004 regarding ways of ceasing certain unlawful practices for the protection of consumers' collective interests Mediation Council Decision No. 5/2007 for the approval of the Regulation of organisation and functioning of the Mediation Council Government Ordinance No. 38/2015 regarding the alternative settling of disputes between consumers and traders	
Consumer Rights Directive 2011/83/EU	Government Emergency Ordinance No. 34/2014 on consumers' rights in contracts concluded with professionals as	

	well as the modification and amendment of other legislative acts	
ADR for Consumer Disputes Directive 2013/11/EU	Mediation Council Decision No. 5/2007 for the approval of the Regulation of organisation and functioning of the Mediation Council Government Ordinance No. 38/2015 regarding the alternative settling of disputes between consumers and traders	

Source(s):

1. CONCEPT OF THE CONSUMER

1.1 Please outline the concept of the consumer in national law, indicating whether it is intended to be a uniform concept, whether it has been legislated for and where it can found (i.e. in a legislative provision, governmental guidelines, case law etc.).

The concept of consumer is defined in a number of legislative acts implementing the provisions of European directives. The definitions are similar between various acts and sometimes refer to a specific type of commercial activity. The consumer is usually refer to as being a natural persons and, in some acts, groups of natural persons organised in associations that act outside their commercial or professional activities.

The following acts offer a definition of consumer:

- Article 2 point 2 Government Ordinance No. 21/1992 (republished) defines the consumer as any natural person or group of natural persons organised into associations who act for purposes outside their commercial, industrial, artisanal or liberal production activities;
- Article 2(1) Law No. 193/2000 (republished) and Article 2(a) Law No. 363/2007 defines the consumer as Government Ordinance No. 21/1992 though no express reference to this other act is made;
- Article 2 point 4 Government Ordinance No. 107/1999 (republished) defines the consumer as any person or group of natural persons organised in associations who buy or undertake to buy a travel services package – main contract – or any person for which the principal buyer undertakes to buy the travel services packages – other beneficiaries – or any person in favour of whom the principal contracting party or other beneficiaries assign the travel services package – assignee;

- Article 4(1) point 5 Government Emergency Ordinance No. 111/2011 defines the consumer as any natural person who uses or requests an electronic communication service provided for the public for other purposes than for his commercial or professional activities;
- Article 7 point 1 Government Emergency Ordinance No. 50/2010 defines the consumer as the natural person who acts for purposes outside his commercial or professional activity;
- Article 4 letter f) Government Emergency Ordinance No. 14/2011 defines the consumer as any natural persons who acts for purposes outside his commercial, industrial or production, artisanal or liberal activities.

The Romanian courts referred questions for preliminary ruling to the CJEU on the definition of 'consumer' in three instances concerning parties to financial agreements. The clarifications were sought in relation to Directive 93/13 transposed by Law No. 193/2000 (republished) and Directive 87/102 transposed by Law No. 289/2004. In Costea Case (C-110/14; ECLI: EU:C:2015:538), the CJEU 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 lawyer's profession in the light of Article 2(b) of the Directive 93/13. The fact that the contract is secured by a mortgage taken in the person's capacity as representative of his law firm and it involves goods intended for the exercise of his profession is not relevant for the assessment. In Tarcău Case (C-74/15; ECLI: EU:C:2015:772),[301] the Court ruled that the notion of 'consumer' includes natural persons that gave security for the performance of the obligations of a commercial company when they acted for purposes of private nature. In Bucura Case (C-348/14; ECLI: EU:C:2015:447), the CJEU 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 be outside his trade or profession (Article 1(2)(a) Directive 87/102 and Article 2(b) Directive 93/13).

Source(s): Government Ordinance No. 21/1992 (republished), Government Ordinance No. 107/1999, Law No. 193/2000 (republished), Government Emergency Ordinance No. 111/2011, Law No. 363/2007, Government Emergency Ordinance No. 50/2010; Government Emergency Ordinance No. 14/2011

2. REGULATORY AUTHORITIES COMPETENT FOR CONSUMER PROTECTION ISSUES

[301] The Romanian High Court of Cassation and Justice ruled the opposite some month earlier in Decision No. 763/10.03.2015, Section II Civil.

2.1 What regulatory authorities, if any, are competent for enforcing consumer protection law? Please identify them, their nature (i.e. whether they are public or private or mixed) and the nature of enforcement.

The national regulatory authority competent to carry out activities regarding the control and verification of commercial activities of legal entities and their products and services in order to guarantee the consumers' protection is the National Authority for Consumer Protection (Autoritatea Națională pentru Protecția Consumatorilor). The authority is a special organisation part of the central public administration, subordinate to the Romanian Government (Article 27 Government Ordinance No. 21/1992 (republished)). Besides its involvement at legislative level, the National Authority for Consumer Protection can undertake a broad range of activities in securing the compliance with consumer legislation provisions (Article 3 Decision No. 700/2012 for the organisation of the National Authority for Consumer Protection). The inspectors of the authority can enter production and commercial premises in order to verify the compliance with the production regulations, the quality of the products and, the compliance with safety standards. When the activity or the products do not comply with the established norms, the National Authority for Consumer Protection can require competent authorities to suspend or withdrawal professionals' operating or manufacturing licenses, or classification certificates, and impose fines. When abusive clauses by a trader or professional are discovered in consumers' contracts, the National Authority for Consumer Protection can file a lawsuit to obtain a judgment ordering the professional to modify the abusive clause in all ongoing contracts and/or to put an end to discovered unfair commercial practices (Articles 12-13 Law No. 193/2000 and Article 3 Government Decision No. 700/2012 for the organisation and functioning of the National Authority for Consumer Protection). Additionally, the Authority for Consumer Protection supports consumer association in their activities.

In order to protect consumer interests a number of consumer associations are active at national or local level (such as Asociația pentru Protecția Consumatorilor – APC; InfoCons; European Consumer Centre Romania, Asociația Parakletos). They are non-government organisations to which the law gives a right to initiate court actions for the protection of consumers' legal rights and interests (Article 37 letter h) Government Ordinance No. 21/1992 (republished)). In practice, until now, it is not very clear how often these consumer organisations have actually made use of this right to initiate court proceedings in defending consumers' rights.

Besides the National Authority for Consumer Protection and the consumer associations, a number of national authorities in various domains have set consumer departments within their structure, consumer information sections and/or petition mechanisms through which consumers can lodge complains against professionals and companies these regulatory authorities supervise and control. This is for example the case of the Financial Supervisory Authority for banking and financial institutions, insurance and private pensions funds and companies, the National Authority for Management and Regulation of Communication for communication services (television, phone and internet services) and the Regulatory Authority for Energy.

2.2 Is there a specific venue for this type of enforcement and does this limit the jurisdiction of courts/ADR fora (even if only initially)?

Consumer court claims are litigated in civil courts. There are no special consumer courts in Romania.

With regard to ADR fora, according to Article 19 Government Emergency Regulation No. 38/2015, a structure responsible for conducting alternative dispute resolution procedures will be established as part of the National Authority for Consumers Protection. However, for the moment no such body has yet been put in place within the structure of the authority. For banking related disputes, a Centre for Alternative Dispute Resolution in the Banking Sector (Centrul de Soluționarea Alternativa a Litigiilor din Domeniul Bancar, CSALB) was established in November 2015 (Article 21 Government Ordinance No. 38/2015). A new entity for alternative dispute resolution will be set within the structure of the Financial Supervisory Authority for disputes with financial non-banking institutions (SAL-FIN). The Regulation No. 4/2016 was adopted by the Financial Supervisory Authority for its establishment. The Mediation Law (Law No. 192/2006) may also be used to settle disputes between consumers and trades or professionals. The judge may propose parties to take part in a mediation information session (Article 227 NCPC). In case they agree to follow the mediation procedure, the court will issue a judgment taking act of the transaction of the parties (Article 227 in conjunction with Article 441 NCPC).

In practice, the impact of the ADR solutions appears to be rather limited for the time being. The traditional mechanisms of court litigation remain the most popular solution for parties to solve their disputes in consumer claims.

2.3 Can criminal prosecutions be initiated for violations of consumer protection rules? How serious must the infringement be? What are the penalties and sanctions? And might these prosecutions lead to criminal penalties or sanctions? Can individual consumers piggy back on these claims (e.g. via a partie civile method)?

Yes, this is possible. According to Article 50 Government Ordinance No. 21/1992 (republished), activities that are considered to be contraventions, may be subject to criminal prosecution when they fulfil the conditions set by the criminal law. According to the New Criminal Code ('NCC'), criminal prosecutions can be initiated for crimes against public health, for example for the counterfeiting of food products and other goods (Article 357 NCC),[302] the selling of altered goods (Article 358 NCC),[303] fraudulent financial transactions (Article 250-251 NCC),[304]

[302] When counterfeited or substituted food products, beverages or other products affect health, the party responsible faces jail sanctions from 3 months to 3 years or a fine and the prohibition of certain rights. When the counterfeited products are medicine the sanctions applicable are jail from 6 months to 5 years and the prohibition of certain rights.

[303] The selling of food, beverages or other products which the seller knows that are altered or expired will be sanctioned with jail from 6 months to 3 years or with a fine and the interdiction of certain rights when the products affected consumers' health. The same sanctions are applicable in case meat products that have not been subject to

fraudulent misrepresentation (Article 244 NCC).[305] The penalties for these activities may be jail and/or fines and the prohibition of certain rights depending on the criminal activity prosecuted. The level of fines in criminal proceedings will be appreciated by the court in accordance with Article 61 NCC.

Individual consumers that have been harmed by such activities may claim damages in case they can prove they have suffered damages as a consequence of the activity of the commercial entity or professional (e.g. Article 16 Government Ordinance No. 21/1992 (republished), Article 1257 NCC; Article 107 and Article 113 point 8 NCPC).

2.4 Is there judicial review of decisions of consumer regulatory authorities? If so, by which court is this judicial oversight made? Is the forum an ordinary or a specialised court or tribunal?

The decisions of the National Authority for Consumers Protection can be challenged in accordance with the provisions of Law No. 554/2004 regarding administrative claims. According to Article 8 in conjunction with Article 10, the court competent to handle such claims up to a value of 1.000.000 RON (approx. 223.214 €) is the general court. Claims above this threshold are within the competence of the court of appeal. In both instances, the claim will be handled by the administrative and tax section of the court (Article 10(1) Law No. 554/2004).

2.5 Does the national legal system provide for a mechanism of cooperation between its national regulatory authorities and those of other Member States?

Article 3(1) letters e), f) and m) Government Decision No. 700/2012 on the organisation and functioning of the National Authority for Consumer Protection sets a duty on the national authority to collaborate, to exchange information, to initiate, negotiate and participate in the conclusion of agreements and international convention with international authorities and consumer protection organisations in other Member State, with non-government and central and

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veterinary testing have been put up for consumption and they affected the consumers' health. In case the altered or expired products are medicines, the sanctions are jail from 1 to 5 years and the interdiction of certain rights.

[304] For example, the cash withdrawal, the transactions or the transfers of electronic funds without the consent of the owner of the electronic payment instrument or the transfer of identification data that allows such use is sanctioned with jail from 2 to 7 years. The same sanction applies when the transactions were carried out with the use of non-authorised or fictitious identification data. The transfer to non-authorised persons of any identification data for the carrying out of any of the above activities is sanctioned with jail from 1 to 5 years.

The acceptance of cash withdrawal operations, the crediting or debiting of electronic money or the transfer of funds, when it is carried out with an electronic payment instrument that is false or used without the consent of the actual owner is sanctioned with jail from 1 to 5 years. The acceptance of any of these operations when the person is aware the transaction is carried out with the use of non-authorised identification data or fictitious identification data is subject to a jail sanction of 1 to 5 years.

[305] In case a fraudulent misrepresentation of facts is used in order to obtain an unjust financial or patrimonial use and this created a damage to the party, the sanction is jail from 6 months to 3 years. When the fraudulent misrepresentation is based on the use of fake names and professional qualities the sanction is jail from 1 to 5 years. Additionally, if the fraudulent mean is a crime per se the rules regarding concurrent offences apply. However, if the parties reconcile, the criminal responsibility is dismissed.

local authorities for consumer protection. The National Authority for Consumer Protection reports these activities in its annual activity report.

Source(s): NCC, NCPC, Government Emergency Regulation No. 38/2015, Government Decision No. 700/2012, Law No. 192/2006, Law No. 554/2004, Government Ordinance No. 21/1992 (republished).

3. LEGAL AID

3.1 Is legal aid available to consumers in: a) bringing a claim and b) defending a claim before a court?

Legal aid is available for consumers in accordance with the provisions of Government Emergency Ordinance No. 51/2008 regarding judicial public aid in civil matters.
The consumer is exempted from paying court fees in consumer cases, but he can benefit from legal aid for other costs related to judicial proceedings (see also question 2.1.1 Part I and question 5.3 below)

3.2 For what kinds of disputes and actions is legal aid available? (NB: legal aid might not be available for consumer or contractual disputes but be available instead for a related action, e.g. actions relating to debt, mortgage arrears, eviction etc.)

Legal aid in accordance with Government Emergency Ordinance No. 51/2008 is available for civil, commercial, administrative, labour and social security cases, as well as other cases, with the exception of criminal cases (Article 3).

3.3 What requirements must be satisfied for the consumer to be entitled to legal aid? Please specify if there are any additional limitations to its availability.

Any party who cannot manage to pay the expenses necessary to take legal action or receive legal advice without putting in danger his maintenance or that of his family can request public legal aid (Article 90 NCPC, Articles 3-4 Government Emergency Ordinance No. 51/2008). When the average monthly net income per family member in the last two months prior to the request is below 300 RON (approx. 67 €), the litigation costs will be entirely covered by the state (Article 8(1) Government Emergency Ordinance No. 51/2008). When the income per family member is below 600 RON (approx. 134 €) threshold, the state will cover 50% of the sums considered for legal aid (Article 8(3) Government Emergency Ordinance No. 51/2008). Furthermore, legal aid can be awarded also in other circumstances, proportionally with the needs of the claimant, when the costs of the trial would reach an amount that would limit the party's access to justice (Article 8(3) Government Emergency Ordinance No. 51/2008). The courts are to assess the need of the party to benefit from legal aid according to their appreciation of the case. However, the total amount of the legal aid a party can receive within one year period is limited to an amount

equivalent to 10 minimum gross national salaries for the year in which the request was filed (Article 7 Government Emergency Ordinance No. 51/2008).[306] Legal aid may be awarded also independently from the financial situation of the party requesting it, when this is established by special law as a protection measure (e.g. for minors, handicapped persons, persons with a certain statute as established by law). The aid will be offered in this cases only for defence purposes or for the recognition of certain rights and interestes related to the situation that justified the granting of a right to receive legal assistance or free legal assistance (Article 8[1] Government Emergency Ordinance No. 51/2008).

3.4 What does legal aid encompass? (i.e. (only) general advice, (only) assistance in preparing the case, (only) assistance with negotiation of settlements, (also) representation).

According to Article 6 Government Emergency Ordinance No. 51/2008, legal aid encompasses:

- the payment of the lawyer's fees for representation and legal assistance in court or in other circumstances preventing the initiation of court litigation;
- the payment of a legal expert, a translator or an interpreter used during the trial with the court's approval;
- the payment of the bailiff's fees;
- exemptions, reductions, rescheduling or postponement of the payment of court fees, including for enforcement purposes.

The consumers or associations for consumer protection who are claimants in cases against legal entities are exempted from the payment of court fees. This includes the court fees for the lodging of an initial claim and for the filing of appellate proceedings (Article 29(1) letter f) Government Emergency Ordinance No. 80/2013). Hence, legal aid will not be necessary in consumer cases for the payment of court fees.

Source(s): Government Emergency Ordinance No. 51/2008, Government Emergency Ordinance No. 80/2013

4. COSTS

4.1 What are the costs of different types of procedures before courts? Are there exemptions to the payment of fees and expenses? How can costs be paid?

	Individual claim of	Individual claim of	Individual claim of	Collective claim of	Collective claim of	Collective claim of

[306] From 1 May 2016, the minimum gross national salary guaranteed is 1.250 RON (approx. 279 €). Government Decision No. 1017/2015 establishing the minimum national gross salary guaranteed for payment.

	value € 0 – € 5000	value € 5001 – € 20.000	value € 20.001+	value € 0 – 5000 NB: It is not a monetary claim in Romania	value € 5001-- € 20.000 NB: It is not a monetary claim in Romania	value € 20.001+ NB: It is not a monetary claim in Romania
Court fees	0	0	0	0		
Court expenses	They depend on the lawsuit and whether translations of documents are required; the need of expert reports; use of lawyer services etc.	They depend on the lawsuit and whether translations of documents are required; the need of expert reports; use of lawyer services etc.	They depend on the lawsuit and whether translations of documents are required; the need of expert reports; use of lawyer services etc.	They depend on the lawsuit and whether translations of documents are required; the need of expert reports; use of lawyer services etc.		
Exemptions	Consumers or consumers associations are exempted from paying court fees	Consumers or consumers associations are exempted from paying court fees	Consumers or consumers associations are exempted from paying court fees	Consumers or consumers associations are exempted from paying court fees		

Claimants that are consumers or associations for consumer protection are exempted from the payment of court fees in accordance with Article 29(1) letter f) Government Emergency Ordinance No. 80/2013.

In case the party is granted legal aid, the court expenses might be also partly or entirely covered by this.
The collective action in Romania is not of an opt-in or out type and there is no instrument for advertising the procedure, nor of individual parties giving a mandate for a collective action to be undertaken by the National Authority for Consumer Protection or by the consumer associations. The rules of the ordinary court proceedings are applicable. The court actions the National Authority for Consumer Protestation or the consumer associations can initiate regard either a duty to act (meaning for the professional to modify the ongoing contracts containing the unfair contractual term and the standard contract use by the professional) or a negative duty (not to use the unfair contractual term for future contracts concluded with consumers). They cannot request damages; hence, the action is not a monetary claim. Only individual consumers can subsequently initiate court actions requesting damages. Additionally, more individual consumers can together initiate a claim against a professional, but the general procedural rules will apply.

Source(s): Article 29(1) letter f) Government Emergency Ordinance No. 80/2013

5. STANDING AND REPRESENTATION IN CONSUMER DISPUTES

5.1 Does national law limit the standing of the individual consumer in respect of the claim that can be made and the forum before which it can be brought?

Consumers may exercise their procedural rights in person or by representative (Article 80 NCPC). A legal representative will be appointed when the natural person does not have legal capacity. Based on the provisions of Article 83 NCPC, before the first instance court and in appeal a consumer may be represented by a lawyer or other proxy. Previously, the NCPC imposed a compulsory representation for the drafting of a second appeal request (recurs) as well as for the court hearings, but the Constitutional Court declared the provision unconstitutional in 2014 (Decision No. 462/2014).
The law does not impose on the parties a duty to mediate or use an ADR mechanism in order to solve their dispute. The Constitutional Court declared in 2014 unconstitutional the rules setting a duty on consumers to take part in an information session regarding the benefits of mediation in order to be allowed to initiate a court proceeding. This concerned claims related to damage created by the purchase of a defective product or service, the non-compliance with the contractual terms or the guarantees offered, the existence of unfair contractual terms or the breach of other rights established by national or European legislation regarding consumer protection (Article 60^1(1)(a) Law No. 192/2006 regarding mediation and the organisation of the

profession of mediator). It was considered by the court that the provision violated Article 21 Constitution regarding free access to justice.[307]

5.2 Other than individual consumers, who or which bodies have standing in consumer protection disputes and for what types of claim? If the action is not brought by the individual consumer, what requirements of representation must be satisfied?

The consumer has standing in respect to his individual claims. The National Authority for Consumers Protection (Autoritatea Națională pentru Protecția Consumatorilor) and consumers associations can file legal actions in order to obtain judgments imposing a duty on the professional to eliminate unfair contractual terms from the contracts concluded with consumers or for the professional to modify the ongoing contracts containing such clauses (Article 12(1) Law No. 193/2000 (republished). According to Article 3(1) letter hh) Government Decision No. 700/2012, the National Authority for Consumers Protection may also file actions to put an end to unfair commercial practices. Additionally, the consumer associations can file legal actions against professionals that use in their relations with consumers standard contracts containing unfair terms to obtain a court decision ordering the professional to stop using such contracts and to eliminate the unfair clauses from ongoing agreements (Article 12(3) Law No. 193/2000 (republished). The consumers associations can initiate legal actions against professionals in order to protect the consumers' rights and interests (Article 37(h) Government Emergency Ordinance No. 21/1992 (republished)).

The public prosecutor may intervene in consumer claims when these concern consumer's interests or for protecting the legal order and the citizens' rights and duties (Article 48 Government Ordinance No. 21/1992, republished in conjunction with Article 92(2) NCPC).

The National Authority for Consumers Protection or the consumers associations will have to be represented in court by their legal representative (Article 80 NCPC) or conventionally by their adviser or lawyer (Article 84 NCPC).

5.3 If a consumer wants to bring or defend an action relating to a consumer protection dispute, is there a legal (or otherwise formal) requirement that he or she has legal representation? Please specify for both judicial and ADR fora and the bodies, associations or authorities that can provide this representation.

No, there is no mandatory requirement for the consumer to be represented, but he can choose to be represented.

Source(s): NCPC, Government Emergency Ordinance No. 21/1992 (republished), Law No. 193/2000 (republished), Government Decision No. 700/2012

[307] Decision of the Countitutional Court No. 266/2014 regarding the unconstitutional exception of the provisions of Article 200 NCPC, as well as Article 2(1) and (12) and Article 60^1 of the Law No. 192/2006 regarding mediation and the organisation of the profession of mediator, Official Gazette of Romania, Part I, No. 464/25 June 2014.

6. ACTIONS BEFORE COURTS

6.1 Jurisdiction and competence of the courts in consumer disputes: General structure and special procedures aimed at protecting consumers

6.1.1 Are ordinary courts competent to hear such claims? Is there also a specialised tribunal for consumer protection disputes?

Ordinary courts are competent to hear consumer cases. There is no specialised court for consumer protection disputes.

6.1.2 Which courts are competent to hear consumer protection disputes at first instance and in appeals? Please specify the court, in light of the value of the claim (and identify any other factors that are relevant in allocation jurisdiction).

At first instance the courts competent to hear consumer protection disputes are the district courts (judecătoriile) and the general courts (tribunalele). The district courts are competent for claims up to a value of 200.000 RON (approx. 44.500 €). The general courts are competent for claims above this threshold as well as claims for which the law establishes an exclusive jurisdiction for these courts (e.g. Article 12 Law No.193/2000 (republished) setting exclusive first instance jurisdiction for the general court regarding unfair contractual terms in standard agreements).[308] The general court will handle the appeals against first instance decisions issued by the district court. The court of appeal will have competence for the judgments issued at first instance by the general court (Article 95 point 2 and Article 96 point 2 NCPC).

6.1.3 What is the nature of the procedure at first instance, e.g. is it a simplified or a summary procedure, and is there an assessment of the merits? Please specify in light of the value of the claim (and identify any other factors that are relevant in allocating jurisdiction).

The procedure at first instance can be carried out according to the ordinary national procedure or to special national procedures (the order for payment (ordonanța de plată) for money claims that are certain and have fallen due, or the small value claims for claims not exceeding 10.000 RON (approx. 2.232 €)). The order for payment and the small value claims are simplified procedures. In both ordinary and special procedure the court proceeds to an assessment of the merits of the claim.

[308] According to the High Court of Cassation and Justice, Law Clarifying Appeal No. 24/2015, the claims filed by the National Authority for Consumers Protection against professional with regard to unfair contractual terms will fall within the competence of the civil section or the specialised section (litigation with professionals) of the general court at the domicile/headquarters of the professional.

The competence of the court rests with the district or the general court based on the value of the claim. The consumer filing a claim may choose to lodge the claim with the court of the domicile or headquarters of the defendant (Article 107 NCPC) or at the court of his domicile for claims regarding the execution, the nullity, the annulment, the resolution, the termination or unilateral termination of the agreement concluded with the professional or for claims regarding damages he has suffered (Article 113(1) point 8 NCPC). The claims initiated by the professionals against consumers can be filed only at the court where the consumer is domiciled (Article 121 NCPC). Additionally, in damage related claims, the parties may agree in choosing another court than the one that has jurisdiction according to law. Such agreement may be entered into only after there is a right for the party to claim damages (Article 126 NCPC).

6.1.4 Please identify the formal requirements that must be satisfied for a consumer dispute to be heard before a court. These might include time limits applicable to the filing of the action/defence, representation requirements etc.

No special additional requirements or time limits apply with regard to consumer disputes when the ordinary court procedure, the domestic order for payment or small value claims procedure are used.

6.1.5 In respect of the claims and relevant procedures available in the national legal system, what kind of relief might be available in consumer protection disputes? (monetary remedies, injunctions, skimming off etc.)?

Particular means of relief available in consumer protection disputes regard: monetary remedies (i.e. reimbursing the amounts that have been unduly charged by the professionals), damages, fines, the duty to amend the contracts in order for these to comply with the applicable legal provisions eliminating unlawful or deceitful clauses or practices, and interlocutory injunctions (ordonanțe prețedințiale).

The National Authority for Consumer Protection can fine professionals:

- when their action is preventing the authority from carrying out the activities set by law in its competence (e.g. control of the way in which the commercial activity is carried out, whether the machinery used for the commercial activity corresponds to the norms, the safety of the products, the conditions in which products are stored) (Article 51 Government Ordinance No. 21/1992 (republished)),
- when they do not provide clear information to consumer or they do not provide the information required by law,
- for not providing clear information, for not informing the consumer or for not including in the contract the information required by law (Article 28(5) Government Emergency Ordinance No. 34/2014);
- for not complying with the duties set by law (Article 28(5) Government Emergency Ordinance No. 34/2014);

- for the use of unfair commercial practices (Article 15 and 17 Law No. 363/2007)

Additionally, collective actions may be brought by the National Authority for Consumer Protection or by consumer associations as mentioned at 7.2 above.

6.1.6 Please provide a brief overview of the role of parties and judges in civil proceedings generally (e.g. with reference to the principle of party disposition, the obligation of parties to make and prove factual allegations and to make and provide legal arguments, the possible role of the court). This overview should be brief; these issues will be dealt with in more detail in the questions that follow.

In handling the case and awarding a judgment the Romanian judge is bound to adhere to the scope and particulars of the dispute established by the parties (Article 9, Article 22(6) and Article 397(1) NCPC). However, the judge is not generally hindered by the legal qualifications made by the parties regarding the acts and the facts subject of the dispute. The judge is expected to have an active role in truth-finding (e.g. request additional explanations (orally or in writing) and evidence; proceed to a legal re-qualification of the claim and bring this to the parties' adversarial discussion) (Article 22 NCPC).

The parties have to comply with the duty to submit the procedural documents required within the order and timeframe established by law or set by the judge, to proposed evidence and to prove their claims and defences (Article 10 NCPC).

Source(s): NCPC, Government Emergency Ordinance No. 21/1992 (republished), Law No. 193/2000 (republished), Government Emergency Ordinance No. 34/2014, Government Ordinance No. 107/1999, Law No. 363/2007

6.2 Small claims

6.2.1 Does a small claims procedure exist in the Member State? If yes, is it a specialised or simplified procedure?

The Romanian NCPC has a special small claims procedure that was inspired by the European Small Claims Procedure Regulation to which it resembles significantly.

6.2.2 What are the value thresholds for claims brought under the small claims procedure? Moreover, are there any other factors that shape the use of the small claims procedure (including the nature of the claim, the area of consumer protection law into which the claim falls etc.)?

The claim brought under the small claims must not exceeding 10.000 RON (approx. 2.232 €) (Article 1026(1) NCPC). The national procedure mirrors the scope limitations of the European Small Claims Procedure (Article 1026(2)-(3) NCPC with Article 2(1)-(2) ESCP Regulation).

6.2.3 What forms must be completed to raise the application? Who assists the consumer in completing these forms?

A standard application form must be submitted to the court together with the evidence on which the party basis his claim (Article 1029 (1) and (3) NCPC; Annex No. 1 Order of the Ministry of Justice No. 359/C/2013). The standard form contains guidelines as to the way in which it should be filled in. The law does not establish a special body to provide assistance to the consumer in filling in the forms. Consumers associations might offer information or guidance as to the use of the procedure and the way to fill in the forms.

6.2.4 How can an application for a small claim be made (e.g. online, by post or in person)?

In accordance with general rules, the claim form can be registered with the court in person (or through a representative), or, alternatively, it can be sent by post, currier services, fax, scanned and sent by email or in electronic format with electronic signature (Article 199(1) NCPC).

6.2.5 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

Besides the written evidence the parties submit together with the application form or with the answer form, the court may approve or request the submission of other evidence, clarifications from the parties as well as other type of evidence than written. However, it will not admit evidence taking activities that would involve disproportionate costs in comparison with the value of the claim or the counterclaim (Article 1030(9) NCPC).

The parties may be summoned to appear before the judge when the judge considers it necessary or upon the party(s) request. Nevertheless, when requested by the parties, the judge may refuse to hold a hearing when, considering the circumstances of the case, this is not necessary (Article 1030(2) NCPC).

6.2.6 Are the costs of the successful party reimbursed?

The national small claims procedure applies the loser party pays principle regarding the costs of the proceedings; nonetheless, the court will not grant the winner the expenses that were not necessary or were disproportionate compare to the value of the claim (Article 1032 NCPC).

Source(s): Articles 1026-1033 NCPC, Ministry of Justice Order No. 359/C/2013 for the approval of standard forms regarding the small value claims procedure established by Articles 1025-1032 of Law. No. 134/2010 regarding the Code of Civil Procedure

6.3 Claims other than small claims

6.3.1 If a consumer protection dispute does not qualify as a small claim, what other procedures are available? What are the value thresholds and other factors determining the use of such procedures?

When the consumer dispute does not qualify as a small claim, the claimant may avail himself of the following procedures:

- the ordinary court procedure;
- the domestic order for payment procedure (ordonanța de plată) when the requirements for its use are met (Articles 1014-1025 NCPC);
- alternative dispute mechanisms such as mediation, conciliation or arbitration by special established bodies.

There is no specific threshold established for the use of any of these alternative procedures.

6.3.2 How can such claims be made? Please specify if the applications can be made online, or by post or in person.

In the ordinary court proceedings and the order for payment procedure the general rules regarding court litigation in the NCPC apply. The applications can be made in person to the court or they can be sent by post, currier services, fax, scanned and sent by email or in electronic format with electronic signature (Article 199(1) NCPC).

In relation to ADR mechanisms, the means differ in accordance with the chosen mechanisms (e.g. mediation agreement signed by the parties, by electronic transmission of a standard form for the Centre for Alternative Dispute Resolution in the Banking Sector).

6.3.3 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

In principle, each party has to bring forward all necessary evidence in support of their claim (Article 249 NCPC). In consumer claims the burden of the proof can be reversed; hence, it will be the professional or the provider of the service that will have to prove the fact regardless of his position (claimant or defendant). This is the case, for example, in claims concerning contracts concluded with professionals for the information that has to be provided to the consumer (Article 5 Government Emergency Ordinance No. 34/2014), with regard to commercial practices used (Article 11 Law No. 363/2007), with regard to the information to be provided to the consumer in distance selling of financial services as well as the existence of the consumer's consent in concluding the contract (Article 24 Government Ordinance No. 85/2004), the direct negotiation of a contractual terms in standard agreements (Article 4(3) Law No. 193/2000). The parties have to propose the evidence and the court has to approve their use (Article 258 NCPC). However, when the evidence provided is not considered sufficient by the court, it may require the parties to

provide additional evidence (Article 254 NCPC). The law gives the judge the right to propose ex officio the use of other evidence. The parties will have to discuss this proposal, but the judge may order the proposed evidence when parties have decided against the means (Article 254(5) NCPC). Besides written evidence, witnesses, expert witnesses and other party's interrogatory, and judicial inspection means can be used.
The parties are usually summoned to appear in court during the proceedings. Hearings have a central place in Romanian court proceedings.
With regard to the ADR bodies and procedures, they generally allow submission of all the types of evidence permitted by law.

6.3.4 Are the costs of the successful party reimbursed?

Upon a request of the successful party, the losing party will have to pay the litigation costs (Article 453(1) NCPC), but the court may censor the amount of lawyer's and expert's fees (Article 451(2)-(3) NCPC).
ADR procedures are set to be free of charge. In mediation procedures the parties will have to pay for the services of the mediator in accordance with the mediation contract they signed.

Source(s): NCPC, Government Ordinance No. 85/2004, Government Ordinance No. 85/2004, Government Emergency Ordinance No. 34/2014, Government Ordinance No. 38/2015, Law No. 192/2006.

6.4 Claims for the issuance of a payment order

6.4.1 Does an order for payment procedure exist in the national system? Is it a simplified procedure?

As mentioned at question 8.1.3, the NCPC does provide for a domestic order for payment procedure (ordonanța de plată) for a monetary claim that is certain and has fallen due (Articles 1014-1025 NCPC). No threshold limits the use of this special simplified procedure. However, prior to initiating court proceedings, the creditor has to send a payment notice (somație) requesting the debtor to pay off the debt within a period of 15 days from notification (Article 1015(1) NCPC). When the debtor does not pay within the set period, the creditor can initiate court proceedings. The procedure is adversarial and the defendant is informed of the action. He is required to submit a statement of defence (Article 1019 NCPC). In case, the defendant does not submit the statement, nor does he appear in court for the hearing, the court will issue the order following an assessment of the merits on the basis of the claims and the evidence submitted by the plaintiff (Article 1022(1)-(2) NCPC). Both parties may subsequently request the annulment of the order within a period of 10 days from its issuance or communication (Article 1024 NCPC).

6.4.2 Which authorities or courts are competent to hear claims for the issuance of payment orders?

The jurisdiction is divided between the district courts (judecătorii) and the general courts (tribunale) based on their material competence (Article 94 point 1 letter k) and Article 95(1) NCPC). See also question 8.1.2.

6.4.3 Are there any formal requirements that must be satisfied for the application for the issuance of a payment order to be made (e.g. standard forms, representation by a lawyer, the detail of description required, the need to provide written evidence etc.)?

Prior to initiating court proceedings, the creditor has to send a payment notice (somație) requesting the debtor to pay off the debt within a period of 15 days from notification (Article 1015(1) NCPC). The bailiff will communicate the notice, or the claimant will sent it by registered post with declared content and acknowledgement of receipt. In case the debtor does not pay within the set period, the creditor can initiate court proceedings. The procedure does not make use of standard forms, but Article 1017 NCPC establishes a list of elements the application has to contain (e.g. the identification details of the parties, the details of the claim, the amount of debt, the interest or damages). Together with this, the creditor has to submit the documents attesting the amount of debt claimed, as well as any other element he intends to use as evidence, and the proof that the debtor has previously received a payment notice. When no proof of payment notice is provided, the application is rejected as inadmissible (Article 1017(2) NCPC). Representation is not mandatory, but the parties may always decide to use the services of a lawyer which is common in practice. The fixed court fees will have to be paid in advance. This amounts to RON 200 (approx. €45,25) for filing the claim and RON 100 (approx. €22,62) in case of a request for annulment.[309] Additionally, the application needs to be filed with the court in multiple copies (one for the court and one for each of the other party) (Article 1017(3) NCPC).

6.4.4 What information is generally available to the authority or court when a claim for the issuance of a payment order is made?

The court will have the application of the claimant, the statement of defence, all the additional documents that the parties submitted, and the clarification the parties offered during the court hearing (Article 1017 and Article 1019 NCPC).

6.4.5 What opportunity is available for a defence/statement of opposition to be advanced? How should this be done and what is its effect? Please specify if the means of advancing a defence differ depending on the value of the claim and the court dealing with it.

[309] Article 6(2) Government Emergency Ordinance No. 80/2013 regarding judiciary stamp fees.

The order for payment is an adversarial procedure. The judge will always summon the parties to appear before him for explanations and clarifications (Article 1019(1) NCPC). The defendant has to submit a statement of defence at least 3 days prior to the hearing (Article 1019(3) NCPC) responding to the claimant's application. Based on the facts, the failure to file a statement of defence may be interpreted as an acknowledgement of the claims (Article 1019(3) NCPC). Subsequently, in case the defendant does not file a statement of defence, he will not be able to propose evidence and raise exceptions (unless they concern public policy). He will only be able to provide explanations and clarifications against the allegations (Article 208(2) NCPC). The court considers the arguments and the evidence of both parties in issuing its decision. There are no differences as to the value of the claim.

6.4.6 What is the effect if the claim is uncontested, i.e. if there is a lack of defence/statement of opposition?

The judge will not automatically issue the order based on the presumption of acknowledgement of the debt (Article 1019(3) NCPC). The order will be awarded based on the evaluation of the evidence submitted and the compliance of the claim with the requirements set by Article 1014(1) NCPC. The order may concern the entire amount requested or part of it based on the judge's appreciation of the evidence (Article 1022(1)-(2) NCPC). The order for payment is immediately enforceable (Article 1025(1) NCPC).

6.4.7 If the defendant is a consumer, and he or she does not respond to or raise an objection to the issuance of the payment order, does the authority dealing with the claim for payment order proceedings have the power to examine any issue of consumer protection law of its own motion before treating the action as usual?

The Code of Civil Procedure does not establish special rules in case the defendant is a consumer. However, the judge does not automatically issue the order, but evaluates the evidence submitted and the explanations of the party (parties) present. The judge will issue the order for what appears to be founded (Article 1022(1) NCPC), and he is required to have an active role in through finding.

With regard to Law No. 193/2000 on unfair contractual terms contained by agreements concluded between professionals and consumers (Article 6-7), the court has ex officio a duty to determine whether a contractual clause is unfair or not, considering the interpretation of the CJEU in various cases regarding consumers' protection. There is a possibility for the judge to examine of his own motion issues regarding unfair clauses and whether there is an adequate level of protection for consumers. In practice, not all judges are willing to examine aspects regarding consumer protection law ex officio, and expect the parties to raise them.

6.4.8 What steps must the pursuer take in order to obtain an enforceable decision?

The order for payment is an enforceable title, even when subject to a request for annulment (Article 1025(1) NCPC. The claimant will need to request the court to issue a certified copy of the order to proceed to enforcement. Together with the request, the interested party needs to submit a proof of payment of a RON 5 (approx. €1,31) fee (Article 9 letter (l) Government Emergency Ordinance No. 80/2013)

6.4.9 Is this decision final, or can the defendant appeal against it?

The defendant may file a request for annulment of the order for payment within a period of 10 days from the date he was provided or communicated a copy of the decision (Article 1024(1) NCPC). The reasons that may be invoked are limited and expressly established by Article 1024(3) NCPC. These are: the non-compliance with the requirements necessary for the issuance of the order, or the payment of the debt prior to the issuance of the payment order. The request will be handled by the same court that issued the order, but in a panel of two judges (Article 1024(2) NCPC).

Source(s): Articles 1014-1025 NCPC; Government Emergency Ordinance No. 80/2013.

6.5 Appeals in consumer disputes

6.5.1 Are appeals possible in all consumer disputes? Please specify for small claims and other types of claims.

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000 NB: It is not a monetary claim in Romania	Collective claim of value € 5001-- € 20.000 NB: It is not a monetary claim in Romania	Collective claim of value € 20.001+ NB: It is not a monetary claim in Romania
Nature of the procedure at 1st instance	Ordinary procedure; Small claim	Ordinary procedure	Ordinary procedure	According to the ordinary court procedure		
2nd instance –	Appeal	Appeal	Appeal	Appeal		

appeal to?				
3rd instance – appeal to?	-	-	Second appeal for claims above 500.000 RON (approx. 111.607 €)	-

The NCPC and Law No. 193/2000 (republished) does not set specific rules on appeal for collective action, the general rules regarding court litigation apply. The decision is subject only to appeal (Article 13(4) Law No. 193/2000 (republished)).

6.5.2 Please briefly specify the national appeal procedure, including any requirements to be satisfied for appeals. These might include, but are not limited to, conditions of admissibility, value thresholds, time-limits, the scope of review, and the impact of the appeal on enforcement (provisional enforcement). Please refer to any rules specifically applicable in respect of the claims and relevant procedures outlined above.

A first instance judgment is generally subject to appeal (Article 466(1) NCPC). This can be filed within a period of 30 days from the date of the communication of the decision (Article 468(1) NCPC). The appeal automatically suspends the execution of the judgment. In case of a small claim procedure, the appeal will suspend the execution only upon the deposit of a surety of 10% from the value of the claim (Article 1033 NCPC).

The appeal has to be filed with the court whose decision is challenged under sanction of nullity (Article 471(1) NCPC). A copy of the request has to be submitted for the court and for the communication to the defendant (multiple copies). The court will serve the documents on the appellee requesting him to file a statement of defence within a period of 15 days from communication (Article 471(5) NCPC). Once the statement of defence is submitted, the court will communicate it to the appellant who will have to file a reply within a period of 10 days from the date of communication (Article 471(6) NCPC). No special procedural time-limits are set for situations in which one of the parties is resident abroad. The president of the court will forward the file of the case and the appeal documents to the competent higher court (the general court or the court of appeal). The president of the panel who receives the file will set a date for the trial.

This is maximum 60 days from the date of the resolution summoning the parties to appear in court (Article 475(2) NCPC).[310]
The appeal provides a re-adjudication of the case on the merits as well as on law by a higher court, but only on the points of the decision the party challenged (Article 476, Article 477 and Article 479(1) NCPC). Alternatively, the appellant may request the annulment of the first instance judgment and the rejection or annulment of the application on the basis of procedural exceptions or by requesting the file to be forward to the competent court (Article 476(2) NCPC).
A second appeal (recurs) is available for claims above 500.000 RON (approx. 111.607 €), as well as in special cases established by law (Article 483 (1)-(2) NCPC). The review will concern only issues of law and will be handled by the High Court of Cassation and Justice (Article 483(3) NCPC) or, in certain cases expressly established by law, by a higher court than the one that issued the decision being challenged (Article 483(4) NCPC). The second appeal has to be filed within a period of 30 days from the communication of the decision at the court whose decision is being challenged (Article 486(1) and Article 490(1) NCPC). The court will serve the documents on the defendant requesting him to file a statement of defence within a period of 30 days from communication (Article 490(2) NCPC). Once the statement of defence is submitted, the court will communicate it to the appellant who will have to file a reply within a period of 10 days from the date of communication (Article 490(2) in conjunction with 471(6) NCPC). No special procedural time-limits are set for situations in which one of the parties is resident abroad. For service of documents aspects see also question 2.1.1 above.

Source(s): Article 466-502 NCPC

6.6 Enforcement in consumer disputes

The CJEU has identified a number of situations concerning the enforcement stage of consumer protection disputes in which the effective and equivalent protection of EU consumer rights may be affected by national procedural rules. These include – in relation to the effectiveness and equivalency of the protection afforded by the Unfair Contract Terms Directive, for example – the enforcement of arbitration awards, the enforcement stage in the recovery of consumer credit and the enforcement of mortgages, which often links together declaratory and enforcement proceedings. As such, we focus on these situations below. However, other problematic situations exist. Please indicate if additional (and potentially problematic) situations are identifiable in your national legal system.

[310] In accordance with Article 201(5)-(6) NCPC, for urgent trials the time-limit may be reduced, while for cases in which the defendant is domiciled abroad, the judge may set longer periods that are reasonable considering the particulars of the case.

Moreover, if possible, please provide the reference/citation of an article that provides an overview of the way in which enforcement operates in relation to consumer protection disputes within your national legal system.

6.6.1 If the assessment of a consumer protection issue has not been possible at an earlier stage of the proceedings, is it always possible – either ex officio (see section 10 below) or if the consumer raises a possible violation of consumer protection law – for this assessment to be undertaken during enforcement proceedings?

Generally, according to the principle of parties' disposition, it is the parties that have to invoke or object to actions or contractual provisions that violate their rights (Article 9 NCPC). Nevertheless, the judge is set to have an active role in finding the truth and raise to the parties adversarial discussion matters of fact or law that have not been raised in the claim or the statement of defence and request further explanations (Article 22(2) NCPC). Hence, it is possible for the court to proceed ex officio in certain circumstances. For example, according to Romanian law, the credit contracts are enforceable titles. In such circumstances, for enforcement purposes the court will be requested to issue a writ of execution for the recovery of the credit instalments. In such situations, according to the provision of Article 13 Law 193/2000 (republished) and CJEU case law, the national judge can proceed to assess ex officio a violation of consumer protection law by an unfair contractual term in a credit agreement imposing the payment of higher interest, penalties etc. National courts have refused to issue a writ of execution by raising ex officio a violation of consumer's rights in relation to the presentation of the reimbursement schedule who was not attached to the contract, nor signed by the defendant (Decision 10 June 2009, Câmpulung Muscel District Court; File 1814/205/2009, Final decision No. 2170/R/2009, the General Court Argeș).

At enforcement stage, the consumer can also file an objection to enforcement (contestație la executare) (Article 713(2) NCPC) invoking a violation of consumer protection law by the title on which the execution is based (e.g. credit agreement, authentic notary act).

6.6.2 In the particular case of consumer protection, if a court examines consumer protection law (either ex officio or on the basis of an argument advanced by the consumer), does national procedural law provide that interim measures should 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 final decision will have full effect?

In case execution measures are being undertaken, the consumer may file a motion for the suspension of the execution (Article 719 NCPC). The party requesting it is subject to a surety payment.

Source(s): Article 712-720 NCPC, Law No. 193/2000 (republished)

7. ACTIONS FOR COLLECTIVE REDRESS

The CJEU has considered that situations in which individual and collective actions are in some way linked are those in which the effective and equivalent protection of EU consumer rights may be affected by national procedural rules. As such, we will focus on these situations. However, other problematic situations exist. Please indicate if additional (and potentially problematic) situations are identifiable in your national legal system.

Moreover, if possible, please provide the reference/citation of an article that provides an overview of the way in which the collective redress mechanism operates within your national legal system.

- Lucian Bercea, 'Efectele erga omnes ale hotărârilor judecătorești pronunțate în acțiunile în eliminarea clauzelor abuzive din contractele standard de consum', Revista Română de Drept al Afacerilor, (2013)7, p. 41-50;
- Ioan Ilieș Neamț, 'Considerații generale cu privire la acțiunea reglementată de art. 12 și 13 din Legea nr. 193/2000. Analiză de drept comparat', Revista Română de Drept Privat, (2013)6, p. 87-113.

7.1 Injunctive relief, linking individual and collective actions

The case law of the CJEU requires that a person or organisation with a legitimate interest in consumer protection must be able to bring an action before a national court or tribunal in respect of an alleged violation of consumer rights deriving from Union law, either for compensation or for injunctive relief, to preclude the continued violation of consumer rights[311].

7.1.1 If collective proceedings are launched, does national procedural law provide that ongoing individual claims, relating to the same dispute, should be stayed until the collective proceedings are brought to an end? Please specify if this constitutes an obligation on the part of the national judge or if it is at his or her discretion.

[311] This derives from the EU directives. For example, in respect of the UCTD, Art.6(1), Art.7(1) and (2) UCTD, provide that the Member States must ensure 1) that unfair terms are not binding on the consumer and 2) that adequate and effective means exist to prevent the continued use of unfair terms in consumer contracts. The CJEU has held that effective implementation requires that the consequence of the finding of the violation – in the case of a finding of unfairness under the UCTD – is for the term to be declared invalid, and that the effect of this invalidity extends not only to the parties to the action for an injunction but also to those who have concluded a contract with the seller/supplier to which the same terms apply.

There is no specific provisions that would allow a stay of the individual claims when actions have been file by the National Authority for Consumer Protection or other consumer associations. The Romanian civil procedure rule provide for a suspension of various individual claims dealing with the same question of law when the High Court for Cassation and Justice was requested to issue a decision interpreting a question of law (Article 520(2) NCPC). The courts would have an obligation to suspend the proceedings in such case (Article 412(1) point 8 NCPC). Additionally, the courts may suspend individual cases when the solution in the decision it is required to issue depends in part or entirely on the existence or not of a right that is subject to a different court proceeding (Article 413(1) point 1 NCPC). However, the use of this mechanism depends on the particulars of the claim to comply with the requirement of Article 413(1) point 1 NCPC. Alternatively, if a violation of consumer rights was recognised in a common procedure initiated by the National Authority for Consumer Protection or other consumer associations, the consumer can subsequently initiate a new court action to request damages or possibly request a review of his individual decision when the judgment in the individual claim had not been successful. In practice, the way the courts will interpret the request for review is not settled and there is a possibility that the individual consumer might be opposed the res judicata of the prior decision which did not recognise a violation of his rights.

7.1.2 If individual proceedings are stayed, please indicate what the effect of the court or ADR entity's decision in the collective action on those individual proceedings would be, i.e. whether the outcome of the collective action binds the consumer bringing an individual action.

The practice of the courts is not clear. It should be possible to subsequently invoke the successful outcome of the collective action in following individual proceeding, especially when the consumer is seeking 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, the duty of the judge to have an active role and the public interest in guaranteeing consumers' rights. However, there is no clear practice in this regard for the time being. In case of a negative outcome of a collective action, the judgment will not bind the individual consumer when this concerns standard agreements. The consumer is protected from the effects of collective action and will be able to invoke the nullity of the unfair contractual term by initiating a court action or in order to defend himself in an action filed against him by the professional (Article 12(4) Law No. 193/2000).

Source(s): Articles 412-413 and 509 NCPC, Articles 12-13 Law No. 193/2000 (republished); Article 37(h) Government Ordinance 21/1992 (republished).

8. CONSUMER ALTERNATIVE DISPUTE RESOLUTION

The questions below focus on some key concerns relating to consumer disputes before ADR fora. If possible, please provide the reference/citation of an article that provides a general overview of the way in which consumer alternative dispute resolution operates within your national legal system.

8.1 Consumer disputes before ADR fora

8.1.1 Is ADR mandatory for all parties bringing a claim related to a consumer protection dispute?

It is not mandatory for parties in consumer's dispute to solve it by ADR. The parties may voluntary choose to use an ADR mechanism, mediation or arbitration instead of initiating a court proceeding. For a period of time, in initiating a court litigation, the consumer had to prove he participate in an information session regarding the benefits of mediation and using ADR (Article 60^1 Law No. 192/2006 regarding mediation and the organisation of the profession of mediator). The Constitutional Court declared the provision to be unconstitutional as previously explained at question 7.1.

8.1.2 Please specify if there are limitations to the use of ADR. These might include the nature of the claim (i.e. whether both individual and collective claims are possible), requirements of representation, time limits, value thresholds, etc.

According to Article 3(1) letter a) Government Ordinance No. 38/2015 regarding alternative dispute resolution between consumers and professionals, ADR can be used for both individual and collective claims. In practice, the ADR entities are only starting their activities or steps are taken for their creation. The Centre for Alternative Dispute Resolution in the Banking Sector (Centrul de Soluționarea Alternativa a Litigiilor din Domeniul Bancar, CSALB) is now established and is able to handle claims regarding banking activities between consumers and entities whose activity is regulated, authorised and supervised by the National Bank of Romania and the branches of foreign entities that carry out services in Romania (Article 21(1) Government Emergency Ordinance No. 38/2015). A new structure is being set within the organisation of the Financial Supervisory Authority for disputes with financial non-banking institutions (SAL-FIN) (see also question 4.2 above), but this is not yet operational. The procedures of both entities are set to be free of charge for consumers, and representation is not

mandatory.[312] In case of the SAL-FIN, the consumer has to prove that he sought to directly solve the dispute with the professional prior to initiating a procedure (Article 4(2) Regulation No. 4/2006 issued by the Financial Supervisory Authority). The claim can be filed electronically with the CSALB by using a standard form available on the website of the organisation. The outcome of the ADR mechanisms set by the Government Ordinance No. 38/2015 is not yet visible.

8.1.3 Can ADR entities issue binding decisions and can they enforce those decisions? If not, please explain how they are enforced.

The ADR entities are not enforcing the decision issued themselves. The CSALB and the SAL-FIN have two type of procedures available for consumers to choose from. One leads to the adoption a non-compulsory solution that the parties need to agree to accept in order for this to become binding, while the other secure a binding decision on the parties. In case of a proposed solution approach, the result of the alternative dispute resolution procedure will have to be accepted by both parties before becoming binding (Article 11(5) Government Ordinance No. 38/2015). In case of the binding solution approach, the decision of the conciliator/arbitrator is compulsory for the parties. The same applies for accepted proposed solutions; they become enforceable titles when they have not been challenged within a period of 15 days from their communication (Article 13(4) Government Ordinance No. 38/2015). They will be enforced in a similar manner as a judicial decision.

8.1.4 Does national law provide that limitation periods applicable to judicial actions should be suspended while ADR is ongoing?[313]

The limitation period for taking judicial action will be suspended during an ADR procedure (Article 16 Government Ordinance No 38/2015).

8.1.5 Please specify if national law establishes rules providing for recourse to judicial action following an (unsuccessful) ADR hearing[314].

Participating in an ADR hearing that is not successful does not prevent the parties from initiating court proceedings (Article 4(5) Government Ordinance No. 38/2015). Furthermore, this is the case when the ADR procedure is not successful, and the parties did not accept the solution when the non-binding solution mechanism was chosen (Article 13(1) Government Ordinance No. 38/2015). The ADR entity has to inform the consumer of the administrative and/or judicial actions that are available to him for the resolution of the dispute (Article 13(2) Government

[312] CSALB Rules are available at www.csalb.ro/index.php/regulament; SAL-FIN rules are available at http://asfromania.ro/en/legislation/common-regulations/5256-regulation-no-4-2016-on-the-organisation-and-operation-of-the-alternative-dispute-resolution-entity-in-the-non-banking-financial-field-sal-fin

[313] The Directive on Consumer ADR provides that "the existence of an effective system for collective claims and easy recourse to ADR should be complementary". Consumer ADR is relevant not only for individual claims but also for collective ones; it can provide consumer with a means to reduce costs and save time.

[314] Per Arts.10-12, Directive on Consumer ADR.

Ordinance No. 38/2015). With regard to the CSALB, the solution issued by the arbitral tribunal set in the binding decision track can be challenged only through the submission of an action for annulment (acțiune în anulare) (Article 38(2) of the Rules regarding the procedure to be finalised with a binding solution). The text most probably intends to refer to the contestația în anulare (Articles 503-508 NCPC).

8.1.6 Is there judicial review of decisions and awards made by ADR entities? If so, by which court or tribunal is this oversight made? Is it ordinary or specialised?

The award or the minutes ending the procedure are subject to court review (Article 13(3)-(4) Government Ordinance No. 38/2015). By analogy with the mediation procedure, in accordance with the provision of Article 440 NCPC, the award should be reviewed only by a second appeal (recurs) on matters of law (Article 488(1) NCPC), by a request for annulment (contestație în anulare), or a motion for revision (revizuire), if the condition for their application are fulfilled.

Source(s): NCPC, Government Ordinance No. 38/2015, CSALB Rules, Regulation No. 4/2006 issued by the Financial Supervisory Authority

9. THE EXAMINATION OF CONSUMER PROTECTION LAW IN NATIONAL PROCEDURAL LAW: RESPECT FOR THE PRINCIPLES OF THE EFFECTIVENESS AND EQUIVALENCE OF CONSUMER PROTECTION LAW AND EX OFFICIO CONTROL

The rules of national civil procedure that could potentially affect, and indeed undermine, the effective and equivalent protection of consumer rights are various. They include but are not limited to the rules and practices of ordinary and specialised judicial procedures, rules and practices of consumer ADR, rules applicable to special types of procedure (e.g. payment order procedures), the jurisdiction of individual courts (the courts that have jurisdiction over consumer disputes), the formal requirements that have to be satisfied to bring a case, the types of legal action that are available, the need for parties to be represented, the time-limits applicable to procedural steps of the action, rules on the taking of evidence, the possibility (or lack) to consider certain issues at specific stages of the procedure, the right to appeal and review, and rules relating to the enforcement or judgements and other enforcement titles (e.g. arbitration awards, notarial deeds, including mortgages).

On the basis of the principles of equivalence and effectiveness, the CJEU has established certain requirements for the procedural protection of consumer rights deriving from EU law. In particular (and especially in relation to the protection afforded to consumers via the Unfair

Contract Terms Directive[315]), the CJEU has established an obligation on national judges (and potentially other dispute resolution facilitators) to apply consumer law of their own motion (that is, ex officio), when they have available the legal and factual elements necessary for this task. Ex officio control is one type of procedural mechanism that can be utilised within the national system to promote the effective and equivalent protection of consumer law. Thus, other mechanisms of procedure within your national legal system should be highlighted and discussed where relevant. The following questions should be answered in respect of both judicial and if relevant, alternative dispute resolution.

9.1 The basis of ex officio control of consumer protection law in national law

9.1.1 Is it clear in the national legal system when consumer protection law should be applied ex officio? Is the ex officio control of consumer protection law established as an obligation or as a (discretionary) power of the judge in national procedural law?

The special legislation regarding consumer protection as well as the NCPC does not contain an express provision regarding the duty of the judge to carry out an ex officio control. However, the judge has to have an active role in finding the truth, in establishing of the relevant facts of the case and making a correct application of the law (Article 22 NCPC). In view of this principle and the CJEU case law, he should proceed to a verification ex officio of the compliance with consumer protection law. The court can raise the subject of compliance of the contract with the provisions of Law No. 193/200 (republished) during the court hearings and invite the parties to provide their position with regard to the argument and discuss it (e.g. Decision No. 50/13 January 2016, Călăraşi District Court). In practice, some judges might be reluctant to ex officio control the compliance of the contract with the consumer protection law because of the principle of parties' disposition (Article 9, Article 22(6) and Article 397(1) NCPC). Further, the lawyers are willing to refer to the CJEU decisions, but this appears to be more related to the assessment of the absolute nullity of the contractual terms and their unfair character. An express legal provision in the national legislation on the ex officio control of consumer law provisions would be a welcome step to clarify the way the judge should proceed in these cases and would contribute to a unification of the court practices in this area.

9.1.2 If there is an understanding of ex officio control of consumer protection law in the national legal, what is this control understood to encompass/not cover?

Article 13(1) Law No. 193/2000 (republished) has a very general wording. Hence, in case the court identifies of unfair contractual terms in consumer concluded agreement, it will make it compulsory for the professional to modify all on-going standard contracts containing such clause

[315] However, the CJEU has recognised that ex officio control – and other procedural requirements, that might in themselves (or indeed, in their absence), impact the effective enforcement of consumer law – arise across the EU's consumer protection directives.

as well as from the standard contracts it uses for its professional activities. The ex officio control of consumer protection law appears to be limited to the scope of unfair contract terms.

9.1.3 Is the party who claims to be a consumer required to establish his or her consumer status, the existence of a consumer contract and that consumer law applies to the dispute? Is this required even if the consumer has no legal representation?

The party will generally invoke being a consumer and give arguments on the fact the contract was concluded outside his business or professional activity. He may seek to prove the purpose for which the contract was conclude (i.e. acquiring assets for personal use, credit agreement for the acquisition of a house where the party lives). In practice, it might be considered that the status of consumer is presumed and the professional will have to reverse the presumption. In this respect the lawyers of the profession will seek to show, for example, that the party has several credit lines or agreements with the bank, or that the party has several real estate development credits etc. The judge will appreciate the circumstances of the case, taking into consideration the purpose for which the contract was concluded, the type of assets that were acquired and whether they have a connection with the professional activity of the party, whether it was concluded for investment purposes, whether the contract was concluded by the person in his quality of consumer or legal administrator of a legal entity etc. The court is not limited in its assessment of the case by the legal qualifications made by the parties to the dispute, the judge is bound to make a correct application of the law and of the legal provisions that are relevant for the claim. He can invite the parties to discuss any aspect of fact or law necessary for rendering the judgment, even if the parties did not refer to it in the claim documents submitted to the court or in the statement of defence (Article 22(1)-(2) NCPC).

The Romania law does not establish different tasks for the judge based on the fact the consumer has or not a legal representative.

9.1.4 What information is available to judges and dispute resolution facilitators hearing consumer protection disputes? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a consumer protection dispute to be heard and b) for the court to engage in ex officio control?

Romanian law does not provide for rules on minimum factual information. The courts and dispute resolution facilitators engage in an ex officio control according to available legal provisions (Law No. 193/2000 (republished) and Directive 93/11/EC). The control will be performed against the evidence provided by the parties and additional information and clarifications requested by the court or the disputes resolution facilitators.

9.1.5 Who is responsible for providing this information? If the necessary information is not available to the court (or dispute resolution facilitator), is he or she under an

obligation to investigate in order to be able to respond to a relevant consumer protection dimension of the case?

In court proceedings the parties are responsible to provide the information in order to prove their claims (Article 10(1) in conjunction with Article 249 NCPC). Additionally, in case an evidence means is available with the counterparty the judge may order the document to be produced, ex officio or at the request of the party (Article 10(2) in conjunction with Article 293 NCPC). Ex officio or upon one of the parties' request, the court may ask a public authority or third party to send the court specific documents or to bring them to the hearing (Articles 297-300 NCPC). See also question 11.1.3 above.

In ADR procedures the parties are mainly responsible for providing the dispute resolution facilitator the evidence on which they base their claims. The facilitator may request additional information or explanation from the parties. In accordance with the provisions of Article 590 NCPC, the ADR entities, as the arbitration tribunals should be able to request written information from public authorities in relation documents or activities that are relevant for settling the dispute. In case of refusal, they may request the general court within the jurisdiction of which the ADR entity is situated for issuing a decision forcing the public authority or private person to provide the necessary information or document (Article 547 NCPC).

9.1.6 Will the court provide the consumer with any assistance in gathering factual information or advancing his legal arguments before the court? Please respond for the situation where: a) the consumer has legal representation and b) the consumer has no legal representation.

No, the court will not provide assistance for this purpose, but may order documents that are needed for the assessment of the case to be produced or it can request a public authority or third party to bring it to the court. In case the court would provide assistance to the consumer in gathering factual information, this would be conflicting with the impartiality principle (Article 124(2) Constitution). According to Article 249 NCPC, the party that makes a claim has to prove it, unless otherwise provided by law. In consumer claims the burden of the proof can be reversed as was discussed previously at question 8.3.3.

Source(s): NCPC, Constitution, Law No. 193/2000 (republished)

9.2 The possibility for ex officio control of EU consumer protection law in dispute resolution proceedings

9.2.1 Is ex officio control of consumer protection law always possible when the procedure involves a full assessment of the claim on its merits?

Very little information is actually available in relation to practice. This should be possible, but it is not clear what the decisions of the alternative dispute resolution entities are. There are no

explicit provisions requesting the alternative dispute resolution entities to proceed to an ex officio control of the consumer protection law.

9.2.2 Can ex officio control be exercised even when the procedure does not involve an assessment on the merits?

Maybe at enforcement stage when the court has to issue the writ of execution upon bailiff's request. The court could refused to issue the writ when this would involve enforcing unfair contractual provisions (Article 666(5) point 7 NCPC). However, there is no indication of whether there is a practice of the Romanian courts in this respect.

9.2.3 Please indicate if, per national procedural law, ex officio control can be exercised at the following stages of the procedure:

	Courts		Other dispute resolution facilitators	
	Possible to exercise ex officio control	Not possible to exercise ex officio control	Possible to exercise ex officio control	Not possible to exercise ex officio control
Ordinary proceedings	x		x	
Small claims	x		-	
Payment order	x		-	
Provisional measures		x	-	
Proceedings linked to enforcement	x		-	
Enforcement proceedings				
- Enforcement of payment order		x	-	
- Enforcement of arbitration award	(x)		-	
- Enforcement of mortgage	x		-	
- Enforcement of notarial deed	x		-	
Appeal proceedings (please specify:) Appeal Second appeal	x		-	

9.2.4 What does ex officio control encompass in national procedural law?

The judge will proceed to assess the compliance of the contractual term or enforceable obligation with the consumer protection legislation and/or raise the matter during the public adversarial hearing for the parties to discuss it. Article 479(1) and Article 489(3) NCPC provide that the

appeal and second appeal judge can verify ex officio the compliance of the first instance judgment with public policy.

Source(s): NCPC

9.3 Other procedural mechanisms for the equivalent and effective protection of EU consumer law

9.3.1 Does national procedural law provide that rules of EU consumer law (as well as rules that aim to satisfy EU consumer law objectives) should be understood as having equal standing to national rules of public policy (which is to say, that for the purposes of domestic law, the consumer protection provision is understood to have equal standing to a rule that must be raised ex officio by the national court)?

No, there is no express legal provision in this respect. It is not clear whether a violation of the Unfair Contract Terms Directive is regarded as a violation of public policy in Romania. In the light of the provisions of Law No. 193/2000 that seek to protect the public interest and to secure the recognition by court decisions on the provisions of this law that have a public policy value (Decision No. 1290/A/18.12.2014, Bucharest Court of Appeal, Section V, Civil), this appear so be possible. Additionally, Article 148(2) Constitution states that EU regulation that have a mandatory character prevail over domestic contrary legal provisions.

9.3.2 If ex officio control is not possible in certain types of proceedings or at a certain stage of proceedings (or for any other reason), does national procedural law provide for an alternative way of assessing consumer protection law?

No, there is no express legal provision in this respect. The means to challenge a decision that has acquired res judicata are very limited. The reasons for which a request for annulment (contestație în anulare) or a motion for revision (revizuire) can be file are expressly established by law (Article 503(2) and Article 509 NCPC) and do not contain any special provision for consumers claims.

Source(s): NCPC, Constitution

9.4 Ex officio control in payment order procedures

9.4.1 What information is available to the judge when a claim for the issuance of a payment order is made? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a claim for the issuance of a payment order to be granted and b) for the court to engage in ex officio control before a payment order is issued?

There is no special provision establishing a minimum factual information that has to be provided for the issuance of a payment order or for the court to engage in an ex officio control.
Article 1017 NCPC establishes a list of elements that the application needs to contain (e.g. the identification details of the parties, the details of the claim, the amount of debt, the interest or damages). Together with this, the creditor has to submit the documents attesting the amount of debt claimed, as well as any other element he intends to use as evidence, and the proof that the debtor has previously received a payment notice (somație). The court can request the claimant to rectify or complete his application when elements of the request are missing. The domestic order for payment is an adversarial procedure. The defendant has to submit a statement of defence together with the evidence he want to make use of at least 3 days prior to the hearing (Article 1019(3) NCPC). The judge will always summon the parties to appear before him for explanations and clarifications (Article 1019(1) NCPC). The judge will issue the payment order on the basis of the assessment of the written evidence submitted by the parties and their declarations and explanation. Additionally, replying on the evidence submitted the judge will be able also to verify and assess whether the agreement on which the claims is based contains unfair terms.

9.4.2 What considerations will be assessed ex officio by the court (or other competent authority) before a payment order is issued?

From the beginning the Romanian judge will proceed to assess ex officio the competence of the court, the payment of the court fees and whether all the necessary documents have been filed by the claimant. If the claim is complete, the court will proceed to arrange for a copy of the documents to be served on the defendant. Subsequently, the judge will verify ex officio whether the service was carried out in accordance with the provisions of the applicable law. When considering the merits of the claim, in accordance with the case law of the CJEU and Article 13(1) Law No. 193/2000, the judge should proceed to a verification of the compliance of the contract on which the claim is based with the consumer protection legislation and whether this contains unfair terms.

9.4.3 How is the consumer informed about the claim to issue a payment order against him or her? Does national procedural law make any provision for steps to be taken to ensure that consumers are informed of the claim for the issuance of a payment order so that he or she can contest it?

The court will serve the consumer with a copy of the claim as well as the evidence documents and will inform him of his duty to submit a statement of defence at least 3 days prior to the hearing for which he is summoned (Article 1019 NCPC). Generally, service is carried out by post with registered letter with declared content and with acknowledgment of receipt that has to be signed by the defendant or another person of his household, when the defendant is not present

(Articles 154 and 163 NCPC). Sometimes, when available, service on the defendant might be carried out by the court's procedural agent (Article 154(1) NCPC). Upon claimant's expense and request, service can be carried out also by a bailiff or by fast courier services (Article 154(5) NCPC). The judge proceeds to verify ex officio whether service of the documents of the proceedings was carried out in accordance with the law. When service irregularities have been identified by the court, and the defendant does not enters into appearance, the service will have to be renewed (Articles 153 and 160 NCPC).

9.4.4 If the consumer objects to the claim, what is the next step? Do the proceedings continue, in the context of which ex officio control can be exercised? Or are the proceedings transferred to ordinary proceedings for analysis on the merits of the claim?

The order for payment is an adversarial procedure. If the consumer objects contesting the debt, the court will verify whether the defence has grounds. The ex officio control can be exercised during the hearing for which the parties are summoned. The procedure will be transferred to the ordinary procedure in case other evidence than written evidence is requested and would be admissible in order to decide on the case (Article 1021 NCPC).

Source(s): NCPC

Ex officio case law

The possibility to invoke ex officio the control of consumer law in relation to unfair contractual terms as recognised by the CJEU case-law is most often referred to by the court in assessing the absolute nullity of such terms. An absolute nullity is not subject to limitation; hence, it can be raised at any moment by any interested party, the court, the public prosecutor, or any organisation established according to law.[316] The assessment is made generally in the cases in which consumers are seeking to obtain the declaration of certain contractual clauses as unfair. In some of these cases the court recognises a duty upon itself to ex officio proceed to a verification of compliance of the contract with consumer legislation. For example, the Decision No. 1290/A/18.12.2014, Bucharest Court of Appeal in assessing the absolute nullity of some contractual terms contained in a number of credit agreements concluded by a group of consumers with a credit institution refers to the duty it has to verify ex officio whether the contracts contained unfair terms, regardless of the fact the consumers were represented and appropriately defendant by a lawyer. For this purpose, the court refers also to the relevant case law of the CJEU, to Directive 93/13 and to Law No. 193/2000 implementing the provisions of the directive into Romanian law.

[316] Relative nullities can be raised within a period of 3 years (Article 3 Decree No. 167/1958).

Occasionally, there are cases for which there is a clear indication that the control of unfair contractual terms is examined by the court ex officio. Such as in Decision No. 6738/6.11.2014, Târgu-Jiu District Court, Civil Section,[317] the court indicated it would proceed to analyse ex officio the unfair character of a contractual term conferring exclusive jurisdiction which would result in an excessive limitation of the right of the consumer to bring a legal action. The litigation concerned a personal loan agreement for which the consumer initiated a claim seeking to obtain a court decision which would declare unfair certain contractual terms. The legal provisions invoked for this purpose were Law No. 193/2000, the Government Ordinance 9/2000 and Directive 1993/13. The court retained its competence to trial the case, and declared certain contractual terms abusive, including the one it analysed ex officio. The judge ordered the bank to reimburse the fees it unlawfully perceive on the basis of the unfair clauses. In a series of domestic small claims cases handled by the Marghita District Court, the judge proceeded to assess ex officio the unfair character of a service agreement term in a number of contracts.[318] This regarded a penalty clause for late payment of invoices issued by the company for its services. The creditor filed the claims in order to recover unpaid debts from its clients. The defendants were consumers and did not file any statements of defence. The judge carried out the assessment of the clauses ex officio in the light of the provisions of Article 4 Law No. 193/2000. The court ruled that the defendants had to pay the amounts they owed to the service provider according to the invoices, as well as the penalties for each day of delay, but that the penalties should not exceed the value of the actual debts. In Decision No. 50/13.01.2016, Călăraşi District Court proceeded to ex officio raise the unfair character of a penalty clause contained in a standard sale-purchase agreement for the late payment of the price of the goods. The judge invited the parties to present their arguments on the matter. The amount of the calculated penalties reached an amount superior to the actual price of the goods and the professional would not be subject to a similar penalty for not complying with his contractual obligations. The standard agreement has thus considered to be significantly unbalance for the consumer. The judge appreciated the clause not to produce any effects in the light of the provisions of Law No. 193/2000 transposing Directive 93/13, but could not declare it null because the claimant had not requested it. In another case handled by Braşov District Court (Decision No. 7742/18.06.2014), the judge was requested to rule in favour of the creditor of an apartment lease agreement and declare the contract terminated on a basis of an immediate forfeiture clause. The clause sanctioned only the non-compliance of the tenant with the contractual terms, while the owner would not be sanction to a similar extent for his non-compliance with his duties. The contract concluded was a standard agreement for which a pre-drafted form was used. The court proceeded

[317] The case is available in the iDrept database.

[318] Marghita District Court: Decision No. 249/12.02.2014, Decision No. 408/19.03.2014, Decision No. 468/2.04.2014; Decision No. 828/4.06.2014; Decision No. 828/4.06.2014; Decision No. 926/25.06.2014; Decision No. 952/8.07.2014; Decision No. 1438/26.11.2014; Decision No. 1494/10.12.; Decision No. 1524/17.12.2014. They are available in the iDrept database.

ex officio to assess the validity of the forfeiture clause and to declare it null on the basis of Article 6 Law No. 193/2000 for being unfair in view of the weaker position of the consumer.

There is no specific procedural rule precluding the ex officio control of consumer protection law within the national legislation. The judge has an active role in the civil process and can of his own motion invoke a breach of public policy norms or elements of fact or law that are relevant for solving the case. However, based on the principle of adversarial court proceedings, the judge has to allow parties to the trial to discuss the arguments, the facts or the legal provisions that have been raised by the court ex officio (Article 22(2) in conjunction with Article 14(4) NCPC). In practice, judges might be reluctant to raise various matters ex officio due to the principle of parties' disposition (Article 9, Article 22(6) and Article 397(1) NCPC).

European Commission
An evaluation study of the impact of national procedural laws and practices on the equivalence and effectiveness of the procedural protection of consumers under EU law

JUST/2014/RCON/PR/CIVI/0082

National Report – Consumer Protection Strand

Slovakia

Kristián Csach

SLOVAKIA: LEGAL ANALYSIS

1. NATIONAL LEGISLATION IMPLEMENTING EU CONSUMER PROTECTION INSTRUMENTS – SLOVAKIA

EU legislation	Transposing national legislation	Additional notes (e.g. if there is an overlap in application of legislation etc.)
Doorstep Selling Directive 1985/577/EEC	Act No. 102/2014 Coll. on protection of consumers in respect of selling goods or providing services based on distance contracts and contracts negotiated away from business premises	
Package Travel Directive 90/314/EEC	Civil Code (Act No. 40/1964 Coll.)	

Unfair Contract Terms Directive 1993/13/EEC	§52 et subs. Civil Code, § 3 Act on consumer protection	
Distance Selling Directive 1997/7/EC	Act on protection of consumers in respect of selling goods or providing services based on distance contracts and contracts negotiated away from business premises	
Consumer Sales and Guarantees Directive 1999/44/EC	Civil Code	
Unfair Commercial Practices Directive 2005/29/EC	§ 7 - § 10 & Annex 1 Act on consumer protection	
Misleading and Comparative Advertising Directive 2006/114/EC	Act No. 147/2001 Coll. on advertising, § 46 Act No. 513/1991 Coll. C5mmercial Code	
Consumer Credit Agreement Directive 2008/48/EC	Act No. 129/2010 Coll. on consumer credit agreements and other consumer credits and loans agreements	
Timeshare Protection Directive 2008/122/EC	Act No. 161/2011 Coll. on consumer protection in respect of providing some services of tourism	
Consumer Injunctions Directive 2009/22/EC	Act on consumer protection § 295-299 Civil Procedure Code	
Consumer Rights Directive 2011/83/EU	§ 53 para. 8, § 588 Civil Code § 2, § 4, § 4a, §10a Act on consumer protection Act on protection of consumers in respect of selling goods or providing	

	services based on distance contracts and contracts negotiated away from business premises	
ADR for Consumer Disputes Directive 2013/11/EU	Act on consumer ADR, Act on mediation, Act on consumer arbitration	

Source(s):

1. CONCEPT OF THE CONSUMER

1.1 Please outline the concept of the consumer in national law, indicating whether it is intended to be a uniform concept, whether it has been legislated for and where it can found (i.e. in a legislative provision, governmental guidelines, case law etc.).

The concept of the Consumer is considered (after a specific evolution of legislation previously distinguishing a consumer according to Civil Code and a consumer according to the Act on Consumer protection) to be an uniform concept defined by § 52 (4) Civil Code: The consumer is a natural person who, in concluding and performing the contract, does not act within the scope of his trade or other business activity.

The definition of the Consumer is applied by private law and public law regulation, including Act on consumer protection, Act on consumer arbitration, Act on consumer ADR, etc. and is applied also for the interpretation of criminal law (see below).

Source(s): see at the end of the report

2. REGULATORY AUTHORITIES COMPETENT FOR CONSUMER PROTECTION ISSUES

2.1 What regulatory authorities, if any, are competent for enforcing consumer protection law? Please identify them, their nature (i.e. whether they are public or private or mixed) and the nature of enforcement.

Consumer law is enforced both via public and private law. Administrative and criminal enforcement are two basic branches of public enforcement of consumer law. Private law enforcement is either via individual or collective actions before courts. In between are semi-public ADR mechanisms and arbitration (see 2.2.). Consumer ADR and arbitration is considered mixed, as only certified and registered bodies – even though private ones – underlying the disciplinary powers of state authorities are competent to perform consumer ADR.

Administrative enforcement: The Slovak Trade Inspectorate, the Central Inspectorate (the second instance body) are empowered to supervise the application of consumer law and have the authority to impose administrative sanctions in the event that the entrepreneurs (suppliers) fail to perform their obligations.
Besides, a Commission for the ascertaining of unfair practices and unfair terms in consumer contracts has been created in 2008 as a sui generis advisory body of the Ministry of Justice. Despite its non-binding opinions, lower courts make use of its opinions when reasoning their decisions. Consumers might turn to the Commission which may ask the supplier to provide their contractual templates. The Commission does not issue administrative decisions, its opinions are not binding nor can it impose fines.

2.2 Is there a specific venue for this type of enforcement and does this limit the jurisdiction of courts/ADR fora (even if only initially)?

The consumer might resort to a judicial or ADR method of dispute resolution besides applying for the public enforcement.
There are three different concepts of consumer ADR in Slovakia.:

- The Arbitration regulated by the Act Nr. 335/2014 Coll. on consumer Arbitration,
- Mediation regulated by the Act Nr. 420/2004 Coll. on Mediation and,
- Consumer ADR regulated by the Act Nr. 391/2015 Coll. on Consumer ADR.

Consumer arbitration: The consumer Arbitration establishes strict rules for consumer arbitration and sets the consumer arbiters under the disciplinary competence of the Ministry of Justice. Only arbiters enlisted in the registry of arbiters are competent to hear consumer cases and only before a (licenced) permanent arbitral tribunal established according the Act and enlisted in the respective register. The Act on consumer Arbitration provides templates: information for the consumer about arbitration and a template for the action o annulment of the arbitral award. Otherwise, the Arbitration follows the very same pattern as typical arbitration but very little deviation from the Act – as regarding the internal processes and procedural rules – is possible. The Consumer arbitration requires a consumer arbitral agreement. Such agreement hinders the supplier from recourse to a court as he may bring his claim only before the arbitral tribunal but does not limit the consumer who can always chose whether he likes to bring a claim before ordinary courts or before an arbitral tribunal. However, once the arbitral procedure started, the consumer is no longer able to revert the competence of the arbitral tribunal, who can decide on its competence to hear the case and to decide.

Mediation: mediation is a voluntary possibility to try to reach a settlement with the help of a publicly certified mediator. The parties to a dispute might try to reach a settlement before or after bring a claim before court. The process of mediation is started by concluding of the agreement initiating mediation. The entry of the agreement initiating mediation into the book of mediations

act as if the claim was brought before the court in regard thus halting the prescription period and the time limitation of the right. The (final) agreement of mediation is enforceable if executed as an enforceable notarial deed or a settlement approved by the court or an arbitral body.

Consumer ADR according to the Act on Consumer ADR for claims brought by the consumer only. The named Act presupposes the existence of public ADR bodies (Regulatory office for network industries, Regulatory Authority for electronic communications and postal services, Slovak Trade Inspectorate) and other, certified legal entities (legal entity established with the aim to protect consumers, professional chambers established by law and civil associations of at least 10 legal entities). The list of certified legal entities is led by the Ministry of Economy. According to § 2 (2) of the Act, the consumer ADR is a proceeding by the ADR body aimed at achieving a settlement between the supplier and the consumer.
Even a call for an ADR method according to the Act on consumer ADR (Act Nr. 391/2015 Coll. on Consumer ADR) does not bar the consumer from bringing a case before court.
The ADR body has to have a web-page with electronic forms that might be used when filing an application for initiating an ADR procedure. The consumer has to turn to the supplier first, before initiating an ADR procedure. The application to the ADR body might be filed if the supplier did not respond or responded negatively to a request for rectification of n alleged wrong by the consumer within 30 days the request was filled. The initiating of an ADR procedure has the same effect as the entry of the agreement to mediate into the book of mediation, it bars the prescription and time lapse of the right (16 (10) Act on Consumer ADR).
A specific complaint system is the banking ombudsman. The banking ombudsman is an independent body set up by the Slovak Banking Association, said to be inspired by the German and Polish banking ombudsman prior to the introduction of the Act on consumer ADR. Its task is to monitor and evaluate consumer complaints and the amicable settlement of disputes between banks and their clients (consumers). The banking ombudsman was afterwards registered as a consumer ADR entity according to the Act on consumer ADR and thus became an acknowledged ADR body.
Consumer Banking Ombudsman resolves disputes between customers (consumers) and the Bank (a member of the Slovak Banking Association). Alternative dispute resolution is free of charge and the result is an agreement that is mutually binding if entered into. The consumer has the option to terminate participation in alternative dispute resolution in any of its stages.

2.3 Can criminal prosecutions be initiated for violations of consumer protection rules? How serious must the infringement be? What are the penalties and sanctions? And might these prosecutions lead to criminal penalties or sanctions? Can individual consumers piggy back on these claims (e.g. via a partie civile method)?

Criminal prosecution might be initiated for violation of consumer protection rules. The Criminal Code (Act Nr. 300/2005 Coll.) includes general bodies of criminal offences that cover also breach of consumer law (i.e. deceit: see judgment R 53/1981), but also two specific consumer law-relevant criminal offence: § 269 "**Harming a consumer**" and § 269a "**Unfair trade practices aimed at a consumer**".

A criminal offence (harming a consumer) is committed if the harm sustained by the consumer is more than 266 Eur. The offence "Unfair trade practices aimed at a consumer" is not dependant on a specific damage caused but the gravity of the conduct is represented by the condition of recurrence of the behaviour despite previous sanctioning.

The sanctions imposed range from six months to twelve years imprisonment depending on the gravity and various circumstances.

However, the stated regulation on consumer relevant criminal offences are applied only scarcely. According to the official monthly statistics,[319] only 4 criminal offences have been reported in the last 12 months.

According to the case law, the term consumer in criminal law is to be interpreted in conformity with the definition in Civil law.[320]

It is generally accepted that any harmed person might piggy-back on a criminal investigation and thus save his expenses (costs) and their claim for damages might be brought before a public authority investigating an administrative or criminal offence. The segment of the proceeding related to the claim for damages is called an adhesion proceeding and belongs to the essence of a criminal or administrative proceeding.

Individual consumers might apply for damages within the criminal proceeding (§ 46 Code on Criminal Procedure). The application must be submitted and the claim substantiated before the end of the investigation. The application is considered as a normal application baring the lapse of the prescription period. The court is bound by the application (the amount of damages claimed) and might not exceed what is claimed. The claim for damages is assessed by its civil law conditions. The court has to decide on the claim for damages but is not obliged to decide on the merits of the claim if a more intense factual inquiry is necessary as the assessment of a claim for damages shall not hinder nor create any obstacles to the main proceeding. In that case, the court may refer the applicant to bring his claim before a court in a civil procedure.

[319] http://www.minv.sk/?statistika-kriminality-v-slovenskej-republike-xml.

[320] See Judgment of Regional court file Nr. 1To/38/2015 from 23. 06. 2015: „*The Criminal Code is directly related to the legislation governing the protection of consumers and if the legislature intended to define the scope of the provisions (on the protection of consumers in the Criminal Code), it would be done directly in the Criminal Code. A broader interpretation of the concept of the consumer would be in contradiction with the Constitution of the Slovak Republic. ... A broader interpretation of the term consumer than its legal definition in the law of the Slovak Republic would be contrary to that principle (nullum crimen sine lege) since it would constitute an impermissible extension of criminal liability of individuals beyond the frame of the Criminal Code.*"

2.4 Is there judicial review of decisions of consumer regulatory authorities? If so, by which court is this judicial oversight made? Is the forum an ordinary or a specialised court or tribunal?

Yes, the decisions of Slovak trade inspectorate (first instance body) are subject to an administrative review by the Central Inspectorate (second instance body) and after the administrative decision is final, it is subject to a judicial review by the Regional courts (specialised panels for administrative judiciary) and the Supreme Court as the appellate body. The decisions of the Supreme court might be reviewed regarding their constitutional compliance by the Constitutional court.

2.5 Does the national legal system provide for a mechanism of cooperation between its national regulatory authorities and those of other Member States?

No it does not, besides the application of the uniform EU regulation on judicial cooperation (taking of evidence, serving of documents, etc.)

Source(s):

§ 269 Criminal Code,

Harming a consumer

(1) Any person who causes harm to a consumer thus causing him small damage through,

a) cheating on the quality, quantity or weight of goods, or type, quality and quantity of services provided, or

b) introducing goods, works or services on the market while withholding information about their substantial defects,

c) making the price offer, as a person authorised by the seller, as a consequence of which the goods are sold or the services are provided for the price exceeding the limit set forth under a generally binding legal regulation or a decision based upon it,

shall be liable to a term of imprisonment of between 6 months and 3 years.

(2) The offender shall be liable to a term of imprisonment of 3 to 8 years if he commits the offence referred to in paragraph 1,

a) obtaining larger benefit through its commission,

b) acting in a more serious manner, or

c) in spite of having been convicted for the same offence during the past 24 months or released from the service of a term of imprisonment imposed upon him for such offence.

(3) The offender shall be liable to a term of imprisonment of 4 to 10 years if, through the commission of the offence referred to in paragraph 1, he obtains substantial benefit or causes goods supply failure.

(4) The offender shall be liable to a term of imprisonment of 7 to 12 years if, through the commission of the offence referred to in paragraph 1, he obtains large-scale benefit.

§ 269a Criminal Code
Unfair trade practices aimed at a consumer
(1) Any person who breaches consumer's rights by using trade practices that are under any circumstances considered unfair pursuant to a special consumer protection regulation,
a) despite having been convicted for the same offence within the past 24 months or released from the service of a term of imprisonment imposed upon him for such offence, or
b) in spite of having been sanctioned for the same offence during the past 24 months,
shall be liable to a term of imprisonment of between 6 months and 3 years.
(2) The same sentence as referred to in paragraph 1 shall be imposed upon any person who breaches consumer's rights by giving an instruction to use trade practices as referred to in paragraph 1, in spite of having been sanctioned for the same offence during the 24 months.

3. LEGAL AID

3.1 Is legal aid available to consumers in: a) bringing a claim and b) defending a claim before a court?

Consumers who are in financial distress may ask for a legal aid provided by the Centre of legal aid pursuant to the Act 327/2005 Coll. on providing legal aid for natural persons in financial distress and the respective Governmental Regulation Nr. 544/2005 Coll. The Act (and the Regulation in a more technical sense) defines conditions upon which the centre provides a free legal aid. The actual representation is generally done by lawyers (attorneys) enlisted in the Register of attorneys available for legal aid led by the Bar (see § 87 Act Nr. 586/2003 on Advocacy).

Besides, consumer may also ask for legal advices special collective associations which are supposed to protect their interests. The activity of such organisation might be supported by the state budget (via Ministry of Economy).

Both bodies can represent a consumer and bring a claim on his behalf or defend his position before courts or within ADR mechanism.

3.2 For what kinds of disputes and actions is legal aid available? (NB: legal aid might not be available for consumer or contractual disputes but be available instead for a related action, e.g. actions relating to debt, mortgage arrears, eviction etc.)

The legal aid is available for all civil, commercial, labour and family disputes, also in that one which have a cross-border effect or there is a conflict of laws.

3.3 What requirements must be satisfied for the consumer to be entitled to legal aid? Please specify if there are any additional limitations to its availability.

The consumer is entitled to legal aid only for those who are not able to pay all costs, so only consumers in material or financial distress may be granted free legal aid. A two stage test is

applied for the assessment of the financial situation of the consumer. In the first stage it is necessary to find out if the income and the assets of the consumer can be deemed as financial distress. The consumer has to provide all documents indicated incomes together with the application. The centre decides about the financial distress and the access to free legal aid within 30 days. If the application is complete and the consumer´s possessions and income meet requirements stipulated by the Act, the centre can provide free legal aid, or under particular circumstances, there is a possibility to share costs with consumer.

The consumer is entitled to full free legal aid when a) their income is not higher than 1,4 times the sum of "minimum subsistence (living costs)", b) consumer has not enough assets to pay the costs of legal aid, c) the case is not obviously ill founded and d) the value for claim is higher than minimum salary(§ 6 of the Act). If the income is between 1,4 to 1,6 multiple of the minimum living costs and the case is not obviously lost the applicant has to bear 20% of costs on legal aid (§ 6a of the Act). Under extraordinary circumstances, the Centre might provide legal aid also in cases where the applicant would be considered to fulfil only the partial coverage of legal aid or if they are not entitled for legal aid because their income is above the threshold (§ 6b).

A preliminary consultation of a case is subject to a fee of 4,50 Eur.

3.4 What does legal aid encompass? (i.e. (only) general advice, (only) assistance in preparing the case, (only) assistance with negotiation of settlements, (also) representation).

Legal aid pursuant § 4 (1) of the act encompasses legal advice, help in alternative dispute resolution, including mediation, help with the preparation of the application (actions) and other related documents, the representation of clients within proceedings and performance of related acts and the full or partial reimbursement of costs. Legal aid is granted in all instances. Legal aid is provided by lawyer form the special list or by centre itself only in cases where the condition for providing free legal aid is fulfilled.

Moreover, if necessary, the legal aid includes a) costs of the official translator, b) translation of documents asked for by the court or the authority which are necessary for the decision on the merits and c) reimbursement of necessary travel expenses of a foreign person entitled to legal aid, incurred in connection with the journey from the place of their domicile or habitual residence in a member state to the place of the competent court, if their presence before the court is essential in order to ensure the equality of parties or in view of the complexity of the case (§ 5c of the Act).

Source(s):

4. COSTS

4.1 What are the costs of different types of procedures before courts? Are there exemptions to the payment of fees and expenses? How can costs be paid?

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Court fees	exempted	exempted	Exempted	exempted	exempted	exempted
Court expenses	exempted	exempted	exempted	exempted	exempted	exempted
Exemptions	Consumers / associations	Consumers /associations	Consumers /associations	Consumers /associations	Consumers /associations	Consumers / associations

According to § 4 (2) letter u) Act Nr. 71/1992 Coll. On court fees, the consumer is exempted from the obligation to pay court fees. Under § 4 (2) letter c) of the respective Act the consumer associations are exempted from the court fees. Even in Arbitration, the consumer is exempted from arbitral fees.

Source(s):

5. STANDING AND REPRESENTATION IN CONSUMER DISPUTES

5.1 Does national law limit the standing of the individual consumer in respect of the claim that can be made and the forum before which it can be brought?

No, the consumer´s standing is not limited, neither with respect to claims nor to forums. The consumer is able to apply for any judicial remedy available to him and is able to appear before any court and in all claims. For obligatory representation by a lawyer: see answer 5.3.

5.2 Other than individual consumers, who or which bodies have standing in consumer protection disputes and for what types of claim? If the action is not brought by the individual consumer, what requirements of representation must be satisfied?

Even if the consumer is represented by a lawyer, any other person or a consumer association, the action is brought by the consumer themselves. Only the consumer might bring his own (individual) claim. Other entities might bring only collective claims. A consumer association might apply for an injunction obliging the perpetrator to refrain from the wrongdoing and to remove the violation (§ 3 (5) ZOS) but is not entitled to apply for pecuniary claims. A legislative

amendment introducing a general German-like "Abschöpfungsanspruch" a claim for transfer of profits obtained due to violation of consumer law was proposed but did not find its way into the amendment of the ZOS.
The consumer association are active in appearing as side-intervenient into judicial proceeding, but their activity in abstract control is limited.
If the violation of consumer law constitutes unfair competition (regularly it will), the competitors of the perpetrator might bring an unfair competition claim against the perpetrator (i.e. an injunction to abstain from the violation). It is argued whether an injunction to abstain from further violation is also a judgment on the nullity of the provisions in question.

5.3 If a consumer wants to bring or defend an action relating to a consumer protection dispute, is there a legal (or otherwise formal) requirement that he or she has legal representation? Please specify for both judicial and ADR fora and the bodies, associations or authorities that can provide this representation.

The obligation to be legally represented extends only on a very limited types of disputes (§ 90 (1) of the Code on Civil litigation procedure ("Civilný sporový poriadok - **CSP**"): bankruptcy, reorganisation, competition law, unfair competition, commercial secret, intellectual property disputes). The Consumer is not obliged to be legally represented while bringing a consumer dispute before court nor any ADR mechanism (whether arbitration or other ADRs)
However, it is not settled, whether the obligatory legal representation in disputes arising from unfair competition (§ 90 (1) CSP) extends also to disputes arising from unfair commercial practices. It might be assumed that the term "unfair competition" will be interepreted strictly and based upon its definition in the Commercial Code. It would be unreasonable to assume that the consumer is not to be legally represented in an ordinary consumer dispute but in a dispute arising from the unfair commercial practices.

Source(s):
Unfair competition and consumer law: CSACH, K. (Niektoré) Zmluvnoprávne aspekty práva proti nekalej súťaži. Časopis pro právní praxi a vědu. 2015, Roč. XXIII, č. 1, p. 9-13; DRGONCOVÁ, J. Nekalá súťaž ako prostriedok ochrany spotrebiteľa. Justičná revue, 4/2005; ZAVADOVÁ, D.: Nekalé obchodné praktiky a ich vplyv na platnosť právnych úkonov vo finančných službách. In Súkromné právo, 2/2015, p. 16-20.

6. ACTIONS BEFORE COURTS

6.1 Jurisdiction and competence of the courts in consumer disputes: General structure and special procedures aimed at protecting consumers

6.1.1 Are ordinary courts competent to hear such claims? Is there also a specialised tribunal for consumer protection disputes?

General courts are competent to hear consumer claims (consumer disputes). There is no specialised tribunal for consumer disputes. Regarding the local forum, the domicile of the consumer is relevant. However, for the abstract control of unfair contract terms, only 3 regional (2nd instance) courts are competent (see next answer).

6.1.2 Which courts are competent to hear consumer protection disputes at first instance and in appeals? Please specify the court, in light of the value of the claim (and identify any other factors that are relevant in allocation jurisdiction).

In general, "okresný súd" - local courts (general 1st instance courts in civil matters) are competent to hear consumer disputes. Three "krajský súd" – regional courts (courts of 2nd instance in civil matters – Bratislava, Banská Bystrica and Košice) are competent to hear disputes concerning abstract control of consumer terms, other collective claims (injuction) are heard by local courts.

6.1.3 What is the nature of the procedure at first instance, e.g. is it a simplified or a summary procedure, and is there an assessment of the merits? Please specify in light of the value of the claim (and identify any other factors that are relevant in allocating jurisdiction).

The nature of the proceeding is ordinary, there is no simplified procedure. Amog specific rules applied only to consumer disputes are:

- The court has a wider obligation to instruct the consumer (§ 292 CSP - see below),
- the joinder of claims is not possible, unless all claims are from consumer disputes (§ 293 CSP),
- the change of the claim is not admissible if the claim is brought against the consumer (§ 294 CSP),
- the court might perform a factual inquiry even regarding evidence not proposed by the consumer (§ 295 CSP)
- The limitation regarding the possibility to produce evidence does not apply in consumer disputes and the consumer may produce evidence until the judgment has been rendered (§ 296 CSP), unless the consumer is represented by an attorney (§ 291 (3) CSP)

6.1.4 Please identify the formal requirements that must be satisfied for a consumer dispute to be heard before a court. These might include time limits applicable to the filing of the action/defence, representation requirements etc.

There are no special formal requirements to be satisfied by the consumer. The ordinary regulation on bringing a claim (formal requirements for a petition/application, etc..).

6.1.5 In respect of the claims and relevant procedures available in the national legal system, what kind of relief might be available in consumer protection disputes? (monetary remedies, injunctions, skimming off etc.)?

All substantive claims might be brought before the court in consumer disputes. The consumer might seek redress in form of damages, reasonable satisfaction (i.e. if his personality rights or fundamental rights were violated), unjust enrichment and injunction (abstain from the further violation of consumer´s rights, removal of wrongful state of affairs). Moreover, a consumer is entitled to a special claim: According to § 3 (5) ZOS if a consumer is successful in bringing a claim against the supplier, the consumer is entitled for a reasonable financial satisfaction from the person responsible for the violation of consumer law.

6.1.6 Please provide a brief overview of the role of parties and judges in civil proceedings generally (e.g. with reference to the principle of party disposition, the obligation of parties to make and prove factual allegations and to make and provide legal arguments, the possible role of the court). This overview should be brief; these issues will be dealt with in more detail in the questions that follow.

The new Civil procedural law follows strictly the principle of party disposition and the obligation to prove factual allegations (in contrast to the old one). Currently, only within the so called “non-disputes” covered by the specific act on non-disputes the court performs an investigation into the “true” state of affairs (inquisitionary principle).

Any instrument, which could serve as a mean to ascertain the real state of the matter is capable to serve as evidence. Any means in particular the examination of witnesses, expert opinions, reports and opinions of bodies, legal entities and individuals, documents, and inspection and examination of the parties, may be used as evidence. The Civil Procedure Code explicitly stipulates rules for examination of certain evidence, e.g. hearing of witnesses, expert opinions, presentation of reports, statements and other documents, inspections and examinations. Where the method of examination of evidence is not prescribed, it shall be determined by the court. The judge is to assess the reliability of the evidence provided and to derive factual conclusions from it.

The parties are to make and prove factual allegations and to make and provide legal arguments. The court decides which evidence identified by the parties is to be taken (§ 185). The court may only occasionally take on its own motion evidence which was not submitted by the parties, i.e. gathering data from public registry if diverging information is provided by the parties (§ 185 (2) CSP), or evidence necessary to decide on the procedural preconditions of the proceeding, the competence of the court, whether the decision applied for would be enforceable and evidence needed in order to identify foreign law (§ 185 (3) CSP). Based upon § 295 CSP, the court is empowered to perform its own factual inquiry and to take evidence that were not produced by the parties

The parties are instructed by the court on procedural questions (see below).

The judge may order the parties to present their evidence in a specific time (the judicial concentration).

6.2 Small claims

6.2.1 Does a small claims procedure exist in the Member State? If yes, is it a specialised or simplified procedure?

No specific small claims procedure exists, but some simplification to the ordinary proceeding are regulated. According to the general rule of § 177 (2) CSP the "oral hearing is not necessary if the issue concerned is a simple legal question, the factual allegations of the parties are not contentious and the amount of the claim dos not exceed 2000 Eur". In consumer disputes, § 297 (2) CSP repeats the same wording but lowers the limit of the claim to 1000 Eur.

Another limitation of a claim not exceeding a particular threshold is the limitation of the possibility for filing a revision (dovolanie). According to § 422 (1) a) CSP the revision is not admissible if the contested judgment concerns a financial claim not exceeding ten times the sum of the minimal wage (principal only) and in cases of disputes with a weaker party, twice the sum of the minimal wage (§ 422 (1) b) CSP).

6.2.2 What are the value thresholds for claims brought under the small claims procedure? Moreover, are there any other factors that shape the use of the small claims procedure (including the nature of the claim, the area of consumer protection law into which the claim falls etc.)?

The simplification of the proceeding is possible if the principal of the claim does not exceed the threshold, which is 2000 Eur for ordinary disputes (§ 177 (2) CSP) and 1000 Eur for consumer disputes (§ 297 (2) CSP). Moreover, in both cases, two additional conditions have to be met:

- the issue concerned is a simple legal question and
- factual assertions of the parties are not contentious.

There is no case law nor academic writing on the topic yet.

6.2.3 What forms must be completed to raise the application? Who assists the consumer in completing these forms?

No special forms need to be completed, the general regulation on filing a court application applies (See legal aid and representation).

6.2.4 How can an application for a small claim be made (e.g. online, by post or in person)?

The general regulation on filing a court application applies. According to § 125 (1) CSP the application is to be done in writing either in paper or electronic form. If the application has been filed online (or in any other electronic form) but was not authorised by an electronic certified signature, a supplementary application in paper form or in electronic form duly signed has to be

delivered to the court within 10 days, otherwise the application is not taken into account (§ 125 (2) CSP).
According to § 127 (1) CSP, an application must include: a) the court addressed, b) the identity of the applicant, c) what matter is the application related to, d) what is pursued by the application and e) signature.
Shall the application not fulfil the mentioned conditions or it is not comprehensible, the applicant is asked for addition of lacking information and / or for the clarification of the application within a set time period (§ 129 CSP). The applicant might be summoned to the court for clarification (§ 130 CSP).

6.2.5 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

There is no special regulation on taking evidence in small claims. General rules on taking of evidence applies (see 6.1.6). As no oral hearing is summoned, the taking of evidence is limited to assessment of written documents.

6.2.6 Are the costs of the successful party reimbursed?

Yes, the successful party gets its costs reimbursed, proportionally to the success achieved (§ 255 (1) CSP).

Source(s):
§§ 177, 255, 297, 422 CSP

6.3 Claims other than small claims

6.3.1 If a consumer protection dispute does not qualify as a small claim, what other procedures are available? What are the value thresholds and other factors determining the use of such procedures?

Consumer might apply for an ordinary proceeding.

6.3.2 How can such claims be made? Please specify if the applications can be made online, or by post or in person.

See 6.2.4.

6.3.3 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

See 6.2.5.

6.3.4 Are the costs of the successful party reimbursed?

See 6.2.6.

Source(s):

6.4 Claims for the issuance of a payment order

6.4.1 Does an order for payment procedure exist in the national system? Is it a simplified procedure?

Yes a simplified procedure on payment order is available (§ 265 – 268 CSP). According to § 265 (1) CSP the court may issue a payment order if it is possible to decide on the merits of the case based upon the facts produced by the applicant that the court has no doubts of, in particular because these facts follow from the documents provided. The court does not summon an oral hearing and the payment order is issued ex parte (without the possibility to reply to the application by the defendant). The court is to perform an ex officio scrutiny of the application and shall not issue the payment order if the consumer contract includes an unfair term (§ 299 (2) CSP). The payment order, once issued, is delivered into the hands of the defendant who may either pay the sum or object to the order within 15 days after delivery. The objection has to be substantiated.

6.4.2 Which authorities or courts are competent to hear claims for the issuance of payment orders?

Ordinary first instance courts, no special competence.

6.4.3 Are there any formal requirements that must be satisfied for the application for the issuance of a payment order to be made (e.g. standard forms, representation by a lawyer, the detail of description required, the need to provide written evidence etc.)?

There is no formal requirement and an application for a payment order has to meet typical requirements for any application. However, in order to initiate an accelerated payment order proceeding, the applicant has to file the form provided by the Ministry: https://www.justice.gov.sk/Formulare/Stranky/Platobne-rozkazy.aspx (§ 265 (2) CSP).

6.4.4 What information is generally available to the authority or court when a claim for the issuance of a payment order is made?

According to the new procedural law, the court has to have enough evidence to be able to assess the claim and decide on the merits on ground of the produced evidence raising no doubts on its validity. There is no other formal regulation on information required by the applicant to be given to court.

6.4.5 What opportunity is available for a defence/statement of opposition to be advanced? How should this be done and what is its effect? Please specify if the means of advancing a defence differ depending on the value of the claim and the court dealing with it.

The defendant might rise an objection against the payment order. He has to substantiate his position and include supporting evidence (§ 267 CSP). The defendant is to be instructed on his obligations to support his position with evidence already in the payment order. There is no difference in defence based upon the value of the claim.

6.4.6 What is the effect if the claim is uncontested, i.e. if there is a lack of defence/statement of opposition?

If the claim remains uncontested and the defendant does not object to the payment order, the payment order becomes final and is capable to be enforced.

6.4.7 If the defendant is a consumer, and he or she does not respond to or raise an objection to the issuance of the payment order, does the authority dealing with the claim for payment order proceedings have the power to examine any issue of consumer protection law of its own motion before treating the action as usual?

Irrespective of the fact whether the consumer responds, the court has to perform a scrutiny on its own motion prior the issuing of the payment order (§ 299 (2) CSP).

6.4.8 What steps must the pursuer take in order to obtain an enforceable decision?

No further steps are necessary, the lapse of time for the objection to be raised by the defendant or an unsubstantiated objection leads to an enforceable decision (payment order becomes final).

6.4.9 Is this decision final, or can the defendant appeal against it?

No, the defendant might not appeal against the payment order that is final. However, he might file an action for retrial as an extraordinary review mechanism (§ 397 + § 398 CSP).

6.5 Appeals in consumer disputes

6.5.1 Are appeals possible in all consumer disputes? Please specify for small claims and other types of claims.

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 –	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- €	Collective claim of value € 20.001+

		€ 20.000			20.000	
Nature of the procedure at 1st instance	Ordinary proceeding, possible simplification if under 1000 eur	Ordinary proceeding	Ordinary proceeding	Specialised proceeding – abstract control, otherwise ordinary proceeding	Specialised proceeding – abstract control, otherwise ordinary proceeding	Specialised proceeding – abstract control, otherwise ordinary proceeding
2nd instance – appeal to?	Regional court	Regional court	Regional court	Supreme Court	Supreme court	Supreme court
3rd instance – appeal to?		Supreme court (revision)	Supreme court (revision)			

6.5.2 Please briefly specify the national appeal procedure, including any requirements to be satisfied for appeals. These might include, but are not limited to, conditions of admissibility, value thresholds, time-limits, the scope of review, and the impact of the appeal on enforcement (provisional enforcement). Please refer to any rules specifically applicable in respect of the claims and relevant procedures outlined above.

The appeal ("odvolanie") is regulated by § 355 et subs. CSP. An appeal has to be made within 15 days from the delivery of a first instance court judgement, otherwise becomes the judgement final and effective. If the appeal is filed, the matter shall be decided by the court of appeal (which is a regional court "krajský súd") in relation to the decisions of a local court ("okresný súd") or the Supreme Court if the regional court has decided in first instance).

No appeal is admissible against a judgement issued on the basis of recognising or waiving a title and against a default judgement, except for cases of appeal filed on grounds of failing to comply with the requirements for issuing such decision.
It is not possible to make appeal against the reasoning of the judgment only (§ 358 CSP).

The court of appeal may confirm, modify or annul the decision of the court of first instance (in the latter case it shall refer the case back to the first-instance court). There are also no time limits for the decision of the court of appeal.
An appeal might be reasoned only by the following (§ 365 (1) CSP):

a) the failure to comply with the conditions of the proceedings

b) the court, by its wrong proceeding hindered the party to exercise procedural rights in the extent leading to a violation of the right to a fair trial;
c) the judgment was declared by an excluded judge or the first instance court was wrongly set up,
d) the proceeding was affected by another error that could result in erroneous decision on the merits,
e) the first instance court determining the facts of the case in an incomplete way because it failed to take proposed evidence necessary to find decisive facts,
f) the first instance court arriving to wrong facts of the case based on the evidence taken,
g) he facts of the case do not persist as further procedural defence is available or other means of procedural attack were not made use of, or
h) the decision by the first instance court was based on an erroneous determination of law in the case.

The appellant may not amend the appeal grounds nor the evidence supporting them after the lapse of the time limit for lodging an appeal.

According to § 366 CSP new procedural defences and attacks might be used in the appeal if:
a) they relate to the conditions of the proceedings
b) they relate to the exclusion of a judge or the composition of the panel
c) shall substantiate the position that the proceeding was affected by another error that could result in erroneous decision on the merits or
d) could not have been exercised by the appellant in the proceeding in first instance.

The appeal has a suspensive effect on the judgment.

The court of appeal may confirm, modify or squash the first instance judgment.

The decision of the court of appeal can be further be subject to a revision ("dovolanie") only if i) there are certain massive procedural defects of the proceedings or decisions (§ 420 CSP) or ii) the court of appeal confirmed or modified the original decision of the court of first instance based on an legal question of high legal importance or a diverging case law (§ 421 CSP). The revision has to be filed within two months after the delivery of the final judgment. Moreover, the General Prosecutor may, within three months after the from decision has been final, file an revision of the General Prosecutor ("dovolanie generálneho prokurátora"), provided that the protection of the rights and legally protected interests of the individuals, entities or the state require so and the reparation cannot be achieved in any other manner (§ 458 et subs. CSP). The revision has not a suspensive effect, but the court might decide on the suspension of effects of the judgments.

In addition, any effective judgement can be challenged by an action for retrial ("žaloba o obnovu konania") under certain limited conditions, inter alia if the evidence or certain decisions or facts important for deciding on the matter could not be presented to the court by the party in the original proceedings provided that more favourable decision could have been achieved, or a disadvantageous judgement was rendered as a result of a criminal action of the judge or any other participating person, or the judgment is contrary to an ECJ or the Council, or the Commission which the parties are bound by and also, if the admissibility of review is provided for by special legislation relating to the recognition or enforcement of a decision of the Slovak court in other EU member states.

6.6 Enforcement in consumer disputes

6.6.1 If the assessment of a consumer protection issue has not been possible at an earlier stage of the proceedings, is it always possible – either ex officio (see section 10 below) or if the consumer raises a possible violation of consumer protection law – for this assessment to be undertaken during enforcement proceedings?

The case law on the assessment of consumer protection within the enforcement proceeding has been developed when reviewing arbitral awards for their conformity with consumer law. The concept of limited res iudicata of arbitral awards in consumer disputes has been thereby adopted. It follows the view that arbitral awards are not really definite and do not enjoy a material res iudicata effect if they are issued against a consumer. The Supreme court is still hesitant to allow for a material check of the arbitral award within the enforcement phase, but allows the control of the arbitral agreement for its conformity with unfair terms regulation (a control on the merits of the case) in this phase. As an arbitration agreement was considered unfair, unless individually negotiated, the enforcement of such awards was halted per se, as the awards are considered null despite not being challenged by an action for annulment.[321] Due to the introduction of the Act on Consumer Arbitration, the court will have other means to intervene into the enforcement of arbitral awards (see below - § 57 Act on Enforcement).

The control for consumer law conformity has been recognised within the enforcement of **enforceable notarial deeds** (also an executionary title).

The process of **mortgage enforcement** is regulated by the Act Nr. 527/2002 on Voluntary auctions where the lien creditor acts on behalf of the debtor and initiates an auction. The debtor is entitled to bring an application for interim measure halting the auction or an action against the results of the auction. The court deciding on the case (including the assessment of the ratio between the debt and the value of the assets being auctioned) is to assess also the fairness of

[321] See decision of the Supreme Court file Nr. 5M Cdo 25/2012 from 12. 6. 2013. For the hesitation to review the material correctness of the award see: R 46/2012; decisions file Nr. 6Cdo 105/2011 from 10. 10. 2012, file nr. 7 ECdo 260/2013 from 9. 8. 2014.

terms influencing the amount of debt. According to the Constitution court, the enforcement of mortgage via voluntary auction without the claim being pre-tested by the court and its legal regulation favours the interests of the creditor, nonetheless such interests must be balanced by the protection of the debtor and the proportionality of the enforcement of mortgage (liens) and by an effective ex ante control of the process.[322]

The new law on arbitration (Act on Arbitration and Act on Consumer Arbitration) brought also significant changes to the Act on Enforcement. According to § 57 (1) letter l) Act on Enforcement the enforcement proceeding is to be halted if the **enforcement of the executionary title is contrary to the public order**. The provision was supposed to provide a last-resort possibility to protect the consumer shall the control system of the consumer arbitration fail. However, due to its wording, it is applicable to any kind of executionary titles. Unfortunately, there is still no discussion on the extent of enforcement scrutiny of other executionary titles.

Applying the principle adopted by the ECJ in Asturcom, at least some of the consumer law rules are to be considered as public order in national law (are to be protected equally to public order). Thereby, a violation of the consumer law might be considered as a reason to halt the enforcement according to § 57 (1) letter l) Act on Enforcement. At least in cases when the question has not been assessed (and is not res iudicata), i.e. notarial deeds.

6.6.2 In the particular case of consumer protection, if a court examines consumer protection law (either ex officio or on the basis of an argument advanced by the consumer), does national procedural law provide that interim measures should 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 final decision will have full effect?

No, there is no obligation to stay any other related enforcement proceeding while a proceeding that could affect the enforcement proceeding is in progress, nor is there any obligatory interim measure adopted by the courts. However, the courts tend to stay the enforcement proceeding either on their own motion, or based upon the application of the debtor if it may be awaited that the enforcement will be halted (§ 56 (2) Act on Enforcement).

Source(s): CSACH, K.: Uspokojenie pohľadávok veriteľom alebo samovykonateľné práva veriteľa. Bankovnictví, 12/2015, p. 60-63, STRAKA, P. Výkon záložného práva v aplikačnej praxi súdov. Bankovnictví, 12/2015, p. 64.

7. ACTIONS FOR COLLECTIVE REDRESS

[322] See decisions of the Constitutional Court file Nr. II. ÚS 261/2013 from 30. 4. 2013 (in particular para 5.3.), but also the reasoning of the decision file Nr. PL. ÚS 23/2014 from 24. 9. 2014.

7.1 Injunctive relief, linking individual and collective actions

7.1.1 If collective proceedings are launched, does national procedural law provide that ongoing individual claims, relating to the same dispute, should be stayed until the collective proceedings are brought to an end? Please specify if this constitutes an obligation on the part of the national judge or if it is at his or her discretion.

A collective proceeding might be initiated by a consumer association which might apply for an injunction obliging the perpetrator to refrain from the wrongdoing and to remove the violation (§ 3 (5) ZOS). However, the consumer association is not entitled to apply for pecuniary claims (for more details see under 5.2. of this report). Otherwise, there is no representative action specifically for consumer protection available within the Slovak legal system.

Under Slovak law, there is no obligation to stay individual proceedings before a court if a public enforcement procedure has been initiated (vice versa) nor if a collective claim is brought before a court. The start of an individual judicial proceeding is not lis pendens in regard to other possible proceedings (collective claims, or public enforcement – see § 40 Act Nr. 71/1967 Coll. on Administrative proceeding).

The situation changes once there is a decision on the violation of consumer law. The situation differs based upon what decision became final first.

1. The CSP directly stipulates which decisions are binding for the courts (§ 193), disregarding the matter of the claim brought (individual, collective).[323] Inter alia, the decision of the competent authority on the issue that a criminal or public offence was committed and by whom. As the violation of consumer law is a public offence, the decision of the competent authority (Slovak Trade Inspectorate) is binding to the court (is res iudicata).
2. If the court renders a judgment on the violation of consumer law, such decision are considered as res iudicata on the matter for other proceedings (the merits of a judgment of the court is effective erga omnes - § 306 CSP).
3. A special substantive regulation on the specific effects of judgment in an individual dispute regarding unfair terms in consumer contract is set by § 53a Civil Code. If the court declares a contract term unfair or denies the applicant payment on the base of the unfair term or was obliged to give back unjust enrichment or pay damages because of the unfair term, the user of the unfair term is obliged to refrain from the use of such unfair term or similar one towards any other consumer. Thereby, via an in-between mechanism (between collective and individual claims) the legislator tries to compensate the lack of collective actions by the enhancement of effects of individual actions.

[323] According to the § 194 CSP, the court is free to examine matters falling within the scope of other competent authorities. However, if the competent authority has already decided on the matter, the court shall take its decision into account (but it is not bound by it as such).

From a procedural point of view, such provision does not extend the effect of the judgment upon third parties (not represented in the case), but "only" imposes a substantive obligation (to refrain from the use of unfair terms) – which can be called upon in other proceedings.

7.1.2 If individual proceedings are stayed, please indicate what the effect of the court or ADR entity's decision in the collective action on those individual proceedings would be, i.e. whether the outcome of the collective action binds the consumer bringing an individual action.

See 7.1.1.

Source(s): CSACH, K.: Nesúdna ingerencia do zmlúv a možnosti jej súdnej korekcie (The administrative control of contracts and its judicial correction). In: Ingerencia súdov do súkromnoprávnych zmlúv: Zásahy súdov do obsahu súkromnoprávnych zmlúv. Pezinok : Justičná akadémia Slovenskej republiky, 2014, p. 52-66.

8. CONSUMER ALTERNATIVE DISPUTE RESOLUTION

8.1 Consumer disputes before ADR fora

8.1.1 Is ADR mandatory for all parties bringing a claim related to a consumer protection dispute?

No, there is no mandatory ADR for consumer disputes per se. Only if the parties concluded an arbitral agreement, the supplier is obliged to bring the case to arbitration, while the consumer can always choose between arbitration and the ordinary judicial proceeding. However, according to § 93b Act Nr. 483/2001 Coll. On banks as amended, the bank is obliged to offer the consumer an unconditional an irrevocable offer of an arbitration agreement. Such arbitration agreement must be, according to the act on Consumer arbitration, separated from the main consumer contract.

For more information on arbitration, mediation and consumer ADR, the respective bodies and their competences, see 2.2.

8.1.2 Please specify if there are limitations to the use of ADR. These might include the nature of the claim (i.e. whether both individual and collective claims are possible), requirements of representation, time limits, value thresholds, etc.

Consumer arbitration: Both individual and collective claims are admissible if they are covered by the arbitration agreement. However, a consumer dispute is a dispute between a consumer and

a supplier (as parties to the proceeding), hence a collective claim shall not fall within the scope of consumer arbitration according to the law on consumer arbitration.
Only disputes which may be settled by agreement of the parties are arbitrable. The ownership of immovable, disputes about the personal status, disputes which arose from the enforcement of decisions and disputes relating to bankruptcy and reorganization are not arbitrable according to § 1 (3) of the Act on Consumer arbitration (nor under the "normal" arbitration).
The Arbitral tribunal might render an award declaring the existence of a particular legal relation. Only a consumer has an urgent need required for a decision declaring the existence or a non-existence of a particular legal relation (§ 1 (2) Act on Consumer arbitration). Therefore, the supplier might not resort to the arbitral tribunal to declare his contractual terms valid and has to bring a claim for performance only (not for a declaration).
According to the Act on **Consumer ADR**, only individual complaints (applications) of consumers are covered.

For more information on arbitration, mediation and consumer ADR, the respective bodies and their competences, see 2.2.

8.1.3 Can ADR entities issue binding decisions and can they enforce those decisions? If not, please explain how they are enforced.

Yes, the consumer arbitral tribunals might render awards which are binding to the consumers and are enforceable just as any civil judgment. However, the consumers are entitled to contest the award via an application for annulment of the arbitral award. The outcome of mediation or consumer ADR is binding only if it fulfils the requirements of a binding act (enforceable notarial deed, judicially approved settlement, etc. – see 2.2.)

8.1.4 Does national law provide that limitation periods applicable to judicial actions should be suspended while ADR is ongoing?[324]

Yes (see 2.2.), once the mediation or consumer ADR has been duly initiated, the prescription period is barred and so is any other time lapse. Moreover, the application for an arbitral proceeding equals an action before the court.

8.1.5 Please specify if national law establishes rules providing for recourse to judicial action following an (unsuccessful) ADR hearing[325].

Unsuccessful ADR proceeding do not hinder the consumer from raising the claim before court, except the arbitral proceeding ended with an arbitral award against the consumer. In that case,

[324] The Directive on Consumer ADR provides that "the existence of an effective system for collective claims and easy recourse to ADR should be complementary". Consumer ADR is relevant not only for individual claims but also for collective ones; it can provide consumer with a means to reduce costs and save time.
[325] Per Arts.10-12, Directive on Consumer ADR.

the consumer may bring an action for annulment of the arbitral award. The grounds for annulment include also the violation of consumer law (is examined ex offo by the court). All grounds for annulment based on "New York Convention 1958" are incorporated into the Act on Consumer Arbitration as well.

8.1.6 Is there judicial review of decisions and awards made by ADR entities? If so, by which court or tribunal is this oversight made? Is it ordinary or specialised?

The Courts do interfere into results of ADR in two ways:

a) If the outcome of mediation or consumer ADR is a settlement approved by the court, the court examines the content of the settlement. Ordinary first instance courts are competent to hear the case.
b) If an arbitral award has been rendered, the judicial oversight might be triggered via an action for annulment of the award. Ordinary first instance courts are competent to hear the case, local competence: according to the domicile of the consumer.

Source(s): CSACH, K.: Nesúdna ingerencia do zmlúv a možnosti jej súdnej korekcie (The administrative control of contracts and its judicial correction). In: Ingerencia súdov do súkromnoprávnych zmlúv: Zásahy súdov do obsahu súkromnoprávnych zmlúv. Pezinok : Justičná akadémia Slovenskej republiky, 2014, p. 52-66; MAGÁL, M., KUBINA, P. Rozhodcovské doložky v spotrebiteľských zmluvách. In Justičná revue. 4/2008; MASLÁK, M.: Nová právna úprava spotrebiteľského rozhodcovského konania. In Súkromné právo, 3/2015, p. 18-28.

9. THE EXAMINATION OF CONSUMER PROTECTION LAW IN NATIONAL PROCEDURAL LAW: RESPECT FOR THE PRINCIPLES OF THE EFFECTIVENESS AND EQUIVALENCE OF CONSUMER PROTECTION LAW AND EX OFFICIO CONTROL

9.1 The basis of ex officio control of consumer protection law in national law

9.1.1 Is it clear in the national legal system when consumer protection law should be applied ex officio? Is the ex officio control of consumer protection law established as an obligation or as a (discretionary) power of the judge in national procedural law?

The judges are obliged to perform an ex officio application of consumer protection law. Such an obligation arises from the substantive law regulation on the voidness of legal acts which is to be assessed ex officio (§ 39 Civil Code). The same applies to arbitrators within the consumer ADR, however, the obligation for an ex offo control is stressed also in the procedural ADR regulation. According to § 28 (6) Act on Consumer Arbitration: "The permanent court of arbitration

(meaning: the arbitral tribunal) is obliged on its own motion to assess whether the claim does not result from an unfair contractual term nor from a contractual arrangement that is violating the legal regulation on protection of consumer rights"

9.1.2 If there is an understanding of ex officio control of consumer protection law in the national legal, what is this control understood to encompass/not cover?

The exact extent of ex offo control is not settled. Based on personal experience of the reporter (judging on my own lecturing activities for the Judicial Academy) and the case law analysed the judges distinguish between an ex offo factual inquiry of circumstances relating to the definition of consumer (natural persons, scope of activity) and an ex offo legal assessment of the compliance with the legal regulation on consumer protection (fairness of contractual terms, etc.).
Recent legislative changes have extended the notion of ex officio judicial intervention way beyond the requirements of EU law. According to the newly introduced § 5 of the Act on consumer protection (in an ambiguous wording): "The authority deciding on claims arising from a consumer contract has to take into consideration on its own motion all circumstances leading to the impossibility of the application of claim, on the weakening of the claim of the seller towards the consumer including the prescription of the claim or any other legal impediments or other legal grounds precluding the application or the awarding of the performance of the seller to the consumer, even if it would otherwise be necessary that the consumer brings these circumstances before the court on its own motion." The vague wording of the provision makes any reasonable interpretation near to impossible. The constitutionality of the provision has been challenged before the Constitutional court but the prospects of a successful challenge are rather minimal. The provision is applied by the courts in order to substitute the lack of consumers´ activity to bring the exception of prescription before the court and thereby allowing the time barring of a claim against a consumer even without his active defence.
According to the new regulation (§ 295 CSP), the court might upon its own motion order the performance of evidence that was not asked for by the consumer if held necessary for the decision of the case.

9.1.3 Is the party who claims to be a consumer required to establish his or her consumer status, the existence of a consumer contract and that consumer law applies to the dispute? Is this required even if the consumer has no legal representation?

Consumer law is considered to be an exception to the general legal regulation. Therefore, the status of the consumer is to be established in order to be relied upon. The court has to perform an ex offo check on the criteria of the consumer status. In case it is not proven that the natural person acted outside the scope of his business or professional activities.
An exemption is the recent Amendment of the Bill of Exchange Act and the Act on Civil Procedure (99/1963) introduced on 23.12.2015, according to which unless proven otherwise, a claim based upon a bill of exchange against a defendant who is a natural person, is considered as

steaming from a consumer contract. However, the new CSP (in effect from 1.7.2016) does not include such presumption (as it does not include any regulation on a simplified procedure for claims based on bill of exchange).

9.1.4 What information is available to judges and dispute resolution facilitators hearing consumer protection disputes? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a consumer protection dispute to be heard and b) for the court to engage in ex officio control?

Slovak national law does not provide for rules defining the minimum factual information. Based upon § 295 CSP, the court is empowered to perform its own factual inquiry and to take evidence that were not produced by te parties.

9.1.5 Who is responsible for providing this information? If the necessary information is not available to the court (or dispute resolution facilitator), is he or she under an obligation to investigate in order to be able to respond to a relevant consumer protection dimension of the case?

Generally, the applicant is responsible for the provision of evidence. However, within consumer disputes, according to § 295 CSP, the court is empowered to perform its own factual inquiry.

9.1.6 Will the court provide the consumer with any assistance in gathering factual information or advancing his legal arguments before the court? Please respond for the situation where: a) the consumer has legal representation and b) the consumer has no legal representation.

Provision of legal arguments to the consumer: According to § 292 CSP (see "Source") the court has a wide range of notification obligation with the first procedural act towards the consumer on the procedural law. The extent of the duty to instruct the party to a litigation towards the consumer regarding the substantive right is not clear (no literature yet), but it is possible that the courts will opt for a more pro-consumer approach and instruct the consumer also on substantive issues (aiming at the effective protection of his rights).

Gathering of factual information: According to § 295 CSP, the court is empowered to perform its own factual inquiry

Source(s):

§ 292 CSP: The court informs the consumer in a proper way with the first procedural act towards the consumer about:

a) The possibility to be represented in the proceeding,
b) His procedural rights and duties not only within the limits of the general notification duty, but the court also instructs the consumer on the evidence to be produced, on the

possibility to apply for urgent interim measures or securing measures and on other possibilities needed for an effective application or protection of their rights.

9.2 The possibility for ex officio control of EU consumer protection law in dispute resolution proceedings

9.2.1 Is ex officio control of consumer protection law always possible when the procedure involves a full assessment of the claim on its merits?

Yes.

9.2.2 Can ex officio control be exercised even when the procedure does not involve an assessment on the merits?

Yes – see enforcement procedure: see 6.6.1.

9.2.3 Please indicate if, per national procedural law, ex officio control can be exercised at the following stages of the procedure:

	Courts		Other dispute resolution facilitators	
	Possible to exercise ex officio control	Not possible to exercise ex officio control	Possible to exercise ex officio control	Not possible to exercise ex officio control
Ordinary proceedings	X		X	
Small claims	X			
Payment order	X			
Provisional measures	X			
Proceedings linked to enforcement	X		X (mortgage - auction)	
Enforcement proceedings	X			
- Enforcement of payment order	X			
- Enforcement of arbitration award	X			
- Enforcement of mortgage	X			
- Enforcement of notarial deed	X			
Appeal proceedings (please specify:)	X			

9.2.4 What does ex officio control encompass in national procedural law?

See 9.1.2.

Source(s):

9.3 Other procedural mechanisms for the equivalent and effective protection of EU consumer law

9.3.1 Does national procedural law provide that rules of EU consumer law (as well as rules that aim to satisfy EU consumer law objectives) should be understood as having equal standing to national rules of public policy (which is to say, that for the purposes of domestic law, the consumer protection provision is understood to have equal standing to a rule that must be raised ex officio by the national court)?

No, there is no expressly stated equation between the public order and the consumer law. Besides private international law, the concept of public order has not been very well known and accepted by the judiciary nor by the doctrine. The recourse to good morals appeared sufficient to allow a throughout scrutiny of the contracts. However, the courts used to stress the "public interest" on the protection of consumers in order to provide reasons for an enforcement scrutiny of arbitral awards.[326]

Since the introduction of § 57 (1) letter l) into the Act on Enforcement (public order), the situation should not change and the courts have a clear possibility to exercise the ordre public scrutiny (see 6.6.1.).

9.3.2 If ex officio control is not possible in certain types of proceedings or at a certain stage of proceedings (or for any other reason), does national procedural law provide for an alternative way of assessing consumer protection law?

It is still not settled, whether and to what extent the introduction of § 57 (1) letter l) into the Act on Enforcement (the obligation to halt the enforcement if the enforcement is contrary to public order is applicable to other executionary titles than arbitral awards (see 6.6.1.). The wording and the Asturcom – concept of the ECJ would enable an enforcement scrutiny of any titles as regarding their conformity with – at least a part of – consumer law.

Source(s):

[326] See See decision of the Supreme Court file Nr. 5M Cdo 25/2012 from 12. 6. 2013.

9.4 Ex officio control in payment order procedures

9.4.1 What information is available to the judge when a claim for the issuance of a payment order is made? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a claim for the issuance of a payment order to be granted and b) for the court to engage in ex officio control before a payment order is issued?

According to § 265 (1) CSP the court may issue a payment order if it is possible to decide on the merits of the case based upon the facts produced by the applicant that the court has no doubts of, in particular because these facts follow from the documents provided. The court does not summon an oral hearing and the payment order is issued ex parte (without the possibility to reply to the application by the defendant). The payment order, once issued, is delivered into the hands of the defendant who may either pay the sum or object to the order within 15 days after delivery. The objection has to be substantiated.
No exact limit on minimal factual information is provided for but rather the court is given the discretion to assess whether the factual information provided might be considered as sufficient for the issuance of the payment order. The court is to perform an ex officio scrutiny of the application and shall not issue the payment order if the consumer contract includes an unfair term (299 (2) CSP - see next answer).

According to § 265 (2) CSP a more speedy procedure (10 days) is initiated if the applicant files the formular provided by the Ministry: https://www.justice.gov.sk/Formulare/Stranky/Platobne-rozkazy.aspx.

9.4.2 What considerations will be assessed ex officio by the court (or other competent authority) before a payment order is issued?

According to § 299 (2) CSP: “If a claim for payment arising from a consumer contract against a consumer is brought, the court does not issue a payment order, if the consumer contract or any other contractual documents relating to the consumer contract contain an unfair term.” Thereby the court is obliged to assess the fairness of consumer contract before issuing a payment order.

9.4.3 How is the consumer informed about the claim to issue a payment order against him or her? Does national procedural law make any provision for steps to be taken to ensure that consumers are informed of the claim for the issuance of a payment order so that he or she can contest it?

The payment order is always to be delivered into the hands of the consumer with the application of the applicant (§ 266 (1) CSP)

9.4.4 If the consumer objects to the claim, what is the next step? Do the proceedings continue, in the context of which ex officio control can be exercised? Or are the proceedings transferred to ordinary proceedings for analysis on the merits of the claim?

According to § 267 (1) CSP an objection against the payment order has to be substantiated. If at least one of the defendants objects, the court squashes the payment order and calls for an oral hearing (§ 267 (2) CSP).

The application for the payment order is a parallel application to the actual application on the merits of the case. Therefore, even if the application for the payment order is not granted, the proceedings on merits continues.

Source(s):

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European Commission
An evaluation study of the impact of national procedural laws and practices on the equivalence and effectiveness of the procedural protection of consumers under EU law

JUST/2014/RCON/PR/CIVI/0082

National Report – Consumer Protection Strand

Slovenia

Verica Trstenjak

SLOVENIA: LEGAL ANALYSIS

1. NATIONAL LEGISLATION IMPLEMENTING EU CONSUMER PROTECTION INSTRUMENTS

EU legislation	Transposing national legislation	Additional notes (e.g. if there is an overlap in application of legislation etc.)
Doorstep Selling Directive 1985/577/EEC	- Consumer Protection Act (Zakon o varstvu potrošnikov – Zvpot), Official Gazette of the RS (OG RS) No. 98/04 et seq. - Rules on forms for	Full implementation; coherent.

	the enforcement of a right to withdraw from a distance contract or an off-premises contract (Pravilnik o obrazcih v zvezi z uveljavljanjem pravice do odstopa od pogodbe, sklenjene na daljavo ali zunaj poslovnih prostorov), OG RS No. 43/14	
Package Travel Directive 90/314/EEC	Consumer Protection Act (Zakon o varstvu potrošnikov – Zvpot), Official Gazette of the RS (OG RS) No. 98/04 et seq.	Full implementation; coherent. There were initially problems with adjudication dealing with question of available head of damages in the lower instance courts (compensation for non-material damage for the loss of enjoyment). Eventually, the Supreme Court ruled in accordance with the interpretation of the Court of Justice of the EU in the case of Leitner (C-168-00). See decision of the Supreme Court II Ips 160/2013, 23.04.2015, ECLI:SI:VSRS:2015:II.IPS.160.2013.
Unfair Contract Terms Directive 1993/13/EEC	- Consumer Protection Act (Zakon o varstvu potrošnikov – Zvpot), Official Gazette of the RS (OG RS) No. 98/04 et seq. - Rules on forms for	Full implementation; coherent

	the enforcement of a right to withdraw from a distance contract or an off-premises contract (Pravilnik o obrazcih v zvezi z uveljavljanjem pravice do odstopa od pogodbe, sklenjene na daljavo ali zunaj poslovnih prostorov), OG RS No. 43/14	
Distance Selling Directive 1997/7/EC	- Consumer Protection Act (Zakon o varstvu potrošnikov – Zvpot), Official Gazette of the RS (OG RS) No. 98/04 et seq. - Consumer Protection against Unfair Commercial Practices Act (Zakon o varstvu potrošnikov pred nepoštenimi poslovnimi praksami), OG RS No. 53/07 - Rules on forms for the enforcement of a right to withdraw from a distance contract or an off-premises contract	Full implementation; coherent

	(Pravilnik o obrazcih v zvezi z uveljavljanjem pravice do odstopa od pogodbe, sklenjene na daljavo ali zunaj poslovnih prostorov), OG RS No. 43/14 - Decision on the application of the Guidelines on the security of online payments (S klep o uporabi Smernic o varnosti spletnih plačil), OG RS No. 47/15 and 55/15	
Consumer Sales and Guarantees Directive 1999/44/EC	- Consumer Protection Act (Zakon o varstvu potrošnikov – Zvpot), Official Gazette of the RS (OG RS) No. 98/04 et seq. - Rules on forms for the enforcement of a right to withdraw from a distance contract or an off-premises contract (Pravilnik o obrazcih v zvezi z uveljavljanjem pravice do odstopa od pogodbe, sklenjene na daljavo	Code of Obligations (Obligacijski zakonik – OZ), Official Gazette of the RS (OG RS) No. 83/2001 – overlap, Articles dealing with these issues: 458-487. These rules are applied as lex generalis.

	ali zunaj poslovnih prostorov), OG RS No. 43/14	
Unfair Commercial Practices Directive 2005/29/EC	- Consumer Protection Act (Zakon o varstvu potrošnikov – Zvpot), Official Gazette of the RS (OG RS) No. 98/04 et seq. - Consumer Protection against Unfair Commercial Practices Act (Zakon o varstvu potrošnikov pred nepoštenimi poslovnimi praksami), OG RS No. 53/07	The main act governing unfair commercial practices is the Consumer Protection against Unfair Commercial Practices Act (CPCPA). The Consumer Protection Act contains rules dealing with advertising of goods and services. It provides in Article 12.b(1) that misleading advertising directed to consumers amounts to unfair commercial practice under the CPCPA.
Misleading and Comparative Advertising Directive 2006/114/EC	- Consumer Protection Act (Zakon o varstvu potrošnikov – Zvpot), Official Gazette of the RS (OG RS) No. 98/04 et seq. - Consumer Protection against Unfair Commercial Practices Act (Zakon o varstvu potrošnikov pred nepoštenimi poslovnimi praksami), OG RS	See above.

	No. 53/07	
Consumer Credit Agreement Directive 2008/48/EC	- Consumer Credit Act (Zakon o potrošniških kreditih), OG RS No. 59/10 et seq. - Financial Collateral Act (Zakon o finančnih zavarovanjih), OG RS No. 67/11 et seq.) - Standard European Consumer Credit Information (Pravilnik o vsebini predhodnih informacij in obrazcih za predhodne informacije o potrošniških kreditih), OG RS No. 104/10	Full implementation
Timeshare Protection Directive 2008/122/EC	- Consumer Protection Act (Zakon o varstvu potrošnikov – Zvpot), Official Gazette of the RS (OG RS) No. 98/04 et seq. - Standard information forms for timeshare contracts, for long-term holiday product contracts, for resale	Full implementation; coherent

	contracts and for exchange contracts (Pravilnik o obrazcih za informacije o pogodbah o časovnem zakupu, o dolgoročnem počitniškem proizvodu, o nadaljnji prodaji in o zamenjavi ter o obrazcu za odstop od pogodb), OG RS 100/11	
Consumer Injunctions Directive 2009/22/EC	Out-of-Court Resolution of Consumer Disputes Act (Zakon o izvensodnem reševanju potrošniških sporov), OG RS 81/15	
Consumer Rights Directive 2011/83/EU	- Consumer Protection Act (Zakon o varstvu potrošnikov – Zvpot), Official Gazette of the RS (OG RS) No. 98/04 et seq. - Rules on forms for the enforcement of a right to withdraw from a distance contract or an off-premises contract (Pravilnik o obrazcih v zvezi z uveljavljanjem pravice do odstopa od pogodbe,	Full implementation; coherent

	sklenjene na daljavo ali zunaj poslovnih prostorov), OG RS No. 43/14	
ADR for Consumer Disputes Directive 2013/11/EU	Out-of-Court Resolution of Consumer Disputes Act (Zakon o izvensodnem reševanju potrošniških sporov), OG RS 81/15	

Source(s):

1. CONCEPT OF THE CONSUMER

1.1 Please outline the concept of the consumer in national law, indicating whether it is intended to be a uniform concept, whether it has been legislated for and where it can found (i.e. in a legislative provision, governmental guidelines, case law etc.).

The concept of the consumer can be found in Article 1 of the Consumer Protection Act (CPA). It is in accordance with the Directive 1999/44 – it excludes persons buying goods or services for professional or profit-making purposes. Article 1(2) CPA: "a consumer is any natural person which acquires or uses goods or services for purposes other than for professional or profit-making purposes." The same definition is found also in Article 1 of the Out-of-Court Resolution of Consumer Disputes Act (Official Gazette of the RS No. 81/15).

Generally, the concept of the consumer is a uniform concept. The legislator decided for a broader concept than the one used in EU law in the field of guarantees. The Consumer Protection Act's provisions dealing with guarantees grant the same rights to consumers and also to persons which do not fall under the definition of the consumer (Article 21 of the Consumer Protection Act). It is questionable whether this is always justifiable, taking into account competitors' position and role in the market.

There is almost no case law dealing with the concept of the consumer. Courts rely on the notion of an 'average' consumer as interpreted and developed by the Court of Justice of the EU (see, for example, decision of the Appellate Court in Ljubljana II Cp 123672013, 09.10.2013, CLI:SI:VSLJ:2013:II.CP.123672013).

Source(s):
- Consumer Protection Act

2. REGULATORY AUTHORITIES COMPETENT FOR CONSUMER PROTECTION ISSUES

2.1 What regulatory authorities, if any, are competent for enforcing consumer protection law? Please identify them, their nature (i.e. whether they are public or private or mixed) and the nature of enforcement.

- Market Inspectorate (under Ministry of Economic Development and Technology) http://www.ti.gov.si/en/ – public – It s responsible for surveillance of execution of Slovenian legislation in areas of consumer protection, product safety, trade, catering, crafts, services, pricing, tourism, competition protection and copyrights. The CPA grants powers of surveillance and enforcement to the Market Inspectorate (and other competent inspectorates) in Article 70. Pursuant to the CPA, the Market Inspectorate has the power to, for example, issue injunctions, decisions to temporarily prohibit unlawful practices or to require the fulfilment of legal obligations. It has the power to impose monetary penalties.

- Also: Inspectorate for Culture and Media; the Agency of the Republic of Slovenia for Medicines and Medical Devices; Transport Inspectorate.

- The Slovene Consumers' Association (Zveza potrošnikov Slovenije – ZPS) https://www.zps.si/ – private – it has a standing to request an injunction or start legal proceedings due to the invalidity of contract terms (under the CPA).

- Persons conducting the out-of-court resolution of consumer disputes pursuant to the Out-of-Court Resolution of Consumer Disputes Act – private – there are five organisations listed in the register so far: European Centre for Dispute Resolution (http://www.ecdr.si/); PERSVET, izobraževanje, d.o.o. (http://www.persvet.eu/#/spori); Združenje bank Slovenije – GIZ (http://www.zbs-giz.si/zdruzenje-bank.asp?StructureId=1283); Slovensko zavarovalno združenje – GIZ (http://www.zav-zdruzenje.si/izvensodno-resevanje-potrosniskih-sporov/) and Odvetniška pisarna Devetak in partnerji, d.o.o. (http://devetak.si/sl/irps) (the register available at http://www.mgrt.gov.si/si/delovna_podrocja/notranji_trg/sektor_za_varstvo_potrosnikov_in_konkurence/seznam_izvajalcev_irps/, 27.09.2016).

2.2 Is there a specific venue for this type of enforcement and does this limit the jurisdiction of courts/ADR fora (even if only initially)?

Sanctioning proceedings commenced by regulatory authorities can amount to a sanction for infringement of administrative rules. This has no direct impact on the private rights of consumers and does not amount to an obstacle for the commencement of judicial or ADR proceedings.

2.3 Can criminal prosecutions be initiated for violations of consumer protection rules? How serious must the infringement be? What are the penalties and sanctions? And might these prosecutions lead to criminal penalties or sanctions? Can individual consumers piggy back on these claims (e.g. via a partie civile method)?

The CPA regulates infringements that amount to "minor offences" (prekrški) with prescribed monetary penalties in Articles 77-78a. These monetary penalties vary from 1200 to 40000 EUR for legal persons or sole entrepreneurs, and from 400 to 4000 for the responsible (natural) person. "Minor offences" are infringements that do not amount to a criminal offence - law of minor offences has generally focused strictly on less serious unlawful actions. These offences in the CPA are, for example: not conducting business with consumers in compliance with the CPA; not using company's full title and registered address in written communications with consumers; as a provider of information society services, for not allowing for an easy and direct and constant access to data; for advertising goods or services in a manner contrary to the CPA; for comparatively advertising goods or services contrary to the CPA; for failing to provide for the repair and maintenance of a product throughout the guarantee period or its extension free of charge, and after its expiry against payment by carrying out the service himself or through another entity with whom he has concluded a servicing contract; for failing to include in the guarantee certificate all the required data; or not selling goods or providing services to consumers under equal conditions; for failing to pay back to the consumer, in the case that the consumer cancels the contract, any instalments received together with the statutory interests from the day they were received and reimburse the consumer for any unavoidable costs connected with the goods, etc.

The Criminal Code (Kazenski zakonik, KZ-1, OG RS 50/12 et seq.) contains a provision dealing with the production and trade of tainted foodstuffs and other products (Article 184). It provides in the first paragraph that "Whoever produces, sells or otherwise supplies foodstuffs dangerous to human health, thus causing danger to human life or health shall be sentenced to imprisonment for not more than three years." The second paragraph reads: "Whoever produces, sells or otherwise puts on the market products for personal care, toys or similar products for mass consumption, which are dangerous to human health, shall be punished to the same extent." If

serious or grievous bodily harm or a corresponding impairment of health of at least one person have been caused, the sentence can be five years of imprisonment.

2.4 Is there judicial review of decisions of consumer regulatory authorities? If so, by which court is this judicial oversight made? Is the forum an ordinary or a specialised court or tribunal?

Regulatory authorities' decisions may be challenged before the administrative courts. The general rules on judicial proceedings in administrative matters apply (the Administrative Dispute Act).

The request for judicial review of a decision issued in the minor offence proceedings can be filed at the competent court for minor offence of the first and second instance – there are two levels of courts dealing with minor offences (these are specialised units of the ordinary courts) (Articles 45 and 46 of the Minor Offences Act (Zakon o prekrških, ZP-1), OG RS 29/11 et seq.).

2.5 Does the national legal system provide for a mechanism of cooperation between its national regulatory authorities and those of other Member States?

The Government of the Republic of Slovenia adopted the Decree implementing the Regulation (EC) of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws (Official Gazette No. 118/05 et seq.).

Source(s):

1. Legal acts:

- Consumer Protection Act
- Out-of-Court Resolution of Consumer Disputes Act
- Criminal Code
- Minor Offences Act
- Decree implementing the Regulation (EC) of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws

2. Websites:
- http://www.ti.gov.si/en/
- https://www.zps.si/
- http://www.ecdr.si/
- http://www.mgrt.gov.si/si/delovna_podrocja/notranji_trg/sektor_za_varstvo_potrosnikov_in_konkurence/seznam_izvajalcev_irps/

3. LEGAL AID

3.1 Is legal aid available to consumers in: a) bringing a claim and b) defending a claim before a court?

Yes, it is regulated by the Legal Aid Act (Zakon o brezplačni pravni pomoči), OG RS No. 96/04.

3.2 For what kinds of disputes and actions is legal aid available? (NB: legal aid might not be available for consumer or contractual disputes but be available instead for a related action, e.g. actions relating to debt, mortgage arrears, eviction etc.)

Legal aid is in principle available for all types of disputes. Thus, it is available for consumer and contractual disputes – also for out-of-court settlements of disputes.

3.3 What requirements must be satisfied for the consumer to be entitled to legal aid? Please specify if there are any additional limitations to its availability.

The consumer is entitled to free legal aid if, in view of his/her financial position and that of his/her family, he/she would not be able to cover the costs of legal proceedings on his/her own without jeopardising his/her financial position and that of his/her family (Article 13 of the Legal Aid Act).

It is considered that the financial position of the applicant and his family due to the cost of litigation or the costs of providing legal aid is in jeopardy if the monthly income of the applicant or average monthly income per family member does not exceed the amount of 2x minimum income provided by the law governing social security benefits (Article 14 of the Legal Aid Act).

The minimum income is provided by the Social Security Act as the minimum means of subsistence. This income is aligned each year with the growth of consumer price indices and published in the Official Gazette. In 2016, the minimum income is 288,81 EUR (http://www.mddsz.gov.si/si/delovna_podrocja/sociala/denarna_socialna_pomoc/).

There is also a possibility of an irregular legal aid, granted in case that the monthly income does not exceed 4x minimum income – for reasons of extraordinary costs related to medical treatment, force majeure, costs needed for a psychically or mentally disabled family member, schooling and upbringing of a child with special needs etc. (Article 22 of the Legal Aid Act).

The Legal Aid Act does not define who is considered as a family member – Article 23, which used to define family members, has been deleted with an amendment published in the Official Gazette No. 19/2015 on 20.03.2015. Thus, since this is fairly recent, existent case law to a significant extent relies on this provision, as well as the ZZZDR, lex specialis in family matters. Ministry of Justice published special instructions on filling in forms for legal aid. These instructions provide the following definition:

"Family members are:
- spouse or partner,
- persons who live with the applicant in a registered same-sex partnership,
- children of the applicant, until he or she is obliged to provide subsistence for them - up to 18 years of age or until they are enrolled in school (with certain restrictions) or as long as the applicant has the extended parenting rights,
- parents of the applicant until he or she is obliged to to provide subsistence for them;
- stepchildren of the applicant;
- minor grandchildren, nephews and brothers and sisters of the applicant or of the spouse or of the unmarried partner if that person provides subsistence for minor grandchildren, nephews or brothers and sisters who are without parents;
- adult for whom any member of the family is obliged to provide subsistence, if that family member does not have its own assets or income in the amount of 2x the minimum income.

A single person is a person who has no family members."

(Instructions are available at http://www.mp.gov.si/fileadmin/mp.gov.si/pageuploads/mp.gov.si/PDF/obr_bpp_navodila_za_izpolnjevanje_obrazca.pdf).

Forms for legal aid are available at http://www.mp.gov.si/fileadmin/mp.gov.si/pageuploads/mp.gov.si/PDF/obr_bpp_prosnja_za_dodelitev_BPP_1.pdf. One can obtain these forms also in courts, which organise special office hours when judicial interns help customers with filling in these forms.

3.4 What does legal aid encompass? (i.e. (only) general advice, (only) assistance in preparing the case, (only) assistance with negotiation of settlements, (also) representation).

A person entitled to free legal aid may claim funds to meet the costs of legal help in full or in part and exemption from the costs of court proceedings. In practice, this encompasses the costs of legal advice, legal representation at general courts, specialised courts and the Slovenian Constitutional Court and before all bodies, institutions and persons in Slovenia which have jurisdiction for out-of-court settlement of disputes, and exemption from paying the cost of court proceedings.

Source(s):

- Legal Aid Act

4. COSTS

4.1 What are the costs of different types of procedures before courts? Are there exemptions to the payment of fees and expenses? How can costs be paid?

Fixed costs for consumers (or any other litigant) in civil proceedings include:

- court fees,
- attorneys' fees,
- experts' fees,
- translators' and interpreters' fees,
- travel costs (e.g. those of witnesses and experts).

The court fees are determined and calculated according to the Court Fees Act (Zakon o sodnih taksah, OG RS No. 37/08 et seq.). In ordinary proceedings, court fees must be paid for each instance of proceedings (so, including access to the Supreme Court, up to three court fees; Article 18(1) of the Court Fees Act). Court fees are usually paid at the beginning of the proceeding when the application has been filed. Attorneys' fees must be paid after the court issues an order on the costs of the proceeding. Attorneys may request that a portion or the full amount of their fees be paid in advance, which is common practice. The amount of court fees and attorneys' fees depends on the amount in controversy and they are calculated according to the court fees and attorneys' fees tariffs.

The party who suggests an examination of the evidence, or the use of the service of a translator or interpreter, must pay these costs in advance.

The basic rule of cost and fee allocation in civil proceedings is that the losing party must reimburse costs to the winning party. If the party only partially succeeds in the litigation, such a party is entitled to a proportionate amount of costs. In such a case, the court may also order that each party bears his or her own costs (Article 154 of the Civil Procedure Act (Zakon o pravdnem postopku, OG RS No. 73/07).

A rule that represents an exemption to the basic rule (the principle of success) is that irrespective of the outcome of the litigation, the party shall refund the opposing party the costs arising due to the default of, or the accident occurring to the former (Article 156 of the Civil Procedure Act).

A person entitled to legal aid can be exempted from paying the cost of court proceedings.

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Court fees	Up to 240 € (starting with 51 EUR for individual claim of value up to 300 €)	267-567 € (189 are fees for individual claim of value up to 22.000)	From 567 €	/	/	/
Court expenses	/	/	/	/	/	/
Exemptions	1/3 if the procedure ends with settlement	1/3 if the procedure ends with settlement	1/3 if the procedure ends with settlement	/	/	/

Source(s):

- Court Fees Act
- Civil Procedure Act

- http://www-personal.umich.edu/~purzel/national_reports/Slovenia.pdf

5. STANDING AND REPRESENTATION IN CONSUMER DISPUTES

5.1 Does national law limit the standing of the individual consumer in respect of the claim that can be made and the forum before which it can be brought?

No

5.2 Other than individual consumers, who or which bodies have standing in consumer protection disputes and for what types of claim? If the action is not brought by the individual consumer, what requirements of representation must be satisfied?

Consumer protection organisations – for injunctions and actions for annulment of contract terms.

Article 63 CPA provides that consumer organisations are registered as societies or institutes, or other organisations not involved in profit-making activities, which are founded by consumers in order to protect their rights, and which are entered in the register of consumer organisations kept at the competent ministry. Conditions for entry in the register of consumer organisations shall be the neutrality and independence of the organisation from the interests of suppliers of goods and services, meaning that such an organisation may not receive funds from suppliers of goods and services. For entry in the register of consumer organisations, an organisation must meet certain organisational, spatial and technical conditions.

5.3 If a consumer wants to bring or defend an action relating to a consumer protection dispute, is there a legal (or otherwise formal) requirement that he or she has legal representation? Please specify for both judicial and ADR fora and the bodies, associations or authorities that can provide this representation.

There is no mandatory legal representation in the regular judicial proceedings (it is mandatory only in extraordinary legal remedies proceedings). A party can either represent himself/herself or he or she is represented through agency of an attorney (Article 86 of the Civil Procedure Act). In the proceedings before a local court, any person of full legal capacity may act as an attorney. In the proceedings conducted by district and high courts and by the Supreme Court only a practicing lawyer or other person who has passed the state judicial examination may act as an attorney (Article 87 of the Civil Procedure Act). District courts have jurisdiction to hear cases in which the individual value of a claim exceeds 20.000 EUR.

There is no mandatory legal representation in ADR fora either. Parties can decide to have any natural or legal person as a representative in the arbitration procedure, whereas for ADR in judicial matters it is only governed that parties' representatives are permitted to attend a hearing – thus, the same rules apply by analogy (Article 22 of the Arbitration Act and Article 16(5) of the Act on Alternative Dispute Resolution in Judicial Matters). Similar provision is found in Article 7 of the Out-of-Court Resolution of Consumer Disputes Act.

Source(s):

- Consumer Protection Act
- Civil Procedure Act
- Arbitration Act
- Act on Alternative Dispute Resolution in Judicial Matters
- Out-of-Court Resolution of Consumer Disputes Act

6. ACTIONS BEFORE COURTS

6.1 Jurisdiction and competence of the courts in consumer disputes: General structure and special procedures aimed at protecting consumers

6.1.1 Are ordinary courts competent to hear such claims? Is there also a specialised tribunal for consumer protection disputes?

Yes, ordinary courts are competent to hear claims in consumer disputes. There are no specialised tribunals.

6.1.2 Which courts are competent to hear consumer protection disputes at first instance and in appeals? Please specify the court, in light of the value of the claim (and identify any other factors that are relevant in allocation jurisdiction).

At first instance, there are local and district courts – the factor for allocating jurisdiction is value of the claim. District courts are competent to hear cases in which the value of a claim exceeds 20.000 EUR.

"Ordinary" appellate or high courts are competent to hear the appeals.

At both first instance and in appeals there are special civil units dealing with "civil" cases (as opposed to criminal cases).

6.1.3 What is the nature of the procedure at first instance, e.g. is it a simplified or a summary procedure, and is there an assessment of the merits? Please specify in light of the value of the claim (and identify any other factors that are relevant in allocating jurisdiction).

As a general rule, the procedure at first instance is a normal court procedure. However, the Civil Procedure Act governs the small claims procedure (Articles 442 et seq.). A small claim dispute shall denote a dispute where the amount of a claim does not exceed 2.000 EUR. Small claims procedures is conducted on the basis of acts of procedure executed in writing. It may not be stayed.

6.1.4 Please identify the formal requirements that must be satisfied for a consumer dispute to be heard before a court. These might include time limits applicable to the filing of the action/defence, representation requirements etc.

There are no special requirements for consumer disputes. General rules on time limits, applicable to consumer contracts, can be found in the Code of Obligations (Obligacijski zakonik, OG RS No. 97/07). The court may not take notice of time limits if the debtor makes no reference thereto (Article 335(3)). General time limit for civil law claims is five years (Article 346). Time limit for claims for periodic charges that fall due annually or at specific shorter time intervals (periodic claims) is three years after each individual charge falls due, whether they are accessory periodic claims, such as interest claims, or such periodic claims by which a right itself is drawn upon, such as maintenance claims (Article 347(1)). Time limit for compensation claims for damage inflicted is three years after the injured party learnt of the damage and of the person that inflicted it (Article 352(1)).

There is a special one-year time limit for the following claims (Article 355):
1. claims for supplied electricity, thermal energy, gas, and water, for chimney-sweeping services and for municipal cleaning services, if the supply or service was carried out for the needs of a household;
2. radio and television stations' claims for station reception;
3. claims by the post office and telecom companies for the use of telephones and PO boxes, and other claims thereby paid at three-monthly or shorter intervals;
4. claims for subscription fees for periodic publications, counted from the end of the period for which the publication was ordered;

5. claims for internet access services, services for the use of e-mail and e-mailboxes, website maintenance services, and services connected to access to cable and satellite radio and television stations paid at three-monthly or shorter intervals;
6. claims by the administrators of apartment blocks for services and other claims thereby paid at three-monthly or shorter intervals.
In these cases, time limits run from the end of the year in which the claim fell due for payment.

There is no mandatory legal representation in regular civil matters. A party can represent himself/herself or through agency of an attorney (Article 86 of the Civil Procedure Act). See 7.3 above.

Civil proceedings shall be conducted in the official language of the court (Article 6 of the Civil Procedure Act). The parties and other persons involved in the proceedings shall have the right to use their own language in accordance with legislation.

Regarding language in the oral proceedings, the parties and other persons involved in the oral proceedings shall have the right to use their own language in all acts of procedure they perform in court (Article 102(1) of the Civil Procedure Act). If the proceedings are not conducted in the language of a party or of other persons involved in the proceedings, they shall be afforded (upon a motion filed to this effect or when the court finds that they do not understand the Slovenian language) oral translation of statements made at the hearing and written translation of documents used as evidence at the hearing.

The parties and other persons involved in the proceedings shall be advised of their right to attend the oral proceedings in their own language by way of an interpreter (Article 102(2) of the Civil Procedure Act).

As regards written correspondence, summons, decisions and other court writings, they shall be sent to the parties and other persons involved in the proceedings in the language officially used by the court (Article 103 of the Civil Procedure Act).

6.1.5 In respect of the claims and relevant procedures available in the national legal system, what kind of relief might be available in consumer protection disputes? (monetary remedies, injunctions, skimming off etc.)?

Monetary remedies, injunctions, invalidity or lack of legal effects, compensation for the inflicted damage.

6.1.6 Please provide a brief overview of the role of parties and judges in civil proceedings generally (e.g. with reference to the principle of party disposition, the obligation of parties to make and prove factual allegations and to make and provide legal arguments, the possible role of the court). This overview should be brief; these issues will be dealt with in more detail in the questions that follow.

The main principle is the principle of party disposition. As a general rule in civil proceedings, the court shall not decide beyond the limits and extent of the claim as defined by the parties to the litigation (Article 2 of the Civil Procedure Act). The parties shall be free in disposition of the claims which they raise in the proceedings. Each party to the litigation shall be granted the opportunity to be heard on the opposing party's claims and assertions.

The parties shall state all facts giving rise to their cause of action and shall adduce evidence proving these facts. The court may decide to establish the facts and produce evidence which were not presented by the parties, if during the procedure it becomes apparent that the parties intend to dispose with claims to which they are not entitled (Article 7 of the Civil Procedure Act). However, the court may not found its judgment upon the facts on which the parties have been denied the opportunity to be heard.

The decision on the facts, which will be deemed to have been proven, shall be based upon the opinion that the court shall take after a careful and thorough evaluation of every piece of evidence in itself, and of the evidence as a whole, and considering the outcome of the entire proceedings.

Source(s):

- Civil Procedure Act
- Code of Obligations
- Consumer Protection Act

6.2 Small claims

6.2.1 Does a small claims procedure exist in the Member State? If yes, is it a specialised or simplified procedure?

Yes, it is governed by the Civil Procedure Act. It is a simplified procedure.

6.2.2 What are the value thresholds for claims brought under the small claims procedure? Moreover, are there any other factors that shape the use of the small claims procedure (including the nature of the claim, the area of consumer protection law into which the claim falls etc.)?

Up to 2.000 EUR.

Small claim disputes shall not include disputes relating to immovable property, disputes arising out of copyright, disputes relating to the protection and use of inventions and marks of distinctiveness or to the right to use a company title, disputes relating to the protection of competition, and disputes for disturbance of possession.

Small claims procedures shall also be conducted upon a plea against a payment order if the contested part of the payment order does not exceed 2.000 EUR.

6.2.3 What forms must be completed to raise the application? Who assists the consumer in completing these forms?

There is no special application procedure. The applicant files a normal action before the local court. There are special forms in a case of a small claims procedure based on an authentic document – a form of an enforcement based on an authentic document.

There is no specific provision of anybody's assisting the party in completing the form or in whatsoever way. In practice, judicial interns often help consumers in completing different forms and filing actions.

6.2.4 How can an application for a small claim be made (e.g. online, by post or in person)?

By post or in person.
An enforcement based on an authentic document can be initiated online (https://evlozisce.sodisce.si/esodstvo/index.html).

6.2.5 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

In the small claims procedures, the plaintiff shall state all facts and adduce all evidence in the action, while the defendant shall do so in his defense plea (Article 451 of the Civil Procedure Act). Each party may file one preparatory pleading. Facts and evidence presented in pleadings other than those shall be ignored.

If, after the receipt of the defense plea and the preparatory pleadings of the parties, the court finds that no dispute exists on the matter of the facts and that no other obstacles hinder the rendition of a decision, it shall decide the case without a hearing (Article 454 of the Civil Procedure Act).

6.2.6 Are the costs of the successful party reimbursed?

Yes, according to general rules. The party losing the litigation shall refund the costs incurred by the winning party and their intervener. If one party wins the litigation only in part, the court may decide, with respect to the outcome of litigation, that each party cover their own costs of proceedings, or may, considering the circumstances of the case, order one party to refund the other party and their intervener an appropriate amount of costs.

Source(s):

- Civil Procedure Act

6.3 Claims other than small claims

6.3.1 If a consumer protection dispute does not qualify as a small claim, what other procedures are available? What are the value thresholds and other factors determining the use of such procedures?

There are no other special procedures. Consumer claims up to 20.000 EUR are heard before the local court, whereas claims above 20.000 EUR are heard before the district court.

6.3.2 How can such claims be made? Please specify if the applications can be made online, or by post or in person.

See 8.2.4.

6.3.3 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

Each party shall state the facts and adduce the evidence, upon which their claims are based, and by means of which they contest the facts stated and evidence adduced by the opposing party (Article 212 of the Civil Procedure Act). The parties have to propose witnesses', expert witnesses' and other party's interrogatory, as well as judicial inspection. The court shall decide

which evidence will be produced for determination of the ultimate facts (Article 213(2) of the Civil Procedure Act).

Facts presumed to be existing by virtue of statute need not be proved; however, the parties may challenge the existence of such facts, unless otherwise prescribed by the statute (Article 214(4) of the Civil Procedure Act). Generally known facts shall not be subject to proving (Article 214(4) of the Civil Procedure Act).

If the evidence produced in respect of a particular fact does not induce a sufficient degree of persuasion, the court's conclusions on such fact shall be drawn pursuant to rules on the burden of proof (Article 215 of the Civil Procedure Act).

To establish the disputed facts which are of importance to determination of the dispute, the court may also examine the parties (Article 257 of the Civil Procedure Act). A duly summoned party who has not appeared in court may not be subject to any compulsory measure and may not be forced to testify. The court shall assess, considering all circumstances of the case, the significance of the fact that a party has not appeared at the hearing or has refused to testify (Article 262 of the Civil Procedure Act).

6.3.4 Are the costs of the successful party reimbursed?

Yes, see 8.2.6.

Source(s):
- Civil Procedure Act

6.4 Claims for the issuance of a payment order

6.4.1 Does an order for payment procedure exist in the national system? Is it a simplified procedure?

There is a special chapter in the Civil Procedure Act dealing with the issue of payment order (chapter 29). When a monetary claim is supported by an authentic document, the original or a certified copy of which is enclosed with the action, the court shall order the defendant to satisfy the claim (payment order) (Article 431 of the Civil Procedure Act). It is a simplified procedure.

The Civil Procedure Act provides that small claims procedures shall also be conducted upon a plea against a payment order if the contested part of the payment order does not exceed 2.000 EUR. It is a simplified procedure.

6.4.2 Which authorities or courts are competent to hear claims for the issuance of payment orders?

A payment order is issued by a law clerk in ex parte proceedings (Article 433 of the Civil Procedure Act).

6.4.3 Are there any formal requirements that must be satisfied for the application for the issuance of a payment order to be made (e.g. standard forms, representation by a lawyer, the detail of description required, the need to provide written evidence etc.)?

A monetary claim must be supported by an authentic document. In claims providing for payment of due sum of money not exceeding 2.000 EUR, the court shall issue a payment order against the defendant even though the action does not contain an authentic document, but does allege the legal basis and the amount of debt, adducing also the evidence to determine the truth of such allegations.

It is in the court's discretion to assess which evidence determines the truth of such allegations. In practice, the evidence could be, for example, witness testimony, letters, notes, etc.

6.4.4 What information is generally available to the authority or court when a claim for the issuance of a payment order is made?

Generally, a monetary claim supported by an authentic document (but see above, 8.4.3.).

6.4.5 What opportunity is available for a defence/statement of opposition to be advanced? How should this be done and what is its effect? Please specify if the means of advancing a defence differ depending on the value of the claim and the court dealing with it.

By issuance of a payment order, the court shall impose on the debtor a duty to satisfy the claim and pay the determined amount of costs within the term of eight days from the day of service of the payment order, in disputes involving bills of exchange or cheques such term of payment

being three days, or else to file a plea against the payment order in the same period of time. The payment order shall contain a legal warning instructing the defendant that a belated plea shall be rejected. At the same time, it shall warn the party that a defense plea must contain a statement of grounds otherwise it shall be deemed unfounded. (Article 433(2) of the Civil Procedure Act)

The defendant may challenge the payment order only by means of a plea. The defendant shall submit documents and adduce evidence supporting the statements contained in the defense plea, otherwise the plea shall be deemed unfounded. If the payment order is challenged only in respect of the decision on costs of proceedings, then such decision may only be challenged by means of appeal from decree. (Article 435 of the Civil Procedure Act)

If the defendant files a plea asserting that the statutory conditions for issue of payment order have not been fulfilled or that other obstacles exist in respect of continuation of the proceedings, the court shall first decide upon such a plea. If it establishes that the plea is well-founded, it shall set aside the payment order and, after finality of the decree to set aside, commence to examine the main subject of dispute if a hearing is to be conducted. (Article 437 of the Civil Procedure Act)

6.4.6 What is the effect if the claim is uncontested, i.e. if there is a lack of defence/statement of opposition?

The payment order shall become final in respect of the part which is not subject to a plea.

6.4.7 If the defendant is a consumer, and he or she does not respond to or raise an objection to the issuance of the payment order, does the authority dealing with the claim for payment order proceedings have the power to examine any issue of consumer protection law of its own motion before treating the action as usual?

According to general rules of law of obligations, the court must raise the issue of nullity ex officio (Article 92 of the Code of Obligations). Article 86 of the Code of Obligations provides that a contract that contravenes the constitution, compulsory regulations or moral principles shall be null and void. Thus, the authority has the power to examine issues of consumer protection law that could amount to nullity of its own motion – any infringement of mandatory consumer law provisions (for example unfair contract terms).

The Slovenian law of obligations also contains rules on challengeability or ‘relative nullity’ – an assessment must be made at the request of a party (Article 95 of the Code of Obligations).

6.4.8 What steps must the pursuer take in order to obtain an enforceable decision?

The final payment order is a directly enforceable decision (Articles 17 and 18 of the Claim Enforcement and Security Act (Zakon o izvršbi in zavarovanju – ZIZ, OG RS No. 3/07 et seq.)).

6.4.9 Is this decision final, or can the defendant appeal against it?

This decision is final. In this stage, upon the defendant's appeal against the payment order, rules governing small claims procedure are applied also to claims for the issuance of a payment order (Article 445 of the Civil Procedure Act). Since this decision is final, the defendant can appeal against it with extraordinary legal remedies. Article 458 provides that there is no appel on points of law ("revision") in small claims procedure (and by analogy for the payment order). Moreover, reopening of proceedings is not possible regarding ius novorum. Thus, the defendant can request reopening of proceedings as regards other 9 points listed in Article 394 of the Civil Procedure Act.

Source(s):

- Civil Procedure Act
- Code of Obligations
- Claim Enforcement and Security Act

6.5 Appeals in consumer disputes

6.5.1 Are appeals possible in all consumer disputes? Please specify for small claims and other types of claims.

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 –	Individual claim of value € 20.001+	Collective claim of value	Collective claim of value	Collective claim of value

		€ 20.000		€ 0 – 5000	€ 5001-- € 20.000	€ 20.001+
Nature of the procedure at 1st instance	Small claims procedure and payment order for claim up to € 2000; ordinary procedure before local courts for other claims	ordinary procedure before local courts	ordinary procedure before district courts			
2nd instance – appeal to?	Higher/Appellate Court (small claims and payment order – only for reasons of a severe violation of civil procedure provisions and on the ground of violation of substantive law. But not on the ground of erroneous or incomplete determination of state of facts).	Higher/Appellate Court	Higher/Appellate Court			
3rd instance – appeal to?	The Supreme Court of the RS (small claims and payment order – no revision, no	The Supreme Court of the RS	The Supreme Court of the RS			

	reopening of proceedings for ius novorum)					

6.5.2 Please briefly specify the national appeal procedure, including any requirements to be satisfied for appeals. These might include, but are not limited to, conditions of admissibility, value thresholds, time-limits, the scope of review, and the impact of the appeal on enforcement (provisional enforcement). Please refer to any rules specifically applicable in respect of the claims and relevant procedures outlined above.

The parties may take an appeal from judgment rendered by the court of first instance within fifteen days from the day of service of the copy of the judgment, unless other time period is provided therefor by the Civil Procedure Act. In disputes involving bills of exchange and cheques this period shall be eight days. (Article 333 of the Civil Procedure Act)

A timely institution of an appeal shall prevent the judgment from becoming final in respect of the part subject to the appeal.

The appeal shall contain:
1. the designation if the judgment subject to appellate attack;
2. the statement as to whether the judgment is challenged in whole or in a specific part;
3. the grounds of appeal;
4. the signature of the appellant. (Article 335 of the Civil Procedure Act)

In the appeal new facts and evidence may be presented only if the appellant proves presumptively that for reasons beyond his control he has been unable to present them by the first hearing session or until the conclusion of the main hearing. (Article 337(1) of the Civil Procedure Act)

A judgment may be attacked:
1. on the ground of severe violation of civil procedure provisions;
2. on the ground of erroneous or incomplete determination of state of facts;
3. on the ground of violation of substantive law.
A default judgment may not be attacked on the ground of incorrectly or incompletely established facts.
A judgment on the basis of acknowledgment and a judgment on the basis of relinquishment may be attacked on the ground of severe violation of civil procedure provisions and on the ground

that the statement on acknowledgment and/or relinquishment of claim has been made in error, under duress or due to deception. (Article 338 of the Civil Procedure Act)

In small claims procedure, an appeal is allowed only on the ground of a severe violation of civil procedure provisions and on the ground of violation of substantive law. It is not allowed on the ground of erroneous or incomplete determination of state of facts. Time limit is 8 days (Article 458 of the Civil Procedure Act).

Source(s):
- Civil Procedure Act

6.6 Enforcement in consumer disputes

The CJEU has identified a number of situations concerning the enforcement stage of consumer protection disputes in which the effective and equivalent protection of EU consumer rights may be affected by national procedural rules. These include – in relation to the effectiveness and equivalency of the protection afforded by the Unfair Contract Terms Directive, for example – the enforcement of arbitration awards, the enforcement stage in the recovery of consumer credit and the enforcement of mortgages, which often links together declaratory and enforcement proceedings. As such, we focus on these situations below. However, other problematic situations exist. Please indicate if additional (and potentially problematic) situations are identifiable in your national legal system.

Moreover, if possible, please provide the reference/citation of an article that provides an overview of the way in which enforcement operates in relation to consumer protection disputes within your national legal system.

Not to our knowledge at the time of drafting this.

6.6.1 If the assessment of a consumer protection issue has not been possible at an earlier stage of the proceedings, is it always possible – either ex officio (see section 10 below) or if the consumer raises a possible violation of consumer protection law – for this assessment to be undertaken during enforcement proceedings?

Yes, as regards nullity and partial nullity. The consumer can file a complaint against an enforcement order for reasons governed by Article 55 ZIZ. The court needs to assess some of those grounds for appeal ex officio, including (i) if the document on the basis of which enforcement was allowed is not the executive title or authentic document; (ii) if the decision, on the basis of which the writ was issued, is not yet enforceable; (iii) if the decision, on the basis of

which the writ was issued, is repealed, abolished or altered. Mandatory consumer protection law is part of 'compulsory regulation' and its violation can amount to nullity of the contract which forms basis for enforcement. See 11.1.1 below.

The question of non-existence or nullity of the contract can be resolved as a preliminary question of law on the basis of Article 13 of the Civil Procedure Act and in connection with Article 15 ZIZ. The court can make such an assessment on its own motion. Under these provisions, the court can make such an assessment if a decision is dependent on a prior resolution of the question of whether a right or legal relation exists (preliminary question of law). It is frequent in practice that court assess nullity in the preliminary question of law procedure and this is possible also in the enforcement procedure. See decision of the Appellate Court in Ljubljana, II Ip 2305/2009, 21.10.2009, ECLI:ECLI:SI:VSLJ:2009:II.IP.2305. See also decision of the Supreme Court of the RS II Ips 51/2009, 2. 4. 2009, ECLI:SI:VSRS:2009:II.IPS.51.2009.

NB: Ex officio control of consumer protection is possible in all stages of the proceedings – for ordinary proceeding, small claims, provisional measures, proceedings linked to enforcement, all enforcement proceedings and appeal proceedings. Regarding the payment order, if an objection is advanced against the issuance of a payment order ex officio control will be made but only when the proceedings are transferred to ordinary civil proceedings for discussion on the merits.

6.6.2 In the particular case of consumer protection, if a court examines consumer protection law (either ex officio or on the basis of an argument advanced by the consumer), does national procedural law provide that interim measures should 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 final decision will have full effect?

Yes, Article 71 ZIZ provides that the Court may in certain instances, at the debtor's request, fully or partially suspend the enforcement if the debtor proves that the immediate enforcement could lead to irreparable damage or damage that is difficult to remedy and that this damage is greater than damage that can suffered by the creditor due to the stayed proceedings. One of these instances is also a complaint against an enforcement order. Moreover, proceedings can be stayed, inter alia, also if the debtor has lodged extraordinary legal remedies against a decision on which enforcement is based; if an application for reinstatement of the proceedings in which the decision, which was the basis for enforcement, was issued; if an action is brought for the annulment of an arbitral award on the basis of which enforcement was permitted; if an action is brought for the annulment of the settlement, on the basis of which enforcement was permitted; if the validity of the transaction from a directly enforceable notarial act, on the basis of which

enforcement was permitted, is contested; if the debtor filed a motion for revocation of the certificate of enforceability.

7. ACTIONS FOR COLLECTIVE REDRESS

The CJEU has considered that situations in which individual and collective actions are in some way linked are those in which the effective and equivalent protection of EU consumer rights may be affected by national procedural rules. As such, we will focus on these situations. However, other problematic situations exist. Please indicate if additional (and potentially problematic) situations are identifiable in your national legal system.

Moreover, if possible, please provide the reference/citation of an article that provides an overview of the way in which the collective redress mechanism operates within your national legal system.

Aleš Galič, Skupinske tožbe na področju potrošniškega prava (2011) Pravni letopis 215

7.1 Injunctive relief, linking individual and collective actions

The case law of the CJEU requires that a person or organisation with a legitimate interest in consumer protection must be able to bring an action before a national court or tribunal in respect of an alleged violation of consumer rights deriving from Union law, either for compensation or for injunctive relief, to preclude the continued violation of consumer rights[327].

7.1.1 If collective proceedings are launched, does national procedural law provide that ongoing individual claims, relating to the same dispute, should be stayed until the collective proceedings are brought to an end? Please specify if this constitutes an obligation on the part of the national judge or if it is at his or her discretion.

[327] This derives from the EU directives. For example, in respect of the UCTD, Art.6(1), Art.7(1) and (2) UCTD, provide that the Member States must ensure 1) that unfair terms are not binding on the consumer and 2) that adequate and effective means exist to prevent the continued use of unfair terms in consumer contracts. The CJEU has held that effective implementation requires that the consequence of the finding of the violation – in the case of a finding of unfairness under the UCTD – is for the term to be declared invalid, and that the effect of this invalidity extends not only to the parties to the action for an injunction but also to those who have concluded a contract with the seller/supplier to which the same terms apply.

Collective organisations are able to bring an action for injunctive relief under Article 74 of the Consumer Protection Act. This act does not specify whether ongoing individual claims should be stayed in such a case.

There are no classic class actions in Slovenia, neither opt-in nor opt-out class actions are possible.

7.1.2 If individual proceedings are stayed, please indicate what the effect of the court or ADR entity's decision in the collective action on those individual proceedings would be, i.e. whether the outcome of the collective action binds the consumer bringing an individual action.

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Source(s):
- Consumer Protection Act
- Aleš Galič, Skupinske tožbe na področju potrošniškega prava (2011) Pravni letopis 215

8. CONSUMER ALTERNATIVE DISPUTE RESOLUTION

The questions below focus on some key concerns relating to consumer disputes before ADR fora. If possible, please provide the reference/citation of an article that provides a general overview of the way in which consumer alternative dispute resolution operates within your national legal system.

Aleš Galič, Zunajsodno reševanje potrošniških sporov v Sloveniji - med pomanjkljivim, sistemsko zgrešenim in protiustavnim (2012) 31-32 Pravna praksa

8.1 Consumer disputes before ADR fora

8.1.1 Is ADR mandatory for all parties bringing a claim related to a consumer protection dispute?

ADR in consumer disputes is governed by the Out-of-Court Resolution of Consumer Disputes Act (Zakon o izvensodnem reševanju potrošniških sporov, OG RS No. 81/15). Under this Act, ADR is voluntary.

The elements of mandatory mediation are present in relation to court-annexed mediation in the Act on Alternative Dispute Resolution in Judicial Matters (Zakon o alternativnem reševanju sodnih sporov, OG RS No. 97/09 et seq.). As regards the court-annexed mediation, the Civil Procedure Act provides that the court has a duty to draw the parties' attention to the possibilities of interrupting the legal proceedings due to alternative dispute resolution mechanisms or to refer them to such mechanisms whenever this is appropriate. With the introduction of the Act on Alternative Dispute Resolution in Judicial Matters in 2010, the court-annexed mediation was made obligatory for the first instance courts and appellate courts.

8.1.2 Please specify if there are limitations to the use of ADR. These might include the nature of the claim (i.e. whether both individual and collective claims are possible), requirements of representation, time limits, value thresholds, etc.

As regards the resolution of the consumer disputes according to the Out-of-Court Resolution of Consumer Disputes Act, it is possible only for individual claims. Parties have a right to be represented by their representative (Article 11 of the Out-of-Court Resolution of Consumer Disputes Act). There is no value threshold set by this Act. As regards time limits, it is for the organisation conducting ADR to set the time limit to bring the application, however, it should not be less than a year since the consumer made a complaint (Article 12 (3) of the Out-of-Court Resolution of Consumer Disputes Act).

8.1.3 Can ADR entities issue binding decisions and can they enforce those decisions? If not, please explain how they are enforced.

ADR entities can issue binding decisions. The decision is legally binding if the parties have been notified of the binding effect and the legal consequences of a binding decision ex ante and have consented with an express written consent (Article 22(1) of the Out-of-Court Resolution of Consumer Disputes Act).

Binding decision has the legal effect of an arbitration decision (Article 22(3) of the Out-of-Court Resolution of Consumer Disputes Act). Thus, it can be enforced by the competent court according to the Claim Enforcement and Security Act.

8.1.4 Does national law provide that limitation periods applicable to judicial actions should be suspended while ADR is ongoing?[328]

Article 305 of the Civil Procedure Act provides that the court may interrupt civil proceedings for up to three months, if parties agree to try ADR. Article 15 of the Act on Alternative Dispute Resolution in Judicial Matters provides that this interruption shall not be longer then three months. Thus, if the alternative dispute resolution procedure is not concluded with an agreement within three months' period, the interrupted judicial proceedings continue ex lege (see decision of the Higher Labour and Social Court Pdp 1248/2014, 05.11.2014, ECLI:SI:VDSS:2014:PDP.1248.2014).

8.1.5 Please specify if national law establishes rules providing for recourse to judicial action following an (unsuccessful) ADR hearing[329].

Not expressly, however, Article 8(2) of the Out-of-Court Resolution of Consumer Disputes Act provides that by filing the application for ADR with an ADR entity the consumer does not waive the right to administrative and judicial redress.

8.1.6 Is there judicial review of decisions and awards made by ADR entities? If so, by which court or tribunal is this oversight made? Is it ordinary or specialised?

Yes, decision made by ADR entities can be challenged in court with an action for annulment of the decision according to the rules governing the arbitration (Article 23 of the Out-of-Court Resolution of Consumer Disputes Act).

Source(s):

- Out-of-Court Resolution of Consumer Disputes Act
- Civil Procedure Act
- Act on Alternative Dispute Resolution in Judicial Matters
- Aleš Galič, Zunajsodno reševanje potrošniških sporov v Sloveniji - med pomanjkljivim, sistemsko zgrešenim in protiustavnim (2012) 31-32 Pravna praksa

[328] The Directive on Consumer ADR provides that "the existence of an effective system for collective claims and easy recourse to ADR should be complementary". Consumer ADR is relevant not only for individual claims but also for collective ones; it can provide consumer with a means to reduce costs and save time.
[329] Per Arts.10-12, Directive on Consumer ADR.

9. THE EXAMINATION OF CONSUMER PROTECTION LAW IN NATIONAL PROCEDURAL LAW: RESPECT FOR THE PRINCIPLES OF THE EFFECTIVENESS AND EQUIVALENCE OF CONSUMER PROTECTION LAW AND EX OFFICIO CONTROL

The rules of national civil procedure that could potentially affect, and indeed undermine, the effective and equivalent protection of consumer rights are various. They include but are not limited to the rules and practices of ordinary and specialised judicial procedures, rules and practices of consumer ADR, rules applicable to special types of procedure (e.g. payment order procedures), the jurisdiction of individual courts (the courts that have jurisdiction over consumer disputes), the formal requirements that have to be satisfied to bring a case, the types of legal action that are available, the need for parties to be represented, the time-limits applicable to procedural steps of the action, rules on the taking of evidence, the possibility (or lack) to consider certain issues at specific stages of the procedure, the right to appeal and review, and rules relating to the enforcement or judgements and other enforcement titles (e.g. arbitration awards, notarial deeds, including mortgages).

On the basis of the principles of equivalence and effectiveness, the CJEU has established certain requirements for the procedural protection of consumer rights deriving from EU law. In particular (and especially in relation to the protection afforded to consumers via the Unfair Contract Terms Directive[330]), the CJEU has established an obligation on national judges (and potentially other dispute resolution facilitators) to apply consumer law of their own motion (that is, ex officio), when they have available the legal and factual elements necessary for this task. Ex officio control is one type of procedural mechanism that can be utilised within the national system to promote the effective and equivalent protection of consumer law. Thus, other mechanisms of procedure within your national legal system should be highlighted and discussed where relevant. The following questions should be answered in respect of both judicial and if relevant, alternative dispute resolution.

9.1 The basis of ex officio control of consumer protection law in national law

9.1.1 Is it clear in the national legal system when consumer protection law should be applied ex officio? Is the ex officio control of consumer protection law established as an obligation or as a (discretionary) power of the judge in national procedural law?

[330] However, the CJEU has recognised that ex officio control – and other procedural requirements, that might in themselves (or indeed, in their absence), impact the effective enforcement of consumer law – arise across the EU's consumer protection directives.

Ex officio control of consumer protection is possible in all stages of the proceedings – for ordinary proceeding, small claims, provisional measures, proceedings linked to enforcement, all enforcement proceedings and appeal proceedings. Regarding the payment order, if an objection is advanced against the issuance of a payment order ex officio control will be made but only when the proceedings are transferred to ordinary civil proceedings for discussion on the merits.

The court shall attend to nullity ex officio and any person concerned may make reference to it (Article 92 of the Code of Obligations). Thus, mandatory consumer protection law should be applied ex officio. See 8.6.1 and 11.1.1 above.

The right to apply nullity shall not expire (Article 93 of the Code of Obligations).

One of the grounds of appeal is also violation of substantive law (Article 338 of the Civil Procedure Act). As regards the scope of appellate review, the court of second instance shall examine the judgment of the court of first instance within limits of reasons stated in the appeal; however, the correctness of application of the substantive law is assessed ex officio (Article 350 of the Civil Procedure Act). Thus, the application of consumer protection law is assessed ex officio at the appellate level.

9.1.2 If there is an understanding of ex officio control of consumer protection law in the national legal, what is this control understood to encompass/not cover?

As regards contracts, it encompasses control of nullity and partial nullity, i.e. compliance with the constitution, compulsory regulations or moral principles (Article 86 of the Code of Obligations). At the appellate level, it encompasses the correctness of the application of consumer law at the first instance.

9.1.3 Is the party who claims to be a consumer required to establish his or her consumer status, the existence of a consumer contract and that consumer law applies to the dispute? Is this required even if the consumer has no legal representation?

No, iura novit curia should apply here, so the court can assess of its own motion that a party is a consumer, that the contract is a consumer one and that consumer law applies to the dispute.

9.1.4 What information is available to judges and dispute resolution facilitators hearing consumer protection disputes? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a consumer protection dispute to be heard and b) for the court to engage in ex officio control?

The judges and dispute resolution facilitators only have the information provided by the parties in their contentions of fact and law. They are not entitled to perform ex officio inquiries. (There is an exception, see 8.1.6).

9.1.5 Who is responsible for providing this information? If the necessary information is not available to the court (or dispute resolution facilitator), is he or she under an obligation to investigate in order to be able to respond to a relevant consumer protection dimension of the case?

See above.

9.1.6 Will the court provide the consumer with any assistance in gathering factual information or advancing his legal arguments before the court? Please respond for the situation where: a) the consumer has legal representation and b) the consumer has no legal representation.

Only in cases where the consumer has no legal representation. Article 12 of the Civil Procedure Act provides that a party who is not represented by an attorney and who by reasons of ignorance fails to exercise their procedural rights shall be advised by the court of the acts of procedure which they are entitled to execute.

Acts of procedure also cover the collection of evidence (see decision of the Appellate Court in Ljubljana I Cp 379/2015, 22.04.2015, ECLI:SI:VSLJ:2015:I.CP.379.2015).

Source(s):

- Code of Obligations
- Civil Procedure Act

9.2 The possibility for ex officio control of EU consumer protection law in dispute resolution proceedings

9.2.1 Is ex officio control of consumer protection law always possible when the procedure involves a full assessment of the claim on its merits?

Yes, see 11.1.1, 8.6.1 above.

9.2.2 Can ex officio control be exercised even when the procedure does not involve an assessment on the merits?

Yes. See 8.6.1 and 11.1.1.

9.2.3 Please indicate if, per national procedural law, ex officio control can be exercised at the following stages of the procedure:

	Courts		Other dispute resolution facilitators	
	Possible to exercise ex officio control	Not possible to exercise ex officio control	Possible to exercise ex officio control	Not possible to exercise ex officio control
Ordinary proceedings	x		x	
Small claims	x		x	
Payment order	x		x	
Provisional measures	x		x	
Proceedings linked to enforcement	x		x	
Enforcement proceedings	x		x	
- Enforcement of payment order	x		x	
- Enforcement of arbitration award	x		x	
- Enforcement of mortgage	x		x	
- Enforcement of notarial deed	x		x	
Appeal proceedings	x		x	

9.2.4 What does ex officio control encompass in national procedural law?

Nullity and partial nullity, i.e. compliance with the constitution, compulsory regulations or moral principles (Article 86 of the Code of Obligations). See 8.6.1 and 11.1.1 above. Mandatory consumer law provisions are covered by the notion compulsory regulations. The notion of 'moral principles' protects general social values (see decision of the Supreme Court of the Republic of Slovenia II Cp 2105/2005, 22.11.2007, ECLI:SI:VSLJ:2005:II.CP.2105.2005). Examples are good faith and fair dealing.
National procedural law requires ex officio control of jurisdiction, capacity of the parties, their representation etc. However, it does not encompass ex officio control of, for example, the amount of interest (as it was the case in the case C-618/10, Banco Español de Crédito).

Source(s):

- Code of Obligations

9.3 Other procedural mechanisms for the equivalent and effective protection of EU consumer law

9.3.1 Does national procedural law provide that rules of EU consumer law (as well as rules that aim to satisfy EU consumer law objectives) should be understood as having equal standing to national rules of public policy (which is to say, that for the purposes of domestic law, the consumer protection provision is understood to have equal standing to a rule that must be raised ex officio by the national court)?

Not expressly, however, the provision on nullity, which needs to be raised ex officio, provides that compliance with mandatory legislation needs to be assessed – it is believed that this also encompasses EU consumer law which is implemented in national legal order or directly applicable.

9.3.2 If ex officio control is not possible in certain types of proceedings or at a certain stage of proceedings (or for any other reason), does national procedural law provide for an alternative way of assessing consumer protection law?

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Source(s):

- Code of Obligations

9.4 Ex officio control in payment order procedures

9.4.1 What information is available to the judge when a claim for the issuance of a payment order is made? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a claim for the issuance of a payment order to be granted and b) for the court to engage in ex officio control before a payment order is issued?

The court shall order the payment order when a monetary claim is supported by an authentic document with an enclosed original or a certified copy (Article 431 of the Civil Procedure Act). In claims providing for payment of due sum of money not exceeding 2.000 EUR, the court shall issue a payment order against the defendant even though the action does not contain an authentic

document, but does allege the legal basis and the amount of debt, adducing also the evidence to support such allegations (Article 432 of the Civil Procedure Act).

9.4.2 What considerations will be assessed ex officio by the court (or other competent authority) before a payment order is issued?

The fulfilment of the requirements set in Articles 431 and 432 of the Civil Procedure Act (see above 11.4.1), and other procedural requirements – jurisdiction, capacity of the parties, correct representation etc.

9.4.3 How is the consumer informed about the claim to issue a payment order against him or her? Does national procedural law make any provision for steps to be taken to ensure that consumers are informed of the claim for the issuance of a payment order so that he or she can contest it?

No, he or she is only entitled to attack the payment order once it is issued. He or she may challenge the payment order only by means of a plea (Article 435 of the Civil Procedure Act).

9.4.4 If the consumer objects to the claim, what is the next step? Do the proceedings continue, in the context of which ex officio control can be exercised? Or are the proceedings transferred to ordinary proceedings for analysis on the merits of the claim?

If the consumer files a plea asserting that the statutory conditions for issue of payment order (Articles 431 and 432 of the Civil Procedure Act) have not been fulfilled or that other obstacles exist in respect of continuation of the proceedings, the court shall first decide upon such a plea. If it establishes that the plea is well-founded, it shall set aside the payment order and, after finality of the decree to set aside, commence to examine the main subject of dispute if a hearing is to be conducted. If the court dismisses the plea, it shall forthwith commence to examine the main subject of dispute, while the decision on the plea shall be included in the decision on the main subject. (Article 437 of the Civil Procedure Act)

Source(s):

- Civil Procedure Act

European Commission
An evaluation study of the impact of national procedural laws and practices on the equivalence and effectiveness of the procedural protection of consumers under EU law

JUST/2014/RCON/PR/CIVI/0082

National Report – Consumer Protection Strand

Spain

Fernando Gascón Inchausti

SPAIN: LEGAL ANALYSIS

1. NATIONAL LEGISLATION IMPLEMENTING EU CONSUMER PROTECTION INSTRUMENTS

EU legislation	Transposing national legislation	Additional notes (e.g. if there is an overlap in application of legislation etc.)
Doorstep Selling Directive 1985/577/EEC	Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias (esp. arts. 92-113) [Legislative Royal Decree 1/2007, of 16 November,	

	approving the Consolidated Text of the General Consumer and User Protection Act (especially Articles 92-113).]	
Package Travel Directive 90/314/EEC	Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias (esp. arts. 150-165) [Legislative Royal Decree 1/2007, of 16 November, approving the Consolidated Text of the General Consumer and User Protection Act (especially Articles 150-165).]	
Unfair Contract Terms Directive 1993/13/EEC	Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias (esp. arts. 80-91) [Legislative Royal Decree 1/2007, of 16 November, approving the Consolidated Text of the General Consumer and User Protection Act (especially Articles 80-91).]	
Distance Selling Directive 1997/7/EC	Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias (esp. arts. 92-113) [Legislative Royal Decree 1/2007, of 16 November, approving the Consolidated Text of the General Consumer and User Protection Act (especially Articles 92-113).]	Ley 7/1996, de 15 de enero, de Ordenación del Comercio Minorista. Act 7/1996, of 15 January, on the Regulation of Retail Sales (only applicable to business relationships)
Consumer Sales and Guarantees Directive 1999/44/EC	Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias (esp. arts. 59-79 y 114-127).	

	[Legislative Royal Decree 1/2007, of 16 November, approving the Consolidated Text of the General Consumer and User Protection Act (especially Articles 59-79 and 114-127).]	
Unfair Commercial Practices Directive 2005/29/EC	Ley 29/2009, de 30 de diciembre, por la que se modifica el régimen legal de la competencia desleal y de la publicidad para la mejora de la protección de los consumidores y usuarios [Modificación de la Ley 3/1991, de 10 de enero, de Competencia Desleal; modificación de la Ley 34/1988, de 11 de noviembre, General de Publicidad; modificación del texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias, aprobado por el Real Decreto Legislativo 1/2007, de 16 de noviembre; y modificación de la Ley 7/1996, de 15 de enero, de Ordenación del Comercio Minorista]. [Act 29/2009, of 30 December, amending the regulation on unfair competition and publicity to enhance the protection of consumers and final users (modifying, on turn: Act 3/1991, of 10 January, on unfair competition; Act 34/1988, of 11 November, on publicity; Legislative Royal Decree 1/2007, of 16 November, approving the Consolidated Text of the General Consumer and User Protection Act; and Act 7/1996, of 15 January, on the regulation of retail sales]. It is in the amended version of the mentioned Act where the implementing rules are to be found.]	
Misleading and Comparative Advertising Directive 2006/114/EC	Ley 29/2009, de 30 de diciembre, por la que se modifica el régimen legal de la competencia desleal y de la publicidad para la mejora de la protección de los consumidores y usuarios [Modificación de la Ley 3/1991, de 10 de enero, de Competencia Desleal; modificación de la Ley 34/1988, de 11 de noviembre, General de Publicidad; modificación del texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias, aprobado por el Real Decreto Legislativo 1/2007, de 16 de noviembre; y	

	modificación de la Ley 7/1996, de 15 de enero, de Ordenación del Comercio Minorista]. Act 29/2009, of 30 December, amending the regulation on unfair competition and publicity to enhance the protection of consumers and final users (modifying, on turn: Act 3/1991, of 10 January, on unfair competition; Act 34/1988, of 11 November, on publicity; Legislative Royal Decree 1/2007, of 16 November, approving the Consolidated Text of the General Consumer and User Protection Act; and Act 7/1996, of 15 January, on the regulation of retail sales]. It is in the amended version of the mentioned Act where the implementing rules are to be found.	
Consumer Credit Agreement Directive 2008/48/EC	Ley 16/2011, de 24 de junio, de contratos de crédito al consumo [Act 16/2011, of 24 June, on Consumer Credit Agreements]	
Timeshare Protection Directive 2008/122/EC	Ley 4/2012, de 6 de julio, de contratos de aprovechamiento por turno de bienes de uso turístico, de adquisición de productos vacacionales de larga duración, de reventa y de intercambio y normas tributarias. [Act 4/2012, of 6 July, on timeshare, long-term holiday product, resale and exchange contracts and tax regulation]	
Consumer Injunctions Directive 2009/22/EC	Ley 39/2002, de 28 de octubre, de transposición al ordenamiento jurídico español de diversas directivas comunitarias en materia de protección de los intereses de los consumidores y usuarios. [Act 39/2002, of 28 October, implementing into Spanish legislation certain European Directives on the protection of the interests of consumers and final users (mainly amending the Civil Procedure Act, where the implementing rules are to be found)].	Act 39/2002 served the implementation of Directive 98/27 (repealed by Directive 2009/22). No additional provision has been made to implement the changes

		operated.
Consumer Rights Directive 2011/83/EU	Ley 3/2014, de 27 de marzo, por la que se modifica el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias, aprobado por el Real Decreto Legislativo 1/2007, de 16 de noviembre Act 3/2014, of 27 March, amending the Legislative Royal Decree 1/2007, of 16 November, approving the recast of the General Act for the Defense of Consumers and Final Users and other complementary Acts (It is in the amended version of the Legislative Royal Decree where the implementing rules are to be found].	
ADR for Consumer Disputes Directive 2013/11/EU	It has not been yet implemented. The so-called "Sistema Arbitral de Consumo"/ Arbitration System for Consumer Matters (Arts. 57-58 of the Legislative Royal Decree 1/2007, of 16 November, approving the Consolidated Text of the General Consumer and User Protection Act; Real Decreto 231/2008, de 15 de febrero, por el que se regula el Sistema Arbitral de Consumo) provides for general coverage –via arbitration or mediation- to consumer disputes, but it does not meet all the ADR Directive requirements.	

1. CONCEPT OF THE CONSUMER

1.1 Please outline the concept of the consumer in national law, indicating whether it is intended to be a uniform concept, whether it has been legislated for and where it can found (i.e. in a legislative provision, governmental guidelines, case law etc.).

Pursuant to Article 3 of the Legislative Royal Decree 1/2007 there is a broad notion of consumer that includes:

a) Natural persons acting on a purpose not linked to their commercial, business or professional activity.

b) Legal persons and non-incorporated entities acting without profit purposes in a scope that is stranger to any commercial or business activity.

2. REGULATORY AUTHORITIES COMPETENT FOR CONSUMER PROTECTION ISSUES

2.1 What regulatory authorities, if any, are competent for enforcing consumer protection law? Please identify them, their nature (i.e. whether they are public or private or mixed) and the nature of enforcement.

Due to "constitutional architecture" grounds the regulatory powers in the field of consumer protection is fragmented between State, Regions and Towns.
a) At the State's level, the main regulatory entity is the so-called Agencia Española de Consumo, Seguridad Alimentaria y Nutrición (Aecosan), created in 2014, merging two pre-existing and different entities, the Instituto Nacional de Consumo and the Agencia Española de Seguridad Alimentaria y Nutrición.
It is an autonomous public entity, depending from the Spanish Ministry of Health, Social Services and Equality.
Its regulatory powers encompass surveillance over market and products. It is entrusted with inspection and sanctioning powers in case on infringement of consumers and users' rights that amount to administrative infractions.
Apart from Aecosan, other autonomous/independent public regulators have powers that encompass in many different ways the protection of consumers' rights, like the Comisión Nacional del Mercado de Valores (Stock Exchange National Commission), protecting the interest of investors (also non-professional ones) or the Comisión Nacional de los Mercados y de la Competencia (Markets and Competition National Commission), with a wide scope of powers in sectors where consumers' rights are directly involved, like competition, energy, telecommunications and transports.
For Bank issues, the regulator is the Banco de España (Spain's Central Bank).
In the field of insurance, regulatory powers are conferred to the Dirección General de Seguros y Fondos de Pensiones (Directorate-General of Insurance and Pension Funds) of the Ministry of Economy. And in the scope of telecommunication, regulatory powers also fall upon the Secretaría de Estado de Telecomunicaciones y para la Sociedad de la Información- SETSI (Secretary of State for Telecommunications and for the Information Society). These two agencies are not autonomous from the government, but they also play a role in the extrajudicial solution of complaints.
b) At the Regions' level (Comunidades Autónomas), almost every Region in Spain has passed its own Consumer Protection Act and established its own regulatory authority, sharing inspection

and sanctioning powers with Aecosan (see, for instance, the "Dirección General de Comercio y Consumo" of the Madrid Region).

A detailed list of the competent national and regional authorities can be found in the Commission communication pursuant to Article 5(2) of Regulation (EC) No 2006/2004 of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws, concerning the competent authorities and single liaison offices (for Spain, pages 18 ff.)

c) Finally, also towns (Municipios) are competent in the field of consumer protection and some of them (the biggest ones) have created specific entities or offices (for the City of Madrid, Oficina Municipal de Información al Consumidor Central). At this level the powers are linked to information and to facilitating conflict resolution.

The enforcement of consumer protection law entrusted to said regulatory authorities has two main faces (at least, concerning the scope of this study):

- On the one hand, inspections and sanctions, amounting usually to pecuniary fines or withdrawal of the authorization to carry on a specific business. Some statistics on the activity of Aecosan and Regional agencies can be found here.
- On the other hand, alternative dispute resolution, via the so-called "Sistema Arbitral de Consumo", structured through public arbitration boards (Juntas Arbitrales de Consumo), whose organization, support and main funding is entrusted to Aecosan (for the National Consumer Arbitration Board), to the Regions (for the Regional Arbitration Boards) and to Towns (for some Municipal Arbitration Boards).

In the context of securities, banking and insurances there is a specific system to handle complaints, regulated by a 2012 Order of the Ministry of Economy (Orden ECC/2502/2012, de 16 de noviembre, por la que se regula el procedimiento de presentación de reclamaciones ante los servicios de reclamaciones del Banco de España, la Comisión Nacional del Mercado de Valores y la Dirección General de Seguros y Fondos de Pensiones). It is not an arbitration system, but rather similar to an Ombudsman service: the complaint procedure (that can be substantiated electronically) ends with a reasoned report assessing if transparency and protective rules have been infringed and if the entity has respected the good practices in that sector. The report is not binding and cannot be appealed.

For complaints in the scope of telecommunications, the system ("Oficina de Atención al Usuario de Telecomunicaciones") is handled by SETSI and regulated by a 2007 Order of the Ministry of Industry (Orden ITC/1030/2007, de 12 de abril, por la que se regula el procedimiento de resolución de las reclamaciones por controversias entre usuarios finales y operadores de servicios de comunicaciones electrónicas y la atención al cliente por los

operadores). It is not an arbitration system either, but it ends with a decision that is binding on the business and that can be challenged before administrative courts.

Although it is a little far from the notion of "regulatory power", it is important to note that some entities have been empowered with standing to file "collective claims" and, hence, to promote "collective relief" in consumer matters. Apart from Aecosan, it is the case with consumers' associations, State Prosecution Office (Ministerio Fiscal), professional organisations (in some areas of law) and Chambers of Commerce (in some areas of law).

2.2 Is there a specific venue for this type of enforcement and does this limit the jurisdiction of courts/ADR fora (even if only initially)?

Sanctioning proceedings commenced by regulatory authorities can amount to a sanction for infringement of administrative rules. This has no direct impact on the private rights of consumers and does not amount to an obstacle for the commencement of judicial or ADR proceedings. In practice, however, many legal actions (especially collective ones) are follow-on actions, taking advantage of the information gathered by regulatory authorities during their sanctioning proceedings.

2.3 Can criminal prosecutions be initiated for violations of consumer protection rules? How serious must the infringement be? What are the penalties and sanctions? And might these prosecutions lead to criminal penalties or sanctions? Can individual consumers piggy back on these claims (e.g. via a partie civile method)?

Yes, and it has been frequent (in fact, the "rapeseed oil case" in the 1980s and 1990s was the first case where collective standing was recognized to consumer associations to seek collective damages redress). The most known current case concerns the 2011 IPO of Bankia, for misleading to small investors (the prospectus for its public stock offering was inaccurate as to the real finance situation of the entity): apart from a criminal proceeding, many civil proceedings were engaged. After on 3 February 2016 a Judgment of the Civil Division of the Supreme Court [Sentencia núm. 24/2016, ECLI:ES:TS:2016:92] ordered Bankia to reimburse two small investors, the bank announced full compensation to minority shareholders who participated in the IPO. The criminal lawsuit, however, is still in the investigation phase.

Apart from the more general provisions on fraud or misappropriation, the Spanish Criminal Code includes a Section on "Crimes against market and consumers" (Articles 281-286). Some examples:

- Removing raw materials or products of basic need from the market, with a penalty of imprisonment from one to three years and fine.

- Manufacturers or traders who make false claims or declare untrue features, with a penalty of imprisonment from six months to one year or fine.
- Managers of companies issuing securities listed on the stock markets falsifying the economic-financial information contained in the prospectuses, with a penalty of imprisonment from one to four years.
- Billing higher amounts for products or services whose cost or prices is measured by automatic appliances, by altering or manipulating these, with a penalty of imprisonment of six months to one year and fine.

In Spain civil actions are ordinarily exercised within the framework of the criminal procedure (Arts. 100 and 108 of the Criminal Procedure Act, "Ley de Enjuiciamiento Criminal" = LECrim): the decision rendered shall decide not only on the criminal accountability, but also on the civil consequences of the crime. Consumers, as victims, may intervene in the criminal proceeding in their own interest (Art. 110 LECrim); consumer associations do also have standing to claim redress for all affected consumers; the State Prosecutor is also entitled to do it.

2.4 Is there judicial review of decisions of consumer regulatory authorities? If so, by which court is this judicial oversight made? Is the forum an ordinary or a specialised court or tribunal?

Regulatory authorities' decisions (e.g., imposing a fine) may always be challenged with administrative courts. The general rules on judicial proceedings in administrative matters are followed (Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-administrativa). There are no specific courts to deal with these matters: the general rules on the allocation of cases among administrative courts will be applied.

In the context of securities, banking and insurances (see above 4.1) the regulatory authorities have a function as Ombudsmen handling complaints. Their reports are not binding nor reviewable, because they do not have the consideration of "decisions" (Art. 12.6 of Order ECC/2050/2012).

In the field of telecommunications (see also above 4.1) the complaint system handled by SETSI ends with an administrative decision that, given the case, has to be implemented by the concerned operator (it is binding on it) and that may be judicially challenged before the competent administrative courts (Art. 9.3 of Order ITC/1030/2007).

2.5 Does the national legal system provide for a mechanism of cooperation between its national regulatory authorities and those of other Member States?

Aecosan is Spain's Single Liaison Office, pursuant to Regulation (EC) No 2006/2004 of the European Parliament and of the Council on cooperation between national authorities

responsible for the enforcement of consumer protection laws, concerning the competent authorities and single liaison offices.

3. LEGAL AID

3.1 Is legal aid available to consumers in: a) bringing a claim and b) defending a claim before a court?

Legal aid in Spain is regulated by Act 1/1996 of 10 January on Legal Aid ("Ley de asistencia jurídica gratuita" = LAJG). If legal requirements are met, legal aid covers both sides, i.e., bringing a claim and defending a claim.

3.2 For what kinds of disputes and actions is legal aid available? (NB: legal aid might not be available for consumer or contractual disputes but be available instead for a related action, e.g. actions relating to debt, mortgage arrears, eviction etc.)

In some areas of law legal aid may be automatically granted (gender-violence, terrorism and human trafficking victims, car accidents victims suffering severe consequences); but, in general terms, legal aid is only granted to persons that do not have financial means to litigate (Art. 2 LAJG). There are no areas or kinds of dispute for which legal aid might not be in principle available.

3.3 What requirements must be satisfied for the consumer to be entitled to legal aid? Please specify if there are any additional limitations to its availability.

Three requirements must be satisfied:
1. Lack of financial means, measured on the basis of some thresholds, calculated annually and per family unit (Art. 3.1 LAJG):

a) Twice the current public revenue index (IPREM) at the time the application is made, where the individual is not a part of a family unit. [In 2016 IPREM = 532,51 € per month, or 7.455,14 € per year].

b) Two and half times of the current public revenue index at the time the application is made, where the individual is part of a family unit under 4 members.

c) Three times the current public revenue index for family units with 4 or more members.

However, even if these thresholds are not met, legal aid may be denied if there is an appearance of a better financial situation (e.g., property of immovable assets not used as dwell) (Art. 4 LAJG).
2. Litigating for rights and interests belonging to the party seeking legal aid (Art. 3.4 LAJG).

3. Sustainable nature of the claim or defence (Arts. 32-34 LAJG): if the attorney designated to take care of the case considers that the claim or defence is of an unsustainable nature, he/she will notify the legal aid board and this may eventually lead to legal aid being refused.

3.4 What does legal aid encompass? (i.e. (only) general advice, (only) assistance in preparing the case, (only) assistance with negotiation of settlements, (also) representation).

The contents of legal aid are standard and described in Art. 6 LAJG:
- Free advice and guidance prior to proceedings for those who intend to seek court protection of their rights (including the possibility of exploring mediation).
- Legal advice for individuals under arrest or detention.
- Free defence by a lawyer and free court representation by a "procurador".
- Free publication in official journals which might be needed for the development of proceedings (e.g., service by publication).
- Exemption from payment of court fees and deposit required to lodge appeals.
- Free expertise where required as evidence to sustain the claim or defence.
- Free or reduced notarial fees, when required for the purposes of the proceeding.

4. COSTS

4.1 What are the costs of different types of procedures before courts? Are there exemptions to the payment of fees and expenses? How can costs be paid?

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Court fees	0	0	0	150 to 175 € (only 150 after the Constitutional Court judgment 140/2016)	If juicio verbal (for injunctions): from 175 to 250 € (only 150 after the Constitutional Court judgment	If juicio verbal (for injunctions): from 250 € (150 fix + 0,5% value claim) (only 150 after the Constitution

					140/2016) If juicio ordinario: from 325 to 400 € (only 300 after the Constitutional Court judgment 140/2016)	al Court judgment 140/2016) If juicio ordinario: from 400 € (300 fix + 0,5% value claim) (only 300 after the Constitutional Court judgment 140/2016)
Court expenses	Procurador: ca. 150 Lawyer: ca. 1200	Procurador: ca. 440 Lawyer: ca. 4000	Procurador: ca. 1700 (if value = 600.000) Lawyer: ca. 44.000 (if value = 600.000)	Procurador: ca. 150 Lawyer: ca. 1200	Procurador: ca. 440 Lawyer: ca. 4000	Procurador: ca. 1700 (if value = 600.000) Lawyer: ca. 44.000 (if value = 600.000)
Exemptions	Court fees	Court fees	Court fees	Possible for court fees if legal aid is granted to the consumer association	Possible for court fees if legal aid is granted to the consumer association	Possible for court fees if legal aid is granted to the consumer association

Consumers, as natural persons, are exempt from the payment of court fees [Art. 2 a) of Act 10/2012 on Court Fees].

Consumer associations (with standing to present collective claims), as legal persons, should in principle pay court fees. However, if they have been granted legal aid, the will also be exempt [Art. 2 b) of Act 10/2012 on Court Fees]. Consumer associations are entitled to legal aid if they are properly registered (with Aecosan or a relevant Regional authority) and the collective claim seeks relief linked to goods or services of common, ordinary and general use [see Additional

Provision 2 LAJG and Arts. 37 and 9 of the Consolidated Text of the General Consumer and User Protection Act].
Court expenses entail, at least, lawyers' and procuradores' fees.
Lawyers' fees are established on a freedom-of-contract-basis. Nevertheless, Bar Associations provide for some guidance, which is not binding by itself, but that is used when a party challenges the costs and an opinion of the Bar Association is required by the court to solve the dispute [Art. 246.1 LEC]. The guidances, in turn, may differ from one Bar Association to the other. The figures inserted above assume that the case is handled before a court in Madrid, according to the guidelines of the Madrid's Bar Association.
As to the fees of the "procurador", they are established by decree.

The figures provided take in account only first instance proceedings. Appeals would increase lawyers' and procuradores' fees.

5. STANDING AND REPRESENTATION IN CONSUMER DISPUTES

5.1 Does national law limit the standing of the individual consumer in respect of the claim that can be made and the forum before which it can be brought?

No. According to Article 24 of the Spanish Constitution any person has the right to access the court system and to seek judicial relief to his/her rights and legitimate interests. This means that any individual consumer has standing to make any claim arising for any breach or infringement of his/her rights.
There is not a duty to mediate or to explore any ADR path before going to court in consumer matters, so an individual consumer is entitled to file a claim directly with the court system.
[At a later moment, Law Decree 1/2017, of 20 January 2017, has created a specific out-of-court procedure to facilitate the repayment of amounts unduly paid by the consumer to credit institutions under certain floor clauses contained in loan agreements secured by real estate mortgages. This ADR procedure is not mandatory, but ignoring it could have consequences in the field of costs for a consumer who would directly go to court,]

5.2 Other than individual consumers, who or which bodies have standing in consumer protection disputes and for what types of claim? If the action is not brought by the individual consumer, what requirements of representation must be satisfied?

1. Pursuant to general rules of law, any party can be represented in a judicial proceeding by somebody holding a power of attorney enabling him/her to do so. Sometimes

consumer associations act in this way in order to file "collective" claims: they ask their affiliates to empower them in order to file a claim seeking relief on their behalf. According to Spanish law these situations are not considered as real "collective actions", but rather as a case of joinder of claims (there is a multiplicity of individual claims that are going to be substantiated in a single proceeding and adjudicated in a single judgment).

2. When it comes to “real” collective redress, the Spanish system belongs (in a somewhat peculiar way) to the "opt-out" family. Standing to file claims seeking collective redress in consumer matters depends on one element: whether the group of affected consumers are totally determined or easy to determine (a), on the one hand, or not (b).

(a) If the consumers harmed are totally determined or easy to determine, standing to seek collective redress in the interest and to the benefit of all of them is granted by law (Art. 11.2 LEC) to:
   (i) Consumer associations.
   (ii) Entities legally created having the aim to protect consumer's and user's rights and interests (like Aecosan)
   (iii) Groups of affected consumers: a "group" is not a legal entity, in the sense that it does not possess any legal personality; it is just the gathering of more than the half of the harmed consumers (Art. 6.1.7º LEC).
   (iv) Public Prosecution Office (Ministerio Fiscal) (Art. 11.5 LEC) –for civil cases as well-.

(b) If the consumers harmed by the fact leading to the filing of the claim are not determined or if they are difficult to determine, then the standing is restricted to:
   (i) Consumer associations qualified as "representative" (Art. 11.3 LEC), and this means, in turn, that they belong to the "Consejo de Consumidores y Usuarios", a national representative board (Art. 24.2 of the Consolidated Text of the General Consumer and User Protection Act). Nevertheless, if the scope of the conflict is substantially limited to the territory of a Region, regional law will apply to determine the meaning of "representative" (see, for instance, Art. 127.7 of the Catalan Consumer Code).
   (ii) Public Prosecution Office (Ministerio Fiscal) (Art. 11.5 LEC)

3. The above mentioned rules on attribution of standing relate to non-typical collective claims, i.e., those that are not especially regulated by specific laws. They encompass most of the cases of compensatory collective redress. Apart from that, there are specific rules on standing to seek injunctions pursuant to Directives 98/27 and 2009/22. The most relevant list is that included in Article 54.1 of the Consolidated Text of the General Consumer and User Protection Act, attributing standing to:

(a) Aecosan (before: "Instituto Nacional de Consumo), as well as bodies and entities belonging to Regions and Towns that are competent in the field of the defence of consumers and users.
(b) Consumer associations meeting the requirements set in the 2007 Consolidated Text or, when applicable, in the regional legislation.
(c) Public Prosecution Office (Ministerio Fiscal).
(d) Entities incorporated in other EU Member States included in the "Official Journal List" (the court must assess whether standing is justified on a single case basis, checking if the claim is linked to the scope of activities of the foreign entity).

5.3 If a consumer wants to bring or defend an action relating to a consumer protection dispute, is there a legal (or otherwise formal) requirement that he or she has legal representation? Please specify for both judicial and ADR fora and the bodies, associations or authorities that can provide this representation.

(i) Consumer action (or defence) before a court: general rules apply, requiring lawyer and procurador if the claim's value is above 2000 € (Arts. 23.2 and 31.2 LEC). If the consumer expressly empowers a consumer association to act on his/her behalf, the consumer association will have to hire lawyer and procurador (usually consumers are required to pay a more or less symbolic lump sum to “adhere” to this “collective” claims promoted via joinder of claims).

(ii) Consumer action before the Consumer Arbitration System (ADR) does not require any kind of legal representation.

6. ACTIONS BEFORE COURTS

6.1 Jurisdiction and competence of the courts in consumer disputes: General structure and special procedures aimed at protecting consumers

6.1.1 Are ordinary courts competent to hear such claims? Is there also a specialised tribunal for consumer protection disputes?

Only ordinary courts are competent to hear consumer claims. There are no specialised courts.

6.1.2 Which courts are competent to hear consumer protection disputes at first instance and in appeals? Please specify the court, in light of the value of the claim (and identify any other factors that are relevant in allocation jurisdiction).

General rule: the so-called "Juzgados de Primera Instancia" (Courts of First Instance): Art. 45 LEC; Art. 85.1 LOPJ.
Specific rule: the so-called "Juzgados de lo Mercantil" (Commercial Courts) are competent to hear collective claims in the field of general contract terms and of consumer redress [Art. 86 ter 2 d) LOPJ].

Venue (Arts. 50, 51, 52.2 and 52.3 LEC):
(a) Consumer to business individual claim: the consumer has the choice between the court of his/her domicile or the court of the business' domicile (under business' domicile the law considers also the place of performance of professional activity leading to the claim, or the place where the business has an establishment open to the public or an authorized representative).
(b) Business to consumer individual claim: only before the court of the consumer's domicile.
(c) Choice of court agreements in consumer contracts are void (Art. 54.2 LEC).

6.1.3 What is the nature of the procedure at first instance, e.g. is it a simplified or a summary procedure, and is there an assessment of the merits? Please specify in light of the value of the claim (and identify any other factors that are relevant in allocating jurisdiction).

There are two possibilities:
(a) The so-called "juicio ordinario" (ordinary procedural track), for claims above 6000 euros.
(b) The so-called "juicio verbal" (fast procedural track), for claims until 6000 euros.
Both are considered by the law as "ordinary", in the sense that they lead to a judgment having full res judicata effects.
"Juicio verbal" was initially much shorter than "juicio ordinario". The 2015 reform of the Civil Procedure Act has changed the features of "juicio verbal" and rendered it longer.

(a) The structure of "juicio ordinario" is the following:
(i) submission of a written claim, including all factual and legal contentions, and enclosing documents and expertises prepared by experts appointed by him/her;
(ii) taking the claim into consideration and service to the defendant, granting him a fix 20 working days deadline to present a written answer to the claim, that will have to include all defences, and enclosing all documents and expertises prepared by experts appointed by him/her;

(iii) preliminary hearing, to discuss on procedural defences, to propose evidence and to decide on evidence admissibility;
(iv) trial, for the contradictory eliciting of (personal) evidence.

(b) The structure of "juicio verbal" (after the 2015 reform) is the following:
(i) and (ii) like in “juicio ordinario”, with the difference that the deadline to present the written answer to the claim is of 10 working days;
(iii) hearing [i.e., the addition of (iii) and (iv) of the “juicio ordinario”].

6.1.4 Please identify the formal requirements that must be satisfied for a consumer dispute to be heard before a court. These might include time limits applicable to the filing of the action/defence, representation requirements etc.

General procedural requirements need to be met. The following are to be considered:
(i) the court will analyse ex officio its jurisdiction and venue: lack of jurisdiction will lead to non-admission of the claim, so the claimant will have to present a new one with the competent court (Arts. 38 and 48 LEC); lack of venue will lead to a "redirection" of the procedure to the competent court (Art. 58 LEC).
(ii) the court will also analyse, even ex officio, capacity and representation of the parties (Art. 9 LEC).
(iii) the court will check that proper procedural track is followed (juicio ordinario or juicio verbal) (Art. 254 LEC).
(iv) the court will also assess, in case of joinder of actions, if the legal requirement are met (regarding jurisdiction and relation between actions) (Art. 73.3 LEC).

The issue of time limits is considered by Spanish law and practice as a matter of substantive law, so no claim will be considered non-admissible on such a ground (Art. 403 LEC).

6.1.5 In respect of the claims and relevant procedures available in the national legal system, what kind of relief might be available in consumer protection disputes? (monetary remedies, injunctions, skimming off etc.)?

Individual claims: the consumer may seek the relief which is more adequate and suitable, according to the harm suffered and the applicable law: the most frequent in practice are monetary compensations, orders to perform an obligation, and nullification of a contract or declaration that a contract term is not applicable. But there is not a numerus clausus system.

6.1.6 Please provide a brief overview of the role of parties and judges in civil proceedings generally (e.g. with reference to the principle of party disposition, the obligation of

parties to make and prove factual allegations and to make and provide legal arguments, the possible role of the court). This overview should be brief; these issues will be dealt with in more detail in the questions that follow.

In Spanish civil procedure there is a very strict assumption of the principle of party disposition (Art. 216 LEC) and of judicial impartiality that deprives the civil judges of ex officio initiatives concerning the merits of the case.
The parties have the burden to make their factual and legal allegations: the court is not enabled to introduce facts ex officio and (this is "typical Spanish") it is not authorized either to introduce a different legal perspective to the case (Art. 218.1 II LEC). The "iura novit curia" principle has a very narrow scope of application: only to correct parties' mistakes in the selection of the applicable rule of law, but not to put the case under a different legal perspective (amounting to change the relevance of the facts).
In the field of evidence, the Spanish civil courts cannot order ex officio the taking of evidence not proposed by the parties (not even expertises) (Art. 282 and 339.5 LEC): they may only "suggest" to the parties further evidence to be proposed in order to complete their contentions of fact (Art. 429.1 LEC) [exception: the court can take evidence ex officio in family and civil status matters: Art. 752 LEC].

6.2 Small claims

6.2.1 Does a small claims procedure exist in the Member State? If yes, is it a specialised or simplified procedure?

A "small claims procedure" does not exist as such under Spanish law. However, the so-called "juicio verbal" can be regarded as the suitable procedure to substantiate small claims, since its top, when applying value criteria, amounts to 6000 euros. Nevertheless, it is important to bear in mind that: (i) applying the scope criterion, "juicio verbal" is the proper procedural track to substantiate claims of great value (notably, collective injunctions in consumer matters: Art. 250.1.12 LEC); (ii) applying the scope criterion, "juicio ordinario" is the proper procedural track to substantiate claims that can be regarded as consumer claims (notably, individual claims in the field of general contract terms: Art. 249.1.5 LEC).
As explained above [8.1.3.], "juicio verbal" is simplified if compared to "juicio ordinario", but not so much.

6.2.2 What are the value thresholds for claims brought under the small claims procedure? Moreover, are there any other factors that shape the use of the small claims procedure (including the nature of the claim, the area of consumer protection law into which the claim falls etc.)?

Value threshold for "juicio verbal": 6000 euros.
Value threshold for "juicio verbal" without mandatory legal representation: 2000 euros.

6.2.3 What forms must be completed to raise the application? Who assists the consumer in completing these forms?

If the value of the claim is over 2000 euros, legal representation is mandatory, so the consumer's lawyer will prepare the claim.
For claims not above 2000 euros, there are two specific rules arising from the fact that legal representation is not mandatory (Art. 437.2 LEC):

(i) The claim can be "simplified" ("succinct", says the law): this means that the claimant can limit its content to identifying the parties and their domiciles, and to determining in a clear and precise way the relief he/she seeks and the fundamental facts on which he/she relies (so, in practice, this means that legal contentions are not necessary).

(ii) There are official claim forms, available at the court and online, approved by the General Council for the Judiciary. There is no specific provision of anybody's assisting the party in completing the form or in whatsoever way. Bar Associations have a Legal Guidance Service (Servicio de Orientación Jurídica) that in practice is used to get help for issues like this one.

6.2.4 How can an application for a small claim be made (e.g. online, by post or in person)?

General rules are applicable (Art. 273 LEC):

a) When legal representation is mandatory, claims must be presented online, using the Lexnet platform. The duty to use online systems to present claims and other applications to the court was established in October 2015. We are currently experiencing the transition (and its difficulties).

b) When legal representation is not mandatory, claims must be lodged in paper with the competent court, either personally or by post (with acknowledgment of receipt).

6.2.5 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

Pre-existing evidence (like documents and party appointed expertises) has to be produced together with the claim or with the written answer to the claim (Art. 265 LEC). There is a strict preclusion rule for documents that were not produced timely (not applicable, of course, to new documents nor to documents the existence of which was not known to the

party: Art. 270 LEC). If the party prefers the court to appoint an expert, he/she has to ask for it in the claim or in the answer to the claim (Art. 339.2 LEC): the court will appoint an expert and his/her report will have to be ready before the hearing.
During the hearing phase the party has the burden to propose witnesses', expert witnesses' and other party's interrogatory (Art. 443.3 LEC); in fact, the party has the burden to ensure that the witnesses and the other party will be present at the hearing (within 5 days upon being informed of the hearing's date, the party may ask the court to summon witnesses and/or the other party: Art. 440.1 LEC).
Personal evidence will be taken at the hearing in an adversarial form: questions will be stated by the lawyer of the party that proposed evidence, followed by cross-examination by the other party's lawyer; the court may ask afterwards for clarification (Arts. 306 and 372 LEC).
When a party does not have a lawyer, the court can allow him/her to formulate the questions directed to the other party; the court can also interrogate by itself the party called to be interrogated (Art. 306.2; also applicable to witnesses).

When there is no legal representation, parties are required to appear personally to the "hearing" phase of the proceeding. (i) If the claimant fails to appear, the court will dismiss the case, unless the defendant asks for the procedure to continue, showing a good cause for it (e.g., the defendant is interested in having the case adjudicated). (ii) If the defendant fails to appear, the hearing will take place without him/her (no automatic upholding of the claim) (Art. 441 LEC).
When there is legal representation, the parties can avoid attending to the hearing by sending their procurador. However, if a party has been summoned by the opponent party for interrogatory in the hearing, and that summoned party does not attend, then ficta confessio rules will apply (the court may consider as admitted by the non-appearing party the facts on which the interrogatory was going to be conducted: Art. 304 LEC).

6.2.6 Are the costs of the successful party reimbursed?

Pursuant to Article 394 LEC, the loser-pays principle applies. A party can only benefit of a cost reimbursement order if he/she is completely successful: if claims are only partially upheld no cost reimbursement will be granted. There is some temperance to this rule: (i) in cases of partial success, the law permits the issuing of an order to reimburse costs if the court expressly states in the judgment that one of the parties acted in a reckless manner, i.e., with temerity; (ii) in practice, in cases where it is hard from the very beginning to achieve full success (e.g., claims for personal injury, where the final evaluation of harm is not easily predictable), case law has developed the doctrine of the "substantial upholding of the claim", in order to grant costs to the party that was successful, although success was not 100%

complete (the problem, of course, lies in determining what is "substantial" and what not…).[see, for instance, Judgment of the Civil Chamber of the Supreme Court of 9 July 2007 (núm. 776/2007, ECLI:ES:TS:2007:5668).

6.3 Claims other than small claims

6.3.1 If a consumer protection dispute does not qualify as a small claim, what other procedures are available? What are the value thresholds and other factors determining the use of such procedures?

The alternative to "juicio verbal" is “juicio ordinario” (see 8.1.3.), for claims above 6000 euros value.
“Juicio ordinario” is also the proper procedural track when the claim deals with any of the matters established in Article 249.1 LEC (including claims concerning general contract terms, excluded injunctions aimed at refraining from the use of unfair general contract terms).

6.3.2 How can such claims be made? Please specify if the applications can be made online, or by post or in person.

The same rules apply as for “juicio verbal” with mandatory legal representation (see above, 8.2.4).

6.3.3 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

Pre-existing evidence (like documents and party appointed expertises) has to be produced together with the claim or with the written answer to the claim (Art. 265 LEC). There is a strict preclusion rule for documents that were not produced timely (not applicable, of course, to new documents nor to documents the existence of which was not known to the party: Art. 270 LEC). If the party prefers the court to appoint an expert, he/she has to ask for it in his/her claim or in his/her answer to the claim (Art. 339.2 LEC): the court will appoint an expert and his/her report will have to be ready before the preliminary hearing.
During the preliminary hearing the parties have to propose witnesses', expert witnesses' and other party's interrogatory, as well as judicial inspection. The court will decide on evidence admissibility and is enabled to suggest "missing" evidence, so the parties can

complete their proposals (but never ordering the ex officio taking of evidence). (Art. 429.1 LEC).
Personal evidence will be taken at the trial in an adversarial form: questions will be stated by the lawyer of the party that proposed evidence, followed by cross-examination by the other party's lawyer; the court may ask afterwards for clarification (Arts. 306 and 372 LEC).

The parties are expected in court twice:

(i) During the preliminary hearing: they can avoid appearance by sending their procurador (Art. 414 LEC).

(ii) During the trial: they can avoid appearance, but only if the other party has not proposed their interrogatory (in that case, non-appearance would lead to ficta confession: Art. 304 LEC).

6.3.4 Are the costs of the successful party reimbursed?

Yes, according to the rules explained above in 8.2.6.

6.4 Claims for the issuance of a payment order

6.4.1 Does an order for payment procedure exist in the national system? Is it a simplified procedure?

Yes, the so-called "proceso monitorio" was very successfully introduced into the Spanish legal system in 2001 with the entry into force of the Civil Procedure Act (Arts. 812-818). It is a very simplified procedure, although still belonging to the "document-based-family" of payment orders (unlike the EOP procedure, for instance).
The Act on Voluntary Jurisdiction (July 2015) has created a new "proceso monitorio notarial", to be conducted before a Notary instead of a court (Articles 70-71 of the Notary Act). It is important to note that this procedure cannot be used to collect debts from consumers (so it will not be taken into consideration hereinafter for questions directly linked to consumer cases).

6.4.2 Which authorities or courts are competent to hear claims for the issuance of payment orders?

Art. 813 LEC: for ordinary payment order proceedings the competent authority is the Court of First Instance ("Juzgado de Primera Instancia") of the debtor's domicile or residence or,

when not applicable, of the place where the debtor can be found in order to require payment from him. If the debtor cannot be found at the domicile or residence provided by the creditor, or if he/she is found at a different judicial area than the one of the court seized with the application, the procedure as a whole will be dismissed. This procedure may not be used if the debtor's domicile is outside the Spanish territory and he/she cannot either be located there.

Art. 70.1 of the Notary Act: for the specific notarial payment order proceedings the competent authority is the Notary established in the place where the debtor is domiciled, where he/she has his/her residence or where the debtor can be located in order to require payment from him/her.

6.4.3 Are there any formal requirements that must be satisfied for the application for the issuance of a payment order to be made (e.g. standard forms, representation by a lawyer, the detail of description required, the need to provide written evidence etc.)?

The debt must be net and due, and not subject to any condition that has still to be fulfilled. There is no amount limitation (Art. 812.1 LEC).
The creditor has to present an application (free-style in principle, but there are official application forms) and has to accompany a document showing prima facie existence of the debt in any of the following manners (Art. 812 LEC):
- By documents which are signed by the debtor or contain his seal, stamp or mark or any other physical of electronic sign, regardless of their form and nature or the support used.
- By invoices, delivery notes, certifications, telegrams, telefaxes or any other documents which, even if created unilaterally by the creditor, are commonly used to prove credits and debts in relationships of the nature that appear to exist between creditor and debtor
- When, together with the document recording the debt, commercial documents are submitted evidencing a previous enduring relation.
- When the debt is evidenced by means of certifications of non-payment of amounts owed as common expenses of communities of owners of urban real properties.

Legal representation is not mandatory (but very common in practice). It will only turn to be mandatory: (i) if the debtor files an opposition and the value of the claim is above 2000 euros; (ii) if the debtor does not react and enforcement proceedings commence, being the value of the claim above 2000 euros.

Court fees will be due if the creditor is a legal person: the fix part amounts to 100 euros, the variable is 0,5% of the claimed sum (Art. 7 of Act 10/2012 on Court fees). [It is

important to note again that the variable part of court fees was later nullified by the 140/2016 judgment of the Constitutional Court]

6.4.4 What information is generally available to the authority or court when a claim for the issuance of a payment order is made?

The information contained in the application form (very succinct: parties' identities and whereabouts, and origin and amount of the debt) and the additional information that may arise from the documents that need to accompany it.

6.4.5 What opportunity is available for a defence/statement of opposition to be advanced? How should this be done and what is its effect? Please specify if the means of advancing a defence differ depending on the value of the claim and the court dealing with it.

If the court's clerk considers that all legal requirements are met, he/she will issue an order for payment and will order service on the debtor. The order for payment will require the debtor to pay within a time limit of 20 working days (and to show proof of the payment to the court) or to present a written statement of opposition to the order (Art. 815.1 LEC).
No differences exist at this regard depending on the value of the claim and the court dealing with it: the right to challenge the order for payment is of a general nature: Art. 818 LEC:

(a) The statement of opposition shall be grounded and has to include the reasons why, in the debtor's opinion, he/she does not owe the amount claimed, either in full or in part.
(b) The statement of opposition shall be signed by an attorney and a procurador if their intervention is required in view of the amount, in accordance with the general rules (i.e., over 2000 euros).
(c) If the debtor files a statement of opposition in due time, the matter shall be resolved definitively following the corresponding procedural track:
    (i) If the amount does not exceed 6000 euros, the creditor will be served with the debtor's statement of opposition; he/she will have a 10 working days deadline to challenge it in written and, if requested by any of the parties, a hearing will be held, following the general rules of the "juicio verbal".
    (ii) If the amount exceeds 6000 euros, the creditor will have the burden to file a new claim on the merits within a month upon service of the statement of opposition that will be substantiated as a "juicio ordinario". If he fails to do so the court will issue an order for costs against him (he will have to reimburse to the debtor the costs of filing the statement of opposition); but he will not be deprived of any right on the merits, if he/she decides to file the claim later

In any case, the judgment eventually rendered shall have the effect of res judicata.

6.4.6 What is the effect if the claim is uncontested, i.e. if there is a lack of defence/statement of opposition?

Article 817 LEC: If the debtor does not comply with the order for payment and fails to appear and does not present a statement of opposition, the court clerk shall issue a decision declaring the procedure to be terminated and shall serve this decision on the creditor, being then for him to apply for the commencement of enforcement proceedings (a mere simple request shall suffice). The lack of payment and of opposition, therefore, creates an enforceable title. As of the moment where enforcement proceedings commence the debt shall accrue the interest referred to in Article 576 LEC (i.e. additional 2% penalty over the legal interest rate).
The enforcement proceedings will be carried out in accordance with the provisions for the enforcement of court judgements, but: (i) the creditor cannot subsequently request in ordinary proceedings the amount claimed in the order for payment procedure; (ii) the debtor cannot subsequently request in ordinary proceedings the reimbursement of the amount obtained from him through the enforcement.

6.4.7 If the defendant is a consumer, and he or she does not respond to or raise an objection to the issuance of the payment order, does the authority dealing with the claim for payment order proceedings have the power to examine any issue of consumer protection law of its own motion before treating the action as usual?

Traditionally Spanish case law considered that the infringement of the provisions on unfair contract terms could not be assessed ex officio by the court in the context of the payment order procedure: it was the debtor's burden to lodge a statement of opposition and to claim the nullity of the debt in the subsequent procedure. But, if the debtor did not challenge the order for payment, then he was not allowed to lodge an opposition against enforcement on that ground (preclusion: he should have lodged an opposition against the order for payment…). This problem of unfair contract terms was controversial and, as is well known, it lies on the basis of ECJ preliminary ruling in the Banco Español de Crédito case (C-618/10) and, more recently, in the Finanmadrid EFC case (C-49/14).

Only in October 2015 the Civil Procedure Act was amended to solve (at least apparently) the problem, by means of introducing a new Article 815.4 LEC; it is necessary to note that the protection is to be implemented at the very initial phase of the proceedings, before issuing an order for payment. The new provision states the following:

- If the debt arises from a contract between a business and a consumer, the court clerk, before issuing any payment order, shall inform the judge, so he/she can assess if any of

the terms of the contract is unfair (it can be the contract term on which the application is founded or any other contract term with influence in the determination of the amount requested by the creditor).

- The judge will assess ex officio if any of the terms can qualify as unfair. If he/she comes to this conclusion, he/she will grant the parties a 5 working days deadline to submit written contentions on that issue and he/she will take a decision within the next 5 working days. No legal representation is required from the parties at that stage (although it is hard to imagine a plain consumer making representations on that issue without any legal advice).
- If the judge considers any of the contract terms as unfair, he/she will establish the consequences: in some cases he/she will dismiss the application for a payment order, in other cases he/she will allow proceedings to be commenced, but excluding the application of the unfair or vexatious terms. The judge's decision can be directly challenged before the court of appeal.

6.4.8 What steps must the pursuer take in order to obtain an enforceable decision?

(See 8.4.6) If the claim is uncontested the court clerk will issue a decision putting an end to the procedure and will inform the creditor, who will just need to present a claim for enforcement. So no specific step is necessary to obtain an enforceable decision, it happens automatically in case the claim is uncontested and not paid.

6.4.9 Is this decision final, or can the defendant appeal against it?

There is no specific provision on that issue. The court clerk decision declaring the procedure to be terminated has a final nature, so in principle the debtor could lodge an appeal against it with the judge, pursuant to the general rules (so-called "recurso de revisión", Art. 454 bis LEC).

6.5 Appeals in consumer disputes

6.5.1 Are appeals possible in all consumer disputes? Please specify for small claims and other types of claims.

NB. This national reporter has changed the value thresholds, in order to adapt them to the legal relevant thresholds according to Spanish legislation.

	Individual claim of	Individual claim of	Individual claim of	Collective claim of	Collective claim of	Collective claim of

	value **€ 0 – € 3000**	value € **3001 – € 600.000**	value € **600.001+**	value € **0 – 3000**	value € **3001-- € 600.000**	value € **600.001+**
Nature of the procedure at 1st instance	"Juicio verbal"	"Juicio verbal" (>6000) or "juicio ordinario"	"Juicio ordinario"	"Juicio verbal"	"Juicio verbal" (>6000 or injunction) or "juicio ordinario"	"Juicio ordinario" (rule) or "juicio verbal" (for injunction)
2nd instance – appeal to?	No appeal	Yes Court of Appeal ("Audiencia Provincial")	Yes Court of Appeal ("Audiencia Provincial")	No appeal (except for injunctions)	Yes Court of Appeal ("Audiencia Provincial")	Yes Court of Appeal ("Audiencia Provincial")
3rd instance – appeal to?	No appeal	Appeal for cassation or for procedural grounds, only if the applicable law is "new" (not older than 5 years) or if there is contradictory case law on the merits	Appeal for cassation or for procedural grounds, granted due to the value of the case.	No appeal (except for injunctions)	Appeal for cassation or for procedural grounds, only if the applicable law is "new" (not older than 5 years) or if there is contradictory case law on the merits	Appeal for cassation or for procedural grounds, granted due to the value of the case.

6.5.2 Please briefly specify the national appeal procedure, including any requirements to be satisfied for appeals. These might include, but are not limited to, conditions of admissibility, value thresholds, time-limits, the scope of review, and the impact of the appeal on enforcement (provisional enforcement). Please refer to any rules specifically applicable in respect of the claims and relevant procedures outlined above.

Judgments rendered after a first instance procedure are generally appealable under Spanish law. The only exclusion applies to cases where the value of the claim is not over 3000€ (Art. 455.1 LEC).

There is a deadline of 20 working days to lodge an appeal upon service of the judgment. The appeal is lodged in written with the court of first instance. The motion for appeal shall be exhaustive: the party must include all reasons (procedural and/or substantive) sustaining his/her recourse (Art. 458 LEC). It will be served on the other party that will be granted a 10 working days deadline to present written allegations and/or to adhere to the appeal (using different grounds and challenging different decisions) (Art. 461 LEC).

The scope of appeal proceedings in Spain is very narrow: it is established as a "revisio prioris instantiae", not as a "novum judicium" (Art. 456.1 LEC). Parties cannot change their legal or factual arguments and contentions, they can only rely to the arguments previously used in the first instance. New facts, however, can be alleged and proved (Art. 460 LEC).

The lodging of an appeal does not amount to an obstacle for enforcement: provisional enforcement will be possible at any time and no security will have to be posted by the party seeking it. In case of provisional enforcement some specific provisions will apply, concerning the grounds the party suffering execution can use to sustain his/her opposition to it.

6.6 Enforcement in consumer disputes

The CJEU has identified a number of situations concerning the enforcement stage of consumer protection disputes in which the effective and equivalent protection of EU consumer rights may be affected by national procedural rules. These include – in relation to the effectiveness and equivalency of the protection afforded by the Unfair Contract Terms Directive, for example – the enforcement of arbitration awards, the enforcement stage in the recovery of consumer credit and the enforcement of mortgages, which often links together declaratory and enforcement proceedings. As such, we focus on these situations below. However, other problematic situations exist. Please indicate if additional (and potentially problematic) situations are identifiable in your national legal system.

The problem analysed in the ECJ decision in the Radlinger and Radlingerová case (C-377/14) also exists under Spanish insolvency law: the regulation in insolvency proceedings does not permit expressly the court hearing the action to examine of its own motion any unfairness of contractual terms on which the claims declared in those proceedings are based, even when that court has available to it the matters of law and fact necessary to that end.

In case there has been a previous declaratory procedure, the debtor has the burden to claim the unfairness of any contract term on which the action against him is founded by the plaintiff. If he

does (via defence, via counter-claim), then the issue will be solved in the judgment with res judicata effect and the question will not be a valid or admissible ground for an opposition against enforcement procedure. But:
a) If the debtor does not raise the question during the declaratory proceedings (e.g., litigant in person in cases below 2000 euros, bad lawyer) and judgment is rendered, then the issue of unfairness will not be admitted as a valid ground to challenge enforcement (Art. 556.1 LEC), because the debtor failed to use the timely opportunity to do so (Art. 564 LEC).
b) If the debtor did not enter an appearance and was declared in default, the plaintiff still has to win his case (Art. 496.2 LEC). But if the case comes to the enforcement stage, then the issue of unfairness will not be admitted as a valid ground to challenge enforcement (Art. 556.1 LEC), because the debtor failed to use the timely opportunity to do so (Art. 564 LEC).
c) The same limitations would apply in case of arbitration proceedings. Case law has accepted that courts can assess ex officio the voidness of the arbitration agreement at the moment they have to decide on the enforcement of the arbitral award [see Decision of the Court of Appeal of Madrid of 27 March 2012 (Audiencia Provincial de Madrid (Sección 21ª), Auto núm. 92/2012, ECLI:ES:APM:2012:6193A; and see also the Judgment of the ECJ of 6 October 2009 in the case Asturcom Telecomunicaciones, C-40/08]. But the content of the award itself and its potential voidness due to an infringement of EU consumers' rights is not explicitly envisaged.

The Spanish civil procedure sticks to a very strict assumption of the party autonomy principle (Art. 216, Art. 218 LEC). In the framework of declaratory proceedings the ex officio powers of courts to assess defences that the defendant has not expressly raised are very limited. Case law, however, considers that assessment of the nullity of a contract or of a contract term can be achieved by the court of its own motion, but only exceptionally, i.e, in cases of criminal facts or where the contract 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); see also the Judgment of the ECJ of 17 December 2009 in the case Martín Martín, C-227/08]. Since unfairness of a contract term in the sense of Directive 93/13 amounts to an infringement of public policy, Spanish courts should consider themselves empowered to assess this issue ex officio and this, in turn, should be considered as a sufficient basis to avoid the problems described above in a) and b).

Moreover, if possible, please provide the reference/citation of an article that provides an overview of the way in which enforcement operates in relation to consumer protection disputes within your national legal system.

The most recent contribution is: Carmen SENÉS MOTILLA, "Cláusulas abusivas y ejecución hipotecaria", Práctica de Tribunales, Nº 120, Mayo-Junio 2016, Editorial LA LEY.
See also very recently: Juan F. HERRERO PEREZAGUA, "Principios de la ejecución hipotecaria y la protección del consumidor", in Vivienda, préstamo y ejecución (eds. M. Espejo Lerdo de Tejada and J.P. Murga Fernández), Cizur Menor, 2016, pp. 303-344.
On the specific issue of judicial control in the enforcement of arbitral awards, see José María RUIZ MORENO, "La hiperprotección del consumidor por medio de la ejecución y anulación del laudo en el arbitraje de consumo. Un estudio basado en la doctrina jurisprudencial", in Cuestiones actuales sobre la protección de los consumidores: Tutela penal, civil y arbitral (ed. I. Cubillo López), Cizur Menor, 2010, pp. 351-376.

6.6.1 If the assessment of a consumer protection issue has not been possible at an earlier stage of the proceedings, is it always possible – either ex officio (see section 10 below) or if the consumer raises a possible violation of consumer protection law – for this assessment to be undertaken during enforcement proceedings?

If there has been a previous judicial or arbitral proceeding, the issue of a possible violation of consumer rights will not be possible during enforcement: the grounds to challenge enforcement of judicial decisions or arbitral awards are limited by the law (Arts. 556 and 564 LEC) and limited to certain grounds that occurred after the judgment or the award were rendered. It is assumed that the defendant should have raised the question during the declaratory proceeding and preclusion rules are very strict.

If enforcement is based on a non-judicial enforceable title, the rules are different since the entry into force of Act 1/2013 of 14 May, amending LEC in that point as a reaction to the ECJ preliminary ruling in the Aziz case of 14 March 2013 (C-415-11):

a) The court required to decide on the claim for enforcement will assess ex officio if any of the contractual terms of the enforceable document could be qualified as unfair. If so, the court will give the parties a 15 working days deadline to submit their contentions on that issue and will decide (Art. 552.1 LEC): it may deny the commencement of enforcement or it can limit its amount/content to what is not affected by the unfair contract term (Art. 561.1.3º LEC).
b) In case the court did not assess it of its own motion, the debtor still may challenge enforcement and adduce, as grounds for opposition, the unfair nature of any of the contract terms of the enforceable document (Art. 557.1.7º LEC). In that case, the court will substantiate the specific procedure for the opposition to enforcement and in the end it will decide: it may dismiss the enforcement proceedings or it can reduce its amount/content to what is not affected by the unfair contractual term (Art. 561.1.3º LEC).

The specific procedure for the opposition is considered by the law as an incidental procedure directly linked to enforcement and has to be decided by the same court that ordered the commencement of enforcement proceedings.
The same system applies for the specific mortgage enforcement procedure (again, after the 2013 reform following the ECJ Aziz judgment). The provisions of Art. 552.1 LEC have a general scope, for all kinds of enforcement, and shall therefore be considered applicable to mortgage enforcement proceedings. The challenge of enforcement on the basis of the unfairness of a contract term in the loan will be possible under Art. 695.1.4ª LEC (on equivalent terms to those set in Art. 557.17º and 561.1.3º LEC).

Article 564 LEC regulates a different possibility for the debtor to react against enforcement: engaging into a declaratory procedure, not linked to the enforcement procedure, in which the debtor can claim for compensation of loss and harm arising from enforcement, on the grounds that enforcement should have never commenced. This possibility, however, is only limited to facts or acts that:

(i) occurred after the enforcement title was created; and
(ii) are not admitted by the law as grounds of opposition to the enforcement (within the framework of incidental opposition proceedings) but are legally relevant in relation to the rights of the enforcement creditor as against the enforcement debtor or the rights of the enforcement debtor as against the enforcement creditor.

This possibility of a parallel or subsequent declaratory procedure is, therefore, not available to adduce the unfairness of the contract terms, at least for two reasons: a) the unfairness exists at the very moment of the contract's perfection; b) the unfairness of a contract term can be used as a ground to challenge enforcement within the context of the enforcement procedure itself (if the enforceable title was a non-judicial one).
The same applies to the specific mortgage enforcement procedure (Art. 698 LEC).

6.6.2 In the particular case of consumer protection, if a court examines consumer protection law (either ex officio or on the basis of an argument advanced by the consumer), does national procedural law provide that interim measures should 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 final decision will have full effect?

If the consumer debtor challenges enforcement of a non-judicial enforceable title, the court clerk will stay the enforcement proceeding itself until the issue is decided by the enforcement judge (Art. 557.2 LEC, in general; Art. 695.2 LEC for mortgage enforcement procedure).

Since challenging enforcement within the framework of the enforcement proceeding seems to be the only way to adduce the infringement of the consumer's rights, there seems to be no need to provide for additional interim measures.
The problem was raised at the Aziz case, when preliminary ruling was sought to the ECJ. At that time the problem was that the unfairness of contract terms was not a valid ground to challenge mortgage enforcement –nor the enforcement of a non-judicial enforceable title/document-, so the debtor had no option but to commence a parallel declaratory procedure, which could not have suspensive effect on the enforcement (Art. 698.1 LEC). The situation was quite "Kafkaesque", but the 2013 reform seems to have circumvented the problem by means of introducing the new grounds to challenge enforcement.
In practice, however, declaratory proceeding that are parallel to enforcement are not infrequent, since debtors seek a decision nullifying the loan itself or relevant contract terms, and the lack of possible coordination between both proceedings causes trouble (especially, the fact that enforcement proceedings cannot be stayed).

7. ACTIONS FOR COLLECTIVE REDRESS

The CJEU has considered that situations in which individual and collective actions are in some way linked are those in which the effective and equivalent protection of EU consumer rights may be affected by national procedural rules. As such, we will focus on these situations. However, other problematic situations exist. Please indicate if additional (and potentially problematic) situations are identifiable in your national legal system.

There is a very serious problem concerning in general terms the Spanish system of collective redress in cases where compensatory relief is sought by a consumer association, Aecosan or the Public Prosecution Service (see standing rules described above in 7.2). If one reads Art. 222.3 LEC ("The authority of res judicata shall be binding on the parties to the proceedings in which it arises, their heirs and those deriving title from them, and on the persons who, not being parties to the proceedings, hold the rights which give them standing to bring proceedings in accordance with the provisions of Article 11 of this law"), the conclusion is that we are facing an opt-out system. This is consistent with Article 15 LEC, dealing with the announcement and intervention in proceedings for the protection of collective and diffuse rights and interests of consumers and users: consumers of the product or users of the service which gave rise to the proceedings are entitled to appear in the proceeding in order to assert their individual rights or interests. 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.

Moreover, if possible, please provide the reference/citation of an article that provides an overview of the way in which the collective redress mechanism operates within your national legal system.

- Fernando GASCÓN INCHAUSTI, Tutela judicial de los consumidores y transacciones colectivas, Ed. Civitas, Madrid, 2010.
- Fernando GASCÓN INCHAUSTI, «Acciones colectivas y acciones de cesación para la defensa de los consumidores (arts. 53 a 56 TRDCU)», in La defensa de los consumidores y usuarios. Comentario sistemático del Texto Refundido aprobado por Real Decreto Legislativo 1/2007 (eds. M. Rebollo Puig and M. Izquierdo Carrasco), Ed. Iustel, Madrid, 2011, pp. 891-967..
- Andrea PLANCHADELL GARGALLO, Las "acciones colectivas" en el ordenamiento jurídico español, Ed. Tirant lo Blanch, Valencia, 2014.

7.1 Injunctive relief, linking individual and collective actions

The case law of the CJEU requires that a person or organisation with a legitimate interest in consumer protection must be able to bring an action before a national court or tribunal in respect of an alleged violation of consumer rights deriving from Union law, either for compensation or for injunctive relief, to preclude the continued violation of consumer rights[331].

7.1.1 If collective proceedings are launched, does national procedural law provide that ongoing individual claims, relating to the same dispute, should be stayed until the collective proceedings are brought to an end? Please specify if this constitutes an obligation on the part of the national judge or if it is at his or her discretion.

The relationship between collective procedures seeking injunctive relief and individual actions has been addressed by the ECJ in the Sales Sinués case (C-381/14), in the sense that

[331] This derives from the EU directives. For example, in respect of the UCTD, Art.6(1), Art.7(1) and (2) UCTD, provide that the Member States must ensure 1) that unfair terms are not binding on the consumer and 2) that adequate and effective means exist to prevent the continued use of unfair terms in consumer contracts. The CJEU has held that effective implementation requires that the consequence of the finding of the violation – in the case of a finding of unfairness under the UCTD – is for the term to be declared invalid, and that the effect of this invalidity extends not only to the parties to the action for an injunction but also to those who have concluded a contract with the seller/supplier to which the same terms apply.

staying the individual procedure would infringe the provisions of Directive 93/13. The ECJ solution seems correct to me. In fact, in my view, the assumptions made by the Spanish court that formulated the motion for a preliminary ruling were not completely accurate: it is at least doubtful that Article 43 LEC requires staying the individual procedure until the collective one is adjudicated, because the parties are not the same and the standing of the consumer association to file the collective claim seeking the granting of the injunction does not stem from Article 11 LEC (which would be required for an extension of res judicata effects, according to Article 222.3 LEC), but from the 1998 Act on General Contract Terms (and this is also confirmed by Article 15.4 LEC, excluding the application of the rules on announcement and intervention in collective proceedings seeking injunctive relief). The criterion of the ECJ in the Sales Sinués case has also been followed by several decisions of the Spanish Constitutional Court (judgment 148/2016, of 19 September, followed by others, like judgments 206/2016, 207/2016 and 208/2016 of 12 December.

If the collective claim is a compensatory one, an ongoing individual claim, relating to the individual dimension of the dispute, shall not be necessarily stayed. There is no clear regulation and, as described above, the lack of regulation of the opt-out possibility is quite problematic. But if an individual claim is brought separately to a collective one, then Article 222.3 LEC should not apply to the single consumer that decided to ride alone and, therefore, the judgment rendered on the collective claim could not have binding effects on his claim, and this, in turn, excludes any need to stay the individual proceeding.

7.1.2 If individual proceedings are stayed, please indicate what the effect of the court or ADR entity's decision in the collective action on those individual proceedings would be, i.e. whether the outcome of the collective action binds the consumer bringing an individual action.

N/A

8. CONSUMER ALTERNATIVE DISPUTE RESOLUTION

The questions below focus on some key concerns relating to consumer disputes before ADR fora. If possible, please provide the reference/citation of an article that provides a general overview of the way in which consumer alternative dispute resolution operates within your national legal system.

- Ignacio J. CUBILLO LÓPEZ, "El procedimiento para la tutela arbitral de los consumidores", in Cuestiones actuales sobre la protección de los consumidores: tutela penal, civil y arbitral (ed. I. J. Cubillo López), Cizur Menor, 2010, pp. 275-349.

- AA.VV., Retos y perspectivas de los sistemas de reclamación de los consumidores : Estudio jurídico sobre la aplicación en España de la Directiva 2013/11/UE de resolución alternativa de conflictos de consumo (ed. ADICAE), Zaragoza, 2015.
- Ana Isabel BLANCO GARCÍA, La Tutela del cliente bancario y las ADR : la institución del Ombudsman: una visión comparada entre España, Reino Unido y Australia, Valencia, Tirant lo Blanch, 2015.

8.1 Consumer disputes before ADR fora

8.1.1 Is ADR mandatory for all parties bringing a claim related to a consumer protection dispute?

No, it is not mandatory.

8.1.2 Please specify if there are limitations to the use of ADR. These might include the nature of the claim (i.e. whether both individual and collective claims are possible), requirements of representation, time limits, value thresholds, etc.

For the moment, the ADR Directive has not been implemented. The main ADR system in consumer matters is the Consumer Arbitration System ("Sistema Arbitral de Consumo"), regulated in Royal Decree 231/2008, of 15 February (with subsidiary applicability of Act 60/2003, of 23 December, on Arbitration) and organized by the public administration through the Consumer Arbitration Boards ("Juntas Arbitrales de Consumo") (at national, regional and town level), who give support to arbitration tribunals. Arbitral tribunals are usually composed by three members (one from the list submitted by businesses' organizations, a second one from the list submitted by consumers' organizations and the third from the list submitted by the public administration in charge of the system: Art. 20 RD 231/2008). For non-complex disputes below 300 euros there will be a single arbitrator (Art. 19 RD 231/2008).
All sort of disputes involving consumers and businesses and linked to consumers legal or contractual rights are suitable for "consumer arbitration" (Art. 1.2 RD 231/2008), provided the matter is governed by the autonomy of the parties (Art. 2.1 RD 231/2008). However, certain matters cannot be adjudicated via consumer arbitration: it is the case of disputes where there is also intoxication, injuries, death or reasonable indications of a criminal offence, including the civil claim ex delicto (Art. 2.2. RD 231/2008).
Arts. 56-62 RD 231/2008 have established a system for "consumer collective arbitration", on an opt-in basis: if the business agrees to it, a single arbitration procedure will be available to all consumers accepting it (public announcements will be made, so

consumers can be aware of the possibility and may join to the procedure within a pre-established time framework).

In the context of securities, banking and insurances there is a specific system to handle complaints, regulated by a 2012 Order of the Ministry of Economy. It is not an arbitration system, but rather similar to an Ombudsman service: the complaint procedure (that can be substantiated electronically) ends with a reasoned report assessing if transparency and protective rules have been infringed and if the entity has respected the good practices in that sector. The report is not binding and cannot be appealed (Art. 12.6 of Order ECC/2050/2012).

For complaints in the scope of the telecommunications system ("Oficina de Atención al Usuario de Telecomunicaciones") is handled by SETSI and regulated by a 2007 Order of the Ministry of Industry. It is not either an arbitration system, but it ends with a decision that is binding on the business and that can be challenged before administrative courts.

8.1.3 Can ADR entities issue binding decisions and can they enforce those decisions? If not, please explain how they are enforced.

Under RD 231/2008 the arbitral tribunal will deliver an award which is binding (res judicata effects) and enforceable. But arbitral tribunals are not competent to enforce their awards: only courts can order the enforcement of arbitral awards, according to the same rules that apply to the enforcement of judicial decisions (Art. 517.1.2 LEC, Art. 44 of the Arbitration Act).

Reports issued by the complaint system in the financial sector (securities, banking and insurances) are not binding: the door remains open to consumer arbitration or to judicial claim.

Decisions in the telecommunications sector are binding on the business and can be challenged before administrative courts.

8.1.4 Does national law provide that limitation periods applicable to judicial actions should be suspended while ADR is ongoing?[332]

Yes. There is a specific provision in that sense in Art. 4 of Act 5/2012, of 6 July, on Mediation (for mediation) and in Art. 143 of Act 15/2015, of 2 July, on Voluntary Jurisdiction (for conciliation). Such a provision does not exist for arbitration, but it is commonly accepted in case law and in practice that arbitration proceedings suspend limitation periods (in fact, there is a more obvious similarity on this point with court proceedings).

8.1.5 Please specify if national law establishes rules providing for recourse to judicial action following an (unsuccessful) ADR hearing[333].

The option for arbitration (also "consumer arbitration") entails the waiver of recourse to judicial action (general rule common to all legal systems). If, for any reason, the consumer arbitration concludes without a decision (e.g., arbitrators decide that the case falls out of the scope of RD 231/2008), then judicial action will be open to the parties.
In case of mediation, recourse to judicial action always remains an option, according to the general rules.

Reports issued by the complaint system in the financial sector (securities, banking and insurances) are not binding: the door remains open to consumer arbitration or to judicial claim.

8.1.6 Is there judicial review of decisions and awards made by ADR entities? If so, by which court or tribunal is this oversight made? Is it ordinary or specialised?

Arbitral awards can be challenged before courts. Arts. 40-42 of the Arbitration Act regulate the so-called "acción de anulación" against arbitral awards, for specific grounds (the merits of the award can only be controlled from a restrictive public policy perspective).
Regional Superior Courts ("Tribunales Superiores de Justicia") are competent to hear these cases: they are not specialised courts; however, there are only 17 of them in Spain and they have a relatively narrow scope of jurisdiction, this leading in practice to a special "care" when dealing with these sort of cases.

[332] The Directive on Consumer ADR provides that "the existence of an effective system for collective claims and easy recourse to ADR should be complementary". Consumer ADR is relevant not only for individual claims but also for collective ones; it can provide consumer with a means to reduce costs and save time.
[333] Per Arts.10-12, Directive on Consumer ADR.

In the last times there has been great controversy because the Regional Superior Court of Madrid has annulled several arbitral awards, on the grounds of economic public policy, due to infringement of imperative rules in the area of finance (see for instance the Judgment of 28 January 2015, ECLI:ES:TSJM:2015:1286). Many commentators (and pro-arbitration institutions) claim that the Court has gone beyond the restrictive limits of public policy control. It is necessary to clarify that in none of these cases arbitration had been carried out under the "Sistema Arbitral de Consumo", but under ordinary arbitration schemes, involving banks and small and medium businesses. But when defining "economic public policy" they always refer to EU legal rules, which could encompass consumer protection rules.

9. THE EXAMINATION OF CONSUMER PROTECTION LAW IN NATIONAL PROCEDURAL LAW: RESPECT FOR THE PRINCIPLES OF THE EFFECTIVENESS AND EQUIVALENCE OF CONSUMER PROTECTION LAW AND EX OFFICIO CONTROL

The rules of national civil procedure that could potentially affect, and indeed undermine, the effective and equivalent protection of consumer rights are various. They include but are not limited to the rules and practices of ordinary and specialised judicial procedures, rules and practices of consumer ADR, rules applicable to special types of procedure (e.g. payment order procedures), the jurisdiction of individual courts (the courts that have jurisdiction over consumer disputes), the formal requirements that have to be satisfied to bring a case, the types of legal action that are available, the need for parties to be represented, the time-limits applicable to procedural steps of the action, rules on the taking of evidence, the possibility (or lack) to consider certain issues at specific stages of the procedure, the right to appeal and review, and rules relating to the enforcement or judgements and other enforcement titles (e.g. arbitration awards, notarial deeds, including mortgages).

On the basis of the principles of equivalence and effectiveness, the CJEU has established certain requirements for the procedural protection of consumer rights deriving from EU law. In particular (and especially in relation to the protection afforded to consumers via the Unfair Contract Terms Directive[334]), the CJEU has established an obligation on national judges (and potentially other dispute resolution facilitators) to apply consumer law of their own motion (that is, ex officio), when they have available the legal and factual elements necessary for this task. Ex officio control is one type of procedural mechanism that can be utilised within the national

[334] However, the CJEU has recognised that ex officio control – and other procedural requirements, that might in themselves (or indeed, in their absence), impact the effective enforcement of consumer law – arise across the EU's consumer protection directives.

system to promote the effective and equivalent protection of consumer law. Thus, other mechanisms of procedure within your national legal system should be highlighted and discussed where relevant. The following questions should be answered in respect of both judicial and if relevant, alternative dispute resolution.

9.1 The basis of ex officio control of consumer protection law in national law

9.1.1 Is it clear in the national legal system when consumer protection law should be applied ex officio? Is the ex officio control of consumer protection law established as an obligation or as a (discretionary) power of the judge in national procedural law?

After constant "warnings" by the ECJ in cases concerning enforcement of arbitral awards, mortgages and orders for payment, the Spanish legislator has modified the Civil Procedure Act in more than one occasion to establish the court's duty to examine of its own motion any possible infringement of consumers' rights under the Unfair Contract Terms Directive.

Nowadays the following is clearly stated by law:

a) Before ordering the official commencement of enforcement proceedings on the basis of non-judicial enforceable documents (notarial deeds, including mortgages) the court has the duty to examine if any of the contract terms is unfair and must proceed consistently (Art. 552.1 LEC).

b) Before issuing an order for payment in the context of the "proceso monitorio", the judge has the duty to examine if any of the contract terms is unfair and must proceed consistently (Art. 815.4 LEC).

Apart from that, unfortunately, nothing else is clear. The Spanish procedural system sticks very strongly to a very strict notion of the principle of the parties' disposition (Arts. 216 and 218 LEC) and the court's powers to apply the law ex officio have always been regarded as very exceptional.

In general terms, case law considers that assessment of the nullity of a contract can be achieved by the court of its own motion, but only exceptionally, 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)]. As the ECJ case law shows, Spanish courts have not been always in favour of an ex officio application of consumer protection law; this is the mentality that is starting to change, a change fostered by the recent legal amendments. Since unfairness of a contract term in the sense of Directive 93/13 amounts to an infringement of public policy, Spanish courts can and should consider themselves empowered to assess this issue ex officio.

9.1.2 If there is an understanding of ex officio control of consumer protection law in the national legal system, what is this control understood to encompass/not cover?

For the moment, ex officio control of consumer protection law seems to be limited to the scope of unfair contract terms: this is the only context where the Spanish legislator has expressly acted. It is to be expected that progressively Spanish courts assume that consumer protection under other EU provisions disserves the same treatment.

9.1.3 Is the party who claims to be a consumer required to establish his or her consumer status, the existence of a consumer contract and that consumer law applies to the dispute? Is this required even if the consumer has no legal representation?

If the consumer has legal representation it will be expected that his/her lawyer will make the relevant contentions of fact and of law. Nevertheless, the iura novit curia rule should apply here, so the court could also be able to assess of its own motion that a party is a consumer, that the contract is a consumer one and that consumer law applies to the dispute (but Spanish judges are still quite reluctant to make the lawyers' work).
The affirmative answer is clearer if the consumer has no legal representation.

9.1.4 What information is available to judges and dispute resolution facilitators hearing consumer protection disputes? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a consumer protection dispute to be heard and b) for the court to engage in ex officio control?

The judges and dispute resolution facilitators only have the information provided by the parties in their contentions of fact and law. They are not entitled to perform ex officio inquiries.
The judge (enforcement proceedings based on deeds and mortgages) and the court clerk (order for payment) usually will have information enough to assess that the contract is a consumer one and that the contract itself or a contract term "might" be unfair. In order to gather information, and pursuant to Arts. 552.1 and 815.4 LEC, the judge will hear the parties before deciding on the commencement of enforcement or on the issuing of the order for payment. The information, therefore, will have to be provided by the parties, although upon ex officio request of the judge.

9.1.5 Who is responsible for providing this information? If the necessary information is not available to the court (or dispute resolution facilitator), is he or she under an

obligation to investigate in order to be able to respond to a relevant consumer protection dimension of the case?

See above: the parties will provide the information.
An ex officio investigation should be unnecessary under the current provisions, but the truth is that legal provisions are restricted to certain infringements (unfair contract terms) in certain contexts (enforcement of non-judicial enforceable titles and orders for payment). Outside that framework the general rules of civil procedure do not allow ex officio factual investigations by judges; it could be derived from the general principles of EU law, but it is hard to imagine it happening in practice.

9.1.6 Will the court provide the consumer with any assistance in gathering factual information or advancing his legal arguments before the court? Please respond for the situation where: a) the consumer has legal representation and b) the consumer has no legal representation.

a) If the consumer has legal representation his or her lawyer is supposed to make all relevant factual and legal contentions.
b) If the consumer does not have legal representation some assistance from the court can be expected, although there are no explicit provisions in that sense.

9.2 The possibility for ex officio control of EU consumer protection law in dispute resolution proceedings

9.2.1 Is ex officio control of consumer protection law always possible when the procedure involves a full assessment of the claim on its merits?

It should be, according to the imperative nature of the rules. However, the Spanish legal system is very reluctant to acknowledge ex officio powers of courts concerning the merits of the claim, and prefers considering the court to be bound by the factual and legal contentions made by the parties (by their lawyers). As said before, case law considers that assessment of the nullity of a contract or of a contract term can be achieved by the court of its own motion, but only exceptionally, i.e, in cases of criminal facts or where the contract 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)]. If the infringement of consumer protection law is deemed to amount to an infringement

of public policy (it seems to be the case with the rules on unfair contract terms), Spanish courts should consider themselves empowered to assess this issue ex officio.

9.2.2 Can ex officio control be exercised even when the procedure does not involve an assessment on the merits?

The question is not clear to this national reporter. A court could in theory decline jurisdiction if it considers, even ex officio, that the rule for venue in a consumer case has been infringed by the claimant or that a choice of court agreement in a consumer contract is not valid (Arts. 38 and 58 LEC).

9.2.3 Please indicate if, per national procedural law, ex officio control can be exercised at the following stages of the procedure:

	Courts		Other dispute resolution facilitators	
	Possible to exercise ex officio control	Not possible to exercise ex officio control	Possible to exercise ex officio control	Not possible to exercise ex officio control
Ordinary proceedings	x		X	
Small claims	x		X	
Payment order	x		X (Notary)	
Provisional measures		x		
Proceedings linked to enforcement	x			
Enforcement proceedings	x			
- Enforcement of payment order		x		
- Enforcement of arbitration award	x			
- Enforcement of mortgage	x			
- Enforcement of notarial deed	x			
Appeal proceedings (please specify:)	x			

The possibility of other dispute resolution facilitators to exercise ex officio control in the context of enforcement or appeal proceedings has not been addressed, since only courts are competent in those fields.

9.2.4 What does ex officio control encompass in national procedural law?

Ex officio control would be, anyway, very limited and would probably only encompass the existence of unfair contract terms in the basis of the obligations claimed or enforced against a consumer. As said before, unfair contract terms are being the scope of current discussion in case law and of legislative action: judicial mentality is changing quite quickly in this field. In other fields of consumer protection the maturity process should take longer.

9.3 Other procedural mechanisms for the equivalent and effective protection of EU consumer law

9.3.1 Does national procedural law provide that rules of EU consumer law (as well as rules that aim to satisfy EU consumer law objectives) should be understood as having equal standing to national rules of public policy (which is to say, that for the purposes of domestic law, the consumer protection provision is understood to have equal standing to a rule that must be raised ex officio by the national court)?

There is no such a specific legal provision in Spanish procedural system. However, the above mentioned reforms (fostered by the ECJ case law concerning Spanish cases) have led in practice to consider that consumer protection provisions belong to the core of public policy. This is especially clear with the rules on unfair contract terms.

9.3.2 If ex officio control is not possible in certain types of proceedings or at a certain stage of proceedings (or for any other reason), does national procedural law provide for an alternative way of assessing consumer protection law?

Unfortunately this has been the problem in the past with Spanish procedural system: ex officio control was not possible and there were no alternatives to comply with EU consumer protection requirements, so some Spanish judges felt in the duty to seek preliminary rulings from the ECJ and these, in the end, have forced legal changes.
However, in the contexts where legal changes have not been yet implemented the risk still exists.

9.4 Ex officio control in payment order procedures

9.4.1 What information is available to the judge when a claim for the issuance of a payment order is made? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a claim for the issuance of a payment order to be granted and b) for the court to engage in ex officio control before a payment order is issued?

The application for the issuance of a payment order can be limited to identify the parties, the obligation and its origin (in a very succinct way) (Art. 814 LEC). It has to be accompanied by the document or documents that show prima facie that the obligation exists. No lawyer or procurador are needed to apply for a payment order (although in practice they are commonly used).

Art. 815.4 LEC establishes the way to implement ex officio control. The claim will be first analysed by the court clerk. If the court clerk notices that the debt arises from a contract between a consumer and a business, instead of issuing any payment order (as would be the rule), he/she will inform the judge, so he can assess if any of the terms of the contract is unfair. It is important to note that the clerk has the duty to submit the case to the judge if the contract is a consumers' one: this provision overcomes the criticism raised by the ECJ in the Finanmadrid case (the Court was concerned by the fact that, before the October 2015 LEC reform, court clerks had the duty to issue the order for payment without being empowered to assess any possible infringement of the unfair contract term rules and that, at a later stage, if the claim was uncontested, the debtor was not entitled to raise that question and to state an opposition against enforcement).

The only elements the judge has in order to make this "first" assessment are the documents submitted by the applicant creditor. Therefore, it is difficult for the judge to arrive to any clear conclusion on the unfair nature of a contract term. To surmount this obstacle, the law states that the judge, considering that a contract term might be unfair, will grant the parties a 5 working days deadline to submit written contentions on that issue. So the judge will get the information from the parties. However, No legal representation is required from the parties at this stage, and it is hard to imagine a plain consumer making representations on that issue without any legal advice.

9.4.2 What considerations will be assessed ex officio by the court (or other competent authority) before a payment order is issued?

In general terms, the court clerk will check if there is a pecuniary and due debt, and if the document may be considered as prima facie proof of this. As said before, if the contract is a consumer one, the court clerk will turn the application to the judge, so he/she can assess if any of the terms of the contract is unfair: it can be the contract term on which the application

is founded or any other contract term with influence in the determination of the amount requested by the creditor.

9.4.3 How is the consumer informed about the claim to issue a payment order against him or her? Does national procedural law make any provision for steps to be taken to ensure that consumers are informed of the claim for the issuance of a payment order so that he or she can contest it?

The consumer will be served with the order for payment, once it has been issued, but in general he/she will not be informed about the claim itself (it is an ex parte procedure). A previous notice will only take place, as explained above, if the judge considers that there might be an unfair contract term on the basis of the claim (pursuant to Article 815.4 LEC).
Service of the order for payment must be done personally, pursuant to Article 815.2 LEC. Fictitious service (by publication) is expressly excluded: if the addressee (the consumer, for current purpose) cannot be deemed to have been served the order for payment procedure will be dismissed.
The order for payment shall include explicit indication that the addressee (the consumer, for current purpose) may present a statement of opposition, informing of the deadline and the contents requirements for doing so.
These are general provisions, applying for any debtor, and not only for consumers.

9.4.4 If the consumer objects to the claim, what is the next step? Do the proceedings continue, in the context of which ex officio control can be exercised? Or are the proceedings transferred to ordinary proceedings for analysis on the merits of the claim?

Pursuant to Article 818 LEC, if the debtor files a statement of opposition in due time, the matter shall be resolved definitively following the corresponding procedure:

(i) If the amount does not exceed 6000 euros, the creditor will be served with the debtor's statement of opposition; he will have a 10 working days deadline to challenge it in written and, if requested by any of the parties, a hearing will be held, following the general rules of the "juicio verbal".

If the consumer claims that his consumer rights are being infringed, he is supposed to make this contention in his statement of opposition (if the claim's value is over 2000 euros legal representation will be required to lodge the statement of opposition). In principle the court, when analysing the merits of the claim, could control ex officio if public policy rules are infringed or not; however, in practice it may be doubtful that such a control is carried out

if the court is not provided with (at least) factual contentions on that issue (either in the statement of opposition, or at the hearing, if it takes place).

Ex officio Case Law

The Judgment of the Civil Chamber of the Supreme Court of 22 April 2015 (núm. 265/2015; ECLI:ES:TS:2015:1723) is a good example of the evolution of Spanish case law to a more flexible approach towards the issue of ex officio control of consumer law.
In the first instance (at the Juzgado de Primera Instancia nº 6 of La Laguna), a Bank was claiming that a client was ordered to pay back a loan (credit consumer) and included in the claim an amount of default interests –interests on late payment- (at a rate of 21,80%).
The defendant argued that the contract term establishing the interests on late payment rate was unfair (Directive 93/13) and asked its amount to be tempered. The first instance judgment dismissed the defence and ordered full payment, including interests on late payment as calculated by the plaintiff.
The defendant lodged an appeal with the Audiencia Provincial of Santa Cruz de Tenerife, asking again for temperance of the interest on late payment. The court upheld the appeal but, going beyond what had been asked, it considered that EU consumer law did not allow any temperance of unfair contract terms that are not essential for the contract itself and it simply declared the term concerning interest on late payment as void and, therefore, excluded it completely from the amount due by the defendant to the Bank.
Appeal for cassation and for breach of procedural law was raised before the Tribunal Supremo, on the ground that such a decision had infringed the principle of party autonomy and of consistency (the defendant had had a lawyer at both prior phases of the proceeding). The Court, however, confirmed the decision rendered by the Audiencia Provincial, considering that public policy rules (such as those established by EU Consumer Law) are not covered by the principles of parties' disposition and consistency, and therefore could/should be assessed ex officio by courts,

In general terms, as mentioned above on several occasions, the main obstacle to ex officio control in declaratory proceedings is the strict assumption of the principles of parties' disposition (Art. 216 LEC) and of consistency (Art. 218 LEC) that prevails in Spanish procedural law.
When it comes to enforcement proceedings, the main obstacles lay with two facts: (i) in general terms, the debtor is not entitled to challenge enforcement on any possible ground, but only on the specific grounds established in law; (ii) additionally, challenging the enforcement of judgments and arbitration awards is precluded when the grounds could have been used in the previous declaratory procedure.

The case law of the ECJ in cases affecting Spanish legislation is a good indicator on how these factors have been detected by the Spanish judges who submitted the motions for preliminary rulings and on how they have been assessed by the ECJ.

(i) The liaison between the (Spanish assumption of the) principle of disposition and the ex officio application of EC consumer law was analysed by the Judgment of the ECJ of 17 December 2009 in the case Martín Martín, C-227/08, concerning the 1985/577 Doorstep Selling Directive. In that case, the Spanish court sort of "asked for the ECJ placet" to assess ex officio the voidness of a contract, arising from the fact that the consumer had not been duly informed of her right of cancellation.

(ii) The difficulties to assess, ex officio or at the request of the debtor, any infringement of EU Consumer law in the framework of enforcement proceedings (especially mortgage enforcement proceedings) were analysed by several ECJ judgments: Judgment of 14 March 2013, Aziz, C-415/11; Order of 14 November 2013, Banco Popular Español, C-537/12; Judgment of 17 July 2014, Sánchez Morcillo (1), C-169/14; and Order of 17 March 2016, Ibercaja Banco, C-613/15. They led to legal amendments to the Civil Procedure Act, introduced by Act 1/2013 of 14 May, Act 8/2013 of 26 June, Royal Decree-Act 11/2014, of 5 September, Act 9/2015 of 25 May and Act 42/2015 of 5 October,
It is significant to note that in the Order of 16 July 2015, Sánchez Morcillo (2), C-539/14, the ECJ acknowledged that legal changes had successfully overcome the hurdles to the protection of consumers' rights detected in the previous case law.
Nevertheless, after the Judgment of 30 April 2014, Barclays Bank, C-280/13, some issues remain unsolved in the context of mortgage enforcement proceedings, concerning the valuation of the property: the consumer/debtor/party against whom enforcement is sought may not request revision of the sum at which the property was valued, although it may have changed significantly after the creation of the mortgage and it has very relevant consequences on enforcement; additionally, the Spanish procedural rules on mortgage enforcement provide that the creditor seeking enforcement may be awarded the mortgaged property at 60% of the sum at which the property was valued, which entails an unjustified penalty for the consumer/debtor/party against whom enforcement is sought equivalent to 40% of that valuation. The ECJ could not analyse those issues, since statutory and regulatory provisions of a Member State, such as those, are excluded from the scope of Directive 93/13, when there is no contractual term altering the effect or ambit of its provisions.

(iii) The difficulties to assess ex officio the infringement of consumers' rights before issuing an order for payment in the framework of the proceso monitorio were

criticized in the Judgment of 14 June 2012, Banco Español de Crédito, C-618/10. The Spanish legislator did not react as fast as with mortgage enforcement proceedings; the mandatory control on the existence of unfair contract terms on the basis of an application for an order for payment has been introduced with Act 42/2015 of 5 October. In fact, the new regulation has erased the legal grounds on which the ECJ founded new criticism to the Spanish order for payment procedure in its Judgment of 18 February 2016, Finanmadrid EFC, C-49/14.

(iv) In the Judgment of 3 October 2013, Duarte Hueros, C-32/12, the ECJ dealt with Directive 1999/44/EC and the rights of the consumer in the event of lack of conformity in a product, especially when, due to the minor nature of that lack of conformity, rescission of the contract is not possible. If the consumer has only claimed for the rescission of the contract, the principle of parties' disposition forbids the court to grant an appropriate reduction in the price. The Court of First Instance who submitted the motion for a preliminary ruling considered that this rule could infringe the due protection to consumers, because it left no space for a proper application of EU consumer law, since Art. 400 LEC would also impede the consumer to file a new claim, asking this time for the price reduction. The ECJ, as expected, stated the following:

> "Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which does not allow the national court hearing the dispute to grant of its own motion an appropriate reduction in the price of goods which are the subject of a contract of sale in the case where a consumer who is entitled to such a reduction brings proceedings which are limited to seeking only rescission of that contract and such rescission cannot be granted because the lack of conformity in those goods is minor, even though that consumer is not entitled to refine his initial application or to bring a fresh action to that end."

The truth, however, is that the assumption made by the ECJ is wrong and founded on a misrepresentation of the contents of Art. 400 LEC: "Where the claims advanced in the application can be based on different facts, different grounds or different legal arguments, they must be advanced in the application when they are known or can be advanced at the time at which the application is lodged. It is not permissible to defer claims to later proceedings." The rule does not preclude the parties to bring a new action claiming for a different object (price reduction, instead of rescission). The Spanish judge was wrong and the agent of the Spanish government during

proceedings before the ECJ did not notice the mistake, leading to a sort of condemnation by the Court that, in fact, is not founded…

European Commission
An evaluation study of the impact of national procedural laws and practices on the equivalence and effectiveness of the procedural protection of consumers under EU law

JUST/2014/RCON/PR/CIVI/0082

National Report – Consumer Protection Strand

Sweden

Eva Storskrubb

SWEDEN: LEGAL ANALYSIS

1. NATIONAL LEGISLATION IMPLEMENTING EU CONSUMER PROTECTION INSTRUMENTS

EU legislation	Transposing national legislation	Additional notes (e.g. if there is an overlap in application of legislation etc.)
Doorstep Selling Directive 1985/577/EEC	[Have not yet been able to clarify. Directive enacted pre Swedish membership of EEA and EC/EU.]	
Package Travel Directive 90/314/EEC	Lag (1992:1672) om paketresor	In addition regulations elaborated by KV: http://www.konsumentverket.se/Global/Konsumentverket.

		se/Best%c3%a4lla%20och%20ladda%20ner/kovfs/1993/1993-3.pdf and http://www.konsumentverket.se/Global/Konsumentverket.se/Best%c3%a4lla%20och%20ladda%20ner/kovfs/2009/kovfs_2009_17_paketresor.pdf
Unfair Contract Terms Directive 1993/13/EEC	Lag (1994:1512) om avtalsvillkor i konsumentförhållanden	
Distance Selling Directive 1997/7/EC	Original implementing law: Lag (2000:274) om konsumentskydd vid distansavtal och hemförsäljningsavtal (has been repealed) Current implementing law: Lag (2005:59) om distansavtal och avtal utanför affärslokaler	
Consumer Sales and Guarantees Directive 1999/44/EC	Konsumentköplag (1990:932) amended by SFS 2002:587	
Unfair Commercial Practices Directive 2005/29/EC	Marknadsföringslag (2008:486)	
Misleading and Comparative Advertising Directive 2006/114/EC	Marknadsförsinglag (2008:486) and as regards specifically comparative advertising Section 18 of the Act.	
Consumer Credit Agreement Directive	Konsumentkreditlag (2010:1846)	In addition regulations elaborated by

2008/48/EC		KV:http://www.konsumentverket.se/Global/Konsumentverket.se/Best%c3%a4lla%20och%20ladda%20ner/kovfs/2004/kovfs2004_05.pdf
Timeshare Protection Directive 2008/122/EC	Lag (2011:914) om konsumentskydd vid avtal om tidsdelat boende eller långfristig semesterprodukt	In addition regulations and guidelines elaborated by KV: http://www.konsumentverket.se/Global/Konsumentverket.se/Best%c3%a4lla%20och%20ladda%20ner/kovfs/2011/KOVFS%202011%204%20Utkast%20konsumentskydd%20vid%20avtal%20om%20tidsdelat%20boende%20eller%20l%c3%a5ngfristig%20semesterprodukt.pdf and http://www.konsumentverket.se/Global/Konsumentverket.se/Best%c3%a4lla%20och%20ladda%20ner/kovfs/2011/kovfs-2011-01-allmant-rad-konsumentkrediter-ver3-kov.pdf
Consumer Injunctions Directive 2009/22/EC	Lag (2000:1175) om talerätt för vissa utländska konsumentmyndigheter och konsumentorganisationer	
Consumer Rights Directive 2011/83/EU	Amendments to several acts, see Government Bill 2013/14:15: - konsumentköplagen (1990:932) - lagen (1991:351) om handelsagentur - lagen (1994:1512) om avtalsvillkor i	

	konsumentförhållanden - distans- och hemförsäljningslagen (2005:59) - lagen (2007:528) om värdepappersmarknaden - marknadsföringslagen (2008:486) - konsumentkreditlagen (2010:1846) - skatteförfarandelagen (2011:1244)	
ADR for Consumer Disputes Directive 2013/11/EU	Lag (2015:671) om alternativ tvistlösning i konsumentförhållanden	

Source(s): Various books and websites.

1. CONCEPT OF THE CONSUMER

1.1 Please outline the concept of the consumer in national law, indicating whether it is intended to be a uniform concept, whether it has been legislated for and where it can found (i.e. in a legislative provision, governmental guidelines, case law etc.).

Originally the concept was not defined in national consumer legislation. However, with the implementation of EU-legislation in the field, there are now also definitions in Swedish consumer legislation. The definitions may be different in different acts. For example in the Consumer Contracts Act (1990:932), Section 1(5): "A consumer is a natural person that purchases goods for use that mainly falls outside professional activities." (own translation).

Source(s): L. Grobgeld & A. Norin, Konsumenträtt 15th ed. (Nordsteds Juridik, 2013) p. 21.

2. REGULATORY AUTHORITIES COMPETENT FOR CONSUMER PROTECTION ISSUES

2.1 What regulatory authorities, if any, are competent for enforcing consumer protection law? Please identify them, their nature (i.e. whether they are public or private or mixed) and the nature of enforcement.

There are two main regulatory types of regulatory authorities. First, there are bodies that deal with information and advice on documents and policy. These include both local municipal consumer advice centres, Konsumentvägledare, and the central body the Swedish Consumer Agency, Konsumentverket ("KV") (see: http://www.konsumentverket.se/Other-languages/English-Engelska/). Consumers may file complaints with KV that can conduct an administrative investigation and request that the company corrects its practices. If the company does not comply KV can through the KO (see below) make a formal order or take the matter to court for an injunction (the case will not however deal with individual consumer grievances or claims but with the practices of the relevant trader for example in its marketing to consumers or its general standard terms.) The Consumer Ombudsman, Konsumentombudsmannen ("KO"), is the director general of the Consumer Agency. The Consumer Ombudsman can in limited circumstances assist an individual consumer in a claim if the matter is of importance for the application of the law generally or a big number of consumers can be affected. KO is also empowered to institute a group action in consumer matters. (See further below under remedies, question 6.5.1). The main role of KO is however to with the KV monitor the market and ensure compliance of the traders with their obligations under consumer law (e.g. in their terms or marketing) (see in particular responses to questions 5.2, 6.1.5 and 7.1.1 below).

Second, there is the Swedish National Board for Consumer Disputes, Allmänna reklamationsnämnden, ("ARN") that deals solely with individual consumer claims (see: http://www.arn.se/other-languages/english-what-is-arn/). The procedure before the ARN is briefly elaborated below.

2.2 Is there a specific venue for this type of enforcement and does this limit the jurisdiction of courts/ADR fora (even if only initially)?

Formally the ARN that is the main regulatory body to deal with individual consumer complaints does not limit the jurisdiction of the courts but in practice very few consumer matters are brought to court. In part due to costs reasons, the ARN recommendation procedure is much more cost efficient from the perspective of the consumer. The ARN procedure is also in other respects non-taxing on the consumer (low effort), well known and very effective in results. (Note though I have so far found no reliable statistics to corroborate this general perception.) During 2015 a total of 12 035 complaints were received by ARN and 5672 recommendations handed down (see: http://www.arn.se/om-arn/statistik/).

In relation to the costs of the procedure, note that there is no fee for the consumer or the trader and no "loser pays rule" applies (in contrast to court proceedings). The consumer needs no representative and the ARN case administrator progresses the matter after the initial complaint that can be made online. The parties must though themselves substantiate their claims with supportive evidence. The proceedings are written only. After the parties have provided their submissions (complaint and response) and evidence the ARN will make a recommendation based on the relevant consumer legislation and case law. The recommendation is not binding on the parties, however, compliance among traders to follow the ARN recommendations is very high (81% according to the most recent figures, see: http://www.arn.se/om-arn/aktuellt/rekordmanga-foretag-foljer-arns-beslut-2016-05-24/.)

The recommendations of ARN are handed down by board consisting of two representatives for the consumer organisations and two representatives of business organisations and a chairman. The chairman is either the director of the ARN or a senior judge (active or retired) mostly from the Supreme Court or one of the courts of appeal.

Aside from the ARN procedure, with scope related to consumer matters generally, there are a number of private sector ADR mechanisms in consumer matters (sometimes mandatory and thereby quasi public structures albeit in a private regime). Examples include the financial services, insurance and telecoms.

The consumer must first have complained to the company/trader directly before the ARN will deal with a matter. In practice this also means that a significant amount of matters are dealt with that never reach the ARN (either directly between the parties or in the private sector ADR mechanisms mentioned above.)

Note that when a consumer brings a claim before court the same matter cannot be lodged with the ARN.

2.3 Can criminal prosecutions be initiated for violations of consumer protection rules? How serious must the infringement be? What are the penalties and sanctions? And might these prosecutions lead to criminal penalties or sanctions? Can individual consumers piggy back on these claims (e.g. via a partie civile method)?

Not applicable in Sweden.

2.4 Is there judicial review of decisions of consumer regulatory authorities? If so, by which court is this judicial oversight made? Is the forum an ordinary or a specialised court or tribunal?

No, there is no judicial review of ARN recommendations. (Note that the result of the ARN procedure is not binding, but there is a high level of compliance. The names of traders that do not comply can be published in a "black list" in a consumer magazine that often raises media interest.) In limited circumstances the ARN board can review a decision based on a request for reconsideration.

As noted there is no judicial review. A consumer always has the option to bring the matter to court. Either directly, without going through the ARN recommendation procedure, or as a second option, if he/she is dissatisfied with the ARN recommendation or if the trader does not comply with the recommendation. (In practice though it is rare that consumers take matters to court. See above response to question 2.2). It should also be noted that the ARN can even provide opinions on consumer issues to courts on request. Thus, once can state that the ARN is considered to have the highest level of experience and legal expertise in consumer claims In Sweden. The ARN also publishes reports on its recommendations that can be seen as a soft form of precedent.

2.5 Does the national legal system provide for a mechanism of cooperation between its national regulatory authorities and those of other Member States?

For the domestic level see responses above. Each actor forms distinct functions. In some instances these functions intersect and they cooperate.

Both KV and ARN are involved in the European enforcement and cooperation structures. Consumers that have come into conflict with a business operator in a country within the EU other than their own can turn to their European Consumer Centre or Euroguichet for advice and help. The centres work in a network, with the aim of providing consumers access to fast and easy dispute resolution. Norway and Iceland are also included in this network. The Swedish European Consumer Centre is called Konsument Europa and is formally a unit of KV. In Sweden, the ARN has the task of trying disputes that arise between consumers from other EU countries and Swedish business operators.

Source(s):

Websites of KV, KO and ARN (see above links). See also see Sweden Chapter in C. Hodges, I. Benöhr & N. Creutzfeldt-Banda eds. Consumer ADR in Europe (Oxford: Hart, 2012).

See also relevant legislation: Marknadsföringslag (2008:486); Lag om marknadsdomstolen (1970:417); Lag om avatalsvillkor i konsumentförhållanden (1994:1512). Förordning (2015:739) med instruktion för Allmänna reklamationsnämnden.

3. LEGAL AID

3.1 Is legal aid available to consumers in: a) bringing a claim and b) defending a claim before a court?

The circumstances under which legal aid can be provided to consumers when a consumer matter is brought to court are the same as have already been elaborated in response to Part 1 of the report, question 2.1.1.

3.2 For what kinds of disputes and actions is legal aid available? (NB: legal aid might not be available for consumer or contractual disputes but be available instead for a related action, e.g. actions relating to debt, mortgage arrears, eviction etc.)

No differentiation based on substance of the claim relevant in this context.

3.3 What requirements must be satisfied for the consumer to be entitled to legal aid? Please specify if there are any additional limitations to its availability.

See response under Part 1, question 2.1.1.

3.4 What does legal aid encompass? (i.e. (only) general advice, (only) assistance in preparing the case, (only) assistance with negotiation of settlements, (also) representation).

See response under Part 1, question 2.1.1.

Source(s):

See http://www.rattshjalp.se/Vad-ar-rattshjalp/Har-du-ratt-till-rattshjalp/
See also Rättshjälpslagen (1996:1619) (Act on Legal Aid) https://lagen.nu/1996:1619.

4. COSTS

4.1 What are the costs of different types of procedures before courts? Are there exemptions to the payment of fees and expenses? How can costs be paid?

The general court fees for civil matters that applies to each claimant (unless the matter concerns certain family law matters) is 2016:

Claims below the value of SEK 22 150 (= EUR 2 388*) SEK 900 (= EUR 97*)
Claims above the value of SEK 22 150 SEK 2800 (= EUR 302*)
*Exchange rate 1 June

The expenses are not regulated/fixed. Depend on the costs of potential counsel (see above Part 1, response to question 2.1.1) and other litigation costs. The loser pays principle applies. (See though below in relation to small claims).

Source(s):

See court services website: http://www.domstol.se/tvist/stamningsansokan/

5. STANDING AND REPRESENTATION IN CONSUMER DISPUTES

5.1 Does national law limit the standing of the individual consumer in respect of the claim that can be made and the forum before which it can be brought?

There are no limits on standing for individual consumers to bring a claim to court.

There are limits to the scope of the matters that can be heard in the ARN recommendation procedure, e.g. certain value thresholds, certain substantive exclusions of matters that are dealt with by other bodies (for example legal services complaints that are dealt with by the Bar Association) and certain other limits (for example that a recommendation has already been issued by the ARN in the same matter). See: http://www.arn.se/info-konsument/innandu-anmaler/kanarn-prova-tvisten/.

5.2 Other than individual consumers, who or which bodies have standing in consumer protection disputes and for what types of claim? If the action is not brought by the individual consumer, what requirements of representation must be satisfied?

As mentioned above KV can, based on complaints received and after conducted investigation, request that the company corrects its practices. If the company does not comply KO can make a formal order or take the matter to court for an injunction against

the trader (the case will not however deal with individual consumer grievances or claims but with the practices of the relevant trader for example in its marketing to consumers or its general standard terms.)

As mentioned above the KO can in limited circumstances assist an individual consumer in a claim if the matter is of importance for the application of the law generally or a big number of consumers can be affected. KO is also empowered to institute a group action in consumer matters.

Certain consumer organisations and trade unions are also empowered to seek injunctions against the general practises of a trader. The empowered organisations rarely do so and in practice appear to rely on the actions of KV/KO. They focus their efforts instead on raising awareness on consumer issues. In addition, competitors of traders and certain business organisations can seek injunctions against a trader for breaches of consumer marketing or trade practises law. These applications can indirectly also benefit consumers and consumer interests.

5.3 If a consumer wants to bring or defend an action relating to a consumer protection dispute, is there a legal (or otherwise formal) requirement that he or she has legal representation? Please specify for both judicial and ADR fora and the bodies, associations or authorities that can provide this representation.

There are no requirements of representation in the ARN recommendation procedure or in civil proceedings in court. (See also above Part 1, response to question 2.1.1).

Source(s):

See sources mentioned under question 2. In addition see Sweden Chapter in Study on the Application of Directive 2009/22/EC on injunctions for the protection of consumers' interests (Final Report available at: http://ec.europa.eu/consumers/enforcement/documents/study_on_injunctions_directive_final_report-18_12_2011_en.pdf).

6. ACTIONS BEFORE COURTS

6.1 Jurisdiction and competence of the courts in consumer disputes: General structure and special procedures aimed at protecting consumers

6.1.1 Are ordinary courts competent to hear such claims? Is there also a specialised tribunal for consumer protection disputes?

Yes, the ordinary courts are competent and there are no special tribunals for claims by individual consumers. (For matters filed by KV/KO the Market Court often has jurisdiction. See below response to question 6.1.5).

6.1.2 Which courts are competent to hear consumer protection disputes at first instance and in appeals? Please specify the court, in light of the value of the claim (and identify any other factors that are relevant in allocation jurisdiction).

The rules in CJP Chapter 10 apply to internal/domestic jurisdiction. The main rule is jurisdiction at the domicile of the defendant. Consumer matters can also be heard at the domicile of the consumer (Chapter 10, Section 8(a), CJP) but only when the matter is a small claim.

If a consumer matter is appealed the relevant court of appeal will be determined based on the same rules as any other civil matter. The six appeal courts have jurisdiction over a certain number of district court territories based on their regional catchment area. See http://www.domstol.se/Om-Sveriges-Domstolar/Domstolarna/Hovratt/.

6.1.3 What is the nature of the procedure at first instance, e.g. is it a simplified or a summary procedure, and is there an assessment of the merits? Please specify in light of the value of the claim (and identify any other factors that are relevant in allocating jurisdiction).

The procedure is simplified only if the monetary value of the claim (regardless of whether it is a consumer matter or not) is below a specific amount. See below under question 6 the definition of a small claim. Otherwise the procedure follows the "normal" procedure for civil matters.

6.1.4 Please identify the formal requirements that must be satisfied for a consumer dispute to be heard before a court. These might include time limits applicable to the filing of the action/defence, representation requirements etc.

There are no specific requirements other than the general requirements for all civil claims. No representation requirements. The general limitation period for monetary debts is 10 years (C2B) but three years if the trader has a claim against the consumer (Section 1, Act on Limitation).

6.1.5 In respect of the claims and relevant procedures available in the national legal system, what kind of relief might be available in consumer protection disputes? (monetary remedies, injunctions, skimming off etc.)?

If the consumer brings a claim under contract with a trader general the same remedies are generally available as in any contractual sales dispute. However, the remedies may be separately elaborated and the circumstances under which they arise may be specified in consumer legislation, e.g. in the Consumer Contracts Act (1990:932) for consumer goods:

- Remedies that may be available based on trader's delay in delivery:
    - Retention of payment, right to demand performance, right to terminate contract, right to damages
- Remedies that may be available based on faulty goods:
    - Retention of payment, right to demand performance/new delivery, right to price reduction, right to terminate contract, right to damages

For the claims brought by KV/KO that do not relate to individual consumer claims but general breach by a trader of obligations under marketing law or under legislation on unreasonable contract terms different remedies/sanctions apply. These remedies include injunctions in the form of prohibition orders and injunctions in the form of production of information orders. In smaller matters KO can itself make the order, in more significant matters KO will apply to the Market Court for an order (with limited review possibilities by the Supreme Court in exceptional cases). The injunctions are customarily ordered with threat of fine. If the trader does not comply with the order KO can seek a decision from a district court that may order the fine to be due. KO has an additional remedy in the form of a specific pecuniary sanction called "market disturbance fee" that it can ask a court to order (trade organisations or individual competing traders have a secondary right to apply for such a sanction if KO choses not to make such an application). It should here be noted that a large part of the work of KV/KO is preventative. Before proceedings are commenced negotiations with traders are conducted and often successful. In relation to contract terms, KV has for example managed to negotiate agreements with business organisations representing several sectors on recommended standard terms that are published on the KV website.

Consumers also have the option of seeking non-contractual damages under the Marketing Act if they can establish that they have suffered damage by incorrect and misleading marketing. (Jurisdiction lies with the district courts but appeals will be

heard my the Market Court instead of the appeal courts.) According to a Study published in 2011, such a claim had never been raised because of the expensive and complex nature of such a procedure. Notably either the ARN procedure, other ADR options potentially available are much less cumbersome procedures for a consumer. In addition, to seek redress based on a contractual claim in the district court is an option that is used more often in practice.

6.1.6 Please provide a brief overview of the role of parties and judges in civil proceedings generally (e.g. with reference to the principle of party disposition, the obligation of parties to make and prove factual allegations and to make and provide legal arguments, the possible role of the court). This overview should be brief; these issues will be dealt with in more detail in the questions that follow.

In civil matters in general the parties are responsible for specifying the relief sought as well as alleging the grounds/facts relied upon to substantiate the relief sought. In addition, the parties have the burden of adducing evidence in support of their claimed facts and grounds, i.e. have the burden of proving the facts that claim is based on. The court will thus not make any investigations of its own into evidence and cannot in most cases order any evidence unless the parties request so. The court is however in principle responsible for knowing the law (jura novit curia applies). Customarily the parties will though make arguments in relation to the relevant legal provisions and sources in particular when represented by counsel. The judge has general procedural case management powers. One tasks of the court at the preparatory hearing or preparatory stage of the proceedings (before the main hearing) is to check that it is clear what relief is sought and the positions of the parties, i.e. clarify what is in dispute. Within the boundaries of this management task, called “processledning”, the court may by asking clarificatory questions. In case a party is a litigant in person or where mandatory law provisions apply the court may have to be more active in its management but it is not allowed to assist the parties in actually framing the relief sought and it must remain neutral.

Source(s):

CJP - Unofficial translation of the full code in English provided by the Department of Justice available at (not up-t-date): http://www.government.se/content/1/c4/15/40/472970fc.pdf and http://www.government.se/sb/d/390/a/1540
Court Service Handbook http://www.dvhandbok.domstol.se/
Preskriptionslag (1981:130) (Act on Limitation) http://www.notisum.se/rnp/sls/lag/19810130.HTM

Marknadsföringslag (2008:486); Lag om marknadsdomstolen (1970:417); Lag om avatalsvillkor i konsumentförhållanden (1994:1512).
See L. Grobgeld & A. Norin, Konsumenträtt 15th ed. (Nordsteds Juridik, 2013), in particular pp. 180-190 and 206-207.
On remedies see also Final Report available at: http://ec.europa.eu/consumers/enforcement/documents/study_on_injunctions_directive_final_report-18_12_2011_en.pdf

6.2 Small claims

6.2.1 Does a small claims procedure exist in the Member State? If yes, is it a specialised or simplified procedure?

Yes. (I am not sure that I understand the distinction between "specialised" and "simplified" in this context.)

6.2.2 What are the value thresholds for claims brought under the small claims procedure? Moreover, are there any other factors that shape the use of the small claims procedure (including the nature of the claim, the area of consumer protection law into which the claim falls etc.)?

The only criterion that determines whether or the matter is dealt with as a small claim or not is the value in dispute. (Regardless of the substantive nature of the claims.) The specific amount is determined annually and is SEK 22 150 for 2016.

A party can argue for that the matter should be held in ordinary proceedings if: (i) the amount claimed is probably higher, or (ii) the judgment in the matter may be of more general importance.

6.2.3 What forms must be completed to raise the application? Who assists the consumer in completing these forms?

The same form shall be completed as for normal civil matters.
See http://www.domstol.se/tvist/stamningsansokan/.

General assistance and information can be given by the municipal consumer advice centres and court administration. A lot of basic information is also available online.

6.2.4 How can an application for a small claim be made (e.g. online, by post or in person)?

It cannot be made online. Either sent by post or filed in person at the court house.

6.2.5 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

The rules on taking of evidence do not differ from the general civil proceedings. In principle the party itself or its representative must be present at a potential oral preparatory hearing and at the main hearing. However, the court has discretion to enable a party to attend by telephone or video link.

In simple matters the court can decide against a preparatory hearing and only conduct the preparation based the documentation. In some matters the court can proceed to hold the oral main hearing immediately after an oral preparatory hearing (as a main rule the consent of the parties is required).

In the claim form a party must list the evidence that it considers relevant both written and oral evidence and explain what each piece of evidence is intended to establish. Based on the principles of immediacy, concentration and orality the evidence is then presented at the oral hearing at which potential witnesses are heard. The witnesses will be allowed to first give their own account of the matters and will then be cross-examined by the opposing party.

6.2.6 Are the costs of the successful party reimbursed?

The loser pays principle applies also in small claims matters but is limited to the essential costs because the aim is to keep the costs as low as possible and the intention is that a party should not have to have legal representation. The only recoverable costs are:

i) one hour legal counselling (at fixed fee)
ii) the application fee
iii) travel expenses for the party or a representative, if a court hearing is deemed necessary
iv) costs of witnesses (reasonable)
v) translation of documents

Source(s):

CJP, the Court Service Handbook and the Court Service website. (All links available above.)

6.3 Claims other than small claims

6.3.1 If a consumer protection dispute does not qualify as a small claim, what other procedures are available? What are the value thresholds and other factors determining the use of such procedures?

No other special procedures, just the regular civil proceedings.

6.3.2 How can such claims be made? Please specify if the applications can be made online, or by post or in person.

The claims form shall be filed including information on the relief sought, the grounds and the facts, comments on jurisdiction, and details of the counter party. The application fee should be paid and appended. The application is made by post or in person at the court house.
See http://www.domstol.se/tvist/stamningsansokan/.

6.3.3 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

See above under small claims. The rules on evidence are similar.

6.3.4 Are the costs of the successful party reimbursed?

Yes, the loser pays principle applies. There are though circumstances under which full reimbursement will not be the case. See above Part 1, question 2.1.1. See also above separately in relation to small claims.

Source(s):

CJP, the Court Service Handbook and the Court Service website. (All links available above.)

6.4 Claims for the issuance of a payment order

6.4.1 Does an order for payment procedure exist in the national system? Is it a simplified procedure?

Yes. An application for a payment order can relate to the obligation for the defendant to pay a financial debt. The debt must be overdue and concern a civil matter that is amenable to settlement between the parties.

6.4.2 Which authorities or courts are competent to hear claims for the issuance of payment orders?

The Enforcement Agency.

6.4.3 Are there any formal requirements that must be satisfied for the application for the issuance of a payment order to be made (e.g. standard forms, representation by a lawyer, the detail of description required, the need to provide written evidence etc.)?

No legal representation required. An application for a payment order must be made in writing and signed. In the application, the plaintiff must state the claim and the grounds for it. The amount of the claim, the due date and the interest claimed must be stated, as must any costs for which compensation is sought. The application must also specify who the parties are. There is no need to provide evidence.

There is an application form that can be used, available also in English together with instructions on how to complete it on the website of the Agency (http://www.kronofogden.se/ and http://www.kronofogden.se/download/18.1cddbd7b13519298efb80005856/9012B09.pdf).

6.4.4 What information is generally available to the authority or court when a claim for the issuance of a payment order is made?

The same information mentioned immediately above in response to the preceding question. This is information provide by the claimant/creditor. The grounds must be sufficiently detailed that the defendant knows what the claim concerns and can decide whether or not to dispute it. The grounds must state objectively what the claim concerns, so that what is covered by the legal force of the outcome can be determined in the future.

The general rule is that the correctness of the claim is not examined until an order has been issued. If, however, it is apparent based on the limited facts provided that the claim is unfounded or unjustified, the application must be dealt with as though the defendant had contested it. An application may be rejected if it is defective.

6.4.5 What opportunity is available for a defence/statement of opposition to be advanced? How should this be done and what is its effect? Please specify if the means of advancing a defence differ depending on the value of the claim and the court dealing with it.

The time limit for contesting an order is stated in the order. The time limit is normally set at ten days from the date on which the order was issued. Any contesting of an order must be done in writing. If the defendant contests the application, the claimant will be informed of this immediately. If the claimant wishes to persist in his claim, he may request that the case be submitted to the district court. The effect of contestation is thus that the order is without force and that the matter must be heard in normal civil proceedings in court in order to progress. (No difference depending on the value of the claim.)

6.4.6 What is the effect if the claim is uncontested, i.e. if there is a lack of defence/statement of opposition?

If the defendant does not contest the application the Enforcement Agency will issue a final decision on the application as soon as possible. This decision is enforceable and the Agency will immediately proceed to enforcement unless the claimant has explicitly requested non-enforcement when applying for the payment order.

6.4.7 If the defendant is a consumer, and he or she does not respond to or raise an objection to the issuance of the payment order, does the authority dealing with the claim for payment order proceedings have the power to examine any issue of consumer protection law of its own motion before treating the action as usual?

Not to my knowledge. There is no evaluation of the merits at this stage.

6.4.8 What steps must the pursuer take in order to obtain an enforceable decision?

See response above, question 6.4.6.

6.4.9 Is this decision final, or can the defendant appeal against it?

The defendant may apply for the case to be re-opened within one month of the date of the decision. In this case, the case is passed to a district court for further action.

Source(s):

Website of Enforcement Agency: https://www.kronofogden.se/Ansokaombetalningsforelaggande.html
Website of EJN: https://e-justice.europa.eu/content_order_for_payment_procedures-41-SE-en.do?clang=sv
Act on Payment Orders: http://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1990746-om-betalningsforelaggande-och_sfs-1990-746

6.5 Appeals in consumer disputes

6.5.1 Are appeals possible in all consumer disputes? Please specify for small claims and other types of claims.

The right to appeal in civil matters is not limited based on the amount in dispute or the substance of the matter (for example certain consumer matters). Leave to appeal is though required.

6.5.2 Please briefly specify the national appeal procedure, including any requirements to be satisfied for appeals. These might include, but are not limited to, conditions of admissibility, value thresholds, time-limits, the scope of review, and the impact of the appeal on enforcement (provisional enforcement). Please refer to any rules specifically applicable in respect of the claims and relevant procedures outlined above.

See Part 1, response to question 2.2.

Source(s):

CJP (see link above).

6.6 Enforcement in consumer disputes

6.6.1 If the assessment of a consumer protection issue has not been possible at an earlier stage of the proceedings, is it always possible – either ex officio (see section 10 below) or if the consumer raises a possible violation of consumer protection law – for this assessment to be undertaken during enforcement proceedings?

If the matter has been dealt with by a Swedish court judgment, there is no opportunity at the enforcement stage for the Enforcement Authority to review the merits of the judgment. Ordinary rules on appeal (if still temporally available) or extraordinary means of review in CJP (if the judgment has become final and binding) must be used in order to address any potential material incorrectness of the judgment (regardless of whether or not the relevant substantive law is of a mandatory nature or not). The limited grounds for refusal of enforcement available have been outlined in Part 1 or the Report (see question 3.3.5). If an appeal is pending a party may apply for a stay of enforcement pending final judgment. The court has discretion as to whether or not grant such a stay.

If the matter concerns enforcement of a domestic arbitral award (which will in Sweden rarely be the case in consumer matters), the award entitles a party to proceed to direct enforcement with the Enforcement Agency without any intermediate steps in court. However, if the enforcement officer based on a basic review of the documents considers that is reason to believe that there are grounds for annulment of the award, the officer must order the applicant to bring a case to court regarding potential nullity of the award (Enforcement Code, Chapter 3, Section 16). An arbitration award can only be challenged on limited grounds under the Arbitration Act in court. Among these grounds is ordre public. Incorrect application of substantive law is not in general considered to fulfil grounds for a challenge. However, under certain circumstances complete disregard of mandatory consumer law might be held to fulfil ordre public. (Will check case law. Do not recall any Swedish case where consumer law would be relevant). In addition, disregard or misapplication certain aspects of EU law may fulfil the requirements of ordre public (based on case law from the ECJ). At present there is no time limit in the Swedish Abritration Act for annulment of an award based on ordre public grounds (this may change in a potential future amendment of the Act, based on current recommendation in Government Report).

In matters concerning foreign arbitral awards, an intermediate application to court must be made for enforcement before enforcement proper can be applied for with the Enforcement Agency (Swedish Arbitration Act implements the New York Convention). In these proceedings parties may raise limit grounds of refusal including ordre public.

6.6.2 In the particular case of consumer protection, if a court examines consumer protection law (either ex officio or on the basis of an argument advanced by the consumer), does national procedural law provide that interim measures should 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 final decision will have full effect?

It is difficult to grasp what you are referring to because it does not appear directly familiar to the Swedish procedural system. However, as a general comment a court that is dealing with a review, appeal or similar application whilst enforcement proceedings are already pending will have the discretion on application to stay enforcement.

Source(s):

Arbitration Act
Enforcement Code
CJP

7. ACTIONS FOR COLLECTIVE REDRESS

7.1 Injunctive relief, linking individual and collective actions

The case law of the CJEU requires that a person or organisation with a legitimate interest in consumer protection must be able to bring an action before a national court or tribunal in respect of an alleged violation of consumer rights deriving from Union law, either for compensation or for injunctive relief, to preclude the continued violation of consumer rights[335].

7.1.1 If collective proceedings are launched, does national procedural law provide that ongoing individual claims, relating to the same dispute, should be stayed until the collective proceedings are brought to an end? Please specify if this constitutes an obligation on the part of the national judge or if it is at his or her discretion.

The only collective proceedings in Swedish procedural law are based on the Group Action Act (2002:599) that is an opt-in collective civil procedure the result of which only has res judicata effect for the parties that opted in. Based on Section 10 of the

[335] This derives from the EU directives. For example, in respect of the UCTD, Art.6(1), Art.7(1) and (2) UCTD, provide that the Member States must ensure 1) that unfair terms are not binding on the consumer and 2) that adequate and effective means exist to prevent the continued use of unfair terms in consumer contracts. The CJEU has held that effective implementation requires that the consequence of the finding of the violation – in the case of a finding of unfairness under the UCTD – is for the term to be declared invalid, and that the effect of this invalidity extends not only to the parties to the action for an injunction but also to those who have concluded a contract with the seller/supplier to which the same terms apply.

Act, a party can if a matter is pending in "normal" civil proceedings apply for the proceedings to be changed to a group action. The district court has discretion to decide whether such a change is suitable and may grant the application only if the defendant agrees or if it is obvious based on the circumstances that the benefits of dealing with the matter as a group action outweighs that detriment that may be caused to the defendant. The Group Action Act deals with collective proceedings for individual claims. The remedies available in such proceedings depend on the type of individual claims that are at stake (see above response to question 6.1.5).

As mentioned above under question 6.1.5 the KV/KO can seek injunctions against certain market behaviour of a trader. Information of illegal trade practices may come to the attention of KV/KO via individual complaints. However, the mentioned injunction proceedings are separate to individual consumer claims and may be pending separately in court. There is, thus no interconnection or stay between individual consumer redress and the "regulatory redress" sought by KV/KO.

7.1.2 If individual proceedings are stayed, please indicate what the effect of the court or ADR entity's decision in the collective action on those individual proceedings would be, i.e. whether the outcome of the collective action binds the consumer bringing an individual action.

The individual proceedings are not stayed (see above question 7.1.1). In any event it is important to note that a judgment in a group action matter will only have legal force as regards the actual parties that have opted-in as members of the group, Section 29 of the Group Action Act.

Source(s):

Group Action Act

8. CONSUMER ALTERNATIVE DISPUTE RESOLUTION

8.1 Consumer disputes before ADR fora

8.1.1 Is ADR mandatory for all parties bringing a claim related to a consumer protection dispute?

No, it is not mandatory, but in practice the most used method (either ARN recommendation procedure or private sectoral ADR). Certain sectors may be prescribed to offer ADR opportunities.

8.1.2 Please specify if there are limitations to the use of ADR. These might include the nature of the claim (i.e. whether both individual and collective claims are possible), requirements of representation, time limits, value thresholds, etc.

There are certain limitations to the ARN procedure (see above responses under question 2.)

8.1.3 Can ADR entities issue binding decisions and can they enforce those decisions? If not, please explain how they are enforced.

None of the ADR entities in Swedish consumer matters issue binding decisions. The ARN procedure is explained above. It only issues recommendations. The system is based on voluntary compliance. The private and sectoral ADR mechanisms are many are similar to the ARN model in that boards or other bodies will provide recommendations (with voluntary compliance). Thus, there is no enforcement mechanism of a settlement.

However, to the extent that consumers and traders settle their disputes voluntarily in a settlement agreement either between themselves or by using a mediation procedure, that settlement can be verified in court and thereafter it can be enforced.

8.1.4 Does national law provide that limitation periods applicable to judicial actions should be suspended while ADR is ongoing?[336]

Yes. According to the Mediation Act (2011:860) Section 6, a time limit that was running at the time when mediation proceedings were started ends earliest one month after the mediation proceedings have ended.

The same applies to consumer settlement procedures that fall under the EU Consumer ADR Directive, based on Section 14 of the implementing act (Lag 2015:671 om alternativ tvistlösning i konsumentförhållanden.)

[336] The Directive on Consumer ADR provides that "the existence of an effective system for collective claims and easy recourse to ADR should be complementary". Consumer ADR is relevant not only for individual claims but also for collective ones; it can provide consumer with a means to reduce costs and save time.

8.1.5 Please specify if national law establishes rules providing for recourse to judicial action following an (unsuccessful) ADR hearing[337].

See above response to question, recourse to court is always possible.

8.1.6 Is there judicial review of decisions and awards made by ADR entities? If so, by which court or tribunal is this oversight made? Is it ordinary or specialised?

See response above under question 2.4 on the ARN. As a main rule there is no judicial review because the party always has the option of going to court.

Source(s):

Same sources as above under question 2.

9. THE EXAMINATION OF CONSUMER PROTECTION LAW IN NATIONAL PROCEDURAL LAW: RESPECT FOR THE PRINCIPLES OF THE EFFECTIVENESS AND EQUIVALENCE OF CONSUMER PROTECTION LAW AND EX OFFICIO CONTROL

9.1 The basis of ex officio control of consumer protection law in national law

9.1.1 Is it clear in the national legal system when consumer protection law should be applied ex officio? Is the ex officio control of consumer protection law established as an obligation or as a (discretionary) power of the judge in national procedural law?

It is as a main rule clear when provisions in substantive consumer law are mandatory. In Swedish legal terminology the term “not amenable to settlement” is used as opposed to “amenable to settlement”. It will often be clear from the provision itself or the travaux préparatoires (in practice the relevant Government Bill) whether it is mandatory or not. In consumer legislation certain provisions may be mandatory whereas others are not. Thus, one must establish the In the Consumer Contracts Act, Section 3, it is state that contractual provisions that diverge from the Act are not valid unless it is otherwise explicitly mentioned in the law. Meaning that the presumption is that a provision in the Act is mandatory and cannot be deviated from unless the provision itself states otherwise. Provisions that are not mandatory concern inter alia time of delivery, place of delivery and payment of transport costs. Note also that the

[337] Per Arts.10-12, Directive on Consumer ADR.

provisions in the Act are binding and mandatory ex ante not ex post. The consumer is after a dispute has arisen entitled to agree with the trader and settle on terms that are less advantageous than the Act. Such a settlement will also bind the consumer unless it can be demonstrated that the term is gravely unreasonable (under Section 36 of the Contracts Act). Courts are obliged to ex officio uphold mandatory provisions of law (official principen). Constrained though by the relief sought.

9.1.2 If there is an understanding of ex officio control of consumer protection law in the national legal, what is this control understood to encompass/not cover?

Yes, even though it may in a specific case be complex because certain issues may fall under mandatory provisions and others not.

9.1.3 Is the party who claims to be a consumer required to establish his or her consumer status, the existence of a consumer contract and that consumer law applies to the dispute? Is this required even if the consumer has no legal representation?

The party is not required to establish the legal definition of a consumer, explain whether or not he falls within it, or direct the court to legal provisions of consumer law. The court knows the law (jura novit curia). However, the party must refer to the relevant facts and allege the existence of a contract that is relevant to its claim (burden of allegation). In addition the party must as a main rule provide the necessary proof (burden of proof). However, note the court's case management duty. (See above response to question 6.1.6). The court's case management duty may be more active if a party has no legal representation or the matter includes application of mandatory law. In addition, the court can to the extent that the matter includes mandatory provisions and the matter is not amenable to settlement base its ruling on legal facts not specifically alleged by the parties or ex officio order witness evidence (CJP 17:3 and 35:6). However, the court is bound by the relief sought by the parties.

9.1.4 What information is available to judges and dispute resolution facilitators hearing consumer protection disputes? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a consumer protection dispute to be heard and b) for the court to engage in ex officio control?

No, Swedish procedural law does not include any specific rule on minimum factual information other than the basic information to bring a claim (CJP 33:1 and 42:1). Further, see above response under questions 6.1.6 and 9.1.4.

9.1.5 Who is responsible for providing this information? If the necessary information is not available to the court (or dispute resolution facilitator), is he or she under an obligation to investigate in order to be able to respond to a relevant consumer protection dimension of the case?

See above questions 6.1.6 and 9.1.4. As a main rule the parties are responsible for providing the information relevant (facts and evidence). The

9.1.6 Will the court provide the consumer with any assistance in gathering factual information or advancing his legal arguments before the court? Please respond for the situation where: a) the consumer has legal representation and b) the consumer has no legal representation.

See above under questions 6.1.6 and 9.1.4.

Source(s):

CJP and Ekelöf &b Edelstam, Rättegång – Första Häftet 8th ed (Nordstedts, 2002) p. 56-65 and 68-72.

9.2 The possibility for ex officio control of EU consumer protection law in dispute resolution proceedings

9.2.1 Is ex officio control of consumer protection law always possible when the procedure involves a full assessment of the claim on its merits?

Yes. But this depends on whether the specific consumer law provision is mandatory. (See above.)

9.2.2 Can ex officio control be exercised even when the procedure does not involve an assessment on the merits?

Not relevant. Consumer claims in court even in small claims have a full assessment on the merits.

9.2.3 Please indicate if, per national procedural law, ex officio control can be exercised at the following stages of the procedure:

	Courts		Other dispute resolution facilitators	
	Possible to exercise ex officio control	Not possible to exercise ex officio control	Possible to exercise ex officio control	Not possible to exercise ex officio control
Ordinary proceedings	X		N/A	N/A
Small claims	X		N/A	N/A
Payment order	N/A	N/A		X (see above no review on the merits)
Provisional measures	X		N/A	N/A
Proceedings linked to enforcement (**enforcement of basic domestic judgment**)	N/A	N/A		X
Enforcement proceedings				
- Enforcement of payment order	See above 6.6.1			
- Enforcement of arbitration award	See above 6.6.1			
- Enforcement of mortgage	Not applicable in Sweden	---	---	---
- Enforcement of notarial deed	Not applicable in Sweden	---	---	---
Appeal proceedings (please specify:)				

9.2.4 What does ex officio control encompass in national procedural law?

Jura novit curia entails that the court knows the law and may apply other legal provisions than referred to by the parties, though it is desirable to note the provision to the parties and hear the parties on the matter before judgment. This can in itself be considered a form of "ex officio control". In civil matters that are amenable to settlement, the court is though bound and constrained by the relief sought and facts alleged as relevant by the parties. In addition, the court is bound if a party concedes and accepts a claim or a fact alleged by the other party. In relation to mandatory provisions of law/civil claims not amenable to settlement, the court must ensure that the judgment does not contravene the law. Therefore, the court is not bound by concessions that contravene the law and can base its judgment on facts not alleged by the parties and can to some extent order evidence not presented by either party. The court is, however, to the extent possible bound by the relief sought by the parties.

Source(s):

Same as above under question 9.1.

9.3 Other procedural mechanisms for the equivalent and effective protection of EU consumer law

9.3.1 Does national procedural law provide that rules of EU consumer law (as well as rules that aim to satisfy EU consumer law objectives) should be understood as having equal standing to national rules of public policy (which is to say, that for the purposes of domestic law, the consumer protection provision is understood to have equal standing to a rule that must be raised ex officio by the national court)?

There is no specific procedural law that deals with the issue either in domestic procedural law or the EU context. What constitutes public policy is determined in case law and based on general principles of law. That EU law can constitute public policy follows from Eco Swiss and is mentioned in the literature as something that a court must take into account ex officio.

9.3.2 If ex officio control is not possible in certain types of proceedings or at a certain stage of proceedings (or for any other reason), does national procedural law provide for an alternative way of assessing consumer protection law?

No. See responses above.

Source(s):

Same as above.

9.4 Ex officio control in payment order procedures

9.4.1 What information is available to the judge when a claim for the issuance of a payment order is made? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a claim for the issuance of a payment order to be granted and b) for the court to engage in ex officio control before a payment order is issued?

The Enforcement Agency issues payment orders not the courts and there is no ex officio review at this stage. There are rules on the limited information to be provided. See above responses under question 6.4.

9.4.2 What considerations will be assessed ex officio by the court (or other competent authority) before a payment order is issued?

N/A. See above response to question 9.4.1.

9.4.3 How is the consumer informed about the claim to issue a payment order against him or her? Does national procedural law make any provision for steps to be taken to ensure that consumers are informed of the claim for the issuance of a payment order so that he or she can contest it?

The defendant/debtor is informed by means of service. There are no separate rules for consumers as debtors. See above responses under question 6.4.

9.4.4 If the consumer objects to the claim, what is the next step? Do the proceedings continue, in the context of which ex officio control can be exercised? Or are the proceedings transferred to ordinary proceedings for analysis on the merits of the claim?

There are no separate rules for consumers as debtors. See above responses under question 6.4.

Source(s):

European Commission
An evaluation study of the impact of national procedural laws and practices on the equivalence and effectiveness of the procedural protection of consumers under EU law

JUST/2014/RCON/PR/CIVI/0082

National Report – Consumer Protection Strand

England and Wales

Chris Hodges, Stephanie Law and Vincent Richard

ENGLAND AND WALES: LEGAL ANALYSIS

1. NATIONAL LEGISLATION IMPLEMENTING EU CONSUMER PROTECTION INSTRUMENTS

Individual EU measures have historically been introduced under individual national measures, usually in statutory instruments. The Consumer Rights Act 2015 has in effect produced a codified restatement of the previous legislation.

EU legislation	Transposing national legislation	Additional notes (e.g. if there is an overlap in application of legislation etc.)
Doorstep Selling Directive 1985/577/EEC	Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008	Revoked the Consumer Protection (Cancellation of Contracts Concluded away from Business

		Premises) Regulations 1987 and (Amendment) Regulations 1988 2008 regulations revoked in 2015 by the CRA 2015
Package Travel Directive 90/314/EEC	Package Travel, Package Holidays and Package Tours Regulations 1992	
Unfair Contract Terms Directive 1993/13/EEC	Unfair Contract Terms in Consumer Contracts Regulations 1999	In addition, Unfair Contract Terms Act 1977 (but was not amended) 1999 Regulations revoked 1994 Regulations For B2C contracts, both replaced, from October 2015, by the Consumer Rights Act 2015
Distance Selling Directive 1997/7/EC	Consumer Protection (Distance Selling) Regulations 2000 Amended by, Consumer Protection (Distance Selling) (Amendment) Regulations 2005	2000 regulations revoked in 2015 by the CRA 2015
Consumer Sales and Guarantees Directive 1999/44/EC	Sale and Supply of Goods to Consumers Regulations 2002 Enterprise Act 2002, Part 8 and Schedule 13 (for consumer injunctions)	In addition, relevant provisions can be found in Supply of Goods (Implied Terms) Act 1973 Unfair Contract Terms Act 1977 (sections 6-8, 20, 25) Sale of Goods Act 1979 Supply of Goods and Services Act 1982 Sale and Supply of Goods

		Act 1994 Enterprise Act 2002, Part 8 and Schedule 13 – consumer injunctions For B2C contracts, replaced, from October 2015, by Consumer Rights Act 2015
Unfair Commercial Practices Directive 2005/29/EC	Consumer Protection from Unfair Trading Regulations 2008 (Amended, from October 2014, by) Consumer Protection (Amendment) Regulations 2014	
Misleading and Comparative Advertising Directive 2006/114/EC	Business Protection from Misleading Marketing Regulations 2008	
Consumer Credit Agreement Directive 2008/48/EC	Consumer Credit (EU Directive) Regulations 2010 Consumer Credit (Total Charge for Credit) Regulations 2010 Consumer Credit (Disclosure of Information) Regulations 2010 Consumer Credit (Agreements) Regulations 2010 Consumer Credit (Advertisements) Regulations 2010 Financial Services (Consumer Credit) Act 2011	
Timeshare Protection Directive 2008/122/EC	Timeshare Holiday Products, Resale and Exchange	Amending the Timeshare Act 1992 and Timeshare

	Contracts Regulations 2010	Regulations 1997
Consumer Injunctions Directive 2009/22/EC	Consumer Rights Act 2015 (for some provisions)	
Consumer Rights Directive 2011/83/EU	Consumer Rights (Payment Surcharges) Regulations 2012 Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (from June 2014) Consumer Rights Act 2015 (for some provisions)	Where the CRA 2015 has replaced existing legislation, it applies to contracts concluded after 1 October 2015 only; the previously-applicable legislation applies to contracts concluded before this date.
ADR for Consumer Disputes Directive 2013/11/EU	Consumer (Alternative Dispute Resolution) Regulations 2015 Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015	

Source(s):

http://legislation.gov.uk/

1. CONCEPT OF THE CONSUMER

1.1 Please outline the concept of the consumer in national law, indicating whether it is intended to be a uniform concept, whether it has been legislated for and where it can found (i.e. in a legislative provision, governmental guidelines, case law etc.).

No overarching definition of the consumer is established in English law. Rather, the understanding attributed derives from three sources: definitions tend to be provided in each piece of implementing legislation; judicial interpretations and guidance is also provided in the Civil Court Practice.

Definitions of consumer in legislation (2 examples):

i. Consumer Rights Act 2015, s.2(3): A 'consumer' is defined as "an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession". This definition of consumer is wider than other definitions found in UK and EU law as it includes individuals who enter into contracts for a mixture of business and personal reasons.

ii. Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277), regulation 2: regulation 2(1) refers to the 'average consumer' as "an individual who in relation to a commercial practice is acting for purposes which are outside his business"; regulation 2(2) provides that in understanding the "average consumer", "account shall be taken of the material characteristics of such an average consumer including his being reasonably well informed, reasonably observant and circumspect", while regulation 2(5) provides that In determining the effect of a commercial practice on the average consumer (a) where a clearly identifiable group of consumers is particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, and (b)where the practice is likely to materially distort the economic behaviour only of that group, a reference to the average consumer shall be read as referring to the average member of that group.

<u>The consumer concept in English case law:</u>

Trafford Metropolitan Borough Council v Total Fitness [2002] EWCA Civ 1513: "the man on the Clapham omnibus".

OFT v Foxtons Ltd [2009] EWHC 1681 (Ch): The court engages the notion of the "typical consumer" who might be affected by the contract terms where the action is brought by the OFT; in contrast, the specific facts and circumstances of the case should be engaged when the action is brought by a consumer.

OFT v Abbey National [2008] EWHC 875 (Comm): The "reasonably well-informed and circumspect consumer" (re the UTCCR 1999; the court also highlighted that - because of the European origins of the legislation - references should be made to this understanding in order to determine whether a term was in plain, intelligible language).

OFT v Abbey National [2010] 1 AC 696, para.113 per Lord Mance: "The court should no doubt read and interpret the contract in the usual manner, that is, having regard to the view which the hypothetical reasonable person would take of its nature and terms".

R & B Customs Brokers Co Ltd v United Dominions Trust Ltd [1988] 1 All ER 847: The claimant company's acquisition of a car was held not to be a contract made in the course of a business; as such, the claimant could be held to have been dealing as a consumer and could thus rely on consumer law (similar conclusion in Feldarol Foundry plc v Hermes Leasing (London) Ltd [2004] AWCA Civ 747).

R (on the application of Khatun) v Newham London London Borough Council [2003] EWHC 2326: a council tenant who receives state benefits can be understood as a consumer (and the council, under a statutory duty to provide housing, a supplier).

Governor and Company of the Bank of Scotland v Rueben Singh (2005) QBD 17 June: A company director who provides a loan to his company cannot be understood as a consumer as there is no scope to balance the burdens of the contract (the benefit goes entirely in one direction and the burden in the other).

OFT v Ashbourne Management Services Ltd [2011] EWHC 1237: Kitchin J, essentially, the understanding of the level of engagement of a consumer must be determined in respect of the context of the relevant case.

Guidance from Civil Court Practice (Neuberger):

III CON 3: no universal definition is established; a consumer is understood as a person who contracts for the supply of goods or services but does not do so in the course of a business. English law does not provide that a consumer is necessarily a natural person; thus the consumer concept could also include corporations.

III CON 67: for the purposes of the Sale of Goods Act, s.12 "dealing as a consumer" encompasses the notion of making a contract "in the course of a business"; to be understood as such, the contract must be an integral part of the business, occur with sufficient regularity, and not constitute an ancillary transaction.

III CON 111.1: a person, acting outside of his trade, business or profession, who enters into a contract involving a large sum of money and who does so for reasons that are not only concerned with the satisfaction of his private consumption can be held to be a consumer (in respect of foreign exchange contracts for investment purposes, see Standard Bank London Ltd v Apostolonis 2000 1 L Pr 766).

Source(s):

- Neuberger, The Civil Court Practice 2015 (Butterworths, London; 2015)
- Competition and Markets Authority, Unfair Contract Terms Explained, July 2015, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450410/Unfair_Terms_Explained.pdf

2. REGULATORY AUTHORITIES COMPETENT FOR CONSUMER PROTECTION ISSUES

2.1 What regulatory authorities, if any, are competent for enforcing consumer protection law? Please identify them, their nature (i.e. whether they are public or private or mixed) and the nature of enforcement.

Different regulatory bodies play diverse roles in consumer protection; the following are particularly relevant and examined in more detail:

h. Citizens Advice Service
i. Chartered Trading Standards Institute and Local Authority Trading Standards Services
j. Competition and Markets Authority

a. Citizens Advice Service

The Citizens Advice Service, a not-for-profit body that receives state funding, provides information, advice, direct support and representation to consumers involved in consumer disputes. It also aims to educate citizens as to their rights.

b. Chartered Trading Standards Institute and Local Authority Trading Standards Services

The primary, state-based consumer protection function is provided by the Trading Standards Services (TSSs) of every Local Authority. There are over 400 such Local Authorities in UK. TSSs enforce provisions on consumer protection, unfair trading, product safety, under-age sales, weights and measures, food safety and environmental protection. The individual TSSs are coordinated by various groups, including the National Trading Standards Board, the Chartered Trading Standards Institute (CTSI), and the Regulatory Delivery division of the Department for Business Innovation and Skills.

TSSs have enforcement powers; these include extensive powers to investigate breaches, take samples, obtain and inspect documents and premises, carry out tests and sample purchases, and institute enforcement measures of various kinds. The enforcement powers include the authority

to seek court orders for injunctions and to prosecute breaches of legislation. Specific provisions arise under the Consumer Rights Act 2015, formerly under the Unfair Terms in Consumer Contract Regulations 1999 (UTCCRs), the Consumer Protection (Distance Selling) Regulations 2000 (DSRs), the Business Protection from Misleading Marketing Regulations 2008 (BPRs) and the Consumer Protection from Unfair Trading Regulations 2008 (CPRs)).

Through its 'Business Companion', CTSI offers advice to businesses. It also operates a 'Consumer Codes Approval Scheme' for traders approved to participate. CTSI does not deal with individual consumer complaints but can provide consumer education and advice. It is worth noting that CTSI also has a role to play in respect of ADR (see below at section 10).

c. Competition and Markets Authority

The CMA is the UK's national competition and consumer authority. It is an independent non-ministerial government department with responsibility for carrying out investigations into mergers, markets and the regulated industries. It also has competence to take measures to enforce competition and consumer law. The CMA was created in 2014; before its creation the relevant body was the Office of Fair Trading, which had wider and somewhat different functions. From 1 April 2014, the CMA took over the functions of the Competition Commission, as well as the competition – and certain consumer – functions of the Office of Fair Trading, as provided for by the Enterprise and Regulatory Reform Act 2013.

The CMA is the UK's Single Liaison Office; it also forms part of a cross-border European network. The CMA thus coordinates cooperation between national authorities responsible for the enforcement of consumer protection at the national level (these can be numerous) under Regulation 2006/2004, as well as other public authorities and private enforcement bodies.

The CMA does not provide assistance directly to consumers. It does however play a role in educating businesses on compliance with consumer protection legislation. Thus, it aims to promote consumer protection via the promotion of competitive markets, and compliance with consumer protection law. It does this initially via the provision and dissemination of information, advice and education, dialogue, warning, undertakings, penalties and then through civil and criminal actions.

Enforcement powers under the CRA 2015:

In terms of the public enforcement of consumer law, the CRA 2015 establishes measures – set out in Schedules 5-7 – for the investigation and enforcement of violations of consumer law, allowing regulators to establish enhanced forms of consumer protection:

- Enforcement powers: s.70(1) CRA 2015, "schedule 3 confers functions on the Competition and Markets Authority and other regulators in relation to the enforcement of this Part".
- Investigatory powers: s.77 CRA 2015, schedule 5 and 6.
- Private actions in competition law: s.81 CRA 2015, schedule 8.
- Amendments to enhanced consumer measures in Enterprise Act 2002: s.79 CRA 2015, schedule 7.

The CRA 2015 amends the Enterprise Act 2002, Part 8; this amendment was made in order to empower enforcement bodies (including the Competition and Markets Authority and Trading Standards) to apply to the courts for an enforcement order following violations of consumer law. Before an enforcement order is sought, the enforcement body must firstly consult with the relevant business, which can agree to submit to a monitoring programme.

In this respect, the CRA 2015 provides for "enhanced consumer measures" (ECMs), which might include:

- Appointing a compliance officer;
- Providing training to staff;
- Collecting information from customers on compliance by the business;
- Signing up to a ADR scheme to manage complaints;
- Setting up a scheme to provide redress to customers and ensuring that the scheme is properly publicised (voluntary redress schemes need not be approved by the CMA but can be, either at the time that an infringement is found to have occurred or thereafter, or following an infringement finding by the European Commission/sectoral regulator. The CMA has indicated that it might reduce the penalty imposed upon an infringing party by up to 10 per cent in the majority of cases where a redress scheme is approved at the time the CMA makes an infringement decision; if the business does not comply, the parties injured by the violation may bring an action for breach of statutory duty. The scheme cannot be varied).

An ECM should be just, reasonable and proportionate; it should take into account the consumer benefit, the likely costs to the business to comply, and the costs to the consumer to obtain the benefit of the ECM. ECMs are supported by the court; as such, non-compliance renders the business in contempt of court (for which they can be fined or imprisoned).

The CRA 2015 does not establish that compliance measures should include fines imposed on a trader in non-compliance with the CRA 2015. However, it does provide that the CMA require

that a business pays compensation for its breach. There is a consultation undergoing on the scope for introducing powers to impose civil fines for breach of consumer protection laws (https://www.gov.uk/government/news/cma-welcomes-competition-plan; Treasury and BIS, 'A better deal: boosting competition for families and firms', 2015).

Regulators for the purposes of the CRA 2015 are set out in Schedule 3 of the Act (and in Competition and Markets Authority, Unfair Contract Terms Explained, July 2015, paras.113-115, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450410/Unfair_Terms_Explained.pdf), as:

> 113. Bodies having powers under the Act to enforce its fairness provisions (as well as taking action against blacklisted wording) alongside the CMA are defined as regulators and listed in Schedule 3 of the Act. The CMA and regulators also have separate powers to act under Part 8 of the Enterprise Act, as do certain other bodies.
>
> 114. Schedule 3 regulators include:
>
> - Local weights and measures authorities in Great Britain;
> - The Information Commissioner;
> - The Gas and Electricity Markets Authority (Ofgem and Ofgem Scotland);
> - The Northern Ireland Authority for Utility Regulation;
> - The Office of Communications (Ofcom);
> - The Water Services Regulation Authority (Ofwat);
> - The Office of Rail Regulation (ORR);
> - Department of Enterprise, Trade and Investment in Northern Ireland (DETI);
> - The Financial Conduct Authority (FCA);
> - The Consumers' Association (Which?).
>
> 115. Some authorities are enforcers under the Enterprise Act 2002, but not regulators under Schedule 3 (CRA 2015). They can still take action against unfair terms but only using Enterprise Act powers. They include:
>
> - The Civil Aviation Authority (CAA);
> - Phonepay Plus;
> - The Secretary of State for Health;
> - The Department of Health, Social Services and Public Safety in Northern Ireland.

Consumer protection: example of unfair terms

The CTSI plays a leadership role in respect of unfair terms regulation (one previously played by the OFT) but shares the power to enforce with the TSS and sectoral regulators (as set out above). The sectoral regulators responsible for enforcement (as of 1 April 2014), and who can enforce the UTCCRs, are: FCA, OFCOM, OFGEM, OFWAT, ORR, CAA, the Utility Regulator for Northern Ireland and ICO. Which? are also able to take enforcement action under the UTCCRs.

2.2 Is there a specific venue for this type of enforcement and does this limit the jurisdiction of courts/ADR fora (even if only initially)?

The relevant enforcement bodies can seek an injunction before a county court or the High Court in order to prevent a business from using, proposing to use or recommending the use of a term that appears to be unfair in light of the CRA. An enforcement order may also provide redress for consumers who have suffered loss (including monetary compensation). In terms of consumer violations deriving from competition law violations, the Competition and Appeals Tribunal (CAT) is designated as the specialist tribunal.

Under recent legislation, TSs have various civil as well as criminal enforcement powers, which reduces the burden of proof that they need to establish and provides considerable flexibility. Prosecutions are made before the local magistrates' court or the Crown Court, depending on the seriousness of the offence.

These arrangements are not perceived to give rise to any limitation on the effectiveness of public enforcement officials.

2.3 Can criminal prosecutions be initiated for violations of consumer protection rules? How serious must the infringement be? What are the penalties and sanctions? And might these prosecutions lead to criminal penalties or sanctions? Can individual consumers piggy back on these claims (e.g. via a partie civile method)?

<u>General rule:</u>

Criminal offences are not intended to provide consumers with compensation (1976 Review of the Trade Descriptions Act 1968[338], para.281: compensation is rather deemed to be a matter for the civil law). Moreover, if the consumer has a remedy under consumer law, the courts will be unlikely to allow a claim based on a criminal breach of statutory duties (e.g. Square v Model

[338] Technically, the Act remains in force, most of its specific provisions were repealed and superseded by the Consumer Protection from Unfair Trading Regulations 2008, which implement the Unfair Commercial Practices Directive.

Farm Dairies (Bournemouth) Ltd 1939 2 KB 365). However, criminal penalties might be valuable where the amount of loss suffered is too small to justify a civil claim. The scope for criminal enforcement depends on the nature of consumer protection.

Compensation for damages arising from a criminal conviction:

- The Powers of Criminal Courts (Sentencing) Act 2000, s.130 provides that the courts can require persons convicted of crimes to pay compensation for damages arising from the offence, in respect of "any personal injury, loss or damage" (such orders are generally only made in very simple cases - R. v Thomson Holidays Ltd [1974] QB 592[339])
- R v Stapylton [2012] EWCA Crim 728 (cited in CPS Legal Guidance – available at http://www.cps.gov.uk/legal/s_to_u/sentencing_and_ancillary_orders_applications/) is a damage case involving motor vehicles which reiterated the following key principles
- in relation to the making of compensation orders:
    - the court has no jurisdiction to make an order where there are real issues as to whether those to benefit have suffered any, and if so, what loss;
    - there must be evidence of loss;
    - compensation orders are for straightforward cases;
    - a court should not embark on a detailed inquiry as to the extent of any injury, loss, or damage - that is better done through civil proceedings;
    - compensation orders must not be made unless there is a realistic prospect of compliance; and
    - orders should not be made if they will be protracted in effect, although much will turn on the nature of the offence and the offender.
- The Sentencing Council's Definitive Guidance for Fraud, Bribery and Money Laundering Offences (the "UK Guidelines") came into force on 1 October 2014 (Available athttps://www.sentencingcouncil.org.uk/publications/item/fraud-bribery-and-money-laundering-offences-definitive-guideline/). From 2014, Step 6 thereof requires courts to consider making a compensation order – in every case in which they convict – for the payment of compensation for any personal injury, loss or damage resulting from the offence. Potential claimants are not required to lodge their interest or to use any particular procedure.

Criminal prosecutions for a breach of a statutory duty:

- The CRA 2015, Schedule 5, now requires that the CMA and TSS investigate and initiate a criminal prosecution under the Consumer Protection from Unfair Trading Regulations

[339] Re re Trade Descriptions Act 1968 – see fn.8.

2008, and the Business Protection from Misleading Marketing Regulations 2008 (in respect of the contravention of the requirements of the ′general prohibition′ in the regulation; breaches of the general prohibition will require proof that the trader acted knowingly or recklessly. Other breaches do not require any proof of a specific state of mind), misleading actions, misleading omissions (including the omission of specified information in invitations to purchase), aggressive practices and specific unfair commercial practices. Thus, the Consumer Protection from Unfair Trading Regulations 2008, implementing the UCPD (protecting consumers from misleading actions, misleading omissions, and aggressive practices), can be enforced by TSS via criminal and civil proceedings[340]. Regulation 13 sets out the penalties for offences under regulations 8-12, Consumer Protection from Unfair Trading Regulations 2008 (on summary conviction, the statutory maximum, and if on conviction on indictment, to a fine or imprisonment for a term not exceeding 2 years, or both).

- Defences to criminal charges include the fact that the offence was caused by something or someone beyond the trader's control, provided the trader can show that it took all reasonable precautions and exercised due diligence.
- The decision to initiate criminal prosecutions by TSS generally depends on the seriousness of the breach and on whether the trader has been cooperative in recognising and reducing the future risk, whether it has implemented a good compliance system, or has made redress voluntarily.
- TSSs, like many public authorities, have a wide discretion to accept undertakings as to future behaviour in lieu of prosecutions. A decision to prosecute by the CMA is a strategic one (e.g. where there is a systemic failure in a market, where there is a possibility to set an important precedent, or where there is a need for strong deterrence). Prosecutions may be brought against: individuals responsible for the offences and corporate bodies, or officers of corporate bodies.

<u>Interaction with civil claims:</u>

- If civil proceedings follow, criminal convictions can be used as evidence in civil proceedings (Civil Evidence Act 1968, s.11).
- Sums paid in respect of the criminal conviction should be taken into consideration in the calculation of damages (s.134, Powers of Criminal Courts (Sentencing) Act 2000).

[340] It is worth noting that since the 2014 Amendments, the Regulations now give consumers a private right of redress in respect of unfair commercial practices (s.27A) (previously, in order to privately enforce the rights established under the UCPD, the consumer had to rely on existing private law doctrines).

2.4 Is there judicial review of decisions of consumer regulatory authorities? If so, by which court is this judicial oversight made? Is the forum an ordinary or a specialised court or tribunal?

Scope for judicial review:

The existence, scope and forum for judicial review depend on the relevant regulatory authority. In England, judicial review is the procedure invoked to challenge the decision, action or failure to act of a public body. The general rule is as follows: judicial review can be made in respect of the decisions of public authorities and organisations (including courts but not decisions of the High Court or Court of Appeal); these bodies might include regulators and ombudsmen responsible for consumer protection, depending on their nature. Thus, for example:

- In the private sector: a decision is generally final and cannot be appealed; the only option is to go to court.
- In the public sector: a decision can be challenged only through judicial review (any (statutory or other) right of appeal should be followed first).

Claims should be made with form N461; the forms for service are form N215 (Certificate of Service) and form N462 (Acknowledgement of Service).

Forum of judicial review:

Judicial review applications are heard by the Administrative Court, which sits at the Royal Court of Justice, Manchester Civil Justice Centre, Leeds Combined Court Centre, Birmingham Civil Justice Centre and Cardiff Civil Justice Centre.

The Administrative Court of the Queen's Bench Division of the High Court is the court with jurisdiction for judicial review over decisions of administrative bodies (per CPR 54 and the relevant Practice Directions 54). Decisions of the High Court might then be further appealed, with permission, to the Court of Appeal (CPR 52.3), whose decisions might be appealed, with permission to the UKSC.

Examples of appeal and judicial review:

- Ofcom: Decisions are subject to appeal firstly before the Competition Appeal Tribunal (CAT) (ss.192-197, Communications Act 2003, Competition Appeal Tribunal Rules 2003 and Competition Appeal Tribunal (Amendment and Communication Act Appeals) Rules 2004); the judgments of the CAT can be further appealed before the Court of Appeal

(s.196, Communications Act 2003); decisions are then subject to judicial review before the administrative court of the QBD of the High Court (CPR 54).

- Financial Conduct Authority (FCA): Decisions are subject to appeal to the Upper Tribunal of the FCA (Financial Services and Markets Act 2000); this means that judicial review of decisions is limited immediately given the statutory right to appeal (R (On the Application of Wilford) v The FSA [2013] EWCA Civ 677). From the Upper Tribunal, an appeal to the Court of Appeal is possible; decisions subject to judicial review before the QBD of the High Court (CPR 54).

2.5 Does the national legal system provide for a mechanism of cooperation between its national regulatory authorities and those of other Member States?

Yes. The CMA is the UK Single Liaison Office. Various national networks exist:

- The UK Regulators Network is a network of 9 UK sectoral regulators, including: the Civil Aviation Authority; the FCA; Ofcom; Ofgem; the Office of Rail Regulation; Ofwat; Utility Regulator of Northern Ireland; Monitor and the Water Industry Commission for Scotland (WICS).
- The UK Competition Network (UKCN) comprises an alliance of UK sector regulators, including: the FCA and the Competition and Markets Authority (CMA); the network of regulators has a duty to promote competition in the interests of consumers. UKCN members include: the Competition and Markets Authority, Civil Aviation Authority, FCA, Ofcom, Ofgem, Ofwat, Office of Rail Regulation and the Utility Regulator of Northern Ireland. The Consumer Protection Partnership includes the CMA, Trading Standards (in England, Scotland and NI equivalent), the Chartered Trading Standards Institute (in England, Scotland and NI equivalent) and the Financial Conduct Authority.

Coordinated assured advice on behalf of all Local Authority Trading Standards Departments is given to those businesses and organisations that are part of the Primary Authority Scheme. The Scheme is being extended to include some national regulators, under the Enterprise Act 2016, s 20 and Sch 3: See Factsheet at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/503219/bis-15-498-enterprise-bill-summary.pdf

Source(s):

Consumer Protection from Unfair Trading Regulations 2008

Judicial Review: http://www.cerre.eu/sites/cerre/files/110421_CERRE_Study_EnforcementAndJudicialReview_0.pdf
Cooperation: https://www.fca.org.uk/about/what/promoting-competition/working-with-other-regulators

3. LEGAL AID

3.1 Is legal aid available to consumers in: a) bringing a claim and b) defending a claim before a court?

Although Legal Aid is technically available in certain situations, in practice, its availability and relevance have been diminished almost to vanishing point as a result of successive restrictions over many years. In theory, access to justice was maintained by the introduction of other funding mechanisms, such as Conditional Fee Agreements and after-the-event insurance policies, and more recently by Damages-Based Agreements (a variation on contingency fees), but these have proved to raise their own difficulties and not to be much used. Effective access to justice for consumers has, however, been provided in at least some sectors through the spread of ombudsmen schemes.

Legal aid is provided by the Legal Aid Agency (LAA); there is an online site to determine if an individual qualifies for legal aid: https://www.gov.uk/check-legal-aid.

Civil legal aid might include:

- Legal help – advice on rights and options and help with negotiating;
- Help in court – someone speaks on the behalf of the individual bringing the claim but does not provide formal representation;
- Legal representation – representation at court by a solicitor or barrister;
- Controlled legal representation – representation at mental health tribunal proceedings or before the first-tier tribunal in asylum or immigration cases.

Legal aid services can be provided only by organisations that have a contract with the LAA. These include solicitors in private practice, law centres and some Citizens Advice Bureaux.

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. Legal aid is only available for claims falling within the areas set out in Part 1 of Schedule 1 of the 2012 Act.

As a general rule, legal aid is not available for consumer and other contractual disputes. 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" para.2.28. Previously legal help and legal representation were available (para.4.170). Moreover, in the process of reform, the government considered that as consumer claims are essentially financial, as advice and funding are available elsewhere and as parties bringing claims are unlikely to be particularly vulnerable, there was less of a justification for maintaining legal aid (para.4.171). (References to paragraphs in Ministry of Justice. Proposal for the Reform of Legal Aid in England and Wales: Ministry of Justice, Consultation Paper CP12/10. London: The Stationery Office, 2010). The decision to remove legal aid for consumer and general contract claims has been criticised (see Government Responses, June 2011, paras.38-42 and 57-59).

It is worth noting that civil legal aid might 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 (that is, claims brought under the Equality Act 2010). Legal aid might also be available for cross-border disputes. The conditions for qualifying for legal aid are set out in Part 4.3.

3.2 For what kinds of disputes and actions is legal aid available? (NB: legal aid might not be available for consumer or contractual disputes but be available instead for a related action, e.g. actions relating to debt, mortgage arrears, eviction etc.)

While unavailable for consumer disputes in general, legal aid might be available in respect of related actions:

- Debt actions include:
  - Court actions brought by a mortgage lender because of mortgage arrears;
  - Court actions initiated by a creditor to force the borrower to sell their home;
  - Actions whereby a creditor seeks to make a borrower bankrupt.
- Housing:
  - Court actions to evict a tenant from their home because of rent arrears;
  - Eviction from the home.
- Cross-border disputes:
  - Legal aid should be available per the Legal Aid Directive 2002/8/EC.
- Exceptional funding cases:
  - Art.6 ECHR, and Art.47 CFR arguments (see Lord Chancellor's Exceptional Funding Guidance (Non-Inquests)): "exceptional case funding" might be available if the party

to the dispute can show that the refusal of legal aid would infringe: 1) ECHR rights or 2) EU rights to legal representation.

- An application for "exceptional case funding" can be made to the Exceptional Case Funding team within the Legal Aid Agency. Applications can be made via form CIV ECF1, along with the relevant means and merits forms (available at: http://www.justice.gov.uk/forms/legal-aid-agency/civil-forms/eligibility-and-means-assessment).
- There are financial conditions and merits criteria that must be satisfied. The assessment includes: legal aid must not ordinarily be available for the case; the case must be a strong one; the individual should be financially eligible for legal aid; ECHR or Union law requires the provision of legal aid for the particular case; without legal aid it would be practically impossible to bring the case or there would be obvious unfairness in the proceedings.
- The overarching question to consider is whether the withholding of legal aid would mean that the applicant is unable to present his case effectively and without obvious unfairness. The availability of legal aid on such a basis is intended to be very rare.

3.3 What requirements must be satisfied for the consumer to be entitled to legal aid? Please specify if there are any additional limitations to its availability.

The conditions for legal aid are based on the severity of the problem faced and the financial situation of the person claiming legal aid. The Legal Aid Agency undertakes a review of financial circumstances and determines when payments should be made, whether a lump sum or monthly payments should be made during the case, or whether at the end of the case, some or all of the legal aid costs have to be repaid.

The financial situation of the party claiming legal aid includes both his income and capital (the home is includes in the latter). Generally, legal aid is unavailable if the individual's gross monthly income is over £2,657 (including that of a partner); if gross monthly income is under this amount, the lawyer will assess disposable income (which to qualify for legal aid cannot be more than £733). If either the claimant or their partner receives a "passporting" benefit (Income Support, Income-related Employment and Support Allowance, Income-based Jobseeker's Allowance, Guarantee credit part of Pension Credit, Universal Credit) only capital, and not income, will be taken into consideration. Legal aid is not available if disposable capital is over £8000 (this includes savings, valuables and the value of the home – including that of the partner). Additional rules apply to those who are over 60 (certain capital will be disregarded, depending on income).

If the individual receives legal representation, and has a disposable income of above £315, the legal aid will have to be repaid in monthly contributions; if the individual receives legal representation and has a disposable income of above £3000, he or she will have to make repayments.

If the individual has received legal aid, and as a result of the action keeps or gains money or property, it may be necessary to pay some of the costs back. If the money or property gained is used to buy a home/as a home, legal aid costs may be paid at a later date. In this case, the Legal Aid Agency places a statutory charge with the Land Registry. This is called the statutory charge. Interest – currently 8% - is charged on the interest owed on the statutory charge. In practice, the money awarded is generally paid to the solicitor; the legal aid agency then deducts what has been spent on your solicitor and the successful party receives the remainder.

3.4 What does legal aid encompass? (i.e. (only) general advice, (only) assistance in preparing the case, (only) assistance with negotiation of settlements, (also) representation).

As noted above, a distinction is made between different types of legal aid, namely: legal help, help in court, and legal representation.

Moreover, if an individual is not entitled to legal aid, they might be able to receive free advice from a law centre (lawcentres.org.uk), from the Citizens Advice, from an organisation of which he or she is a member (e.g. motoring organisations) or from a solicitor for a fixed fee (for a meeting of up to half an hour, the charge is the same for everyone and does not depend on income or capital).

In the alternative – as recommended by Lord Justice Jackson – conditional fee agreements might be possible; in this case, the claimant will only have to pay the costs of the other side if they lose and, depending on the agreement, part or all of the expenses paid out by the solicitor, including the fee of a barrister, if necessary. If the claimant is successful, a higher fee will be due to the solicitor. A CFA fee cannot be a percentage of the level of damages awarded or agreed. Rather it is usually a percentage of fees normally charged. The solicitor and claimant essentially share the risks of the action. CFAs are governed by Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, implementing changes via sections 44 and 46 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the Conditional Fee Agreements Order 2013.

Damages based agreements are also possible. The solicitor and claimant can agree to share the risk of litigation. The payment of solicitors' fees, counsel fees and VAT due by the claimant

depends on the terms of the DBA and the percentage of the sum recovered by the losing party. The DBA fee due in respect of solicitors' fees, counsel fees and VAT from monies recovered from the opponent will equate to a sum of up to 25% of general damages and pecuniary loss (other than future pecuniary loss) for a personal injury claim, and up to 50% of the sum recovered other concerns (excluding employment claims). DBAs are permitted per Section 45 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) (which amends section 58AA of the Courts and Legal Services Act 1990) and governed by the Damages-Based Agreements Regulations 2013.

Source(s):

Legal Aid, Sentencing and Punishment of Offenders Act 2012
Civil Legal Aid (Procedure) Regulations 2012
Reform of Legal Aid in England and Wales: Ministry of Justice, Consultation Paper CP12/10. London: The Stationery Office, 2010
https://www.gov.uk/check-legal-aid
https://www.gov.uk/government/publications/legal-aid-exceptional-case-funding-form-and-guidance
Damages-Based Agreements Regulations 2013.
Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013
Conditional Fee Agreements Order 2013

4. COSTS

4.1 What are the costs of different types of procedures before courts? Are there exemptions to the payment of fees and expenses? How can costs be paid?

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Court fees						
Court expenses						
Exemptions						

<u>Claims for payment of money: claim fees</u>

The costs depend on whether a claim is initiated online (via Money Claim Online https://www.gov.uk/make-money-claim-online) or by post. The court to which a claim is allocated depends on the value of the claim (plus interest). Fees for civil claims are found in statutory guidance (HM Courts and Tribunals Service, 'Court fees for the High Court, county court and family court'; https://www.gov.uk/government/publications/fees-for-civil-and-family-courts/court-fees-for-the-high-court-county-court-and-family-court, Form EX50)

If the value is fixed, the fees are set as follows:

Claim amount	Sending form to court centre	Using Money Claim Online
Up to £300	£35	£25
£300.01 to £500	£50	£35
£500.01 to £1,000	£70	£60
£1,000.01 to £1,500	£80	£70
£1,500.01 to £3,000	£115	£105
£3,000.01 to £5,000	£205	£185
£5,000.01 to £10,000	£455	£410
£10,000.01 to £100,000	5% of the claim	4.5% of the claim
£100,000.01 to £200,000	5% of the claim	Money Claim Online unavailable
More than £200,000	£10,000	Money Claim Online unavailable

If the value is not known by the claimant, the fees are set as follows:

Claim amount	Fee
Up to £10,000	£500
£10,000 to £25,000	£1,250
More than £25,000	£10,000

Claims for the payment of money: court hearing fees

Small Claim Track

Claim amount	Fee
Up to £300	£25
£300.01 to £500	£55
£500.01 to £1,000	£80

£1,000.01 to £1,500	£115
£1,500.01 to £3,000	£170
Over £3,000	£335

Fast track claim: The fee is £545.

Multi track claim: The fee is £1,090

How to pay:

- Pay by credit or debit card if the claim is made using Money Claim Online.
- If the claim is posted, payment should be made with a postal order or cheque (payable to 'HM Courts and Tribunals Service').
- Hearing fees must be paid at the same time the pre-trial checklist is filed. If pre-trial checklists are not required, or the case is on the small claims track, the fees must be paid within 14 days of either the date when the notice of trial date is sent out or the date when advised of trial date (if no written notice given).

Fee remissions:

- Fee remissions are possible where the income of the claimant is low (i.e. fee is waived or reduced).
- HM Courts and Tribunals Services, 'Guide How to apply for help with fees' (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/508766/ex160a-eng-20160212.pdf; Form EX160A).

Claiming costs:

- Loss of earnings for the time the claimant had to attend court;
- Expert witness fees up to £200;
- Reasonable travel expenses;
- Costs ordered by the judge is the trader behaved unreasonably;
- Costs are limited in the SCT – the successful party can only claim fixed solicitor's costs for issuing the claim (which should also have been noted on the claim form), costs of enforcing a court order if the defendant does not pay, costs of legal advice and preparing the case (up to £260), if the claimant demands specific performance from the defendant trader;
- Costs if the case was transferred to the SCT from another track.

Source:

CPR Part 44
https://www.gov.uk/make-court-claim-for-money/court-fees
HM Courts and Tribunals Service, 'Court fees for the High Court, county court and family court'; https://www.gov.uk/government/publications/fees-for-civil-and-family-courts/court-fees-for-the-high-court-county-court-and-family-court, Form EX50)
HM Courts and Tribunals Services, 'Guide How to apply for help with fees' (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/508766/ex160a-eng-20160212.pdf; Form EX160A)

5. STANDING AND REPRESENTATION IN CONSUMER DISPUTES

5.1 Does national law limit the standing of the individual consumer in respect of the claim that can be made and the forum before which it can be brought?

Standing is understood as the entitlement to be heard. As a general rule, the party bringing the claim must be able to disclose "reasonable grounds to bringing or defending the claim"; if he cannot, the court can strike out the statement of case - CPR Rule 3.4(2), either on its own basis or on the application of the defendant (CPR PD 3.4).

In England and Wales, there is no separate requirement that the claimant establishes standing for civil law claims (except for the tort of conversion, which is not relevant here)[341]. Thus, as a general rule, the normal rules of standing for the relevant claim apply (i.e. for a claim based in contract or tort, the claimant must assert a right of action) in respect of which the statement of case must indicate the relevant right and remedy and the grounds on which this can be claimed. Individual consumers are attributed rights from EU law via the law transposed in the national system. Thus, for example, for violations of statutory obligations that undermine consumer protection rights, the CRA 2015 provides that individual consumers have standing in respect of violations of consumer law as protected under the Act.

The standing of the individual might however be limited in respect of actions for collective redress (see Part 9).

5.2 Other than individual consumers, who or which bodies have standing in consumer protection disputes and for what types of claim? If the action is not brought by the individual consumer, what requirements of representation must be satisfied?

[341] The issue of standing for applications for judicial review is more complicated but does not need to be discussed here.

The enforcement bodies set out above have standing in respect of the violations of consumer law examined.

5.3 If a consumer wants to bring or defend an action relating to a consumer protection dispute, is there a legal (or otherwise formal) requirement that he or she has legal representation? Please specify for both judicial and ADR fora and the bodies, associations or authorities that can provide this representation.

General rule: there is no requirement that parties seek legal advice or assistance, or are represented by a lawyer (or other body) in civil court proceedings.

However, guidance provided by the Law Society, the courts' system and consumer protection associations, often 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. Generally, the advice provides that representation is not required for a small claim, however suggests that advice should be taken for claims allocated to the fast or multi-track; the complexity of these tracks is highlighted[342].

"Litigants in person" can represent themselves in claims allocated to small, fast and multi-track proceedings. In respect of a case allocated to the small claims track, any person accompanying the litigant may exercise rights of audience under the Lay Representatives (Rights of Audience) Order 1999, SI 1999/1225; a lay representative does not have a right of audience in the absence of the litigant (CPR PD 27). "McKenzie Friends" can: i) provide moral support for litigants; ii) take notes; iii) help with case papers; iv) quietly give advice on any aspect of the conduct of the case but cannot i) act as the litigants' agent in relation to the proceedings; ii) manage litigants' cases outside court, for example by signing court documents; or iii) address the court, make oral submissions or examine witnesses. (The Legal Services Consumer Panel has raised concerns about fee-charging McKenzie friends, Legal Services Consumer Panel, Fee Charging McKenzie Friends, (April 2014); House of Commons Justice Committee, Impact of Civil Legal Aid under Part 1 of the LASPO 2012, 4 March 2015).

Generally, in ADR related to consumer protection, it is not necessary that the consumers have legal representation (of course, ADR tends to be sectoral, so rules might differ).

[342] It does not seem to be necessary for the consumer to have representation, however the guidance of the provides that "however, a consumer should seek legal advice before taking any step that is liable to result in court proceedings" (Competition and Markets Authority, Unfair Contract Terms Explained, July 2015, para.96, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450410/Unfair_Terms_Explained.pdf).

Source(s):

Consumer Rights Act 2015
CPR Part 3 and PD 3
CPR PD 27, Rule 3.2
Lay Representatives (Rights of Audience) Order 1999, SI 1999/1225
Practice Guidance (McKenzie Friends: Civil and Family Courts) 2010 1 WLR 1881
Competition and Markets Authority, Unfair Contract Terms Explained, July 2015, para.97,

6. ACTIONS BEFORE COURTS

6.1 Jurisdiction and competence of the courts in consumer disputes: General structure and special procedures aimed at protecting consumers

6.1.1 Are ordinary courts competent to hear such claims? Is there also a specialised tribunal for consumer protection disputes?

It should be repeated that courts are increasingly not used for small claims and especially consumer claims. Instead, Ombudsmen covering the major sectors (financial services, energy, communications and others) are increasingly used.

Claims for a fixed amount of money can be made via Money Claim Online (https://www.moneyclaim.gov.uk/web/mcol/welcome) if they are:

- For a fixed sum under £100,000;
- Against no more than 2 people or organisations.

Small claims for a money payment must be made at the County Court Claims Centre. If the small claim for payment is defended or made against an individual and not a company, it will be transferred to the county court. Other claims can be issued at the local county court at first instance.

CPR Part 7 and Practice Direction 7A (How to Start Proceedings – The Claim Form) and Practice Direction 7E (Money Claim Online).

6.1.2 Which courts are competent to hear consumer protection disputes at first instance and in appeals? Please specify the court, in light of the value of the claim (and identify any other factors that are relevant in allocation jurisdiction).

- Claims for a fixed sum of money can be made online (Money Claim Online).
- The County Court Money Claims Service deals with money claims (i.e. it is the court to which the initial claim form should be sent); if the claim is defended, or made against an individual and not a business, it will be transferred to the local county court.
- Claims other than small claims will be sent to local county courts, which will then allocate the claim to a particular "track".
- The High Court will deal with claims with a value of more than 100,000 (as well as with personal injury claims of a value of more than 50,000 and those required by law to be issued in the High Court).

6.1.3 What is the nature of the procedure at first instance, e.g. is it a simplified or a summary procedure, and is there an assessment of the merits? Please specify in light of the value of the claim (and identify any other factors that are relevant in allocating jurisdiction).

- The claimant does not choose the track in which they want the claim to be heard; this is a determination for the judge, depending on the amount being claimed and the complexity of the case.
- On completing the initial forms however, the claimant will receive a Directions Questionnaire (DQ) where they can state their preference as to the track to which the case is allocated.
- The small claims track is indeed intended to provide for a simplified procedure, as is the scope to make a claim via Money Claim Online.

6.1.4 Please identify the formal requirements that must be satisfied for a consumer dispute to be heard before a court. These might include time limits applicable to the filing of the action/defence, representation requirements etc.

<u>General rules on limitation periods:</u>

The rules on prescription are set out in the Limitation Act 1980:
- There is a 6-year limitation period for claims relating to tort (s.2), simple contract (s.5), sums recoverable by statute (s.9) and for the enforcement of judgments (s.24).
- s.46(8) CRA 2015 provides that in respect of claims relating to digital content, the general prescription rules should be applied as if the contract was a simple contract.
- In respect of claims for damages, for any other sum of money, or for an injunction, or for collective proceedings, brought under the Competition Act 1998 (which as noted above, may relate to consumer protection), the rules in the 1980 Act apply (s.8(1)(2)(a), inserting s47E into the Competition Act 1998).

- There is a 12-year limitation period for claims on a specialty (e.g. contracts executed on a deed, s.8) and actions relating to the recovery of land (s.15)[343].
- 15-year limitation period (longstop) (s.14B).
- In England, actions based upon infringements of UK or EU competition law are based upon the tort of breach of statutory duty. Claims before the CAT are (now) in line with limitation period for claims before the High Court (thus a six-year period per s.2); This period is extended if the defendant deliberately conceals any fact relevant to the cause of action (s.32(1)(b)).

Commencement of limitation period:

In terms of the date from which the period runs, there is a "discoverability" exception in s.14A, 1980 Act; it commences at the date which is later, either that six years from the accrual of the cause of action (i.e. when the damage occurred); or that three years from when the claimant knows or ought to have known: the material facts about the loss suffered; the identity of the defendant; and his cause of action.

Otherwise, the limitation period will be interrupted on the launching of court proceedings (when the court receives the claim form), acknowledgement of a claim, launching of arbitration (and other ADR mechanisms, ss.33A and B) proceedings, at a date agreed between the parties (on the basis of an unambiguous agreement; shorter limitation periods must be reasonable), on the concealment of facts, or on the admission of liability and insolvency. Procedural steps related to the enforcement of a court judgment will also interrupt the limitation period. The prescription period will be suspended if a competition authority begins an investigation of an alleged infringement or if the parties seek to settle.

Effect of expiration of limitation period:

- The effect of limitation in respect of claims in contract and torts (except the tort of conversion), is to bar the remedy.
- For other actions, the right itself is extinguished.

[343] Alternative time periods for specific claims:
  - Defamation/Slander – one year (s.4A) (although note that a fresh cause of action accrues every time the claimant is defamed)
  - Personal Injury – three years (s.11)
  - Product liability – ten years (s.11A)

Pre-action conduct:

Moreover, both parties must follow the Practice Direction on pre-action conduct. This means that they must, per:

- Rule 3: (a) understand each other's position; (b) make decisions about how to proceed; (c) try to settle the issues without proceedings; (d) consider a form of Alternative Dispute Resolution (ADR) to assist with settlement; (e) support the efficient management of those proceedings; and (f) reduce the costs of resolving the dispute.
- Rule 6: Let each other see relevant documents;
- Rule 7: Share the costs of expert evidence where possible;
- Rule 6: The claimant should write a letter before initiating court action; the defendant should acknowledge this letter;
- Rule 8: litigation should be a last resort and the parties should consider the possible to settle out of court or via ADR;

The Practice Direction on pre-action conduct is available at: https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct.

6.1.5 In respect of the claims and relevant procedures available in the national legal system, what kind of relief might be available in consumer protection disputes? (monetary remedies, injunctions, skimming off etc.)?

Remedies:

- Public enforcement (set out above):
  - Injunctions;
  - Compensation;
  - Criminal redress – fines and imprisonment.
- Private enforcement:
  - The remedies available depend on the claim brought and the remedy sought.
  - The claimant should not be compensated twice, i.e. both for an action for payment (as set out above) and an action for a breach of a statutory obligation.

Statutory remedies - sale of goods:

- The CRA 2015 provides for statutory implied terms in respect of the requirements to provide pre-contractual information per the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

- The CRA 2015 also provides for a tiered remedy system in respect of faulty goods, digital content and services in sections 19 and 26:
    - Within 30 days (s.20(1) and s.22) – there is a right to reject goods (not including digital content; reduced to for perishable goods) of an unsatisfactory quality or not as described, to end the contract and for a full refund (s.20(7)-(18)).
    - If the trader does not deliver within 30 days (default period for delivery), the consumer can rearrange for a new delivery or cancel the order for a full refund.
    - Outwith 30 days (s.20(2) and (24)) – the trader must have an opportunity to repair or replace goods of an unsatisfactory quality or not as described; the trader can usually choose to do the cheapest while the consumer can indicate his or her preference. If the attempt at repair/replacement is not successful, the consumer can then reject the goods and claim a full/partial refund or price reduction, or request further repair or replacement.
    - S.23 - The consumer is entitled to a full or partial refund instead of a repair or replacement, if: the cost of the repair or replacement is disproportionate to the value of the goods or digital content; a repair or replacement is impossible; a repair or replacement would be significantly inconvenient; the repair would take unreasonably long or the repair has been unsuccessful.

<u>Statutory remedies – services:</u>

- Before the introduction of the CRA, consumers had no statutory remedies where services were of poor quality or defective; they had common law remedies (e.g. damages) where the services were rendered in breach of any express or implied contract term which required that the supplier use reasonable care and skill.
- The CRA 2015 introduced two statutory remedies that did not previously exist: 'repeat performance' and price reduction, if a service does not conform to the contract.
- The CRA 2015 provides that every service contract includes a term that the trader must perform the service with reasonable care and skill; this cannot be excluded, but only limited if fair and reasonable and to be given to no less than the contract price (s.49).
- Every service contract will include as a contractual term pre-contractual statements or information about the services if these are taken into account by the consumer; information provided under the Consumer Contracts Regulations 2013 will also be a term of the contract (s.50).
- If the contract price has not been paid or is not fixed in the contract then the consumer has to pay a reasonable price (s.51).
- If the contract price has not been paid or is not fixed in the contract then the consumer has to pay a reasonable price (s.52).

- A breach of s.49 or 50 allows for repeat performance; a breach of s.50 or 51 allows for a price reduction where repeat performance is impossible, or where the trader has failed to provide repeat performance in conformity with the contract.

Unfair contract terms and notices:

- Per the CRA 2015, UCTA 1977 now only applies re B2B contracts; the UTCCRs are replaced by the CRA 2015.
- If specific terms and notices in a contract are unfair, they are not binding on consumers and the trader may not rely on them (s.62).
- Provided the unfair terms or notice is not an essential element of the contract, the rest of the contract (but not the unfair term) will remain valid (s.67).
- The trader can be prevented from using the unfair term or notice by an injunction applied for by a regulator (Schedule 3, pt.3(1), Enforcement of the Law on Unfair Contract Terms and Notices) (Schedule 3 regulators are set out at Schedule 3, pt.8(1)).
- Contract terms or notices which aim to exclude the liability of the trader are not binding on the consumer – s.31 (contracts for sale of goods), s.47 (contracts for digital content); s.57 (contracts for services) CRA 2015.

Misleading or aggressive practices:

The Consumer Protection from Unfair Trading Regulations 2008 (Amended, from October 2014), by Consumer Protection (Amendment) Regulations 2014, provide for new private rights for consumers who have suffered harm as a result of misleading of aggressive practice. They can:

- Unwind a contract and get their money back (Regulation 27F/G/H) (Misleading and bullying consumers into contracts now carried up to 90 days to unwind the contract).
- Obtain a discount on the price paid (Regulation 27I/H).
- Obtain damages (Regulation 27J).

6.1.6 Please provide a brief overview of the role of parties and judges in civil proceedings generally (e.g. with reference to the principle of party disposition, the obligation of parties to make and prove factual allegations and to make and provide legal arguments, the possible role of the court). This overview should be brief; these issues will be dealt with in more detail in relation to consumer protection disputes in the questions that follow.

Generally – and very broadly – the system is conceived as an adversarial one; “The English judge will, if he can, play the umpire rather than the inquisitor” (F. Pollock and F.W. Maitland,

The History of English Law, Vol.II, p.671), coming to "court unprepared without any prior knowledge of the case" (see, for an overview, R. Verkerk, 'England and Wales' in C.G. van Rhee (ed.), European Traditions in Civil Procedure (Intersentia, Antwerp; 2005), pp.307 et seq.)

However, the role of the judge is not necessarily passive. In particular, the Civil Procedure Rules (CPR) have introduced considerable changes in respect of the role of the judge, giving the judge a wide discretion in respect of case management and in setting the direction of the proceedings. Indeed, the attribution of such a role was one of the intentions of the 1999 reform, following the Woolf Working Party proposals and recommendations (Access to Justice, Interim Report to the Lord Chancellor in the Civil Justice System in England and Wales, June 1995), which seemed to advocate a move from the "traditional adversarial approach to adjudication to an adversarial approach that is substantially checked and curtailed by an active and interventionist judge" (K.M. Borrasi, 'England's Reform to Alleviate the Problems of Civil Process: A Comparison of Judicial Case Management in England the United States' (2004) 30 Journal of Legislation 385).

See also, S. Whittaker, 'Who Determines What the Civil Courts Decide?' in D. Leczykiewciz and S. Weatherill (eds.), The Involvement of EU Law in Private Law Relationships (OUP, Oxford; 2013), pp.89-129, p.93-98, who talks of a shift from "judicial passivity to a degree of judicial management" (p.93) with the 1999 CPR reforms.

Source(s):

Limitation Act 1980
Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013
CRA 2015
Consumer Protection from Unfair Trading Regulations 2008
Consumer Protection (Amendment) Regulations 2014
Access to Justice, Interim Report to the Lord Chancellor in the Civil Justice System in England and Wales, June 1995
K.M. Borrasi, 'England's Reform to Alleviate the Problems of Civil Process: A Comparison of Judicial Case Management in England the United States' (2004) 30 Journal of Legislation 385

6.2 Small claims

6.2.1 Does a small claims procedure exist in the Member State? If yes, is it a specialised or simplified procedure?

Yes, the courts allocate claims to the 'small claims track'; it is a simplified procedure, which is intended – in most cases – to proceed in a quick manner and in writing.

6.2.2 What are the value thresholds for claims brought under the small claims procedure? Moreover, are there any other factors that shape the use of the small claims procedure (including the nature of the claim, the area of consumer protection law into which the claim falls etc.)?

As a general rule, the courts will allocate a claim for payment to the 'small claims track' if it has a value of 10,000 GBP or less. However, the court will also look to the complexity of the case. If the case is especially complex, the court may allocate it to another track for a full hearing even if its value is less than 10,000 GBP. The claimant can also make submissions to this effect (i.e. to have the case allocated to a specific track) in the Directions Questionnaire.

Limitation periods depend on the nature of the action, as set out above; there is no specific limitation period for small claims.

6.2.3 What forms must be completed to raise the application? Who assists the consumer in completing these forms?

Forms are available from local courts and online. The forms and guidance (EX306) for small claims are available here: http://hmctsformfinder.justice.gov.uk/HMCTS/GetLeaflet.do?court_leaflets_id=199. CPR, Part 4 and Practice Direction 4 sets out the relevant forms for all types of action.

For all money claims (regardless of the value), the form N1 should be completed and sent to the County Court Money Claims Centre. This includes the: details of the claimant, details of the defendant, how much is being claimed (including interest, if it can be claimed), particulars of the claim, and any additional documents.

Lawyers from the Citizens Advice Bureaux and other consumer advice centres can provide assistance with completing the form. Consumers can also obtain help from the court staff. If the claim is made online via Money Claim Online, there is a helpdesk if additional assistance is required. Additional assistance might also be available for claimants with additional support needs; the claimant should contact the court directly for such assistance.

6.2.4 How can an application for a small claim be made (e.g. online, by post or in person)?

<u>Online money claims:</u>

- Certain claims (for a fixed amount of money – see above) can be started and submitted online at moneyclaim.gov.uk.

Money claims in person/by post:

- The claimant should make three copies of the N1 form – one for himself, one for the defendant and one for the court – and send two copies to the County Court Money Claims Centre.
- In the alternative, the claimant should send two copies of the N1 claim form to the county court in which he or she wants to start the court action.

Completing the initial (N1) form:

- Claimant's details, name and address;
- Defendant's details, name and address;
- Brief outline of the claim (particulars of the claim);
- The amount of money being claimed (either fixed or an approximation - 'I expect to recover') and the interest applicable, either according to the contract or the statutory interest rate (8%, with brief paragraph of statutory wording), either from the date the problem started to the date when the claim for is issued, the date the claim form is issued until the date of a court order, the date of a court order until the date the payment is made (only if the claim was for more than 5000 GBP).

Service of the claim:

- Claims submitted online are usually issued, printed and sent to the defendant on the day the claim is submitted or the next working day (the defendant is deemed to have been served on this day);
- Claims submitted by post/in person are stamped by the court, and served on the defendant by the court;
- The court then provides the claimant a notice of issue (N205), with the case number on it;
- Service must be made within four months of the claim being issued;
- To serve the claim, the court sends it by first class post;
- The defendant is deemed to have been served on the second business day after posting;
- If the claim is returned to the court undelivered, the court will inform the claimant and it becomes his responsibility to ensure it is delivered;
- The claimant can also serve the claim himself (asking the court to return the stamped form);
- Service can be made in person, by first class post, by leaving the document at the defendant's place of business/residence, through the Document Exchange.

6.2.5 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

<u>If the defendant chooses not to defend the case or partially disputes:</u>

- If the defendant ignores the claim and does not respond, the claimant can as the court for a judgment by default.
- Claims for specified amounts:
    - If the defendant responds but does not make an offer to pay or makes an offer to pay nothing, the claimant can also apply for a judgment by default based on a nil offer.
    - If the defendant accepts that he or she owes the money claimed, the court will not allocate the claim to any track; the defendant should pay the money directly to the claimant.
    - If the defendant accepts that he or she owes the money claimed but needs time to pay, he or he can suggest a payment arrangement to the claimant. This should be done via Form N9A. If the claimant accepts this arrangement, he or she should then return to the court to submit a form for "judgment on admission", on the basis of which the claimant can take legal action forcing the defendant to pay. If the claimant does not accept the offer, he or she must provide reasons to the court, which will then decide on a reasonable arrangement, sending both parties an order for payment (a "judgment for claimant after determination"). If the claimant still does not accept the offer, he or she should write to the court with the reason, sending a copy of this letter to the defendant and the court will decide on what is reasonable.
    - If the defendant accepts only part of the claim, he or she should complete form N9A and N9B and send them to the court within 14 days. The claimant should then decide whether to accept the part admission. If it is not accepted, the case will proceed as a defended claim.
- Claims for unspecified amounts:
    - If the defendant admits liability for the entire claim but does not make an offer to satisfy it, he or she should complete form N9C and send it to the court within 14 days; a copy will be sent to the claimant who may request the court to enter judgment against the defendant. The court will enter judgment and refer the court file to a judge for directions, sending a copy of the court's order to the claimant and defendant.
    - If the defendant admits liability or the claim and offers and amount of money to satisfy it, he should complete form N9C and send it to the court within 14 days. The claimant must then reply to the court within 14 days and a copy will be sent to the defendant. If the amount offered is accepted, the claimant can request the court enters judgment against the defendant for that amount; if the defendant asks for time to pay,

and this is not accepted by the claimant, the court will decide on the time. If the offer is not accepted, the claimant can request judgment against the defendant at an amount to be determined by the court, and will enter judgment and refer the case for direction, a copy of which will be sent to the defendant and claimant.

If the defendant chooses to defend the case:

- Form N1C provides guidance to the defendant; Form N1FD should be used for consumer credit cases.
- The defendant must respond to the court either with an acknowledgement of service (a request for time to prepare a defence, which must then be completed and returned within 28 days) or with a defence (Form N9B) with 14 days of the date of service.
- If the defendant admits part of the claim, Form N9B and Admission Form N9A should be sent to the court within 14 days; the claimant will decide whether to accept this partial admission; if the defendant disputes because he has already paid the amount claimed, he should complete Form N9B and send it to the court within 14 days.
- In respect of claims for an unspecified amount, return of goods, non-money claims, the defendant should complete Form N9D as a counterclaim and sent it to the court within 14 days.
- When the defence is returned to the court, the court sends a Direction Questionnaire (Form N180 for the small claims track) to the claimant and defendant; this has a date noted on it and should be returned before this date.
- The claimant must pay a fee (which can be waived on financial grounds) when returning the DQ.
- On this basis, the court decides the track to which the case should be allocated; if both parties indicate mediation, the court offers a free telephone-based mediation service. If a claim is referred to the Mediation Service pursuant to CPR 26.4A or at the court's direction, the settlement agreement must be in Form N182.
- If the defendant does not respond, the claimant can ask for an order to be made in his or her favour.

Allocation of the case:

- The court allocates the case to a judge who decides what to do, either to dismiss the claim (if there is no chance to succeed), to decide the case without further action, to arrange for a hearing – this is done on the basis of the CPR, Practice Direction 26 (Case Management).
- When the court allocates the case to the small claims track (SMT), the parties are sent a notice of allocation, which informs them of what needs to be done for the claim to proceed.

- If the court decides that a hearing does not need to take place, it will indicate this to the parties, who must agree by responding in writing (if the parties do not reply by the indicated date, the judge may take this silence as consent).
- The court might decide that a preliminary hearing should take place, i.e. if it considers that special directions are required, if the judge wants to explain something to the parties or to explain that there is no real chance of success for either party with the aim of resolving the dispute (if the claim is resolved at this stage, the preliminary hearing essentially becomes a final one).
- If the court decides a hearing should take place, the notice of allocation indicates what needs to be done for the final hearing (directions, which include, e.g. the relevant documents that should be gathered and sent to the other party), the time, date and place of the hearing, as well as the time allocated for it.

Applying for a judgment by default:

- If the claim was for a set amount of money, the claimant should complete form N225, requesting the judgment and setting out the specified amount either online or in paper form; if the judgment by default is entered against the trader, the court will send a judgment order to the defendant, specifying how much should be paid, when it should be paid and to where the money should be paid.
- If the claim was for an unspecified amount of money, the court will pass the case to a judge, who will decide on whether a hearing is required and whether any evidence should be submitted.

In the absence of a hearing:

- The claimant can indicate that the court should deal with the claim in his or her absence; the claimant must indicate this to the court and defendant in writing (the letter should arrive 7 days before the hearing date).
- If the court has indicated that the claim can be dealt with without a hearing, it will be resolved on paper.

If a hearing takes place:

- Certain documents and evidence should be prepared, depending on the claim.
- Small claims hearings are informal; strict rules of evidence do not apply.
- An oral judgment is given initially; this can also be given subsequently in writing.

6.2.6 Are the costs of the successful party reimbursed?

General:

- Court fees have to be paid unless the can be reduced or waived for reasons based on income; an application has to be made for this reduction/waiver (one application in respect of each fee due).
- The court fees can be reclaimed by the successful party.
- The successful party might also be able to claim certain expenses.

Small claims (up to 10,000 GBP):

- In most cases, the successful party can recover costs.
- CPR 27.14(2): "the court may not order a party to pay a sum to another party in respect of that other party's costs, fees and expenses, including those relating to an appeal, except - (a) the fixed costs attributable to issuing the claim; (b) in proceedings which included a claim for an injunction or an order for specific performance a sum not exceeding the amount specified in Practice Direction 27 for legal advice and assistance relating to that claim; (c) any court fees paid by that other party; (d) expenses which a party or witness has reasonably incurred in travelling to and from a hearing or in staying away from home for the purposes of attending a hearing; (e) a sum not exceeding the amount specified in Practice Direction 27 for any loss of earnings or loss of leave by a party or witness due to attending a hearing or to staying away from home for the purposes of attending a hearing; (f) a sum not exceeding the amount specified in Practice Direction 27 for an expert's fees; (g) such further costs as the court may assess by the summary procedure and order to be paid by a party who has behaved unreasonably… (3) A party's rejection of an offer in settlement will not of itself constitute unreasonable behaviour under paragraph (2)(g) but the court may take it into consideration when it is applying the unreasonableness test."
- The maximum that can be recovered for expert fees in small claims is 750 GBP (CPR PD 27, 7.3(2) and for loss of earnings, 95 per day (CPR PD 27, 7.3(1)).

Source(s):

CPR and Practice Directions 27

https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CJC/Publications/Other+papers/Small+Claims+Guide+for+web+FINAL.pdf
EX304 – 'I've started a claim in court - what happens next?'
http://hmctsformfinder.justice.gov.uk/courtfinder/forms/ex304-eng.pdf

EX306 – 'The small-claims track'
(http://hmctsformfinder.justice.gov.uk/courtfinder/forms/ex306-eng.pdf)

6.3 Claims other than small claims

6.3.1 If a consumer protection dispute does not qualify as a small claim, what other procedures are available? What are the value thresholds and other factors determining the use of such procedures?

In addition to the small claims tracks, the claim might be allocated to the fast or multi track:
- Fast track – claims between 10,000 and 25,000 GBP.
- Multi track – claims over 25,000 GBP.

If the case is especially complex, the court may allocate the claim to the fast or multi track for a full hearing even if its value is less than 10,000 GBP and it would otherwise be allocated to the SCT. It is important to note that if the case is allocated to the fast or multi track, the court's mediation service is not free (unlike with claims allocated to the SCT).

6.3.2 How can such claims be made? Please specify if the applications can be made online, or by post or in person.

- Claims for a fixed amount of money and for less than 100,000 can be initiated and issued online via moneyclaim.gov.uk.
- Claims for an amount of money that is not fixed and claims for over 100,000 must be made in person or by post.

The initial process for making the claim is the same as for small claims. The defendant may react in the ways set out above.

When the claim is defended, the court provisionally allocates the case based on the value of the claim, and sends the DQ to the claimant and defendant. Both parties must send the DQ back to the court before the sate provided on the form (penalties may apply if this is not done); the claimant must also pay the relevant fee (or enclose the fee remission application). The judge will then decide if this provisional allocation is correct based on the information provided in the DQ.

If the judge requires further information, an Order for Information (allocation) will be sent to the parties, explaining the additional information needed and a deadline for submitting it.

If the judge decides to hold an allocation hearing, both parties will be advised as such, and be giving information about the time, date and place. Once the judge has decided on allocation, the parties are advised via a "notice of allocation"; this also provides information on the next steps for each party.

6.3.3 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

For each, reference should be made to the following parts and relevant PDs of the CPR:

- Part 26: Case management – preliminary stage.
- Part 31: Disclosure and inspection of documents.
- Part 32-34: Evidence.
- Part 35: Experts and assessors.

Fast track claims:

- Standard directions (dates and times are set by the court) set out in CPR Part 28 and PD 28;
- Disclosure (via "list of documents: standard disclosure") and inspection;
- Exchange of witness statements;
- Exchange of expert reports (where experts allowed);
- Pre-trial checklists sent out by court;
- Deadline for return of pre-trial checklists;
- Final hearing.

Multi-track claims:

- There is no standard procedure; the parties agree on directions and file the proposed directions via the Directions Questionnaire.
- Case management conference – an informal meeting is established between the parties and the judge in order to review progress of preparation for the case, to ensure instructions have been followed, to give the other party direction, to note any agreement between the parties, to set a timetable for the next steps, and to monitor costs.
- Pre-trial review – this is undertaken once pre-trial checklists have been assessed by the judge; it provides an opportunity to set a timetable for the hearing, to identify who will give evidence and in what order, to identify all the papers required for the trial, and to estimate the time to be allocated for the trial.

6.3.4 Are the costs of the successful party reimbursed?

General:

- Court fees have to be paid unless they can be reduced or waived for reasons based on income; an application has to be made for this reduction/waiver (one application in respect of each fee due).
- The court fees can be reclaimed by the successful party.
- The successful party might also be able to claim certain expenses.

Costs recovery in respect of the fast and multi-track proceedings is not restricted in the same way as it is in the small claims track. However, certain limitations that apply; for example, the costs of a solicitor attending a trial for a claim allocated to the fast track are fixed based on the value of the claim.

Source(s):

CPR 27-35 and Practice Directions

6.4 Claims for the issuance of a payment order

6.4.1 Does an order for payment procedure exist in the national system? Is it a simplified procedure?

No specific payment order procedure exists however a claim for the payment of money can be raised under the procedures set out above; the applicable procedure (obligatory rules) and the court allocated jurisdiction depends on the value of the claim. The defendant generally always has an opportunity to respond, albeit within a limited period following which the claimant can then apply for a judgment in default.

If a claim remains undefended or if the defendant does not acknowledge service (Rule 12.1, CPR Part 12), it will not be called in court but a claimant can instead apply to obtain a judgment in default. In the case that the claim is undefended, the procedure thus essentially operates as a simplified procedure for uncontested money order claims. The procedure for a judgment by default is part of normal civil proceedings and can be sought/granted in all types of action in the civil courts (with the exception of a claim for delivery of goods where the agreement is registered by the Consumer Credit Act 1974). It is not a separate procedure.

6.4.2 Which authorities or courts are competent to hear claims for the issuance of payment orders?

As above, depending on the value of the claim and the track to which it is allocated.

An application for a default judgment can be made in the county court (claims for less than 100,000 GBP; small claims under 10,000 GBP) and the High Court (claims over 100,000 GBP). The claimant should apply for the default judgment at the court in which he filed his original claim; this allows the court to check that there has been no acknowledgement of service or defence lodged by the defendant and that the time period for the filing of a defence has expired.

Once the claimant issues a claim, the defendant has 14 days to respond having received notification of the claim form. If the defendant does not respond, the claimant can ask the court to enter judgment by default (make an order that the defendant pay the amount claimed because no reply has been received).

The claimant should make the application for the judgment by default as soon as the 14 days have passed. The defendant can still reply to the claim until such a time as the court receives the request to enter a default judgment; moreover, this reply will take priority if it is received before the request of the claimant. If the claimant does not request judgment in default within six months, the claim will be stayed; the defendant will then have to apply for an order which lifts the stay.

6.4.3 Are there any formal requirements that must be satisfied for the application for the issuance of a payment order to be made (e.g. standard forms, representation by a lawyer, the detail of description required, the need to provide written evidence etc.)?

There is no requirement of legal representation; however, as noted above, it is advised that the claimant seeks advice depending on the value and complexity of the claim.

6.4.4 What information is generally available to the authority or court when a claim for the issuance of a payment order is made?

Generally, the judge will have available to him all of the information included on the claim forms and on any response provided by the defendant. Thus, the claimant must provide all of the information required in the initial forms to bring the claim. These have been set out above (i.e. details of the parties, details of the claim, a statement as to the amount of money being claimed and the category into which the claim falls, that is, not more than 10,000 GBP, between 10,000 GBP and 25,000 GBP and over 25,000 GBP).

Thus, the claimant must provide the “particulars of the claim”:

- Brief statement of the facts.
- Statement (if applicable) to the effect that the claimant is seeking particular types of damages.
- Details of any interest claimed.
- Any other information required for the type of claim as set out in the court rules.

NB: in respect of default judgment, where the request for a default judgment is made by the court staff/clerks, they must be satisfied that the requirements of the claim have been satisfied. They will then issue a judgment in favour of the claimant; this judgment sets out how much the defendant should pay, when the amount should be paid and where. It should be sent to both the claimant and defendant.

Where the application for a default judgment is made by a judge (i.e. where the claim is for an unspecified amount), the judge may determine that a hearing is necessary or that further evidence should be provided, a process known as giving directions. The judge will then send both the claimant and defendant an order, which sets out the next steps. Depending on the amount, the claim may be allocated to a track, or to a disposal hearing. In the latter case, the judge will either provide more detailed directions, e.g. on evidence required to allow him to make a determination on the amount of money to be paid, or set the amount that the defendant has to pay. The steps taken depend essentially on the amount of damages, whether the defendant will challenge the amount and whether the judge considers there to be sufficient evidence to make a final decision. Usually the judge does not provide a final judgment at a disposal hearing, unless written evidence provided to the court was also sent to the defendant at least three days before the hearing. After the disposal hearing, the court staff set out what the judge has decided in his or her order; a copy of this information is sent to both the claimant and defendant.

6.4.5 What opportunity is available for a defence/statement of opposition to be advanced? How should this be done and what is its effect? Please specify if the means of advancing a defence differ depending on the value of the claim and the court dealing with it.

As noted above, once the claimant issues a claim, the defendant has 14 days to respond having received notification of the claim form. Once the defendant responds, the claim will proceed along the lines of the relevant procedure, as a normal claim. The procedure for the granting of a default judgment is only available if the defendant fails to defend or acknowledge the claim.

6.4.6 What is the effect if the claim is uncontested, i.e. if there is a lack of defence/statement of opposition?

Rules 12.3 and 12.4, CPR Part 12, 'Conditions to be satisfied' and 'Procedure for obtaining default judgment' are relevant.

As noted, if the defendant does not respond to the claim issued by the claimant, the claimant can then apply for a default judgment. The application for a default judgment can be made in the county courts or in the High Court and should generally be made in the same court as the original claim. The court competent to hear the action follows the same rules as for normal claims. A default judgment is available in respect of almost all types of claims before the civil courts. However, if the defendant seeks a decision on a question that is unlikely to involve a substantial dispute of facts, or where such a procedure is allowed given the claim made, a default judgment will not be available (Part 8 CPR).

If the claimant does not apply for a default judgment, the claim will be stayed after six months; thereafter, it will be considered that the claimant has chosen not to pursue the claim.

Default judgment if the claim is for a specified amount of money:

The claimant needs simply to request the default judgment, which will be dealt with by the clerks of the court (and not by the judge), who will check that there has been no acknowledgement of service or defence by the defendant after the expiration of the relevant time period and that all relevant information (evidence) has been provided by the claimant to the court. In completing the initial form (N205A), the claimant should specify also how he wants the amount owed to be paid. If the claim was made online via Money Claim Online, the request for a default judgment can also be submitted to the court online.

Default judgment if the claim is for an unspecified amount of money:

The claimant must apply to the court for the default judgment; a judge will deal with the matter, decide whether a hearing is necessary and will ascertain what information the claimant must provide in order to allow him to determine the amount of the award. In completing the initial form N205B, the claimant can also ask the court to make an order that the defendant is liable for the claim; the court will then decide how much should be paid (a process of "entering judgment for an amount to be decided by the court").

In both cases, if the claimant applies for a default judgment, he must provide evidence that he has followed and satisfied any procedural requirements and that the defendant has failed to either file an acknowledgement of service or a defence.

Default judgments can be made against defendants living in other Member States or in third states, subject to Regulation 1215/2012. The claimant must ensure that the claim has been properly served on the defendant in accordance with the rules in Regulation 1393/2007 (CPR PD 6B, 'Service Out of the Jurisdiction'). If the defendant living in another Member State or in a third state fails to respond, the claimant must proceed to apply for a default judgment in the same way as with a wholly domestic claim. In this situation, the application for a default judgment will be dealt with by a judge, who will also ensure that the court has jurisdiction and that proper service has been made.

A default judgment will not be granted if the claimant has not complied with the rules of court, or if he has not provided the necessary evidence to satisfy the granting of the judgment.

6.4.7 If the defendant is a consumer, and he or she does not respond to or raise an objection to the issuance of the payment order, does the authority dealing with the claim for payment order proceedings have the power to examine any issue of consumer protection law of its own motion before treating the action as usual?

The court clerks or the judge will examine the request or application for a default judgment in the manner set out above.

6.4.8 What steps must the pursuer take in order to obtain an enforceable decision?

A default judgment can be enforced against the defendant. See Part 9 below on enforcement.

6.4.9 Is this decision final, or can the defendant appeal against it?

The defendant can make an application to have the default judgment varied (if he believes that the amount to be paid should be lowered) or to have it set aside. The court will set aside the judgment if it considers that there exists a good reason for doing so or if it is clear that the defendant has a prospect of successfully defending the claim. This process is not an appeal as such, as it will be heard by the same court as that which would have heard the original claim.

If the claimant considered that the particulars of the claim may not have reached the defendant before the default judgment was made, he is obliged to inform the court and ask it to set the judgment aside.

If the default judgment is set aside, either the defendant will be given an opportunity to advance a defence, or the claim will be essentially dismissed and recommenced; this is a matter for the judge depending on the circumstances of the case. Both parties can appeal against a decision to

set aside/refuse to set aside a default judgment (subject to receiving leave to appeal from the court or the appeal court).

Source(s):

CPR Part 6, 'Service of Documents'
CPR PD 6B, 'Service Out of the Jurisdiction'

CPR Part 12, 'Default Judgment'
CPR PD 12

CPR Part 13, 'Setting Aside or Varying Default Judgment'

6.5 Appeals in consumer disputes

6.5.1 Are appeals possible in all consumer disputes? Please specify for small claims and other types of claims.

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Nature of the procedure at 1st instance	Small claim	Small claim (up to 10,000)	Fast track (between 10,000 and 25,000) or multi-track (above 25,000)			
2nd instance – appeal to?	If heard at first instance in County Court by District Judge – Appeal to Circuit Judge in the	If heard at first instance in County Court by District Judge – Appeal to Circuit Judge in the	Fast track: If heard at first instance in County Court by District Judge – Appeal to			

	County Court If heard at first instance in County Court by Circuit Judge (exceptional) – Appeal to single judge of the High Court	County Court If heard at first instance in County Court by Circuit Judge (exceptional) – Appeal to single judge of the High Court	Circuit Judge in the County Court Multi-track: If heard at first instance in County Court by District Circuit or High Court Judge and final judgment given – Appeal to Court of Appeal			
3rd instance – appeal to?	Court of Appeal	Court of Appeal	Court of Appeal			

6.5.2 Please briefly specify the national appeal procedure, including any requirements to be satisfied for appeals. These might include, but are not limited to, conditions of admissibility, value thresholds, time-limits, the scope of review, and the impact of the appeal on enforcement (provisional enforcement). Please refer to any rules specifically applicable in respect of the claims and relevant procedures outlined above.

The appeal court depends on the type of case, the type of decision made (interim or final), the "lower court", and the judge that made the decision (whether a district or circuit judge).

The appellant must file his notice to appeal, completing form N161 or N164 (for small claims), with relevant documents (including a copy of the order being appealed and the grounds of

appeal, PD 52B 4.2, and an appeal bundle, CPR PD 52B 6.3), which can filed after the notice); the respondent does not need to file a respondent's notice but must if he seeks permission to cross-appeal from the appeal court. There is no automatic requirement for a skeleton argument to be filed in appeals in the County Court or High Court (CPR PD 52B.8.3).

Permission to appeal

Permission to appeal is required in all circumstances (with limited exceptions), either to the lower court or the court to which the appeal is made (CPR 52.3; CPR PD52A 4.1); applications for permission to appeal may be determined with or without a hearing (CPR PD 52B.7.1).

Permission will be required on the same basis as for an appellant and the application for permission must be contained in the respondent's notice; or wishes to ask the appeal court to uphold the order of the lower court for reasons different from (or additional to) those given by the lower court (CPR 52.5).

Time limits

Time limits for filing notice to appeal (form N161 or N164 for small claims) – within the period directed by the lower court or within 21 days after the decision of the lower court, to be served on the respondent as soon as possible and not later than 7 days after being filed (CPR 52.4); time limits for respondent’s notice (N162) to appeal – within the period directed by the lower court or within 14 days after being served with the appellant’s notice (CPR 52.5).

Fees

The fees payable when the appellant’s notice or respondent’s notice is filed depends on the court in which it is filed:

Application type	Fee
High Court	£240
County Court - small claims track	£120
County Court - all other claims	£140

Staying of lower court orders

In most cases, applying for permission to appeal does not preclude the original order from having effect, unless an application for a stay is made or the appeals or lower court orders otherwise (CPR 52.7). If a stay is required, the appellant should seek it from the lower court, particularly if

the effect of the order would defeat the purpose of a successful appeal; this request can be made in the appellant's notice.

Small claims:
- An appeal can only be made from the SCT on a question (mistake) of law, or on the basis of a serious irregularity in proceedings.
- Permission to appeal must be obtained, either from the district judge at the end of the small claims hearing or from the circuit judge who will hear the appeal (using form N164).
- A fee is due for the filing of an appeal (this fee might be waived) (see above).

Fast track:
- If the fast track claim is heard at first instance by a district judge, the appeal is to the circuit judge.
- Appellant's notice to be made in form N161.
- When a circuit judge hears an appeal from a district judge, the (second) appeal is to the Court of Appeal (again, permission is required).
- If the fast track claim is heard by a circuit judge, the appeal is to the High Court.
- When a High Court judge hears an appeal from a circuit judge, the appeal is to the Court of Appeal.

Multi track:
- Appellant's notice to be made in form N161.
- Where a final decision – disposing of the case or part of it, i.e. deciding on liability and assessing damages – is made by a district judge, circuit judge, or a High Court judge, the appeal is to the Court of Appeal.
- Where the decision is not final – i.e. where a case management decision, a summary decision per CPR 24, where it relates only to costs, or to a claim to strike out an action – the process is as above, depending on where the initial hearing took place

If the case is one of important principle or if there is another compelling reason, the appeal may be assigned to the Court of Appeal (CPR 52.14). In exceptional cases, appeals against first instance decisions of High Court judges can be made directly to the UKSC instead of the Court of Appeal (Sections 12 to 16 of the Administration of Justice Act 1969).

In all cases, the second appeal, i.e. at third instance, is to the Court of Appeal. This is rather exceptional. Permission to appeal must be obtained from the Court of Appeal (CPR 52.13), if: 1) the appellant has not asked for permission from the judge whose decision he wants to appeal or 2) if the appellant has previously asked that judge for permission and this appeal was rejected. Permission will only be granted if it is considered that the case gives rise to an important point of

principal or there is some other compelling reason for appeal. If the court to which an appeal is made refuses to give permission to appeal, there is no further appeal (s.54(4) Access to Justice Act 1999).

Source(s):

CPR 52 and Practice Directions (specify rules)
s.54(4) Access to Justice Act 1999
PD 52A: the general provisions about appeals (Table of appeals – CPR PD 52A, 3.5)
PD 52B: specific provisions about appeals in the County Court and High Court

6.6 Enforcement in consumer disputes

Enforcing a judgment for payment of a specified amount:

- If the defendant loses and does not pay, the claimant can go back to court for an order for payment.
- Orders which are not paid immediately are placed in the Register of Judgments, Orders and Fines.
- In most cases, although not always, it is necessary to go to court to authorise enforcement (the exception: control of goods proceedings can be made for unpaid rent, taxes, customs and excise duties and parking fines without the need for consent of the court).
- The country court and High Court are competent to make an order for enforcement in cases where they have granted judgment.
- The order is then given to the bailiff to enforce; it is worth noting that a county court bailiff cannot enforce any amount over 5000 GBP – this has to be transferred to the High Court for execution by an Enforcement Officer (who cannot enforce judgments for amounts less than 600 GBP).

The claimant can apply to the court to get the money owed using:

- A warrant of control/execution (sending bailiffs to collect payment or goods for auction) (http://hmctsformfinder.justice.gov.uk/courtfinder/forms/ex322-eng.pdf) Warrants of execution can be issued using the money claim online website, the county court money claims centre or the local county court; county court judgments between 600 GBP and 5000 GBP can be transferred to the High Court for enforcement by way of execution.
- An attachment of earnings order (deductions from wages) (http://hmctsformfinder.justice.gov.uk/courtfinder/forms/ex323-eng.pdf) (only from the county court).

- A third party debt order (usually used to freeze money in bank or building society accounts) http://hmctsformfinder.justice.gov.uk/courtfinder/forms/ex325-eng.pdf.
- A charging order (a charge on land or property owned by a debtor).
- Writs (High Court): writ of control (recovery of a sum of money); writ of delivery (for goods); writ of possession (recovery of a property or land); the warrant and writ are valid for 12 months and can be extended for a further 12 months by an order of the court.

Enforcement fees

Fees for warrants

Warrant type	Fee - GBP
Issue a warrant of control (recovery of a sum of money) via Money Claims Online or County Court Business Centre	70
Issue a warrant of control (recovery of a sum of money) in any other case	100
Issue a warrant of delivery (for goods)	110
Issue a warrant of possession (recovery of a property or land)	110
Request a further attempt to execute a warrant at a new address, except where a warrant has been suspended	30

Fee for application for attachment of earnings order

- Fee for application of attachment of earnings order – 100

Fees for enforcing award in the County Court

- Application for the enforcement of an award for a sum of money or other decision made by any court, tribunal, body or person other than the High Court or County Court - 40

Fees for enforcing an award in the High Court

- Request or application for registering a judgment or order, permission to enforce an arbitration award, or a certificate or certified copy of a judgment or order for use abroad – 60.

Fees for sealing of writ

Writ type	Fee
writ of control (recovery of a sum of money)	60
writ of delivery (for goods)	60
writ of possession (recovery of a property or	60

land)	

Enforcing a decree for payment from an English/Welsh/NI court in Scotland:

- The process of enforcement will differ depending on whether the defendant lives in Scotland, or England/Wales/NI;
- The main legal provisions are in the Civil Jurisdiction and Judgments Act 1982, s.18 and Schedule 6. The procedure is governed by Rule 74.17 of the Civil Procedure Rules for England and Wales;
- There are three steps:
- Step one: obtain a Certificate of Money Provision by providing written evidence on:
    a. the name and address of the creditor and, if known, of the debtor,
    b. the sums payable and unsatisfied under the money provisions of the judgment,
    c. where interest is recoverable on the judgment, either the amount of interest which has accrued up to the date of the application, or the rate of interest, the date from which it is recoverable, and the date on which it ceases to accrue;
    d. that the judgment is not stayed;
    e. the date on which the time for appealing expired or will expire; whether an appeal notice has been filed; the status of any application for permission to appeal; and whether an appeal is pending.
- The application should be made to:
    f. a Master or district judge, if judgment was given in the Chancery Division or the Queen's Bench Division of the High Court;
    g. a district judge of the Family Division if judgment given in the Family Division of the High Court;
    h. a district judge, if it is a county court judgment.
- Step two: register the Certificate of Money Provision in the Register of Judgments of the Books of Council and Session within 6 months of the date of issue of the certificate, sending a covering letter and fee to the Keeper, Register of Scotland in Edinburgh. The Keeper of the Registers will send the successful party an extract of the registered certificate and a warrant for execution (the authority to enforce the judgment).
- Step three: once the extract and warrant has been received, the successful party can then instruct a sheriff officer to try to enforce it and recover the debt; the sheriff officer must be entitled to act in the area of the defendant’s home address or business premises.

6.6.1 If the assessment of a consumer protection issue has not been possible at an earlier stage of the proceedings, is it always possible – either ex officio (see section 10 below) or if the consumer raises a possible violation of consumer protection law – for this assessment to be undertaken during enforcement proceedings?

It is likely that this is possible as the party due the payment/return of goods etc. must apply to the court for an enforcement order; as such, a hearing will take place. It is worth noting that there is no requirement that the creditor makes an application for enforcement through a lawyer or any other legal professional. No case law found on this issue.

6.6.2 In the particular case of consumer protection, if a court examines consumer protection law (either ex officio or on the basis of an argument advanced by the consumer), does national procedural law provide that interim measures should 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 final decision will have full effect?

CPR, Rule 83.7 provides:
(1)) At the time that a judgment or order for payment of money is made or granted, or at any time thereafter, the debtor or other party liable to execution of a writ of control or a warrant may apply to the court for a stay of execution.
(2) The power of the court to stay execution of a warrant of control may be exercised by a District Judge, or a court officer where paragraph (10) applies, and the power of the court to stay execution of any other warrant or of a writ of control may be exercised by a Master or District Judge.
(3) Where the application for a stay of execution is made on the grounds of the applicant's inability to pay, the witness statement required by paragraph (6)(b) must disclose the debtor's means.
Source(s):

CPR 70 and Practice Directions.

7. ACTIONS FOR COLLECTIVE REDRESS

7.1 Injunctive relief, linking individual and collective actions

As a basic rule, any individual whose personal rights have been infringed may bring an action for compensatory damages or for an order for cessation of ongoing breach (injunction).

Various mechanisms exist under which actions may be brought in relation to the breach of rights of others. There are two generic mechanisms for actions for damages on a collective or aggregated basis, and one new mechanism in relation to competition law damages.

The Representative Action

An individual may bring an action in England and Wales[344] and Northern Ireland[345] on behalf of other parties without their consent, where the represented parties share the 'same interest'[346]. The judgment will bind such represented non-parties[347]. The 'same interest' requirement has been interpreted narrowly by the courts, requiring the individuals represented to share a 'common interest and a common grievance' and 'the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent'[348]. Examples of where 'common interest' may arise are under a single statutory charter,[349] a common contract[350], or single audio recordings subject of alleged copyright infringements[351]. Recent cases have retained the strict approach[352], and this mechanism is of little relevance to consumer claims.

The Group Litigation Order

The Group Litigation Order (GLO) was introduced under the reformed Civil Procedure Rules of 1998[353]. It is an opt-in procedure in which all group members are parties to the proceedings[354]. An application is made for the court to order that proceedings should be constituted and managed as a GLO, and the court must be satisfied that the claims of all group members share 'common or related issues of fact or law' (the 'GLO issues')[355]. The GLO provides for the establishment of a 'group register', and identifies a particular court to manage all claims that fall within the Order. Case management may stay cases, or select test cases or generic issues to be resolved. 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 judgment is binding on claims entered onto the register subsequent to the granting of the GLO[356]. The normal 'loser pays costs rule' applies, and arrangements for funding and costs can be complex. The general position is

[344] Civil Procedure Rules 1998 (as amended) (CPR), Part 19.6.
[345] The Rules of the Court of Judicature (NI), Order 15, Rule 12.
[346] The Rules of the Court of Judicature (NI) Rule 12 (1); CPR Part 19.6 (1).
[347] *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021; *Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] Ch 229.
[348] *Duke of Bedford v Ellis* [1901] AC 1, 8.
[349] ibid, 9.
[350] *Marckt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021 (CA), 1040.
[351] *Independiente Ltd v Music Trading On-Line (HK) Ltd* [2003] EWHC 470 (Ch), para 27.
[352] *Emerald Supplies Ltd v British Airways Plc* [2010] EWCA Civ 1284; *Breslin and others v McKevvitt and others* [2011] NICA 33.
[353] CPR, Part 19 III.
[354] Civil Procedure Rules 1998, Practice Direction 19B-Group Litigation para 1.
[355] CPR Part 19.10.
[356] Ibid Part 19.12.

that all parties in the register are responsible for generic costs, and they typically are required to enter into cost-sharing agreements amongst themselves.

Competition Damages Claims

The Consumer Rights Act 2015 introduced a class action mechanism in relation to damages arising out of breaches of competition law[357]. These claims are brought in the Competition and Appeals Tribunal (CAT). The collective action may only be brought by certain specified bodies or by a party who authorised by the CAT who "will fairly and adequately act in the interests of class members". It may be either (a) a 'follow-on- claim based on a finding of infringement by the Competition and Markets Authority, or the CAT (on appeal from the CMA), or the European Commission (to the extent that although the CAT and EC can make a finding as to the infringement of a breach of competition law and fine businesses, neither can award damages to affected parties), or (b) a stand-alone claim based on an alleged infringement of competition law. The CAT decides whether the proceedings are to be opt-in or opt-out. Under the opt-in procedure, class members notify the class representative of inclusion of their claim. Under the opt-out procedure, claimants domiciled in the UK who fall within the class automatically participate unless they expressly opt out, while claimants not domiciled in the UK must opt in. The CAT makes an award of damages for the entirety of the claim; that is to say, the CAT will not assess the amount of damages to be awarded to each class member – it is not clear how this aggregate calculation should be made**.** The 'loser pays' rule applies. Damages-based agreements are prohibited. Exemplary damages are not available. In opt-out procedures, unclaimed damages will be paid to a charity, and not revert to the defendant.

Further changes will be implemented by the UK by 27 December 2016 on the basis of the Damages Directive 2014/104 in relation to infringements of competition law; a final infringement decision of national competition authority or review court of any EU Member State is to be understood per Art.9(2) thereof as "at least prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties". It also provides for a rebuttable presumption that cartel infringements cause harm.

The CRA may also make an order approving a collective settlement agreement made by the parties (copying the successful Dutch WCAM procedure), irrespective of whether collective proceedings are or are not in existence. If collective proceedings are in existence, an order approving such an agreement is only possible in respect of opt-out collective proceedings. A

[357] This replaced an earlier procedure that was more restricted, widely criticised, and only gave rise to a single and unsatisfactory case: *JJB Sports*.

collective settlement order will therefore be binding on all class members except those who have opted out.

It should be borne in mind that redress is affected in the UK by various other mechanisms that arise under criminal[358] or regulatory law, and the latter in particular have become considerably more effective, speedy and efficient at delivering individual and mass consumer redress.

The FCA also has powers to seek restitution orders compelling defendants to account to the FCA for illicit profits, or losses caused. Amounts received by the FCA under restitution orders must be paid or distributed as ordered by the court to multiple 'qualified persons' to whom the profits are rightly attributable, or who have suffered loss[359]. In financial services, for example, the Financial Conduct Authority has power to make a Consumer Redress Scheme[360]. Claims may be made also to the Financial Ombudsman Service, which operates various aggregating procedures, or to the Financial Services Compensation Scheme[361]. Other regulatory authorities (such as for energy) have similar powers, and their existence has promoted agreement on payment of redress without the authorities needing formally to invoke the powers[362].

7.1.1 If collective proceedings are launched, does national procedural law provide that ongoing individual claims, relating to the same dispute, should be stayed until the collective proceedings are brought to an end? Please specify if this constitutes an obligation on the part of the national judge or if it is at his or her discretion.

This depends on the particular procedure: see above.

As noted, actions for a potential breach of competition law can be brought either before the CAT or before the normal courts. This issue seems to be dealt with on the basis of the opt-in or opt-out nature of the collective action procedure. Thus, it is worth noting that s.82(4) CAT Rules 2015 provides that:

"A class member who has already brought a claim that raises one or more of the common issues set out in the collective proceedings order may not be a represented person unless the class member:
(a) discontinues the claim, or;

[358] Compensation orders in respect of personal injury, loss or damage arising under Powers of Criminal Courts (Sentencing) Act 2000, ss.130–133, which since 2012 are mandatory for courts to consider.
[359] FSMA, ss.382–3.
[360] FSMA s.404, and ss.404A–G.
[361] Ibid Part XV ss.212–224F.
[362] See C Hodges, 'Mass Collective Redress: Consumer ADR and Regulatory Techniques' (2015) 23 *European Review of Private Law* 829-874.

(b) for claims brought in England, Wales or Northern Ireland, applies to stay that claim, or;
(c) for claims brought in Scotland, applies to sist that claim before the time specified in the collective proceedings order under rule 80(1)(h) to opt into or out of the collective proceedings"

7.1.2 If individual proceedings are stayed, please indicate what the effect of the court or ADR entity's decision in the collective action on those individual proceedings would be, i.e. whether the outcome of the collective action binds the consumer bringing an individual action.

This depends on the particular procedure: see above.

Source(s):

C Hodges, Multi-Party Actions (Oxford University Press, 2001).
Competition Appeal Tribunal Rules 2015
CPR and Practice Directions 19 (specify rules)

http://www.collectiveredress.org/collective-redress/reports/ew/overview
C Hodges, 'Mass Collective Redress: Consumer ADR and Regulatory Techniques' (2015) 23 European Review of Private Law 829-874.

8. CONSUMER ALTERNATIVE DISPUTE RESOLUTION

The questions below focus on some key concerns relating to consumer disputes before ADR fora. If possible, please provide the reference/citation of an article that provides a general overview of the way in which consumer alternative dispute resolution operates within your national legal system.

Various forms of ADR exist in UK. First, ADR may simply mean mediation or some similar technique that is invoked before or during a court procedure. That mechanism is standard in all court procedure, but is little used in consumer-trader claims, since it is generally too cumbersome. If a consumer makes a claim within the court system that is defended, both parties will be sent a Directions Questionnaire and if both then tick the mediation box in that DQ they will be referred to the Small Claims Mediation Service, which is free, telephone-based and provided by the court. If the court case is allocated to the fast or multi track, the parties have to select an ADR (mediation) provider, and pay for the service. If either of the parties refuses to use ADR in relation to a court case, they must provide reasons in the DQ. If a consumer brings a

court case against a trader, the court may penalise the consumer if he or she has not first attempted to resolve the dispute out of court (i.e. through a recognised CDR scheme).

Secondly, a range of 'consumer ADR' ('CDR') bodies and mechanisms exist, which are focused specifically on handling consumer-trader claims. This CDR landscape operates independently of the courts, generally subject only to the possibility of judicial review for procedural irregularity by the CDR body (which is very rare indeed). Legislation requires that traders in some sectors belong to an ADR scheme. In addition, many businesses are members of voluntary ADR schemes.

CDR bodies can operate differing types of mechanism, which can be categorised into two broad types. All schemes generally require consumers firstly to make a complaint directly to the trader. The first broad type comprises CDR schemes that are usually sponsored by a particular trade association for complaints against its members, and which offer binding arbitration. They might (but generally do not) have mediation as a first stage. The administration of the CDR scheme may be handled by a body close to the trade association itself (such as Motor Codes have done for claims against members of the Society of Motor Manufacturers and Traders) or may be handled by an independent body (such as a specialist ADR body, like CEDR, which handles a range of schemes for different trade associations, such as the Travel Association, ABTA).

The second broad type comprises consumer ombudsmen schemes (not to be confused with ombudsmen for complaints against public bodies, which operate differently). These typically operate in three stages: triage (sometimes including general advice, which resolves uncertainties or clear cases straight away), informal mediation/conciliation (i.e. resolving a case by providing a communication channel between consumer and trader, which results on agreement between the parties), and finally, a decision by the ombudsman. Such decisions can be non-binding recommendations, or can (by law, as provided under relevant governing legislation) be binding on the trader if the consumer accepts the ombudsman's recommended decision. It should be noted that the consumer is free to reject the recommendation. Some ombudsmen are created by statute, and some are private not-for-profit bodies.

Since 2015, all CDR entities are regulated by a Competent Authority (CA) under the CDR Directive. A number of CAs exists. Various regulatory authorities are CAs for any CDR entities in their sectors, and the CA for any other scheme is the Chartered Trading Standards Institute (CTSI) (see the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 and the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015; also http://www.tradingstandards.uk/advice/ADRApprovedBodies.cfm).

The CDR entities and their CAs for the major sectors are shown in the following table:

CDR entity	**Competent Authority**
Financial Ombudsman Service (FOS	Financial Conduct Authority
Ombudsman Services: Energy	Office of Gas and Electricity Markets (OFGEM)
Ombudsman Services: Communications and Communications and Internet Services Adjudication Scheme (CISAS)	Office of Communications (OFCOM)
Pensions Ombudsman Service	Secretary of State for D Work & Pensions
Office for Legal Complaints (Legal Ombudsman)	Ministry of Justice
CEDR, Ombudsman Services	Civil Aviation Authority
The Property Ombudsman, Ombudsman Services: Property, and Property Redress Scheme	National Trading Standards Estate Agency Team, Powys County Council (The lead enforcement authority for the purposes of the Estate Agents Act 1979)
ADR Group, BACTA ADR service, Centre for Effective Dispute Resolution (CEDR), eCOGRA, IBAS, Isle of Man Gambling Supervision Commission (IoM), Jennifer Gallagher (Lindsays), Joel Goldman, National Casino Forum - Independent Panel for Casino Arbitration, Ombudsman Services, Tattersalls Committee	Gambling Commission
The Consumer Ombudsman	CTSI
The Retail Ombudsman	CTSI
Furniture Ombudsman	CTSI
The Postal Redress Service	Office of Communications (OFCOM)
ABTA, Association of Chartered Certified Accountants (ACCA), British Vehicle Rental and Leasing Association (BVRLA), Centre for Effective Dispute Resolution (CEDR), Dispute Resolution Ombudsman (DRO), Federation of Master Builders, Furniture Ombudsman, Home Improvement Ombudsman (HIO), Motor Codes, National Conciliation Services, NetNeutrals EU, Office of the Independent Adjudicator for Higher	CTSI

Education, Ombudsman Services, Pro Mediate, Renewable Energy Consumer Code, Small Claims Mediation, The Independent Parking Committee Ltd (The Independent Appeals Service), TrustMark, The Waterways Ombudsman	

8.1 Consumer disputes before ADR fora

8.1.1 Is ADR mandatory for all parties bringing a claim related to a consumer protection dispute?

There is no general rule of law that ADR is mandatory for businesses or consumers but it is mandatory in certain sectors for traders to belong to ADR schemes, for example under legislation in respect of traders in financial services, energy, telecommunications, pensions and legal services.

8.1.2 Please specify if there are limitations to the use of ADR. These might include the nature of the claim (i.e. whether both individual and collective claims are possible), requirements of representation, time limits, value thresholds, etc.

The principal limitations in the use of court-related ADR are the cost and un-user-friendliness of commencing a court procedure. Access to the free Small Claims Mediation Service requires the agreement of both parties. Mediation fees charged by mediators registered by the Civil Mediation Council are quoted (http://civilmediation.justice.gov.uk) as:

Amount you are claiming	**Fees per party**	**Length of session**
£5000 or less*	£50 + VAT £100+ VAT	1 hour 2 hours
£5000 to £15,000	£300 + VAT	3 hours
£15,000 - £50,000**	£425+ VAT	4 hours

The principal limitation in the use of CDR schemes is the extent of scope (jurisdiction) of each individual scheme, apart from generic schemes such as the Consumer Ombudsman. CDR schemes vary in whether they are free to consumers (which many are, certainly almost all Ombudsman schemes, being funded via subscription and case fees paid by traders and businesses) or involve some cost (as most arbitration schemes do).

All of the Ombudsman schemes are capable of – and do – handle mass/collective cases. They do this individually or by identifying a generic issue and then applying a unified approach or solution (see description of the FOS in C Hodges, I Benöhr and N Creutzfeldt-Banda, Consumer ADR in Europe (Hart Publishing, 2012), 278ff).

No representation is required for any CDR procedure. Some consumers may feel it necessary to instruct a lawyer for an arbitration-based CDR procedure or for a court-based ADR.

In general, normal time limits for the limitation of actions apply for accessing any ADR/CDR scheme. Some CDR schemes have access time-limits.

Some CDR schemes (such as arbitration schemes) have minimum value thresholds. Some CDR/ombudsman schemes have maximum value thresholds. There is no uniformity and a number of variations; as such, a brief answer is complex. For example, the maximum that can be awarded by the FOS is 150,000 GBP.

8.1.3 Can ADR entities issue binding decisions and can they enforce those decisions? If not, please explain how they are enforced.

This depends on the type of scheme. Any ADR scheme that involves just mediation may result either in an agreement or in no agreement between the parties. If the parties agree, their settlement agreement is a contract. It may be enforced through the courts in the normal way in separate proceedings as any other breach of contract.

Those CDR schemes that are based on arbitration operate on the basis that both parties agree to arbitration at the outset as a condition of access to the scheme. Hence, such agreement will invariably include a term that the party agrees to be bound by the decision of the arbitrator(s). If one party subsequently breaches the agreement, the agreement may be enforced through the courts in separate proceedings as a breach of contract.

The legislation that governs all the statutory-based ombudsman schemes (financial services, pensions, legal services) provides that a decision by the ombudsman is not binding on the consumer, but if the consumer accepts it, then the trader is bound by it. If a trader subsequently fails to observe the decision, the consumer may bring a civil enforcement action in the courts, but it will usually be more effective to bring the trader's breach to the attention of the Ombudsman and/or a regulatory authority, which will probably bring pressure to bear on the trader. If the consumer does not accept the Ombudsman's decision, he or she is free to take the case to court (but the courts would take the Ombudsman's decision into account).

For most of the private ombudsmen and various parts of the general CDR schemes, traders have agreed informally in advance to abide by the recommendations of the ADR body.

8.1.4 Does national law provide that limitation periods applicable to judicial actions should be suspended while ADR is ongoing?[363]

If one party initiates a judicial action, and this claim is issued by the court and allocated to a track, the parties are then sent the Directions Questionnaire. This asks the parties whether they are attempting to settle the dispute outside of court and if they want to request that the case is postponed for up to a month while ADR is engaged.

The court then sends the parties an order stating that the claim has been put on hold (staying the claim for settlement), and which provides further information on what should happen when the period of one month comes to an end; the parties should either notify the court that the dispute has been settled, request a further stay of one month, or notify the court that no settlement has been reached. Normally the proceedings will not be stayed for more than two months.

See Small Claims Directions Questionnaire, N180, Part A (on mediation/settlement) and Fast/Multi-Track Directions Questionnaire, N181, Part A (on settlement).

<u>For cross-border disputes in particular:</u>

- Consumer ADR Regulations SI 2015/542, implementing the Consumer ADR Directive 2013/11/EU, provides for an amendment to the Limitation Act 1980, s33B to allow for an extension by 8 weeks of standard limitation period of 6 years for bringing court proceedings where ADR proceedings are ongoing at the expiry of this 6-year period (only applicable to contract entered into on or after 9 July 2015).

8.1.5 Please specify if national law establishes rules providing for recourse to judicial action following an (unsuccessful) ADR hearing[364].

Unless the dispute is resolved by agreement, arbitration, or a decision of the CDR body, the parties' legal rights remain unaffected, and the dispute can be taken to court (subject to the requirements of judicial action).

[363] The Directive on Consumer ADR provides that "the existence of an effective system for collective claims and easy recourse to ADR should be complementary". Consumer ADR is relevant not only for individual claims but also for collective ones; it can provide consumer with a means to reduce costs and save time.
[364] Per Arts.10-12, Directive on Consumer ADR.

Contractual clauses which remove or limit a consumer's right to go to court will likely be deemed to be unfair. Compulsory arbitration clauses are automatically unfair in respect of consumer disputes (s.91 Arbitration Act 1996).

8.1.6 Is there judicial review of decisions and awards made by ADR entities? If so, by which court or tribunal is this oversight made? Is it ordinary or specialised?

The decision of any public body (such as an ombudsman) is subject to judicial review (but not appeal on the merits) before the High Court. Complaints (but not review) about arbitration or other private CDR schemes may be made to the relevant hoist arbitration body (e.g. to CEDR or ADR Group) or to the relevant Competent Authority.

The procedure is set out in the CPRs (Part 54):

- Applicants must obtain permission to seek judicial review (CPR 54.4) by establishing that the application arguably, substantively, or generally involves an allegation of illegality, irrationality, or procedural impropriety, or a breach of an ECHR right.
- An appeal against the refusal of permission can be made before the Court of Appeal.

Source(s):

Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015; the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015; C Hodges, I Benöhr and N Creutzfeldt-Banda, Consumer ADR in Europe (Hart Publishing, 2012); C Hodges, 'Consumer Ombudsmen: Better regulation and dispute resolution' (2014) ERA Forum, Volume 15, Issue 4, 593-608; (2015) DOI: 10.1007/s12027-014-0366-8of.

EX730 leaflet on the small claims telephone mediation service

9. THE EXAMINATION OF CONSUMER PROTECTION LAW IN NATIONAL PROCEDURAL LAW: RESPECT FOR THE PRINCIPLES OF THE EFFECTIVENESS AND EQUIVALENCE OF CONSUMER PROTECTION LAW AND EX OFFICIO CONTROL

9.1 The basis of ex officio control of consumer protection law in national law

9.1.1 Is it clear in the national legal system when consumer protection law should be applied ex officio? Is the ex officio control of consumer protection law established as an obligation or as a (discretionary) power of the judge in national procedural law?

Yes. National law on consumer protection is harmonised with EU law, and applies without impediment. There is no explicit requirement on judges in legislation to apply consumer law, but it is undoubtedly a(n unwritten) constitutional requirement, and not discretionary. Much of national consumer protection law has recently been brought together in Part 2 of the Consumer Rights Act 2015 (thereby making it easier to access in one place, consolidating various provisions such as the Unfair Contracts Terms Act 1977 (UCTA) and the UTCCR 1999).

All courts are required to apply all UK law. There are specific obligations in relation to some consumer protection provisions, but these can be considered largely as 'reminders' on the role of the judge. For example, CRA 2015, s.71 establishes an obligation on courts to examine the unfairness of terms in consumer contracts ex officio (even when the consumer has not raised the issue). It provides:

s.71: 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.

9.1.2 If there is an understanding of ex officio control of consumer protection law in the national legal system, what is this control understood to encompass/not cover?

The understanding of judicial control of the application of all law is the same. It is simply that the law must be applied.

Essentially, s.71 implements the CJEU's requirement re ex officio control of unfairness of contract terms; it does not go further than this. This duty only applies in respect of consumer contracts. The Explanatory Notes to the CRA 2015 provide that "This provision places a duty upon the courts to look at the fairness of terms even if the parties do not specifically ask the court to do so" (para.339). They also provide that – per CJEU case law, e.g. C-243/08, Pannon – the courts only have to look to the fairness of the term if they have available adequate information to do so. Furthermore, they establish that the court need not examine all of the contract but only the term(s) in question (per C-137/08 Penzugyi).

9.1.3 Is the party who claims to be a consumer required to establish his or her consumer status, the existence of a consumer contract and that consumer law applies to the dispute? Is this required even if the consumer has no legal representation?

No; there is no requirement for a claimant to identify her/himself as a consumer in bringing a claim on a consumer law basis. It is open to a defendant to object that the claimant is not a consumer and hence not entitled to claim under a provision of consumer protection law that protects a consumer's interest or rights. See the notes on burden of proof at 11.1.5.

9.1.4 What information is available to judges and dispute resolution facilitators hearing consumer protection disputes? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a consumer protection dispute to be heard and b) for the court to engage in ex officio control?

There are no specific provisions that distinguish a claim based on consumer protection law from any other type of legal claim or proceedings.

If initially bringing the claim, the consumer party will have to complete the initial claim form, wherein he or she provides the details of the case; similarly, if the claim is brought against the consumer, he or she will also have to complete a form acknowledging the claim/establishing if he or she wants to advance a defence. In light of the statement of claims made, judges and lawyers will refer to the relevant law. The same rules on burden of proof and evidence apply to all types of claim.

9.1.5 Who is responsible for providing this information? If the necessary information is not available to the court (or dispute resolution facilitator), is he or she under an obligation to investigate in order to be able to respond to a relevant consumer protection dimension of the case?

The general rule is that the claimant has the burden of producing the relevant evidence, and citing the relevant law, but judges will be expected to know the law.

In respect of proving the status of the consumer, the burden does not lie with the party claiming to be a consumer; rather, per s.2(4) CRA 2015, the burden of proof lies with the trader who claims that the individual was not acting for purposes wholly or mainly outside his trade, business, craft or profession. The business that asserts that an individual is not a consumer bears the burden of proving this (Competition and Markets Authority, Unfair Contract Terms Explained, July 2015, para.106

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450410/Unfair_Terms_Explained.pdf)

Consumer Contracts (Cancellation, Information and Additional Charges) Regulations 2013, Regulations 10-16 provides that the burden of proof lies with the trader to show that the information duties required therein have been satisfied.

9.1.6 Will the court provide the consumer with any assistance in gathering factual information or advancing his legal arguments before the court? Please respond for the situation where: a) the consumer has legal representation and b) the consumer has no legal representation.

As above, except that where a claimant is without legal assistance (i.e. is a litigant in person), judges will typically adopt a helpful stance, consistent with maintaining the impartiality of the judicial office.

As a general rule, (beyond consumer cases) it has been true that the court should not identify issues that the parties have not brought to the table, even if these issues seem to the court to arise on the basis of the facts (see the approach of the majority of the Court of Appeal in Goldsmith v Sperring Ltd [1977] 1 WLR 478; cf. Lord Denning, who argued that he would have decided the case on the basis of his own research. The majority considered that such an approach would provoke a change in the grounds of the claim, while denying the other party the opportunity to respond/be listened to.

Source(s):

Explanatory Notes, Consumer Rights Act 2015 (http://www.legislation.gov.uk/ukpga/2015/15/notes/contents)

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450410/Unfair_Terms_Explained.pdf
Goldsmith v Sperring Ltd [1977] 1 WLR 478

9.2 The possibility for ex officio control of EU consumer protection law in dispute resolution proceedings

9.2.1 Is ex officio control of consumer protection law always possible when the procedure involves a full assessment of the claim on its merits?

The concept of 'control' of any law is strange. Judges apply the law. In some cases, they may need to interpret the law. No case law on ex officio found yet. Per s.71 CRA 2015, ex officio control – at least in cases of unfairness – should be possible.

9.2.2 Can ex officio control be exercised even when the procedure does not involve an assessment on the merits?

No ex officio consumer case law found yet.

To illustrate the general (orthodox, i.e. not consumer law) approach: in Hoecheong Products Co Ltd [1995] 1 WLR 404, the Privy Council held that the "established principles which inhibit the parties from raising new points on appeal, particularly where the facts have not been investigated at the trial…apply equally where it is the court, rather than the arties, which seeks to introduce the new legal issue". This seems to provide that the court should not point to legal claims arising from the parties' propositions. In the same case, it was provided that as a general rule, the court should only consider new legal concerns on an issue that has already been raised and should not put forward "an entirely new question of law and fact"; in any event, such an approach should be argued again and should only occur in exceptional circumstances (at 409).

Moreover, while the CPR provide the courts with considerable case management powers – and provide that it can strike out claims, at trial and on appeal – they do not establish that the court can put forward additional claims. The court relies on the statement of claims made by the claimant and defence advanced by the defendant. This is true in respect of facts and the legal claims advanced (for example, per the QBD Guide, the parties must provide skeleton arguments, and "concisely summarise the party's submissions…in relation to each of the issues…cite the main authorities relied on", para.7.10.13).

The CPR do not provide the court – in relation to evidence and poof – with any power or competence to adopt an inquisitorial role; moreover, the CPR do not "signal a major departure from the general principle that it is primarily for each party to decide what its case is and how best it is to be presented to the other party or parties or to the court" (Circuit Systems Ltd v Zuken-Redac (UK) Ltd [2001] EWCA Civ 482, paras.22, 58-63).

It is worth noting that the courts can award a remedy which has not been sought or claimed by a party in its claim form/statement of case (CPR 16.2(5)).

9.2.3 Please indicate if, per national procedural law, ex officio control can be exercised at the following stages of the procedure:

	Courts		Other dispute resolution facilitators	
	Possible to exercise ex officio control	Not possible to exercise ex officio control	Possible to exercise ex officio control	Not possible to exercise ex officio control
Ordinary proceedings	X - for unfairness	N/A	N/A	N/A
Small claims	X - for unfairness	N/A	N/A	N/A
Payment order	X - for unfairness	N/A	N/A	N/A
Provisional measures	X - for unfairness	N/A	N/A	N/A
Proceedings linked to enforcement				
Enforcement proceedings	N/A	N/A	N/A	N/A
- Enforcement of payment order	N/A	N/A	N/A	N/A
- Enforcement of arbitration award	N/A	N/A	N/A	N/A
- Enforcement of mortgage	N/A	N/A	N/A	N/A
- Enforcement of notarial deed	N/A	N/A	N/A	N/A
Appeal proceedings (please specify:)	N/A	N/A	N/A	N/A

No consumer case law on ex officio found.

9.2.4 What does ex officio control encompass in national procedural law?

It has been said that the principle of ius curia novit is not known in English law; S. Whittaker, ‘Who Determines What the Civil Courts Decide?’ in D. Leczykiewciz and S. Weatherill (eds.),

The Involvement of EU Law in Private Law Relationships (OUP, Oxford; 2013), pp.89-129, p.91.

It is also important to consider public policy which – understood broadly – will serve as a basis for the unenforceability of a contract or contract term; H. Beale (ed.), Chitty on Contract (Wildy, London; 2012), para.16.001: "the enforcement of contractual claims is in certain circumstances against public policy".

Illegality is a broad concept that will include but is not restricted to public policy; it includes conduct contrary to statutory obligations and to the common law: "an illegal transaction is any transaction which involves…the commission of a legal wrong…or conduct which is otherwise contrary to public policy" (Law Commission, Illegal Transactions: The Effect of Illegality of Contracts and Trusts (Law Commission, Consultation Paper 154; 1999), p.2).

A contract that is ex facie illegal will not be enforced by an English court: Holman v Johnson (1775) 1 Cowper 341, 343 per Lord Mansfield – "if from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the Court says he has no right to be assisted" (see also, H. Beale (ed.), Chitty on Contract (Sweet and Maxwell, London; 2012), para.16.208).

Where the contract is ex facie illegal, the court will not enforce it; the courts will consider illegality of their own motion (See Scott v Brown, Doering, McNab and Co [1892] 2 QB 724, 728 per Lindley LJ, and Lopes LJ at 732: "The illegality of the contract was not pleaded. The point was taken by the court and acted upon"; see also Principles of European Contract Law, Part III (Kluwer, The Hague; 2003), p.220).

If the contract is not ex facie illegal, the court will not consider illegality of its own motion; the facts and plea has to be advanced (North Western Salt Co Ltd v Electrolytic Alkali Ltd [1914] AC 462, 476-477 per Lord Moulton). The court will not refuse to enforce unless it is satisfied that it has considered all relevant facts and can determine that it is illegal or has an illegal object.

Source(s):

S. Whittaker, 'Who Determines What the Civil Courts Decide?' in D. Leczykiewciz and S. Weatherill (eds.), The Involvement of EU Law in Private Law Relationships (OUP, Oxford; 2013), pp.89-129
Law Commission, Illegal Transactions: The Effect of Illegality of Contracts and Trusts (Law Commission, Consultation Paper 154; 1999)
H. Beale (ed.), Chitty on Contract (Sweet and Maxwell, London; 2012)

Principles of European Contract Law, Part III (Kluwer, The Hague; 2003)
Holman v Johnson (1775) 1 Cowper 341
Scott v Brown, Doering, McNab and Co [1892] 2 QB 724
North Western Salt Co Ltd v Electrolytic Alkali Ltd [1914] AC 462

9.3 Other procedural mechanisms for the equivalent and effective protection of EU consumer law

9.3.1 Does national procedural law provide that rules of EU consumer law (as well as rules that aim to satisfy EU consumer law objectives) should be understood as having equal standing to national rules of public policy (which is to say, that for the purposes of domestic law, the consumer protection provision is understood to have equal standing to a rule that must be raised ex officio by the national court)?

See the discussion of public policy and illegality above.

9.3.2 If ex officio control is not possible in certain types of proceedings or at a certain stage of proceedings (or for any other reason), does national procedural law provide for an alternative way of assessing consumer protection law?

See the discussion of public policy and illegality above.

Source(s):

9.4 Ex officio control in payment order procedures

9.4.1 What information is available to the judge when a claim for the issuance of a payment order is made? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a claim for the issuance of a payment order to be granted and b) for the court to engage in ex officio control before a payment order is issued?

There is no specific payment order procedure in English law.

9.4.2 What considerations will be assessed ex officio by the court (or other competent authority) before a payment order is issued?

There is no specific payment order procedure in English law.

9.4.3 How is the consumer informed about the claim to issue a payment order against him or her? Does national procedural law make any provision for steps to be taken to ensure that consumers are informed of the claim for the issuance of a payment order so that he or she can contest it?

There is no specific payment order procedure in English law.

9.4.4 If the consumer objects to the claim, what is the next step? Do the proceedings continue, in the context of which ex officio control can be exercised? Or are the proceedings transferred to ordinary proceedings for analysis on the merits of the claim?

There is no specific payment order procedure in English law.

Source(s):

European Commission
An evaluation study of the impact of national procedural laws and practices on the equivalence and effectiveness of the procedural protection of consumers under EU law

JUST/2014/RCON/PR/CIVI/0082

National Report – Consumer Protection Strand

Scotland

Stephanie Law

SCOTLAND: LEGAL ANALYSIS

1. NATIONAL LEGISLATION IMPLEMENTING EU CONSUMER PROTECTION INSTRUMENTS

EU legislation	Transposing national legislation	Additional notes (e.g. if there is an overlap in application of legislation etc.)
Doorstep Selling Directive 1985/577/EEC	Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008	Revoked the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987 and (Amendment) Regulations 1988 2008 regulations revoked

		in 2015 by the CRA 2015
Package Travel Directive 90/314/EEC	Package Travel, Package Holidays and Package Tours Regulations 1992	
Unfair Contract Terms Directive 1993/13/EEC	Unfair Contract Terms in Consumer Contracts Regulations 1999	In addition, Unfair Contract Terms Act 1977 (but was not amended) 1999 Regulations revoked 1994 Regulations For B2C contracts, both replaced, from October 2015, by the Consumer Rights Act 2015
Distance Selling Directive 1997/7/EC	Consumer Protection (Distance Selling) Regulations 2000 Amended by, Consumer Protection (Distance Selling) (Amendment) Regulations 2005	2000 regulations revoked in 2015 by the CRA 2015
Consumer Sales and Guarantees Directive 1999/44/EC	Sale and Supply of Goods to Consumers Regulations 2002 Enterprise Act 2002, Part 8 and Schedule 13 (for consumer injunctions)	In addition, relevant provisions can be found in Supply of Goods (Implied Terms) Act 1973 Unfair Contract Terms Act 1977 (sections 6-8, 20, 25) Sale of Goods Act 1979 Supply of Goods and Services Act 1982 Sale and Supply of Goods Act 1994 Enterprise Act 2002, Part 8 and Schedule 13 – consumer injunctions

		For B2C contracts, replaced, from October 2015, by Consumer Rights Act 2015
Unfair Commercial Practices Directive 2005/29/EC	Consumer Protection from Unfair Trading Regulations 2008 (Amended, from October 2014, by) Consumer Protection (Amendment) Regulations 2014	
Misleading and Comparative Advertising Directive 2006/114/EC	Business Protection from Misleading Marketing Regulations 2008	
Consumer Credit Agreement Directive 2008/48/EC	Consumer Credit (EU Directive) Regulations 2010 Consumer Credit (Total Charge for Credit) Regulations 2010 Consumer Credit (Disclosure of Information) Regulations 2010 Consumer Credit (Agreements) Regulations 2010 Consumer Credit (Advertisements) Regulations 2010 Financial Services (Consumer Credit) Act 2011	
Timeshare Protection Directive 2008/122/EC	Timeshare Holiday Products, Resale and Exchange Contracts Regulations 2010	Amending the Timeshare Act 1992 and Timeshare Regulations 1997
Consumer Injunctions Directive 2009/22/EC	Consumer Rights Act 2015 (for some provisions)	
Consumer Rights Directive	Consumer Contracts	

2011/83/EU	(Information, Cancellation and Additional Charges) Regulations 2013 (from June 2014) Consumer Rights Act 2015 (for some provisions)	
ADR for Consumer Disputes Directive 2013/11/EU	Consumer (Alternative Dispute Resolution) Regulations 2015 Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015	

Source(s):

http://www.legislation.gov.uk/browse/scotland

1. CONCEPT OF THE CONSUMER

1.1 Please outline the concept of the consumer in national law, indicating whether it is intended to be a uniform concept, whether it has been legislated for and where it can found (i.e. in a legislative provision, governmental guidelines, case law etc.).

No overarching definition of the consumer is established. . Rather, a definition tends to be provided in each piece of legislation.

Case law:

The concept of consumer might also apply to defender's who also pursue business interests, as long as the relevant contract falls "outside of what one would regard as the defender's trade" (however the case law is inconsistent).

Chris Hart (Business Sales) Ltd v Niven, 1992 SLT (Sh Ct) 53, contract with the owner of licensed premises for the marketing of the premises: the "marketing of their licensed premises is a contract for a purpose which can be regarded as outside the defenders' trade. Their trade is to sell, not licensed premises but spirituous and liquors etc. In my opinion the defender was acting privately when entering into this contract… it seems to me that the defenders were economically

in a weaker position than the pursuers and that they were buying privately and therefore were in need of such protection as is afforded by the rule"

Semple Fraser v Quail 2002 SLT (Sh Ct) 33, following Benincasa v Dentalkit, 1993 ECR 1-03767; for the purposes of the UCCTR 1999 –a more restricted test, a "private consumption test": "Only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer". The sheriff considered that, referring to Chris Hart, if "as appeared from the earlier decisions of the Sheriff Principal, the issue was solely one of whether the contract was a type which the defenders would ordinarily enter into in the course of their trade of business that would leave the way open for the largest of corporations to argue that they should be treated as "consumers" whenever they entered into a contract which did not fall directly within their business purposes."

Scottish Water Business Stream Ltd v Deodat Chatartoo 2015 SC (Edin) 60 at 19: "In determining whether a contract is a consumer or a commercial contract much depends on the nature of the contract and whether the consumer requires it for the purpose of his business or for his own needs. I was referred to the case of Sporitelna European Court of Justice 14.3.2013 (opinion of Advocate General Sharpston) There is a requirement to consider whether the quality of "consumer" is present."

OFT v MB Designs (Scotland) Ltd [2005] CSOH 85 at 2 per Lord Drummond Young: "These provide, generally speaking, that a consumer is a natural person who acts for purposes outside his trade, business or profession. Thus in both cases a consumer may be described as an individual who is not acting in a trading or professional capacity." (also a collective interest case).

<u>Definitions of consumer in legislation: See English Report</u>

<u>Governmental guidelines:</u>

Consumer and Competition Policy Unit, Scottish Government, December 2015 (http://www.gov.scot/Resource/0049/00491679.pdf): "anyone who buys goods or digital content, or uses goods or services either in the private or public sector, now or in the future"; "A consumer may also be known as or referred to as client, customer, passenger, patient, pupil, service user, shopper, student, tenant, user".

It is worth noting that Scots consumer law, and the procedural law that accompanies it, is currently undergoing considerable development. Changes to civil procedure derive largely from the Gill Review (made in line with other reviews in recent years, including the Taylor Review on

costs and funding of civil litigation), commissioned in 2007 and published in 2009[365], many implemented in the Court Reform (Scotland) Act 2014[366]. A first step in the reform process was the establishment of the Scottish Civil Justice Council.

Proposed changes to consumer law derive largely from the Agreement derived from the Smith Commission, post-independence referendum (ss.72-73 of the Report of the Smith Commission for further devolution of powers to the Scottish Parliament; https://www.smith-commission.scot/smith-commission-report/). Prior to the referendum, the Scottish Government had requested that all consumer competences be devolved in order to allow it to establish a unified system around the four pillars of consumer policy (i.e. advocacy, advice, education and information, enforcement and redress).

The UK Government Department for Business, Innovation and Skills (BIS) conducted a Consumer Landscape Review in 2011 and concluded in 2012 that Scotland should have a separate enforcement structure (BIS, 'Consumer Landscape Review: Impact assessments on Enforcement, Advocacy and Information, Advice and Education', April 2012).

An independent Working Group on Consumer and Competition Policy for Scotland was established in June 2015; the Working Group's report was published in October 2015, proposing 46 recommendations. The Scottish Government published its response to the proposals in March 2016 (http://www.gov.scot/Publications/2016/03/8525/0).

The idea of a one-stop-shop for consumer redress in Scotland; the Scottish Government has identified the need for a unified approach to consumer policy and has proposed a unified consumer and competition body, bringing together strategy, competition regulation, advocacy, advice, education, information and enforcement (Consumer Protection and Representation in an Independent Scotland, August 2013), with a consumer ombudsman responsible for ADR. The

[365] Recommendations: establishment of a Civil Justice Council for Scotland; creation of a new tier of judiciary (summary sheriffs); establishment of a national Sheriff Appeal Court; establishment of a national Personal Injury Court; changes to the process for Judicial Review; a shift of business from the Court of Session to the Sheriff Courts and various changes to civil court rules to support modernisation of civil court procedures. The Gill Review is available at: http://www.scotcourts.gov.uk/about-the-scottish-court-service/the-scottish-civil-courts-reform. Public consultation: Making Justice Work Courts Reform (Scotland) Bill A Consultation Paper February 2013 (http://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/making-justice-work-courts-reform-(scotland)-bill-a-consultation-paper-february-2013.pdf?sfvrsn=2) undertaken by SG during 2013. Responses Courts Reform (Scotland) Bill Analysis of Consultation Responses (http://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/courts-reform-(scotland)-bill-analysis-of-consultation-responses.pdf?sfvrsn=2) used as preparation for Courts Reform (Scotland) Bill. Bill introduced in SP in 2014; assent received in November 2014 Court Reform (Scotland) Act 2014 (http://www.legislation.gov.uk/asp/2014/18/contents/enacted).

[366] Key changes: Increase in the privative jurisdiction (i.e. exclusive competence) of the Sheriff Court; New simple procedure to be introduced to replace the summary cause and small claims procedures; A third tier of the judiciary (summary sheriffs) will be introduced; A new personal injury court (Scotland-wide) established in September 2015; Establishment of a Sheriff Appeal court – sitting from January 2016.

redress dimension is especially important to the notion of a unified system, it is on his basis that a Scottish Consumer Ombudsman has been proposed (a single, one-point-of-access for all complaints).

The Working Group firstly proposed the creation of a new, independent and statutory public body – provisionally named, Consumer Scotland - to ensure stakeholders' voices are heard. It should work with other bodies in four key areas of consumer protection to ensure a strategic approach to the provision of consumer advocacy, advice, enforcement and redress. Pre and post-referendum (Scottish Government, 'Consumer Protection and Representation in an Independent Scotland' August 2013), the Scottish Government has advanced that a unified consumer and competition body should be established to reduce fragmentation and complexity. The Scottish Government largely agreed with the Working Group's recommendations.

The Scotland Act 2016, s.50 (devolving responsibility for consumer advocacy and advice to the Scottish Parliament) and s.51 (devolves functions exercisable by Scottish Governments Ministers within this competence of consumer advocacy and advice), gives the Scottish Government new powers in respect of consumer law and policy.

The Scottish Government and particularly, Scottish Ministers, will work with the English enforcement authorities and will be able to refer a market for investigation by the Competition and Markets Authority (see the English National Report). The Scottish Government will initiate work with stakeholders under the auspices of a Consumer and Competition Strategy for Scotland. The policy of enforcement and redress will continue to be largely advanced by Westminster.

The Scottish Government has indicated that the next steps are as follows:

- "Given the clear steer from the Working Group, we are working with stakeholders to consider the possible form and functions of a dedicated consumer protection body for Scotland.
- We are committed to working with stakeholders to identify practical solutions to gathering and sharing information data and, in doing so, uniting the four consumer protection pillars in Scotland.
- We intend to establish a Scottish consumer protection partnership, bringing together delivery partners and ensuring multi-agency collaboration on issues such as information sharing.
- We are examining whether consumer issues might be a dedicated brief of a Scottish Minister or whether appointing a designated consumer champion could deliver greater

benefits." (Scottish Government Response to the Consumer and Competition Working Group's Final Report, p.3)

Source(s):

Consumer Rights Act 2015
Consumer and Competition Policy Unit, Scottish Government, December 2015 (http://www.gov.scot/Resource/0049/00491679.pdf)
http://www.gov.scot/Topics/Business-Industry/ConsumerCompetition
http://www.gov.scot/Publications/2016/03/8525/0
http://www.gov.scot/Publications/2013/08/2253
http://www.gov.scot/Topics/Business-Industry/ConsumerCompetition/FinalReport

2. REGULATORY AUTHORITIES COMPETENT FOR CONSUMER PROTECTION ISSUES

2.1 What regulatory authorities, if any, are competent for enforcing consumer protection law? Please identify them, their nature (i.e. whether they are public or private or mixed) and the nature of enforcement.

Different regulatory bodies play different roles in consumer protection; the following three are explored in more detail:

k. Citizens Advice Service
l. Trading Standards Institute/Trading Standards Services
m. Competition and Markets Authority

a. Citizens Advice Scotland

The Citizens Advice Service places a key role in consumer advocacy, education and advice in Scotland. It offers information and education services in respect of consumer protection issues and might also provide advice, direct support and representation to consumers involved in a consumer dispute.

b. Trading Standards Services and Trading Standards Scotland

The Chartered Trading Standards Institute and Trading Standards Scotland operates at the local level, through local councils/authorities, regional and national level, overseen by the Convention

of Scottish Local Authorities (COSLA) in relation to local, regional and national enforcement. They offer advice to business, operate "trusted trader schemes" and provide education, advice and debt counselling to consumers. TS also play a role in the enforcement of consumer protection law at the local authority level, in terms of enforcing fair trade, combatting illegal trading, monitoring product safety, addressing under-age sales, verifying weights and measures.

Trading Standards respond to and investigate consumer complaints; they also undertake inspections (they can to enter and inspect premises, examine goods and conduct test purchases) to ensure businesses' compliance with consumer protection legislation. Their responses might be civil or criminal. Criminal offences can be referred to the Procurator Fiscal. Trading Standards can also seek an enforcement order (interdict/injunction) before a court to stop the infringement of consumer law.

c. Competition and Markets Authority

See the English Report.

It is worth noting that the Working Group on Consumer and Competition Policy in Scotland recommended "that the Scottish Government should develop a competition policy for Scotland which sets out how it differs from that of the UK and the outcomes it seeks to achieve. It also recommended that the Scottish Government should make clear how its role and responsibilities align with those of the CMA….given its geographical, cultural and economic circumstances" Scottish Government Response to the Consumer and Competition Working Group's Final Report, p.8). Moreover, as in England, whereby an enforcer can seek a civil injunction as the main, formal, civil sanction for violations of consumer law, enforcers in Scotland can seek an interdict under Part 8 of the Enterprise Act 2002.

2.2 Is there a specific venue for this type of enforcement and does this limit the jurisdiction of courts/ADR fora (even if only initially)?

The relevant enforcement bodies can seek an interdict in Scotland before a sheriff court or before the Court of Session, to prevent a business from using, proposing to use or recommending the use of a term that appears to be unfair in light of the CRA. An enforcement order may also provide for redress for consumers who have suffered loss (including monetary compensation). An enforcement order may also provide redress for consumers who have suffered loss (including monetary compensation). In terms of consumer violations deriving from competition law violations, the Competition and Appeals Tribunal (CAT) is designated as the specialist tribunal. Any appeal in relation to Tribunal proceedings in Scotland is made to the Court of Session.

2.3 Can criminal prosecutions be initiated for violations of consumer protection rules? How serious must the infringement be? What are the penalties and sanctions? And might these prosecutions lead to criminal penalties or sanctions? Can individual consumers piggy back on these claims (e.g. via a partie civile method)?

The Crown Office and Procurator Fiscal Service in Scotland has the power to initiate a criminal prosecution. Generally, Trading Standards in Scotland, and any other enforcement body, will investigate and initiate civil proceedings but will not take criminal proceedings (civil orders, if breached, can then lead to criminal action, for violations of consumer law); they may submit reports to the procurator fiscal. The decision to prosecute is rather one taken in the public interest by the procurator fiscal.

Principle xi of the Procurator Fiscal's Code of Prosecution provides that: "On consideration of the whole circumstances of a case, civil proceedings may offer a more appropriate method for settling the conflict or issue which forms the core of the case. The right of a party to seek civil redress may, depending on other circumstances, influence the prosecutor in favour of a disposal other than prosecution".

2.4 Is there judicial review of decisions of consumer regulatory authorities? If so, by which court is this judicial oversight made? Is the forum an ordinary or a specialised court or tribunal?

Applications for judicial review in Scotland must be made before the Court of Session. As a general rule, the grounds for review are the same as in England; however, in Scotland, judicial review is available as of right and is not dependent on the court's discretion (Eba v Advocate General for Scotland [2010] CSIH 78).

In the case of Axa General Insurance Ltd v Lord Advocate [2011] UKSC 46, the UKSC removed the requirement of "title and interest", as established by the House of Lords in D&J Nicol v Dundee Harbour Trustees 1915 SC (HL) 7, as the test for access to the courts for judicial review. Per the Courts Reform (Scotland) Act 2014, section 89, a test based on "sufficient interest" – the approach followed in England – is now applied as recommended by the Gill Review (Report of the Scottish Civil Courts Review, Vol II, 2009, ch 12 – http://www.scotcourts.gov.uk/civilcourtsreview/theReport/Vol2Chap10_15.pdf).

Scots law of judicial review is different in its scope and remedies from English judicial review (ordinary civil remedies are used in Scots law). Axa General Insurance Ltd v Lord Advocate [2011] UKSC 46: "The competency of the application [for judicial review] does not depend upon any distinction between public law and private law, nor is it correct in regard to issues about

competency to describe judicial review as a public law remedy."[367] The courts can review actions/omissions "by any person or body to whom a jurisdiction, power or authority has been delegated or entrusted by statute, agreement or any other instrument"; there must be a tripartite relationship between the decision-maker, the person affected by the decision and the third party who delegates the competence.

See for more information, https://ukconstitutionallaw.org/2012/01/20/aileen-mcharg-public-law-private-law-and-the-distinctiveness-of-scots-judicial-review/.

2.5 Does the national legal system provide for a mechanism of cooperation between its national regulatory authorities and those of other Member States?

Yes. The CMA is the UK Single Liaison Office. Various national networks exist:

- The UK Regulators Network is a network of 9 UK sectoral regulators, including, the Civil Aviation Authority, Financial Conduct Authority, Ofcom Ofgem, Office of Rail Regulation, Ofwat, Utility Regulator of Northern Ireland, Monitor and the Water Industry Commission for Scotland (WICS).
- The UK Competition Network (UKCN) comprises an alliance of UK sector regulators, including the FCA and the Competition and Markets Authority (CMA); the network of regulators has a duty to promote competition in the interests of consumers. UKCN members include: the Competition and Markets Authority, Civil Aviation Authority, FCA, Ofcom, Ofgem, Ofwat, Office of Rail Regulation and the Utility Regulator of Northern Ireland. The Consumer Protection Partnership includes the CMA, Trading Standards, the Chartered Trading Standards Institute and the Financial Conduct Authority.

Source(s):

Eba v Advocate General for Scotland [2010] CSIH 78
Axa General Insurance Ltd v Lord Advocate [2011] UKSC 46
Davidson v the Scottish Ministers (No 1) [2005] UKHL 76
See for more information, https://ukconstitutionallaw.org/2012/01/20/aileen-mcharg-public-law-private-law-and-the-distinctiveness-of-scots-judicial-review/.

[367] Cf. Davidson v the Scottish Ministers (No 1) [2005] UKHL 76, in which the Scottish Law Lords, Lord Hope and Lord Rodger, introduced a distinction between 'public law' and 'private law' judicial review (judicial review in Scotland is not only a public law remedy), suggesting there is a distinction between public and private (cf. Axa), and that the grounds for review might differ depending on whether the decision-maker is a private one.

3. LEGAL AID

3.1 Is legal aid available to consumers in: a) bringing a claim and b) defending a claim before a court?

A distinction is made between 1) advice and assistance and 2) civil legal aid. This applies both to consumers bringing and defending a claim. The Scottish Legal Aid Board deals with advice and assistance and civil legal aid in Scotland, and has the responsibility for monitoring the availability and accessibility of legal aid, under the Legal Services (Scotland) Act 2010 (s.141(a)).

3.2 For what kinds of disputes and actions is legal aid available? (NB: legal aid might not be available for consumer or contractual disputes but be available instead for a related action, e.g. actions relating to debt, mortgage arrears, eviction etc.)

Advice and assistance is available for any issue of Scots law; only a solicitor can provide advice and assistance (see below for what advice and assistance encompasses).

Civil legal aid is available in general for claims in the sheriff court (with the exception of small claims at first instance and some claims relating to bankruptcy), the Court of Session, Employment Appeals Tribunal, Land Tribunals, Scottish Land Court and appeals to the UKSC. It is also available for housing problems - such mortgage rights, as eviction, repairs, rent arrears; debts - to recover debts (over £3000) by going to court; consumer problems - compensation for faulty goods or services.

3.3 What requirements must be satisfied for the consumer to be entitled to legal aid? Please specify if there are any additional limitations to its availability.

Pursuers and defenders must financially qualify for both advice and assistance and civil legal aid; both are means-tested (income and savings) and may be offered to cover part of costs (calculation made via http://www.slab.org.uk/public/civil/calculator/index.html). If the party wins or keeps the money in the claim, he or she may have to pay for the entire cost of the work done or make a contribution to the costs. This is true for both advice and assistance and civil legal aid. Financial qualification is based on the income and capital of the pursuer/defender and his or her partner.

Advice and Assistance

A solicitor will determine if the applicant qualifies for advice and assistance (http://www.slab.org.uk/public/advice/index.html), that is: 1) whether the matter relates to Scots law and 2) financial eligibility. It is necessary that the applicant for legal aid provides the relevant documents (e.g. payslips, bank statements and benefit award letters).

Civil Legal Aid

A solicitor (and only a solicitor) should apply for civil legal aid on the behalf of the pursuer/defender (http://www.slab.org.uk/public/civil/calculator/index.html) on the basis of a form detailing finances. In addition to financial testing, the SLAB also determines if an applicant qualifies for legal aid, depending on: "whether the applicant has a plausible case, whether it is reasonable in all circumstances that civil legal aid is made available, and whether they meet the financial eligibility criteria." The solicitor provides the relevant information on: "whether the court can deal with the case; whether you are entitled to be involved in the case; if you have a reasonable chance of winning your case; if the case involves money or property, whether there is a reasonable chance of recovering that money or property from your opponent(s); what attempts you have made to settle the case without going to court."

Criteria for civil legal aid are:

- whether the applicant has a plausible case
- whether it is reasonable in all circumstances that civil legal aid is made available, and
- whether they meet the financial eligibility criteria.

The solicitor provides advice on:

- whether the court can deal with the case
- whether the applicant is entitled to be involved in the case
- if the applicant has a reasonable chance of winning your case
- if the case involves money or property, whether there is a reasonable chance of recovering that money or property from the applicant's opponent(s)
- what attempts the applicant has made to settle the case without going to court.

Financial criteria includes income and capital for 12 months from the date of the application, and capital for as long as the case lasts. The income and capital of the applicant's spouse will also be relevant. Applicants can have a disposable income of up to £26,239, and a limit of £13,017 of capital, and still qualify for civil legal aid. Contributions towards the cost of legal aid can be made in instalments. If annual income is £3,521 or less, no contributions will be due; if income is above this amount, the calculation is made on more complex criteria (available here:

http://www.slab.org.uk/public/civil/eligibility/). The determination on financial aspects is made by the Financial Assessment Unit.

An opponent to a claim can make the argument to SLAB that they do not think that the applicant should be awarded legal aid. If the pursuer/defender neither qualifies for advice or assistance nor for civil legal aid, free advice is available from various organisations (including Citizens Advice Scotland, Money Advice Centres, or Shelter, for housing).

3.4 What does legal aid encompass? (i.e. (only) general advice, (only) assistance in preparing the case, (only) assistance with negotiation of settlements, (also) representation).

Advice and assistance encompasses the following:

- Advice on whether the pursuer/defender has a legal case to take forward
- Negotiation to settle
- Advice on and applications for legal aid
- Letter writing for expert witnesses/reports
- s.6, and Part II, Legal Aid (Scotland) Act 1986

Only a solicitor can provide advice and assistance.

Civil legal aid encompasses:

- The representation in court
- The preparation work
- The hearing itself
- Funding for advocates and experts if necessary
- Part III, Legal Aid (Scotland) Act 1986

Source(s): Scottish Legal Aid Board, CIV/INFO JAN 2016 (http://www.slab.org.uk/export/sites/default/common/documents/publications/leaflets/Info_for_Applicants_08_Jul_14_Web.pdf)
Legal Aid (Scotland) Act 1986

4. COSTS

4.1 What are the costs of different types of procedures before courts? Are there exemptions to the payment of fees and expenses? How can costs be paid?

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+
Court fees						
Court expenses						
Exemptions						

NB: The Taylor Review of Expenses and Funding of Civil Litigation in Scotland was published in 2013 (http://www.gov.scot/Resource/0043/00438205.pdf), following the Gill Review (and the Jackson Review in England and Wales).

Sheriff Court fees:

Sheriff Court Fees Order 2015, SSI No.264, Schedule 2 (fee payable from 1 April 2016)

a. Small claims and summary cause fees:

- To lodge a summons in actions for sums of money - £200 or less (or 250 euros for European small claim) - £18
- To lodge a summons in all other small claims or summary cause actions - £78
- Marking of an appeal - £59
- Service of small claim summons by sheriff officer - £12 plus sheriff officer's fee

b. Ordinary cause fees:

- Initial writ (ordinary) - £96
- NID/reponing note (ordinary) - £96
- Caveat - £36
- Record - £113
- Fixing proof - £54
- Each day or part day of proof, debate or hearing in summary application/misc. application - £227
- Motion or minute - £48
- Appeal to Sheriff Principal - £113

Sheriff Appeal Court fees:

Sheriff Appeal Court Fees Order 2015, SSI No.379, Schedule 2 (fees applicable from 1 April 2016)

- Lodging or opposing a written motion (payable by both lodging and opposing parties; not payable for oral oppositions/motions or minutes) – £48
- Fixing a hearing date (payable by the lodging party) - £54
- Lodging an appeal (other than summary cause; payable by the appellant) - £113
- Hearing fee per day (bench of 1; only for substantive hearings and payable by the appellant) - £227
- Hearing fee per day (bench of 3; only for substantive hearings and payable by the appellant) - £568

Court of Session fees

Court of Session Etc. Fees Order 2015 SSI No.261, Schedule 2 (fees applicable from 1 April 2016)

a. Signeting:
- Signeting of any writ or summons if attendance is necessary outwith normal office hours - £125

b. General costs:
- 1. Appeal, application for leave to appeal, summons, or other writ or step by which any cause or proceeding, other than a family action, is originated in either the Inner or Outer House (to include signeting in normal office hours) - £214
- 2. Defences, answers or other writ (including a joint minute) or step in process or enrolment or opposition to a motion in a pending process by which a party other than an originating party first makes an appearance in a cause or proceeding, other than a family action - £214
- …
- 11. Letter of request to a foreign court - £54
- 13. Reclaiming motion (appeal from the OH to the IH) – payable by each party - £214
- 15. Allowing proof etc. - £59
- 16. Court hearing before a single judge – for every 30 minutes of the hearing (except the first 30 minutes) - £96
- 17. Court hearing before a panel of three judges – for every 30 minutes of the hearing (except the first 30 minutes) - £239

- 21. Fee payable by any party enrolling a motion of making a motion orally – £54

c. Appeal:
   1. Certified copy of proceedings for appeal to the UKSC - £214
   2. Certifying of any other document (plus copying charges if necessary) - £18

Exemptions to fees:

Forms to be completed: https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/forms/fee-exemption-forms/fee-exemption-form---full-version.doc?sfvrsn=16

If the pursuer/defender or their spouse receive certain types of income support (they must provide evidence from DWP or HMRC confirming receipt of benefits); the pursuer/defender may also be entitled to an exemption if they are receiving civil legal aid, the fee is payable in connection with work being undertaken by the solicitor which qualifies for civil legal aid as matter of 'special urgency' (Section 36 of the Legal Aid (Scotland) Act 1986 refers).

How can fees be paid?

- Cheques - made payable to "The Scottish Courts and Tribunals Service"
- Debit Card & Credit Card - please check which types of card are acceptable with the appropriate court
- Postal Order - made payable to "The Scottish Courts and Tribunals Service"
- Cash

Source(s):

https://www.scotcourts.gov.uk/rules-and-practice/fees/sheriff-court-fees
Sheriff Court Fees Order 2015 SSI No.264
Schedule 2 (applicable from 1 April 2016)
New fees in Schedule 3 applicable from 1 April 2017
Sheriff Appeal Court Fees Order 2015, SSI No.379, Schedule 2 (fees applicable from 1 April 2016)
New fees in Schedule 3 applicable from 1 April 2017
Court of Session Etc. Fees Order 2015 SSI No.261, Schedule 2 (fees applicable from 1 April 2016)
New fees in Schedule 3 applicable from 1 April 2017

5. STANDING AND REPRESENTATION IN CONSUMER DISPUTES

5.1 Does national law limit the standing of the individual consumer in respect of the claim that can be made and the forum before which it can be brought?

Standing is understood as the entitlement to be heard. In Scotland, there is no separate requirement that the claimant establishes standing for civil law claims. The claimant must indicate the relevant right and remedy and the grounds on which this can be claimed. Individual consumers are attributed rights from EU law via the law transposed in the national system. Thus, for violations of statutory obligations that undermine consumer protection rights, the CRA 2015 provides that individual consumers have standing in respect of violations of consumer law as protected under the Act.

The standing of the individual might however be limited in respect of actions for collective redress (see Part 9).

5.2 Other than individual consumers, who or which bodies have standing in consumer protection disputes and for what types of claim? If the action is not brought by the individual consumer, what requirements of representation must be satisfied?

The enforcement bodies set out above have standing in respect of the violations of consumer law set out above. If a consumer brings an action as an individual, a solicitor, a friend/relative, a representative of a Citizen's Advice Bureau, Consumer Protection/Trading Standards Department or other advice agency, might be able to represent the consumer in a small claims action.

5.3 If a consumer wants to bring or defend an action relating to a consumer protection dispute, is there a legal (or otherwise formal) requirement that he or she has legal representation? Please specify for both judicial and ADR fora and the bodies, associations or authorities that can provide this representation.

General rule: there is no requirement that parties seek legal advice or assistance, or are represented by a lawyer (or other body) in civil court proceedings. A pursuer or defender who represents him or herself is known as a party litigant.

However, often guidance provided by the Law Society, the courts' system and consumer protection associations recommends that consumers seek legal advice, assistance and representation in complex or high-value cases, or were the procedure is complicated.

Small claims (up to 3000 GBP) before Sheriff Court only:

- Acts of Sederunt (Small Claims Rules) 2002, SSI No.133, Chapter 2
- Representation by a solicitor, advocate or authorised lay person is possible but not necessary, Chapter 2.A
- An authorised lay person "may in representing a party do everything for the preparation and conduct of a small claim as may be done by an individual conducting his own claim",
- (Civil legal aid is not available; a solicitor might be able to provide advice or assistance but will not provide representation in court)
- In the Sheriff Court, in-court advice projects exist

Summary claims (between 3000 and 5000 GBP) before Sheriff Court only:

- Acts of Sederunt (Summary Cause Rules) 2002, SSI No.132, Rule 2.1
- Representation by a solicitor, advocate or authorised lay person is possible but not necessary
- "An authorised lay representative shall not appear in court on behalf of a party except at the hearing held in terms of rule 8.2(1) and, unless the sheriff otherwise directs, any subsequent or other calling where the action is not defended on the merits or on the amount of the sum due."
- Otherwise, an authorised lay person "may in representing a party do everything for the preparation and conduct of a small claim as may be done by an individual conducting his own claim"
- Under the provisions of the Debtors (Scotland) Act 1987, a party can be represented by a person other than a solicitor or an advocate provided that the sheriff is satisfied that such person is a suitable representative and is duly authorised to represent that party, this is not possible in appeals to the sheriff principal.
- Representation by a solicitor is possible but not necessary
- In the Sheriff Court, in-court advice projects exist

Ordinary cause claims (over 5000 GBP, and up to 100,000 before Sheriff Court only):

- Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 SSI No.1956, Rule 1.3
- Representation by a solicitor, advocate or authorised lay person is possible but not necessary
- Under the provisions of the Debtors (Scotland) Act 1987, a party can be represented by a person other than a solicitor or an advocate provided that the sheriff is satisfied that such person is a suitable representative and is duly authorised to represent that party, this is not possible in appeals to the sheriff principal.

- The procedure is quite complicated and as such, the SCTS advises applicants to seek legal advice
- In the Sheriff Court, in-court advice projects exist

Ordinary cause claims (above 100,000GBP before the Court of Session):

- Act of Sederunt (Rules of the Court of Session 1994) and Amendments
- Claims heard before the Court of Session usually require representation by an advocate or a solicitor-advocate
- Party litigants (parties representing themselves) are permitted; lay support may also be available for party litigants on application – Chapter 12a
- Legal representation might also be available for party litigants on application – Chapter 12b

While it is not always necessary for the consumer to have representation, the guidance often suggests that it will be useful; for example: Citizens Advice Scotland, in appeals from small claims: "the help of a solicitor is usually essential" (https://www.citizensadvice.org.uk/scotland/consumer/going-to-court/taking-legal-action-against-traders/taking-a-trader-to-court-s/)

Generally, in ADR related to consumer protection, it is not necessary that the consumers have legal representation (of course, ADR tends to be sectoral, so rules might differ – however, with ADR it is unlikely to be a requirement).

Source(s):

- Acts of Sederunt (Small Claims Rules) 2002, SSI No.133, Rule 2.1
- Acts of Sederunt (Summary Cause Rules) 2002, SSI No.132, Rule 2.1
- Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 SSI No.1956, Rule 1.3
- Act of Sederunt (Rules of the Court of Session 1994) and Amendments, Chapter 12

6. ACTIONS BEFORE COURTS

General considerations on rules of civil procedure in Scotland:

The Sheriff Court and the Court of Session have their own rules of civil procedure, which depend on the nature and value of the claim. Unlike in England – with the exception of certain actions where there exist voluntary pre-action protocols (including professional negligence or

personal injury, or commercial or business claims brought before the Court of Session via the fast-track commercial action procedure[368]) – there are no pre-action protocols that must be followed before a party can issue a claim.

Sheriff Court:

- 'Small claim' rules applies to claim up to 3000 GBP
- 'Summary clause' rules apply to claims (between 3000 GBP and 5000 GBP (Acts of Sederunt (Small Claims Rules) 2002, SSI No.133)
- 'Ordinary clause' rules apply to claims over 5000 GBP (Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 SSI No.1956)
- The Sheriff Court has exclusive jurisdiction for claims of a value between 0 and 100,000 GBP.

Sheriff Appeals Court:

- Act of Sederunt (Sheriff Appeal Court Rules) 2015 SSI 2015/356

Court of Session:

- Default rules of procedure are 'ordinary action procedure' (Act of Sederunt (Rules of the Court of Session 1994) and Amendments)

Guidance notes are available for small claims and summary cause actions (http://www.scotcourts.gov.uk/rules-and-practice/guidance-notes). Special rules apply to commercial, IP and personal injury-related claims.

6.1 Jurisdiction and competence of the courts in consumer disputes: General structure and special procedures aimed at protecting consumers

6.1.1 Are ordinary courts competent to hear such claims? Is there also a specialised tribunal for consumer protection disputes?

Yes, most claims can be brought before the Sheriff Court (essentially, the court of first instance). Since September 2015, the Sheriff Court has exclusive jurisdiction for claims up to 100,000 GBP (this has been increased from 5000 GBP, via the Court Reform (Scotland) Act 2014, s.39).

[368] The Scottish Civil Justice Council undertook a consultation on pre-action protocols in 2014: http://www.scottishciviljusticecouncil.gov.uk/consultations/scjc-consultations.

Claims above 100,000 GBP can be litigated either in the Sheriff Court or in the Outer House of the Court of Session.

6.1.2 Which courts are competent to hear consumer protection disputes at first instance and in appeals? Please specify the court, in light of the value of the claim (and identify any other factors that are relevant in allocation jurisdiction).

Claims – small, summary and ordinary claims – can be brought before the Sheriff Court. As above, the Sheriff Court has exclusive jurisdiction for claims up to 100,000 GBP. Either the Sheriff Court or the Court of Session, Outer House, can hear claims above 100,000 GBP.

There are sheriff courts for different sheriffdoms within Scotland (6 sheriffdoms in total; 39 Sheriff Courts); a consumer bringing a claim could choose to raise the proceedings either in the court within the jurisdiction of which he or she lived, or in that in which the defender is resident. Appeals heard at first instance in the Sheriff Court are made to the Sheriff Appeals Court, then to the Court of Session and possibly to the UKSC. Appeals heard at first instance in the Court of Session, Outer House are made to the Inner House and then to the UKSC.

6.1.3 What is the nature of the procedure at first instance, e.g. is it a simplified or a summary procedure, and is there an assessment of the merits? Please specify in light of the value of the claim (and identify any other factors that are relevant in allocating jurisdiction).

As noted above, the procedure and applicable civil procedure rules depend on the nature of the claim and its value. The small claims procedure is intended to be a simplified procedure, which is cheap, quick and easy to use. The summary procedure is more complicated, and the ordinary procedure more complicated still.

6.1.4 Please identify the formal requirements that must be satisfied for a consumer dispute to be heard before a court. These might include time limits applicable to the filing of the action/defence, representation requirements etc.

<u>General rules:</u>

The law of prescription in Scotland is in need of reform (has been recognised by the Scottish Law Commission), which has published and Discussion Paper (Scottish Law Commission, Discussion Paper on Prescription, DP 160, February 2016) and opened a public consultation (http://www.scotlawcom.gov.uk/law-reform/law-reform-projects/aspects-of-the-law-of-prescription/).

Rules on prescription operate to place a negative prescription, extinguishing entirely obligations following the expiry of a certain period of time - Prescription and Limitation (Scotland) Act 1973[369].

Prescription and Limitation (Scotland) Act 1973, s.6: claims relating to obligations to pay a sum of money, obligations to pay compensation, contract and breach of contract, prescribe after five years. S.6(1) provides that an obligation will be extinguished after five years, "(a)without any relevant claim having been made in relation to the obligation, and (b)without the subsistence of the obligation having been relevantly acknowledged".

In respect of claims for damages, for any other sum of money, for an injunction, or for collective proceedings, brought under the Competition Act 1998 (which as noted above, may relate to consumer protection), the rules in s.6 of the 1973 Act apply (s.8(1)(2)(b), inserting s47E into the Competition Act 1998).

Consumer-related actions:

s.22A(1), 1973 Act: "An obligation arising from liability under section 2 of the Consumer Protection 1987 Act (to make reparation for damage caused wholly or partly by a defect in a product) shall be extinguished if a period of 10 years has expired from the relevant time"
s.22A(4): "Where a relevant claim is made in an arbitration, [F3the date when the arbitration begins (within the meaning of section 4(4) of this Act)] shall be taken for those purposes to be the date of the making of the claim."
s.22A(5): "The prescriptive period calculated in relation to a relevant cross-border dispute for the purposes of this section is extended where the last day of the period would, apart from this subsection, fall—(a)in the eight weeks after the date that a mediation in relation to the dispute ends; (b)on the date that a mediation in relation to the dispute ends, or (c)after the date when all of the parties to the dispute agree to participate in a mediation in relation to the dispute but before the date that such mediation ends."
s.22A(6): "Where subsection (5) applies, the prescriptive period is extended so that it expires on the date falling 8 weeks after the date on which the mediation ends."
s.22A(7): "For the purposes of subsections (5) and (6), a mediation ends on the date that any of the following occurs—(a)all of the parties reach an agreement in resolution of the dispute; (b)all of the parties agree to end the mediation; (c)a party withdraws from the mediation".

[369] Limitation in Scots law – operating as a procedural bar on bringing further claims - only applies to personal injury claims.

s.46(9) CRA 2015 provides that in respect of claims relating to digital content, the general prescription rules under s.6 of the 1973 Act apply.

From which date does the prescription period run?

Prescription usually runs from the date on which loss, injury or damage first occurs. Under s.11(3) provides that if the party suffering loss was not aware and could not with reasonable diligence have been aware that loss, injury or damage has occurred, the prescriptive period will begin to run on the date on which he comes aware or could, with reasonable diligence, have become aware. Previous interpretations of the rule have provided that in cases of negligence or breach of contract, the prescriptive period will begin to run when the pursuer becomes aware or, or should reasonably have been aware of a loss and that was a result of a fault but not necessarily the identity of the party at fault or the exact amount of the loss suffered. However, in a recent UKSC decision – David T Morrison & Co Limited v ICL Plastics [2014] UKSC48 – the rule was interpreted as meaning that the prescription period begins when the pursuer becomes aware of the occurrence of a loss (regardless of understanding of any fault).

Longstop period:

A 20-year 'longstop' period applies, which provides that an obligation will expire if no claim has been made and the existence of the obligation has not been acknowledged. This applies in respect of all obligations. This period cannot be extended on the basis of the pursuer's lack of knowledge of the loss, damage or injury.

Interruption of the prescription period:

Otherwise, the launch of court proceedings (serving of the writ/summons), acknowledgement of a claim, arbitration (and other ADR), admission of liability and insolvency, as well as procedural steps related to the enforcement of a court judgment will interrupt the prescription period.

Specific and alternative prescriptive periods:

- Personal Injury – 3 years (Sections 17 and 18)
- Defamation – 3 years (Section 18A)
- Harassment – 3 years (Section 18B)

6.1.5 In respect of the claims and relevant procedures available in the national legal system, what kind of relief might be available in consumer protection disputes? (monetary remedies, injunctions, skimming off etc.)?

The remedy depends on the action brought.

6.1.6 Please provide a brief overview of the role of parties and judges in civil proceedings generally (e.g. with reference to the principle of party disposition, the obligation of parties to make and prove factual allegations and to make and provide legal arguments, the possible role of the court). This overview should be brief; these issues will be dealt with in more detail in relation to consumer protection disputes in the questions that follow.

The Sheriff (Small Claims Rules, Chapter 9; Summary Cause Rules, Chapter 8; Ordinary Cause Rules, Chapter 9) (or judge) has an active role to play in leading the proceedings.

For example, Small Claims Rules, Rule 9.2:

"(2) At the Hearing, the sheriff shall-

(a) ascertain the factual basis of the claim and any defence, and the legal basis on which the claim and defence are proceeding; and

(b) seek to negotiate and secure settlement of the claim between the parties.

(3) If the sheriff cannot secure settlement of the claim between the parties, he shall-

(a) identify and note on the summons the issues of fact and law which are in dispute;

(b) note on the summons any facts which are agreed; and

(c) if possible reach a decision on the whole dispute on the basis of the information before him;

…

(4) Where evidence requires to be led for the purposes of reaching a decision on the dispute, the sheriff shall-

(a) direct parties to lead evidence on the disputed issues of fact which he has noted on the summons;

(b) indicate to the parties the matters of fact that require to be proved, and may give guidance on the nature of the evidence to be led; and

(c) fix a hearing on evidence for a later date for that purpose."

"Conduct of hearings: 9.3. (1) Any hearing in a claim shall be conducted in accordance with the following paragraphs of this rule.

(2) A hearing shall be conducted as informally as the circumstances of the claim permit.

(3) The procedure to be adopted at a hearing shall be such as the sheriff considers-

(a) to be fair;

(b) best suited to the clarification and determination of the issues before him; and
(c) gives each party sufficient opportunity to present his case.
(4) Before proceeding to hear evidence, the sheriff shall explain to the parties the form of procedure which he intends to adopt.
(5) Having considered the circumstances of the parties and whether (and to what extent) they are represented, the sheriff-
(a) may, in order to assist resolution of the disputed issues of fact, put questions to parties and to witnesses; and
(b) shall (if he considers it necessary for the fair conduct of the hearing) explain any legal terms or expressions which are used.
(6) Evidence will normally be taken on oath or affirmation but the sheriff may dispense with that requirement if it appears reasonable to do so."

Source(s):

Acts of Sederunt (Small Claims Rules) 2002, SSI No.133
Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 SSI No.1956
Act of Sederunt (Sheriff Appeal Court Rules) 2015 SSI 2015/356

Scottish Law Commission, Discussion Paper on Prescription, DP 160, February 2016
Prescription and Limitation (Scotland) Act 1973

6.2 Small claims

6.2.1 Does a small claims procedure exist in the Member State? If yes, is it a specialised or simplified procedure?

A small claims procedure for cases with a value below 3000 GBP. This type of claim can only be sought in the sheriff court. It is intended to be quick, cheap and easy to use. The limit will be increased to 5000 GBP (Court Reform (Scotland) Act 2014); the small claims procedure will be changed as a simple procedure during 2016 (see below).

6.2.2 What are the value thresholds for claims brought under the small claims procedure? Moreover, are there any other factors that shape the use of the small claims procedure (including the nature of the claim, the area of consumer protection law into which the claim falls etc.)?

3000 GBP, excluding interest and expenses; interest can be claimed (at a standard "judicial" rate of 8%).

Three types of claims can be raised under the small claims procedure:

- A claim for payment of money
- A claim for delivery or recovery of moveable property
- A claim for implement of an obligation

If the consumer wants to raise either the 2nd or 3rd type of claim, he or she must also include an alternative claim for payment (not exceeding £3000). The procedure cannot be used even if the value of the claim is less than £3000, for example, in respect of actions for recovery of possession of heritable property and damages resulting from personal injuries.

6.2.3 What forms must be completed to raise the application? Who assists the consumer in completing these forms?

Forms to be completed for all types of action before the Sheriff Court: https://www.scotcourts.gov.uk/rules-and-practice/forms/sheriff-court-forms

Forms to be completed: Found at Appendix 1 (Forms & Other Miscellaneous Small Claim Forms), Act of Sederunt (Small Claim Rules) 2002 No.133

Form 1, which is the court copy of the summons, the first form to be completed. The first part of the form is called the Principal Summons. The second part of the form at 1a or 1b is called the Copy Summons.

- If you are raising a claim against an individual (including a sole trader) you should then complete Form 1a.
- If you are raising a claim against a company you should then complete Form 1b.

Additional forms can be found here: https://www.scotcourts.gov.uk/rules-and-practice/forms/sheriff-court-forms/small-claim-forms and here: https://www.scotcourts.gov.uk/rules-and-practice/forms/court-of-session-forms

The forms are available at the local sheriff clerk's office; if the consumer raises the issue as an individual, the sheriff clerk can help the consumer to identify the correct form for his or her situation, and can provide assistance. The forms (and additional guidance) are also available online.

6.2.4 How can an application for a small claim be made (e.g. online, by post or in person)?

i. Application

The principal summons is made up of a number of parts, including the statement of claim; this is where the pursuer should set out the circumstances of the claim, including the complaint, what should have happened that did not happen, steps taken to try to resolve the problem, what the defender has failed to do, what the consumer wants to happen. If the claim is about a credit agreement, which is a consumer credit agreement regulated under the Consumer Credit Act 1974, this must also be stated on the form. The copy summons includes much of the same information as the principal summons.

The application for the small claim must be made in person or by post; it cannot be made online (because a small fee has to be paid and this cannot be done online). The principal summons is kept by the court.

ii. Service of the summons

The copy summons must then be sent to/served on the trader/business; this cannot be done by an individual himself but must be done by a solicitor or a sheriff officer or, if the consumer bring the claim as an individual, the sheriff clerk (the sheriff clerk will not serve the summons in any other case). If the address of the trader is unknown, the consumer can use a newspaper or a public notice in the court building to formally 'serve' the information. The sheriff clerk will provide guidance. The sheriff officer can service the summons securely, or if the first attempt has been unsuccessful (whereby the summons will be returned to the court), for an additional small fee.

iii. Following service of the summons

When the consumer serves the summons on the trader, as an individual, the next steps might be one of the following (this must be done before the return date):

1. The trader does not respond: the pursuer will be successful, the court will grant a decree at the first hearing and order the amount the pursuer has claimed to be paid by the trader.
2. The trader responds, admits the claim and agrees to pay you in full: the pursuer must inform the court that the claim has been settled; the pursuer's expenses should be included in this notice to the court as he will be entitled to recover costs.
3. Admit the claim but ask for time to pay: the trader may write to the court in order to apply for a period of time to pay or to notify the court that he wants to go to court to make an offer to pay. The court will notify the pursuer about this response. If the consumer objects to the offer or the offer with time to pay, then a hearing will take place.

If the consumer does not object, the court will not normally call a hearing but will grant a court order on the anticipated date.

4. Deny the claim or challenge the court's right to deal with the case: the trader must then write to the court, indicate why he is denying/defending the claim and might also provide a separate letter to either: 1) challenge the court's jurisdiction, 2) provide his defence, 3) state a counterclaim, 4) dispute the amount claimed. A hearing will be heard on the anticipated hearing date.

Where the summons is served on the trader, as a company, the following steps might be taken:

1. Do nothing
2. Admit the claim and settle the case
3. Dispute the claim and attend court

If the defender does not respond to the application served, the court will likely grant the order sought in favour of the pursuer (with an award of expenses, if appropriate).

6.2.5 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

i. Disclosure, evidence and experts

There is no obligatory disclosure of documents in court proceedings; only documents on which the litigant seeks to rely to prove their case need to be disclosed. If a party wants further disclosure, he must apply to the court for a disclosure order and indicate the category of documents sought. The court will only award the order if the documents are relevant for the case and will not allow "fishing expeditions". It is worth noting that there is a balancing of settlement prospects and costs; while the lack of obligatory disclosure may impede the scope for settlements, it may also generate cost savings.

Written evidence: experts do not need to be authorised by the court but is a matter for each party to decide on the need for, whether to request and whether to lodge evidence provided by an expert before the court. Moreover, a sheriff might require a report from a specialist/expert. The parties might provide for joint experts but this is rather rare; it is done by incidental application and can only be obtained if both parties agree and are prepared to pay for it. Site inspections may also be made if necessary.

ii. Hearings

The civil trial is made up of a number of stages.

A hearing may take place before a date is set for proof. Before the first hearing, the pursuer must gather all paperwork, including the Principal Summons and any additional proof required to establish the claim. The claim will be discussed with the sheriff, who will hear each party in turn and generally encourage settlement. The sheriff will have read the written response of the defender and will want to know why the pursuer does not find it acceptable. If information is available but the claim is not settled at the first hearing, the sheriff will set a proof hearing.

- A "proof" is a hearing of evidence. A proof will be held when there is a factual dispute between the parties.
- The hearing of legal arguments in the Sheriff Court on preliminary legal issues (e.g. relevancy, or jurisdiction) is known as a "debate". This stage does not involve witness evidence.
- A "proof before answer" is a hearing on factual and legal issues and will take place when the court must hear such evidence before addressing the legal issues arising.

In respect of a small claim or summary cause procedure, a hearing will only be held when the defender denies the claim or challenges the court's right to deal with case; or the defender wants to go to court to make an offer to pay; or if the pursuer objects to the application by the defender for time to pay.

The proof provides the court with the opportunity to hear evidence from witnesses. This might include the following (https://www.citizensadvice.org.uk/scotland/consumer/going-to-court/taking-legal-action-against-traders/taking-a-trader-to-court-s/)

- all letters and any other documents about the case should be lodged in court no later than 14 days before the proof hearing and you have to send a list of what you have lodged to the trader
- damaged or faulty goods should be lodged as evidence, if possible, for instance, clothes ruined by a washing machine. If this is not possible, photographs could be used instead and lodged in court
- evidence of expenses should be prepared, and any receipts lodged in court that relate to the case, for example, proof of paying the bill
- if there are going to be witnesses, check that they will be there. It may be helpful to send the witness a formal request to attend. This is known as a citation and can only be made up and delivered by a solicitor or sheriff officer.

If the claim is settled, the sheriff can make a final judgment, i.e. a decree. If the trader does not pay within a reasonable time from the granting of the decree, the pursuer may be able to take

further judicial action to force the trader to pay. If not all information is available, the hearing may be continued, i.e. postponed to a later date.

If further time is required following the hearing, a decision will be issued in writing within 28 days of the hearing. The sheriff clerk will send a copy of the decision to the parties on receiving it from the sheriff.

iii. Decrees/judgments

When a final order is made, the court issues an extract decree, a formal copy of the order which is issued to the successful party and can be used to enforce the order.

1. Decree in favour of the pursuer - the pursuer has been successful, either totally or partially; he court might then order the defender to pay the sum of money claimed, or deliver the article or implement the obligation. In the latter, the court may order the defender to deliver the article or carry out the duty within a specified period. If the defender does not comply with the court's order, the pursuer will be entitled to return to court and ask for an order for payment of the alternative sum claimed.
2. Decree of absolvitor in favour of the defender – the pursuer has not been successful; the decree is res judicata and the pursuer cannot raise the action again.
3. Dismissal – the pursuer has not been successful but the pursuer may be able to raise the same claim again.

6.2.6 Are the costs of the successful party reimbursed?

In most cases, the expenses of the successful party are paid by the unsuccessful party. These expenses are calculated by the Sheriff Clerk and approved by the Sheriff (Chapter 21, Act of Sederunt (Small Claim Rules) 2002 No. 133).

What do expenses include?

- Loss of wages and travelling expenses for you and witnesses
- Solicitor fees
- Costs of having the defender comply with the decree

Under the small claims procedure, the expenses that can awarded are limited by the value of the claim:

- Less than £200 and case was defended – no expenses awarded
- Between £200 - £1500 – case defended - maximum £150
- Between £1500 and £3000 - case defended – maximum 10% of the value of the claim

If the case is not defended, i.e. if the trader responds and admits the claim, the rules on limited expenses do not apply. If the consumer wins the case and the trader has not attempted to defend the claim, a decision on expenses is made by the court (which could then award you all expenses). The sheriff might also decide that the pursuer or defender have behaved unreasonably; in this case, the rules limiting expenses will not apply.

Source(s):

Civil procedure rules in small claims: Act of Sederunt (Small Claim Rules) 2002 No. 133 (https://www.scotcourts.gov.uk/rules-and-practice/rules-of-court/sheriff-court---civil-procedure-rules/small-claim-rules)

Guidance from consumer protection associations: Citizens Advice (https://www.citizensadvice.org.uk/scotland/consumer/going-to-court/taking-legal-action-against-traders/taking-a-trader-to-court-s/)

Reform of the small claims and summary cause procedure:

Parts of the Court Reform (Scotland) Act 2014 came into effect on 22 September 2015, however certain dimensions of reform are outstanding and will come into effect in the

Reforms already introduced:

- Appeals from the Sheriff Court (under ordinary cause, previously to the Sheriff Principal, then Inner House of the Court of Session, or directly to the Inner House, with a possible second/third appeal to the UKSC) will now be made to the Sheriff Appeal Court which will hear all appeals from the Sheriff Court from January 2016 (Act of Sederunt (Rules of the Court of Session, Sheriff Appeal Court Rules and Sheriff Court Rules Amendment) (Sheriff Appeal Court) 2015, SSI 419; Act of Sederunt (Sheriff Appeal Court Rules) 2015, SSI 356)
- Decisions of the SAC will be binding on all sheriffs (cf decisions of the Sheriff Principal which were only binding on sheriffs within that sheriffdom).

Reforms still to be introduced:

- New ‘simple procedure’, which will replace the small claims and summary cause procedure for claims 5000 GBP or less (either for claims for payment, or for positive action on the part of the defender).

- A new tier of judges – 'summary sheriffs' – will be established to deal with hearings under the new 'simple procedure'.
- 'All of Scotland' jurisdiction, which will extend a sheriff's jurisdiction throughout Scotland for the purposes of dealing with specific civil proceedings (in certain cases to be identified by Scottish Ministers prior to proceedings being brought); this would create a single route to civil jury trial in the Sheriff Court.

Simple Procedure Rules consultation
- Open until 02 March 2016
- The simple procedure aims to replace the small claims procedure and summary cause procedures in the sheriff court
- Consultation on the draft Simple Procedure Rules (published 25 November 2015) (http://www.scottishciviljusticecouncil.gov.uk/consultations/scjc-consultations)

6.3 Claims other than small claims

6.3.1 If a consumer protection dispute does not qualify as a small claim, what other procedures are available? What are the value thresholds and other factors determining the use of such procedures?

<u>The summary cause procedure:</u>

- Used for claims of a value between 3001-5000 GBP
- Slightly more complicated than small claims (no recommendation given for legal representation)
- Can only be sought in the sheriff court (which has exclusive jurisdiction in claims of a value up to 100,000 GBP)
- Act of Sederunt (Summary Cause Rules) 2002 No.132

<u>The ordinary cause procedure:</u>

- Used for claims of a value over 5000 GBP
- Complex (legal representation is advised)
- Can be sought in the sheriff court or in the Court of Session, depending on the value
- Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 No.1956, S.223

6.3.2 How can such claims be made? Please specify if the applications can be made online, or by post or in person.

Summary clause procedure

- Fees as above; expenses can be claimed
- Applications have to be sent to the court by post (i.e. in paper form)
- If you are acting as an individual, you do not need a solicitor (but you can be represented by others, as set out above)
- The first form to be completed is Form 1, the court copy of the summons
- If you are raising a claim against an individual you should then complete Form 1a
- If you are raising a claim against a company you should then complete Form 1b
- https://www.scotcourts.gov.uk/rules-and-practice/forms/sheriff-court-forms/summary-cause-forms
- The application can only be served once it has been lodged with the court and the sheriff clerk has issued a warrant authorising the writ to be served on the defender
- This must be done by a sheriff officer or a solicitor; the sheriff clerk cannot serve the initial writ
- On being served, the defender will also receive information on how to defend the action and a form to complete

Ordinary clause procedure

- No set application form
- Fees as above; expenses can be claimed
- Applications have to be sent to the court by post (i.e. in paper form)
- Essentially, raised using an initial writ, depending on the type of claim (https://www.scotcourts.gov.uk/rules-and-practice/forms/sheriff-court-forms/ordinary-cause-forms)
- The application can only be served once it has been lodged with the court and the sheriff clerk has issued a warrant authorising the writ to be served on the defender
- This must be done by a sheriff officer or a solicitor; the sheriff clerk cannot serve the initial writ
- On being served, the defender will also receive information on how to defend the action and a form to complete

6.3.3 What are the rules on the taking of evidence? When is it necessary for the pursuer or defender to appear in court?

See above for summary cause procedures.

6.3.4 Are the costs of the successful party reimbursed?

In most cases, the expenses of the successful party are paid by the unsuccessful party. These expenses are calculated by the Sheriff Clerk and approved by the Sheriff (Chapter 23,
Act of Sederunt (Summary Cause Rules) 2002 No.132; Chapter 30, Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 No.1956).

What do expenses include?

- Loss of wages and travelling expenses for you and witnesses
- Solicitor fees
- Costs of having the defender comply with the decree

Source(s):

Act of Sederunt (Summary Cause Rules) 2002 No.132
Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 No.1956, S.223

Guidance notes for summary cause: https://www.scotcourts.gov.uk/rules-and-practice/guidance-notes/summary-cause-guidance-notes

Guidance notes for ordinary cause: https://www.scotcourts.gov.uk/taking-action/ordinary-cause

6.4 Claims for the issuance of a payment order

6.4.1 Does an order for payment procedure exist in the national system? Is it a simplified procedure?

No specific payment order procedure exists however a claim for the payment of money can be raised under the procedures set out above; the applicable procedure and the relevant court depends on the value of the claim. These procedural rules must be followed.

In respect of all procedures, there is an opportunity to provide a defence; if a claim remains undefended, it will not be called in court but a decree in absence will be made in favour of the pursuer. In the case that the claim is undefended, the procedure thus essentially operates as a simplified procedure for uncontested money order claims.

6.4.2 Which authorities or courts are competent to hear claims for the issuance of payment orders?

Claims for the payment of money will be heard by the Sheriff Court (exclusive jurisdiction in claims of a value below 100,000 GBP) or the Court of Session (claims above 100,000 GBP).

6.4.3 Are there any formal requirements that must be satisfied for the application for the issuance of a payment order to be made (e.g. standard forms, representation by a lawyer, the detail of description required, the need to provide written evidence etc.)?

The use of standard forms in order to commence proceedings is obligatory. These have been set out in detail above. Below, a summary:

Small claims: Commenced by summons (form 1), including a statement of the claim, details of its basis and of the relationship etc., in order to give the defender fair notice of the claim.
(https://www.scotcourts.gov.uk/rules-and-practice/forms/sheriff-court-forms/small-claim-forms)

Summary cause: Commenced by summons (form 1), including a statement of the claim, details of its basis and of the relationship etc., in order to give the defender fair notice of the claim. The form is slightly different from that for small claims.
(https://www.scotcourts.gov.uk/rules-and-practice/forms/sheriff-court-forms/summary-cause-forms)

Ordinary cause in the Sheriff Court: by initial writ (form G1); the pursuer must include "an article of condescendence" setting out the grounds of jurisdiction/facts upon which jurisdiction is based.
(https://www.scotcourts.gov.uk/rules-and-practice/forms/sheriff-court-forms/ordinary-cause-forms)

Ordinary cause in the Court of Session: by summons (form 13.2-A).
(https://www.scotcourts.gov.uk/rules-and-practice/forms/court-of-session-forms)

6.4.4 What information is generally available to the authority or court when a claim for the issuance of a payment order is made?

The information included in the standard forms.

6.4.5 What opportunity is available for a defence/statement of opposition to be advanced? How should this be done and what is its effect? Please specify if the means of advancing a defence differ depending on the value of the claim and the court dealing with it.

Small claims

- The "statement of opposition"

The defender has 21 days to complete a form in response; this includes a statement which gives the defender's version of the claim/facts. The defender can also provide whether he will challenge the court's jurisdiction or advance a defence. The summons served on the defender is stamped with a return date by which the defender must return the form to the court (form 1a or 1b).

Summary cause

- The "statement of opposition"

The defender has 21 days to complete a form in response; this includes a statement which gives the defender's version of the claim/facts. The defender can also provide whether he will challenge the court's jurisdiction or advance a defence. The summons served on the defender is stamped with a return date by which the defender must return the form to the court (form 1a or 1b).

Ordinary cause

- The "statement of opposition"

Ordinary cause in the Sheriff Court: the defender has 21 days to complete a form in response (form 07); the defender should provide notice of intention (i.e. essentially what he intends to do) and send this to the pursuer.

Ordinary cause in the Court of Session: if the defender wants to oppose the claim, he must "enter appearance" by "marking a note" on the summons within three days of the case "calling" (the summons includes a date indicating the period of notice, usually 21 days).

6.4.6 What is the effect if the claim is uncontested, i.e. if there is a lack of defence/statement of opposition?

Small claims

- Effect of "statement of opposition"

The procedure continues; at the first hearing, the sheriff will attempt to negotiate settlement.

- Effect of lack of "statement of opposition"

The pursuer can apply (lodge a motion or minute) for a decree in absence. In order to obtain an enforceable decision, the pursuer must lodge a minute or motion for a decree in absence; the Sheriff or judge might then grant the decree sought or another order. There is still a possibility for the defender to appeal; he can apply to the court for a recall of the decree.

Summary cause

- Effect of "statement of opposition"

The procedure continues; at the first hearing, the sheriff will attempt to negotiate settlement.

- Effect of lack of "statement of opposition"

The pursuer can apply (lodge a motion or minute) for a decree in absence. In order to obtain an enforceable decision, the pursuer must lodge a minute or motion for a decree in absence; the Sheriff or judge might then grant the decree sought or another order. There is still a possibility for the defender to appeal; he can apply to the court for a recall of the decree.

Ordinary cause

- Effect of "statement of opposition"

In both the Sheriff Court and the Court of Session, the defender must lodge his defence; following this, the procedure continues as a defended cause, leading to a proof.

- Effect of lack of "statement of opposition"

The pursuer can apply (lodge a motion or minute) for a decree in absence. In order to obtain an enforceable decision, the pursuer must lodge a minute or motion for a decree in absence; the Sheriff or judge might then grant the decree sought or another order. There is still a possibility for the defender to appeal; he can apply to the court for a recall of the decree.

6.4.7 If the defendant is a consumer, and he or she does not respond to or raise an objection to the issuance of the payment order, does the authority dealing with the claim for

payment order proceedings have the power to examine any issue of consumer protection law of its own motion before treating the action as usual?

The authority will be the court.

6.4.8 What steps must the pursuer take in order to obtain an enforceable decision?

In Scotland, diligence is the name of the legal processes which can be executed against debtors in order to enforce payment of debts. Types of diligence include arrestment of earnings, arrestment of goods or funds in the hands of a third party, attachment of goods or funds, inhibition and adjudication for debt.

Sheriff Officers and Messengers-at-Arms are the competent authorities for enforcement. They are instructed by creditors to enforce court orders or warrants. Court orders or decrees issued by a Sheriff or Court of Session are enforceable; thus, the granting of a decree in the pursuer's (the person raising the action) favour is normally sufficient for executing enforcement. An extract of the decree is usually sufficient for enforcement. Generally, it is not necessary to use a lawyer.

6.4.9 Is this decision final, or can the defendant appeal against it?

If a debtor can convince the court that he is unlikely to default on payment again, the Sheriff can make an order recalling the decision granting an enforcement measure. The debtor, the arrestee or a third party may, by notice of objection, can apply to the Sheriff for an order that recalls or limits the arrestment. This should be done within 4 weeks of the execution of the arrestment.

Once the decree has been executed, there is no scope for appeal against removing or ejection.

Source(s):

6.5 Appeals in consumer disputes

6.5.1 Are appeals possible in all consumer disputes? Please specify for small claims and other types of claims.

	Individual claim of value € 0 – € 5000	Individual claim of value € 5001 – € 20.000	Individual claim of value € 20.001+	Collective claim of value € 0 – 5000	Collective claim of value € 5001-- € 20.000	Collective claim of value € 20.001+

Nature of the procedure at 1st instance	- Small claims - Summary procedure	- Ordinary procedure	- Ordinary procedure			
2nd instance – appeal to?	From Sheriff Court to Sheriff Appeals Court	From Sheriff Court to Sheriff Appeals Court	From Sheriff Court to Sheriff Appeals Court; from Court of Session, Outer House to Court of Session, Inner House			
3rd instance – appeal to?	Court of Session	Court of Session	UKSC			

Appeals heard at first instance in the Sheriff Court are made to the Sheriff Appeals Court, then to the Court of Session and possibly to the UKSC. Appeals heard at first instance in the Court of Session, Outer House are made to the Inner House and then to the UKSC.

6.5.2 Please briefly specify the national appeal procedure, including any requirements to be satisfied for appeals. These might include, but are not limited to, conditions of admissibility, value thresholds, time-limits, the scope of review, and the impact of the appeal on enforcement (provisional enforcement). Please refer to any rules specifically applicable in respect of the claims and relevant procedures outlined above.

General:

From January 2016, all appeals from summary sheriffs, sheriffs and sheriffs principal (at first instance) will be made to the Sheriff Appeal Court (civil) in the first instance.

Appeal from Small Claims: Form 21
Appeal from Summary Cause: Form 31
Appeal from Ordinary Cause: Form A1

Onward appeals are to the Court of Session. Disputes heard at first instance in the Court of Session, Outer House can be appealed to the Inner House (known as a reclaiming motion) and then to the UKSC. The Inner House also hears appeals from the sheriff courts and certain tribunals. From September 2015, for appeals from the Court of Session, IH to the UKSC, leave to appeal must be given, either from the Inner House or, failing such permission, from the UK Supreme Court.

Permission must be granted to appeal. Appeals can only be made with the permission of the Sheriff Appeal Court (civil) or the Court of Session if permission is refused by the Sheriff Appeal Court (civil) and only if either court considers that the appeal would raise an important point of principle or practice or there is some other compelling reason for the Court of Session to hear the appeal.

NB: the Courts Reform (Scotland) Act 2014 will replace the small claims and summary cause procedures. The consultation is ongoing. It should be initiated in 2016; thereafter, appeals from the simple procedure will be made to the Sheriff Appeal Court. It will be possible for further appeals to be made to the Court of Session but only if permission is given by the Sheriff Appeal Court or the Court of Session (if the former refuses permission to appeal); appeals should raise a point of principle or there should be another compelling reason for leave to be granted.

Source(s):

Act of Sederunt (Small Claim Rules) 2002 No. 133, Chapter 23 (Appeals)
Act of Sederunt (Summary Cause Rules) 2002 No.132, Chapter 25 (Appeals)
Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 No.1956, Chapter 31 (Appeals)

Sets of guidelines are also given to pursuers for small claims and summary cause actions: https://www.scotcourts.gov.uk/rules-and-practice/guidance-notes/small-claim-guidance-notes

6.6 Enforcement in consumer disputes

<u>Enforcement of a court order:</u>

<u>Small claims, summary claims and ordinary claims:</u>

In respect of all claims, the enforcement of the court's order is a task for the successful party. The court order or decree issued by a court will be enforceable; an extract of the decree is normally enough for enforcement. The pursuer must send a copy of the extract decree to the defender; the order for payment cannot be enforced until the defender has received a copy. The pursuer should send it by recorded delivery letter to ensure proof of posting.

The procedure commences with a charge for payment being served on the defender. This is a document demanding payment within a prescribed period (normally within 14 days).
Where a time to pay direction or time order has been made: If the defender fails to pay instalments on time, the right to pay by instalments ceases, and the pursuer will be entitled to take steps to recover the entire amount.

Where a time to pay direction or time order has not been made: there is no need to send a copy extract as above, but the court order must be complied within following the 14-day period for appealing the sheriff's decision has passed.

If the consumer brings a claim against the trader, and wins, and the trader does not pay, the consumer can ask a sheriff officer to enforce the decree. Only a sheriff officer can enforce the decree; enforcement requires the payment of a fee. Normally the successful pursuer should try to discuss with the defender before employing a sheriff officer.

The Tables of Fees for Sheriff Officers can be found at:- http://www.legislation.gov.uk/ssi/2012/7/contents/made and for Messenger-at-Arms at:- http://www.legislation.gov.uk/ssi/2012/8/contents/made. The fees will normally be recoverable from the defender debtor.

Enforcing a decree for payment from a Scottish court in England/Wales/NI:

- The process of enforcement will differ depending on whether the defender lives in Scotland, or England/Wales
- For enforcement outwith Scotland, a certificate of money provision must be obtained from the court that granted the decree under the CJCA 1982
- The application for the certificate should be made in writing to the sheriff clerk, with an affidavit sworn by a notary public; sheriff officers may also assist in the completion of this step, by swearing the oath before a notary on the behalf of the applicant
- A process fee must to be paid to the Scottish Courts Service for the application of the certificate

- Once the certificate has been obtained, the successful party must then contact HM Courts and Tribunal Services in England and Wales or the Northern Ireland Courts and Tribunals Service

http://www.smaso.org - enforcement and execution of civil court orders

6.6.1 If the assessment of a consumer protection issue has not been possible at an earlier stage of the proceedings, is it always possible – either ex officio (see section 10 below) or if the consumer raises a possible violation of consumer protection law – for this assessment to be undertaken during enforcement proceedings?

The court order or decree issued by a court will be enforceable; an extract of the decree is normally enough for enforcement. Enforcement is usually carried out by Sheriff Officers and Messengers-at-Arms, instructed by the creditor. The Debtors (Scotland) Act 1987, the Messengers-at-Arms and Sheriff Officers Rules 1991, the Debt Arrangement and Attachment (Scotland) Act 2002, the Bankruptcy and Diligence etc. (Scotland) Act 2007 and the Acts of Sederunt Fees of Messengers-at-Arms and Sheriff Officers regulate their functions and conduct.

This suggests that there is no scope for the dispute to go back to the court for assessment.

Before a debt can be recovered, it is normally necessary that a charge for payment is served on the debtor and that he or she is given a Debt Advice and Information Package. A charge for payment is a formal demand for payment, giving the debtor 14 days to pay; if the sum is not paid, the creditor can use diligence.

For enforcement via the ejection or removal from property, a 'Charge of Removing from Heritable Property' must be served on debtor; the period of charge set out must pass before a removal or ejection can take place, unless the Sheriff has dispensed with this requirement. In other cases, the creditor has to go back to court, e.g. an attachment of goods order (for goods in possession of a debtor, i.e. kept in his house); In deciding whether to make such an order the Sheriff has regard to various matters. These are:

- the nature of the debt (and in particular whether the debt relates to any tax or duty or to any trade or business carried on by the debtor);
- whether the debtor resides in the dwelling house specified;
- whether the debtor carries on a trade or business from that dwelling house;
- whether money advice has been given to the debtor;
- whether any extension of time to pay orders or directions have lapsed; and
- any agreement between the debtor and creditor for the settlement of the debt.

Objections to arrestment can be lodged before the Sheriff Court (that it is unduly harsh, that the Sheriff Officer has not carried out the arrestment properly, or that the arrested funds belong to a third party, or are owned by a third party in common with a debtor).

6.6.2 In the particular case of consumer protection, if a court examines consumer protection law (either ex officio or on the basis of an argument advanced by the consumer), does national procedural law provide that interim measures should 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 final decision will have full effect?

The Draft Rules on the Simple Procedure provide that "The sheriff may make interim orders to protect the claimant's position, or the position of a responding party making a counterclaim, before a hearing" (Rule 7.11) (Draft Rules on the Simple Procedure: http://www.scottishciviljusticecouncil.gov.uk/consultations/scjc-consultations/consultation-on-the-draft-simple-procedure-rules)

Source(s):

Debtors (Scotland) Act 1987
Debt Arrangement & Attachment (Scotland) Act 200
Bankruptcy & Diligence etc. (Scotland) Act 2007

7. ACTIONS FOR COLLECTIVE REDRESS

7.1 Injunctive relief, linking individual and collective actions

7.1.1 If collective proceedings are launched, does national procedural law provide that ongoing individual claims, relating to the same dispute, should be stayed until the collective proceedings are brought to an end? Please specify if this constitutes an obligation on the part of the national judge or if it is at his or her discretion.

See the English Report.

Proposals for collective redress in Scotland: http://www.gov.scot/Publications/2015/01/9932/8

There is no established collective action procedure in Scots law. It was suggested to be introduced by the Gill Review, however no progress has yet been made. Cases raising similar issues have been sisted pending the outcome of a test case; this has worked well in some cases and less well in others where the lack of mechanism for bringing cases together before a single court has led to unnecessary costs as parties have had to litigate individually (also recognised in the Taylor Report, p287, paragraph 9). The Scottish Government has identified three different options: 1) a "case management" procedure for mass litigation; 2) a full class action procedure and 3) a full class action procedure wherein a third party with no direct legal interest, e.g. a consumer organisation, can participate. It has not yet made a decision but anticipates to undertake a consultation on the issue.

7.1.2 If individual proceedings are stayed, please indicate what the effect of the court or ADR entity's decision in the collective action on those individual proceedings would be, i.e. whether the outcome of the collective action binds the consumer bringing an individual action.

There is no established collective action procedure in Scots law.

Source(s):

http://www.gov.scot/Publications/2015/01/9932/8

8. CONSUMER ALTERNATIVE DISPUTE RESOLUTION

8.1 Consumer disputes before ADR fora

8.1.1 Is ADR mandatory for all parties bringing a claim related to a consumer protection dispute?

See Scottish Civil Justice Council, Access to Justice Literature Review: ADR in Scotland and Other Jurisdictions (July 2014) and Scottish Legal Aid Board, Overview report of Alternative Dispute Resolution in Scotland, (Making Justice Work)(2014).

ADR is not currently mandatory however the courts will encourage its use. In-court mediation is available and will usually be suggested by a Sheriff before a small claim (and in some cause summary cause action) is dealt with by judicial means; indeed, in small claims and summary cause actions, the Sheriff is under a duty to seek to negotiate and secure settlement of the claim (Rule 9.2(2) of the Small Claim Rules 2002; Rules 8.3(2) of Summary Cause Rules 2002). Research on the behaviour of Sheriff shows a variety of approaches (Lewis J., The Role of

Mediation in Family Disputes in Scotland, Legal Studies Research Findings No 23, Scottish Office Central Research Unit, 1999)

Scottish Legal Aid Board, Overview report of Alternative Dispute Resolution in Scotland, (Making Justice Work)(2014) has asserted "…if public funds are to be invested in promoting or providing/supporting the use of ADR as an alternative to court procedures there is an argument for advocating that parties should not be allowed the luxury of wilfully ignoring the existence of such services. This would replace the luxury of choice advocated by commercial solicitors' websites with a pragmatic acknowledgement that the system may not be able to sustain the costs of a dual system (the courts and the ADR alternative)."

8.1.2 Please specify if there are limitations to the use of ADR. These might include the nature of the claim (i.e. whether both individual and collective claims are possible), requirements of representation, time limits, value thresholds, etc.

The Scottish Legal Aid Board, Overview report of Alternative Dispute Resolution in Scotland, (Making Justice Work)(2014) has recognised that there are problems with funding, the lack of public publicity, understanding and awareness of ADR, a lack of willingness on the party of solicitors to advise clients to use ADR[370] and a lack of support from the court service, Scottish Government and other agencies.

8.1.3 Can ADR entities issue binding decisions and can they enforce those decisions? If not, please explain how they are enforced.

As a general rules, mediation, conciliation and direct negotiation do not lead to binding results; however, from mediation and conciliation, the mediators/conciliators and the parties may seek to identify a legally-binding written agreement at the conclusion of the mediation/conciliation process. With direct negotiations, the parties can also seek to identify a binding agreement.

Generally, ombudsmen decisions are not binding on consumers; as a result, they can then go to court; however, depending on the scheme used, the recommendation or ruling may be made binding. In contrast, decisions of arbitrators (usually from the Chartered Institute of Arbitrators (CIArb)) are binding.

[370] The Law Society of Scotland has issued guidance advising solicitors to highlight the use of ADR to clients: Law Society of Scotland, *Guidance related to rule B1.9: Dispute Resolution.*

8.1.4 Does national law provide that limitation periods applicable to judicial actions should be suspended while ADR is ongoing?[371]

Usually, as noted in Scottish Legal Aid Board, Overview report of Alternative Dispute Resolution in Scotland, (Making Justice Work)(2014), ADR is usually indicated by the Sheriff or Judge as an option when the case is lodged in court. As such, judicial proceedings will be suspended.

Limitation and prescription periods should be suspended in order to encourage ADR in domestic (Prescription and Limitation (Scotland) Act 1973, s.19 for arbitration) and cross-border cases (Prescription and Limitation (Scotland) Act 1973, s.14 as amended by Cross-Border Mediation (Scotland) Regulations 2011, Regulations 4-6). For example, if the parties agree to arbitration, the Arbitration (Scotland) Act 2010, s.10 provides the court seised should stay proceedings if one of the parties has so requested.

8.1.5 Please specify if national law establishes rules providing for recourse to judicial action following an (unsuccessful) ADR hearing[372].

Unless the decision is binding, it will be possible to go to court. Even with arbitration, Part 5 of Schedule 1 of the Arbitration (Scotland) Act 2010 provides that the court has certain powers in respect of ongoing arbitration; Part 8 provides that an appeal can be made to the Court of Session, Outer House on certain procedural issues.

8.1.6 Is there judicial review of decisions and awards made by ADR entities? If so, by which court or tribunal is this oversight made? Is it ordinary or specialised?

Judicial review can be made of public and private decision-makers; Diamond v PJW Enterprises Ltd 2004 SC 430.

Arbitration: Edwards, Petitioner, (9 November 1993 unreported), Lord Clyde (option of arbitration in respect of a decision of a disciplinary committee not a bar to judicial review).

Source(s):

Prescription and Limitation (Scotland) Act 1973

[371] The Directive on Consumer ADR provides that "the existence of an effective system for collective claims and easy recourse to ADR should be complementary". Consumer ADR is relevant not only for individual claims but also for collective ones; it can provide consumer with a means to reduce costs and save time.
[372] Per Arts.10-12, Directive on Consumer ADR.

Cross-Border Mediation (Scotland) Regulations 2011
Scottish Legal Aid Board, Overview report of Alternative Dispute Resolution in Scotland, (Making Justice Work)(2014)
Scottish Civil Justice Council, Access to Justice Literature Review: ADR in Scotland and Other Jurisdictions (July 2014)

9. THE EXAMINATION OF CONSUMER PROTECTION LAW IN NATIONAL PROCEDURAL LAW: RESPECT FOR THE PRINCIPLES OF THE EFFECTIVENESS AND EQUIVALENCE OF CONSUMER PROTECTION LAW AND EX OFFICIO CONTROL

9.1 The basis of ex officio control of consumer protection law in national law

9.1.1 Is it clear in the national legal system when consumer protection law should be applied ex officio? Is the ex officio control of consumer protection law established as an obligation or as a (discretionary) power of the judge in national procedural law?

See the English Report.

9.1.2 If there is an understanding of ex officio control of consumer protection law in the national legal, what is this control understood to encompass/not cover?

See the English Report.

9.1.3 Is the party who claims to be a consumer required to establish his or her consumer status, the existence of a consumer contract and that consumer law applies to the dispute? Is this required even if the consumer has no legal representation?

The determination of whether a party to the dispute is a consumer might be deemed by the judge to be a matter for proof; in this instance, an examination of the whole facts and circumstances surrounding the contract will be undertaken. This would be the case in particular where the party is also engaged in a business. The determination of the party's status will be examined in particular detail where an issue of jurisdiction arises.

The Draft Rules on the Simple Procedure provides that "The sheriff must ensure that parties who are not represented, or parties who are not legally represented, are not unfairly disadvantaged." (Rule 4.3, Draft Rules on the Simple Procedure: http://www.scottishciviljusticecouncil.gov.uk/consultations/scjc-consultations/consultation-on-the-draft-simple-procedure-rules)

9.1.4 What information is available to judges and dispute resolution facilitators hearing consumer protection disputes? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a consumer protection dispute to be heard and b) for the court to engage in ex officio control?

The information that is available in the claim forms and that the parties provide. National procedural law does not provide for minimum information to be provided (except as established in those forms).

9.1.5 Who is responsible for providing this information? If the necessary information is not available to the court (or dispute resolution facilitator), is he or she under an obligation to investigate in order to be able to respond to a relevant consumer protection dimension of the case?

As a general rule, the responsibility lies with the parties. Generally, the consumer will have to prove that he is a consumer. Kenneth Ramsden v Santon Highlands Limited, A558/13, Outer House, Court of Session, 2 June 2015 (paragraphs 35 and 79). However, for claims before the Sheriff Court in particular, the sheriff has an active role to play (see below), and can essentially decide on and shape the procedure, explaining its form to the parties.

9.1.6 Will the court provide the consumer with any assistance in gathering factual information or advancing his legal arguments before the court? Please respond for the situation where: a) the consumer has legal representation and b) the consumer has no legal representation.

As above, except that where a claimant is without legal assistance (a party ligigant), Sheriffs and Judges will typically adopt a helpful stance, consistent with maintaining the impartiality of the judicial office. Generally, the parties are responsible, however, as noted above, the Sheriff or Judge might have a role to play in guiding the proceedings. See for example, the discussion on the Small Claims Rules, Rule 9.2 above. Per C. Hennessy, Civil Procedure and Practice (Greens, Edinburgh; 4th edn., 2014), para.12.04, the "primary responsibility for determining the nature and extent of the issues" lies with the sheriff; where both parties have legal representation, the sheriff will expect that they can "express their claim and defence accurately". Moreover, the sheriff can "in order to assist in the resolution of the disputed issues of fact, put questions to the parties and to the witnesses and may also explain any legal terms or expressions…if he considers this necessary for a fair conduct of the hearing".

Source(s):

C. Hennessy, Civil Procedure and Practice (Greens, Edinburgh; 4th edn., 2014)
Acts of Sederunt (Small Claims Rules) 2002, SSI No.133, Rule 9.2

9.2 The possibility for ex officio control of EU consumer protection law in dispute resolution proceedings

9.2.1 Is ex officio control of consumer protection law always possible when the procedure involves a full assessment of the claim on its merits?

No case law on ex officio found yet. Per s.71 CRA 2015, ex officio control – at least in cases of unfairness – should be possible.

However, as noted, the Small Claims Rules 9.2 obliges the sheriff to ensure certain requirements are satisfied. Per C. Hennessy, Civil Procedure and Practice (Greens, Edinburgh; 4th edn., 2014), para.12.04, the sheriff "must ascertain the factual basis of the claim and any defence and the legal basis on which the claim and defence are proceeding (fn. The expression of the statement of claim may not make either of these points clear, and in certain circumstances the defence as expressed at the hearing might not be very clear either. The sheriff is obliged to assist the parties to clarify such matters.); the sheriff must seek to negotiate and secure settlement of the claim…only if the sheriff cannot secure settlement of the claim, shall he identify the issues of fact and law which are in dispute; he must identify and note the disputed issues on the summons and not on the summons any facts which are agreed". Also in a summary cause action, per C. Hennessy, Civil Procedure and Practice (Greens, Edinburgh; 4th edn., 2014), para.11.11, the sheriff "is required to take an interventionist's role (fn.26, See Penman v Hunter Unreported (Sh.Ct) February 13, 2008, Sheriff Principal Bowen, in which the unsuccessful pursuer argued that the sheriff had gone "fair too quickly" at the rule 8.3 hearing. The sheriff principal concluded that the sheriff had been perfectly entitled to decide the case there and then.) He must establish what the nature of the dispute, both in fact and in law, happens to be…He is required to identify and note on the summons the issues of fact and law which are in dispute". It is not clear that this necessarily amounts to ex officio control, however the sheriff and the judge of the Court of Session has the power to regulate his own procedure, meaning that ex officio control could be integrated without the need, for e.g. statutory intervention.

9.2.2 Can ex officio control be exercised even when the procedure does not involve an assessment on the merits?

No case law on ex officio found yet.

As a general rule, in the case of an appeal, for example, additional evidence cannot be advanced at this stage; however, s.27 of the Sheriff Courts (Scotland) Act 1907 allows a sheriff on appeal to hear additional evidence. This is very rare and would likely lead to the case being remitted back to the original sheriff for proof (MacPhail, Sheriff Court Practice, 2rd edn., para.18.81).

9.2.3 Please indicate if, per national procedural law, ex officio control can be exercised at the following stages of the procedure:

	Courts		Other dispute resolution facilitators	
	Possible to exercise ex officio control	Not possible to exercise ex officio control	Possible to exercise ex officio control	Not possible to exercise ex officio control
Ordinary proceedings	X - for unfairness	N/A	X - for unfairness	N/A
Small claims	X - for unfairness	N/A	X - for unfairness	N/A
Payment order	X - for unfairness	N/A	X - for unfairness	N/A
Provisional measures	X - for unfairness	N/A	X - for unfairness	N/A
Proceedings linked to enforcement				
Enforcement proceedings	N/A	N/A	N/A	N/A
- Enforcement of payment order	N/A	N/A	N/A	N/A
- Enforcement of arbitration award	N/A	N/A	N/A	N/A
- Enforcement of mortgage	N/A	N/A	N/A	N/A
- Enforcement of notarial deed	N/A	N/A	N/A	N/A
Appeal proceedings (please specify:)	N/A	N/A	N/A	N/A

9.2.4 What does ex officio control encompass in national procedural law?

It is also important to consider public policy, which – understood broadly – will serve as a basis for the unenforceability of a contract or contract term; Illegality is a broad concept that will include but is not restricted to public policy (W. McBryde, The Law of Contract in Scotland (Thomson, Edinburgh; 2007), para.19-14-19-17).

Source(s):

Acts of Sederunt (Small Claims Rules) 2002, SSI No.133
W. McBryde, The Law of Contract in Scotland (Thomson, Edinburgh; 2007)
C. Hennessy, Civil Procedure and Practice (Greens, Edinburgh; 4th edn., 2014)

9.3 Other procedural mechanisms for the equivalent and effective protection of EU consumer law

9.3.1 Does national procedural law provide that rules of EU consumer law (as well as rules that aim to satisfy EU consumer law objectives) should be understood as having equal standing to national rules of public policy (which is to say, that for the purposes of domestic law, the consumer protection provision is understood to have equal standing to a rule that must be raised ex officio by the national court)?

No ex officio consumer case law found yet. However, yes, it seems that it does, to the extent that when a matter concerns a right derived from EU law, the courts will rather refer to the regulation or implementing legislation (or directly to the source of the right) as opposed to referencing common law mechanisms, e.g. public policy for unfairness.

9.3.2 If ex officio control is not possible in certain types of proceedings or at a certain stage of proceedings (or for any other reason), does national procedural law provide for an alternative way of assessing consumer protection law?

In court advice centres and in court mediation services – as well as Citizens Advice – and other organisations are intended to provide advice and assistance to consumers.

Source(s):

9.4 Ex officio control in payment order procedures

9.4.1 What information is available to the judge when a claim for the issuance of a payment order is made? Does national procedural law provide for rules as to the minimum factual information that must be available: a) for a claim for the issuance of a

payment order to be granted and b) for the court to engage in ex officio control before a payment order is issued?

There is no specific payment order procedure in Scots law.

9.4.2 What considerations will be assessed ex officio by the court (or other competent authority) before a payment order is issued?

There is no specific payment order procedure in Scots law.

9.4.3 How is the consumer informed about the claim to issue a payment order against him or her? Does national procedural law make any provision for steps to be taken to ensure that consumers are informed of the claim for the issuance of a payment order so that he or she can contest it?

There is no specific payment order procedure in Scots law.

9.4.4 If the consumer objects to the claim, what is the next step? Do the proceedings continue, in the context of which ex officio control can be exercised? Or are the proceedings transferred to ordinary proceedings for analysis on the merits of the claim?

There is no specific payment order procedure in Scots law.