The ex officio Application of EU Consumer Protection Law by National Courts

Findings of the Study

JUST/2014/RCON/PR/CIVI/0082

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Overview

A. The Study JUST/2014/RCON/PR/CIVI/0082

B. EU Consumer Law in National Courts

C. Ex Officio Application of Consumer Law
   I. Legal Foundations: Effectiveness and Equivalence
   II. Addressees: National Judges and National Lawmakers

D. Different Areas of Application
   I. Ordinary Proceedings in the First Instance
   II. Appellate Proceedings
   III. Payment Orders and Default Proceedings
   IV. The Enforcement Stage of Mortgages and Notarial Deeds

E. Possible Improvements
The Consortium working in the Study

Max Planck Institute Luxembourg
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28 national reporters
A. The Procedural Law Study - Sources of Information

1. **Legal Desk Research and Archival Research** (aimed at collecting statistical data and at detecting relevant case-law)

2. **Online Questionnaire** (aimed at highlighting perceptions from stakeholders – 848 answers received)

3. **246 Interviews** (aimed at getting empirical information from stakeholders)

4. **28 National reports** (aimed at assessing the collected information from the different EU Member States)
SurveyMonkey Online Survey: 260 responses from various types of stakeholders, including consumers, lawyers, judges, consumer protection associations.
B. EU Consumer Law in National Courts

The typical nature of a consumer protection dispute is domestic and not European

- EU consumer law is based on Directives. At the national level, national implementing laws supersede the EU background.

- Most consumer disputes are dealt with by the civil courts of EU Member States, where the case-law of the CJEU is often unknown, especially when it relates to cases coming from other Member States.
Consumer protection in the case-law of the CJEU

Number of decisions per MS (2006-2016)
C. Ex Officio Application of Consumer Law

I. Legal Foundations: Equivalence and Effectiveness

1. EU consumer law is applied and enforced in the context of the civil procedural laws of the EU Member States.

2. These are dominated by the principle of party disposition.

3. According to this principle, the parties initiate the proceedings, they provide the court with the facts and legal arguments.

4. The consumer being the weaker party is disadvantaged in this context.
I. Legal Foundations: Effectiveness and Equivalence

The application of the national procedures is controlled by the EU principles of equivalence and effectiveness.

In the context of the Unfair Contract Terms Directive, the Court of Justice has developed the obligation of the national judge to apply consumer law on his own motion in order to protect the weaker party in civil proceedings.

This obligation has been described as “ex officio application” of EU consumer law.
Preliminary references (Art.267 TFEU) concerning the ex officio examination of EU law (2000-2016)
C. Ex Officio Application of Consumer Law

Interviews and the national reports demonstrate that the attitude of national laws (and of individual judges) regarding ex officio is very diverse and that the case-law of the ECJ is not well understood. As a result, the Study found considerable inequalities and shortcomings in the application of EU consumer law in many national judicial systems.
C. Ex Officio Application of Consumer Law – Examples of Answers Given by Interviewees

Belgium: However, this is not done by all Belgian judges. Sometimes, they are simply not aware of it. There is case law, but there are no clear legal rules.

Croatia: Courts do not understand this concept all, nor do they apply it.

Danish lawyer (14 years experience): “It is unclear to what extent Danish judges have an obligation to raise consumer law ex officio. In my practical experience, I have never witnessed a Danish judge raising EU consumer protection law of his/her own motion.”

Irish lawyer: “In practice, a Judge will never bring up a UCTD point of his own motion.”
C. Ex Officio Application of Consumer Law – Examples of Answers Given by Interviewees

Lithuania, CPA: ”The ex officio control of consumer protection is established in Lithuanian law as an obligation on the part of the court. Some case law also stresses that but in many cases still judges are quite passive and consumers have to establish all the facts and prove that consumer law was breached.”

Luxemburgish academic: “It seems to be particularly unclear which are the criteria for the ex officio application of consumer law and how to reconcile the principle of neutrality of the judge with the obligation to raise legal grounds in order to protect the weaker party when there is no such obligation provided for in the civil procedural law. From the interviews I have conducted with the Luxembourg judges, it appears that it would be particularly helpful if the matter would be regulated in detail by national procedural law, following the model, for instance, of French law.”
C. Ex Officio Application of Consumer Law

II. Addressees: National Judges and National Lawmakers

Usually, national judges ask the ECJ about their obligations (and empowerment) under the ex officio principle in the preliminary reference procedure (Art. 267 TFEU). Therefore, the answer given by the Court usually addresses the procedural obligation of the national judge. However, the case-law of the ECJ has also triggered reforms of national civil procedures (Ex. France, Spain).
SurveyMonkey, Online Survey: Is the ex officio control established in the national procedure
1) as an obligation of the court or
2) as a general power of the court
3) situation is unclear.
D. Different Areas of Application

I. Ordinary (first instance) Proceedings

Here, the ex officio obligation empowers national judges to elucidate legal and factual issues by actively asking the parties about the nature of the transaction and their legal status.

Generally, civil procedural law should empower the judge to give a “helping hand” to the weaker party (the consumer).

In particular, this obligation should apply when the consumer is not represented by a lawyer. However, the representation of the consumer by a lawyer (or by a consumer association) shall not prevent the judge from exercising an active role.
D. Different Areas of Application

II. Appellate Proceedings

In the case that the ex officio application is not (sufficiently) implemented by the courts of first instance, an appeal (and also a second appeal) might be based on the lack of respect of the ex officio obligation by the inferior court.

Appellate courts are bound by the ex officio obligation in the same manner as first instance courts.

Member States should make clear in their procedural laws that the failure of a court to apply EU consumer law ex officio entails a right to appeal.
D. Different Areas of Application

III. Payment Order Proceedings

In these proceedings, the consumer is usually the defendant and, quite often, does not appear to actually defend the claim. In this constellation, ex officio control must guarantee that EU consumer protection law is both applied, and implemented, at the application stage or at an early stage of enforcement. In either situation, the ex officio control must be made by a judge.
IV. Enforcement of judgments and other titles

For titles made without the involvement of a judge (mortgages, notarial deeds), a review at the enforcement stage is needed.

In this respect, the ex officio control requires two additional safeguards:

1. enforcement procedures must provide for an efficient (ex post) control of these titles by a judge.

2. consumer must be informed at the enforcement stage about any available relief where ex officio control will be exercised.
D. Different Areas of Application

IV. Enforcement of judgments and other titles

Enforcement proceedings must provide for protective measures aimed at preventing adverse effects for the consumer like the loss of the family home (consequences which are often irreversible).

In this context, special attention must be given to the situation of the vulnerable consumer incapable of efficiently using procedural remedies and engaging in procedural acts without additional assistance.
E. Possible Improvements

At present, EU procedural consumer protection is unsatisfactory as the interplay between domestic procedures and applicable EU standards is not clear. The EU Commission should envisage initiatives:

1. Improving awareness of stakeholders (especially first instance judges) by specific training

2. The publication of a guide on the efficient application of consumer law by national courts (destined for judges, consumers and CPA).

3. Improving awareness of consumers in specific situations: ex. the information campaign of the Irish government concerning housing disputes.
Home repossession

- Introduction
- Legal issues affecting reposessions
- The legal processes involved in repossession
- Other debts and loans
- Getting help

Introduction

When you take out a mortgage to buy a property, you offer the property as security for the mortgage debt. If you are unable to pay the mortgage, you may be faced with repossession.

If you are having difficulties paying your mortgage, you should talk to the lending institution as soon as possible. Our overview of mortgage debt describes what you can do if you risk falling into arrears, and we also describe the codes of conduct for mortgage lenders. Your lender must must take certain steps to deal with any problems you have in paying your mortgage. Repossessing your home should be the lender's last resort.

Several organisations, including the Money Advice and Budgeting Service (MABS) offer advice and support to people who are facing repossession – see ‘Getting help’ below. MABS is centrally involved in a new aid and advice scheme for people who are in serious mortgage arrears and at risk of losing their home, as part of Abhaile, the national Mortgage Arrears Resolution Service.

Other debts and loans

Even if you have no mortgage on your home, it could be in danger of repossession if you have other debts. If you build up other debts and are unable to repay them then the people to whom you owe money may register that debt as a judgment mortgage against your house, flat or apartment and seek to recover their money in that way - see ‘Other debts and loans’ below.

If your home is being repossessed

If you have exhausted all the options open to you, the lender can repossess your home in order to recover the amount you owe. If you do not agree to the repossession, the lender may take you to court. The legal processes are described in detail below.

When your home is to be repossessed, you will need to find somewhere else to live. You can apply to the local authority (county or city council) to be housed. There are also a number of voluntary housing associations which provide social housing. If you rent from a private landlord, you may qualify for a Rent
E. Possible Improvements

4. Regarding the adjudication of consumer disputes, a Directive on Consumer Procedural Protection might be envisaged covering i.a. the following issues:

- a legal presumption that a natural person when concluding a contract for sales and/or services with a professional acted as a consumer.
- a legal clarification that judges must apply EU consumer law on their own motion and give a helping hand to the weaker party
- in payment order proceedings a specific remedy either at the application or enforcement stage which guarantees the ex officio control by a judge
- in enforcement proceedings there must be an effective remedy in case the title was obtained without any involvement of a judge. Specific protection must be afforded to vulnerable consumers.
Thank you for your attention.
Additional information at:
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