

## PART XII

### SPECIAL SUBJECTS

#### CHAPTER 6

#### CONSUMER PROTECTION PROCEEDINGS

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## 1 INTRODUCTION

- 1 Consumer protection proceedings can be defined as a set of procedural rules and mechanisms aimed at implementing consumer policy and enforcing consumer rights.<sup>2</sup> The enforcement of consumer rights occurs in a particularly widespread manner, both on an individual and collective level, both through private and administrative law mechanisms, and both in judicial and out-of-court settings.
- 2 Unlike family law or labour law proceedings, the unique nature and characteristics of consumer protection proceedings as a special subject matter with specific procedural rules may not be immediately apparent. With a few exceptions, there are almost no specialized consumer courts in the world. As opposed to environmental proceedings, for instance, technical experts are not involved. After all, there is no need for special expertise on the part of the judges, as the subject matter is mainly advanced contract law. Moreover, there are no noteworthy matters to report on interim measures and the remedies (such as the appeal procedure). Finally, there is no specific chapter in any civil procedure code that comprehensively regulates the procedure.<sup>3</sup>
- 3 However, it will become clear in the course of this chapter that consumer litigation deserves to be recognized as a special subject matter which is governed by a set of procedural rules with a unique nature. This is not only because, despite their often low value, consumer litigation receives considerable attention in legal scholarship. It is also because the various procedural rules and regulations of consumer law, although not comprehensive or self-contained, differ to varying degrees from general procedural rules throughout the world.

Within continental European legal systems, for example, the individual enforcement of consumer rights is one of the areas where the impact of the European Union (EU) has been particularly noticeable. With regard to the ex officio power of the court, ie, the

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<sup>2</sup> We acknowledge that we could have titled this chapter ‘consumer proceedings’. Some scholars argue that ‘consumer protection law’, initially established as a policy tool to regulate market behaviour and safeguard vulnerable individuals in the consumer society, has evolved into ‘consumer law’, a set of rules in favor of market participants who purchase goods and services globally (H-W Micklitz, ‘The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law: A Bittersweet Polemic’ (2012) 35(3) Springer 283, 285). Nevertheless, we adhere to the use of ‘consumer protection proceedings’ because the aforementioned viewpoint is not universally embraced. Furthermore, the term ‘consumer protection proceedings’ is utilized to explicitly incorporate the regulatory aspect of consumer enforcement (see P Cartwright, ‘Redress compliance and choice: enhanced consumer measures and the retreat from punishment in the consumer rights act’ (2016) 75(2) Cambridge Law Journal 271, 272), which we also address in this chapter in the context of the collective dimension. In the same vein, Zeno-Zencovich and Paglietti speak of ‘*protection procédurale des consommateurs*’ (V Zeno-Zencovich and M-C Paglietti, ‘Le droit processuel des consommateurs’ (2014) (3) Revue de Droit International et de Droit Comparé 321, 324).

<sup>3</sup> Yet there are exceptions. In Brazil, for example, the Código de Proteção e Defesa do Consumidor (Code of Consumer Protection and Defense) (Brazil), which was introduced by the Lei nº 8.078, de 11 de Setembro de 1990 (the Law nº 8.078 of September 11, 1990) contains a title dedicated to Consumer Defense in Court (Title III). Nevertheless, this chapter mainly deals with collective redress.

possibility or obligation for the court to protect consumer rights of its own motion, the question even arises as to whether the jurisprudence of the Court of Justice of the European Union (CJEU) is consistent with the fundamental principles and doctrines underpinning the enforcement of individual rights in other areas of law (such as the principle of party disposition).<sup>4</sup>

- 4 Another example is collective redress procedures. In many EU Member States, this enforcement method is limited to consumer claims. Likewise, although there are no consumer courts in the strict sense of the word in the EU Member States, there is an EU-wide system of alternative dispute resolution (ADR) bodies, known as ‘qualified entities’, which provide simple, quick, and inexpensive out-of-court solutions to disputes between consumers and traders.<sup>5</sup> Although these ADR bodies are not intended to replace court proceedings and should not deprive consumers or traders of their right to seek redress before the courts,<sup>6</sup> they are to some extent functional equivalents of consumer courts.
- 5 Even in jurisdictions where one would not expect to find different procedural rules for consumers, such as the United States, a closer analysis reveals their existence. For example, within the general class action regime, the Class Action Fairness Act (CAFA) has introduced divergent rules that benefit consumers.
- 6 The purpose of this chapter is to provide a global overview of the different procedural rules and enforcement mechanisms for consumers. The starting point is always the extent to which procedural rules for consumers differ from the general framework. Obviously, comprehensive coverage is not feasible and the focus is primarily on several civil law jurisdictions (namely Belgium, the Netherlands, France, Germany, and Austria), common law jurisdictions (namely Canada, the United States, and England & Wales), as well as the EU legal order. Where possible, we have sought to complement our findings with insights from other jurisdictions (such as Brazil, Argentina, China, and Taiwan). In addition, our study has been able to draw on previous, impressive comparative legal

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<sup>4</sup> V Trstenjak and E Beysen, ‘European Consumer Protection Law: Curia Semper Dabit Remedium?’ (2011) 48(1) *Common Market Law Review* 95, 95.

<sup>5</sup> Recital (5) Directive on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, 2013/11/EU of 21 May 2013 (EU).

<sup>6</sup> Recital (45) Directive on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, 2013/11/EU of 21 May 2013 (EU).

research in this area—in particular the work of Saumier and Micklitz,<sup>7</sup> Hess and Law,<sup>8</sup> Law and Richard,<sup>9</sup> and Howells.<sup>10</sup>

- 7 This chapter is structured as follows: before getting to the core of our contribution, in a first section, we will highlight some key aspects of consumer protection proceedings (2). We will look at the specific features that characterize this type of proceeding, characterize this type of procedure, reflect on its rationale and justification, and provide an important terminological clarification regarding the concept of ‘consumer’.
- 8 Then, in a new section (3), we will focus on consumers who, on an individual basis, choose to assert their rights or contemplate doing so, or who are summoned to appear before a court by a professional adversary. There, we will again encounter the dichotomy between, on the one hand, procedural rules that can be specifically tailored to the facts of the case and, on the other hand, the flexible adaptation of general procedural rules to fact-specific circumstances through the proper exercise of judicial discretion. We will also discuss this in the introductory chapter of our segment.
- 9 The following section (4) starts from the premise that, while individual consumers may have small claims, the collective harm caused to consumers by a particular issue can be significant. In other words, small economic losses will often make formal court procedures unaffordable, although they may have a significant impact on consumer welfare. As a result, all legal systems tend to incorporate a collective dimension in the enforcement of consumer rights, which can be divided into collective private enforcement and public enforcement by administrative authorities. As will be shown, these two types of enforcement are not mutually exclusive, but are sometimes interconnected (eg, administrative authorities with standing to bring collective actions). The purpose of this section is not to provide an exhaustive explanation of collective enforcement methods (as other parts of the CPLJ project are devoted to this), but rather to identify where the collective enforcement of consumer rights differs from the collective enforcement of other rights.
- 10 The final section of this chapter (5) is devoted to consumer ADR, which is a somewhat different issue. In civil law systems, particularly in the EU, consumer ADR is primarily administered by state actors and is designed to enable individual consumers to enforce their rights efficiently and effectively, as well as to obtain a collective perspective on companies that have recurring problems. On the other hand, in common law systems,

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<sup>7</sup> H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018).

<sup>8</sup> B Hess and S Law, *Implementing EU Consumer Rights by National Procedural Law. Luxembourg Report on European Procedural Law* (Verlag C.H. Beck 2019).

<sup>9</sup> S Law and V Richard (ed), *Public and Private Enforcement of Consumer Law – Insights for Luxembourg* (Nomos 2021).

<sup>10</sup> G Howells (ed), *Handbook of research on international consumer law* (Edward Elgar Pub Inc 2018); G Howells and R James, ‘Litigation in the Consumer Interest’ (2002) 9(1) *ILSA Journal of International & Comparative Law* 1, 1-56.

particularly in the United States, there is a perception that consumer ADR amounts to a defendant-driven privatization of the justice system, potentially diverting consumers away from traditional litigation.

## 2 KEY ASPECTS OF CONSUMER PROTECTION PROCEEDINGS

- 11 In this section, we will first examine the distinctive features of consumer protection proceedings (2.1). We will then consider their underlying rationale and justification (2.2), and conclude with an important terminological clarification of the term consumer (2.3).

### 2.1 Specific Characteristics

- 12 Generally, if consumer protection proceedings are to be characterized as a special subject matter with specific procedural rules, it is one that is relatively new (2.1.1), which often transcends national or state law (2.1.2) and where regulation takes a pointillist form (2.1.3). In addition, there is a heterogeneity of enforcement mechanisms (2.1.4).

#### 2.1.1 A Relatively New Field of Law

- 13 The identification of the consumer as a discrete party is a product of the latter half of the previous century.<sup>11</sup> In the slipstream of President John F. Kennedy's landmark Special Message to the Congress on Protecting the Consumer Interest (15 March 1962), consumer policy and law have undergone a gigantic development.<sup>12</sup> This is mainly due to technological changes and shifts in the economy from one based mainly on individual relationships to one in which production, distribution, and consumption are mass phenomena.<sup>13</sup>
- 14 In continental European systems (such as France), the law of consumer protection has experienced significant growth since the mid-1970s.<sup>14</sup> Subsequently, initiatives have been set in motion at the international and supranational levels. In 1985, a significant measure was taken towards the advancement and safeguarding of consumer welfare worldwide, with the implementation of the United Nations Guidelines for Consumer Rights. These guidelines comprise a set of well-defined and concise consumer rights. At the EU level, although some EU directives were adopted as early as the mid-1980s,<sup>15</sup> the

<sup>11</sup> G Howells and R James, 'Litigation in the Consumer Interest' (2002) 9(1) ILSA Journal of International & Comparative Law 1, 2.

<sup>12</sup> H-W Micklitz and G Saumier, 'Enforcement and Effectiveness of Consumer Law' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 3, 3.

<sup>13</sup> M Cappelletti, 'Alternative Dispute Resolution Process within the Framework of the World-Wide Access-to-Justice Movement' (1993) 56(3) Modern Law Review 282, 284.

<sup>14</sup> P Minor, 'Consumer Protection in French Law: General Principles and Recent Developments' (1984) 33(1) The International and Comparative Law Quarterly 108, 108.

<sup>15</sup> These directives include the Council Directive relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (84/450/EEC of 10 September 1984 (EU)).

first major consumer directive was adopted in 1993: Directive 93/13/EC on Unfair Contract Terms in Consumer Contracts.<sup>16</sup> Consumer protection laws in East Asian countries also began to flourish in the early 1990s. The Law on the Protection of Rights and Interests of Consumers in the People's Republic of China was enacted in 1993.<sup>17</sup> Similarly, Taiwan enacted its Consumer Protection Law in 1994, which provides consumers with a wide range of legal remedies against businesses.<sup>18</sup>

- 15 Although the UN Guidelines already emphasized the importance of effective consumer redress in 1985,<sup>19</sup> attention to procedural law has only emerged in most countries in a second wave of the implementation of consumer policy.<sup>20</sup> At the EU level, for example, mechanisms to ensure that businesses comply with the applicable substantive rules were only introduced at the end of the 1990s, with the first specific piece of EU legislation in the area of enforcement being the Injunctions Directive in 1998 (see below para 265), followed by the Consumer Cooperation Regulation in 2006 (see below para 332), and the Consumer ADR Directive and ODR Regulation in 2013 (see below para 364). This shift of attention to procedural law was motivated by a growing conviction that minimum substantive harmonization measures were of limited relevance in building consumer confidence. Empirical evidence showed that reluctance to acquire goods and services abroad had more to do with difficulties linked to the settlement of disputes than with substantive consumer law differences.<sup>21</sup>
- 16 Fundamentally, it can be argued that there was a growing understanding that procedural law plays an equally important role as substantive law in protecting consumer interests. The traditional view that procedural rules were subordinate to substantive rules was challenged. In contrast, a more holistic approach is gaining ground, positing that 'consumer disputes require appropriate mechanisms'. As a result, differentiated procedural protection has become an inevitable consequence of differentiated substantive protection.<sup>22</sup> This paradigm shift involves a redefinition of the traditional separation between substantive and procedural law and a move away from the logic of the individual case towards the protection of consumer rights.<sup>23</sup>

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<sup>16</sup> J Stuyck, 1993 - *Twenty Years Later: The Evolution of Consumer Law in the European Union* (Intersentia 2013) 5.

<sup>17</sup> D Wei, 'The New Consumer Law in China: Improvements and Enforcement' (2016) 4(1) *International Journal on Consumer Law and Practice* 1, 2.

<sup>18</sup> C T Juang, 'The Taiwan consumer protection law: attempt to protect consumers proves ineffective' (1997) 6(1) *Pacific Rim Law & Policy Journal* 219, 220.

<sup>19</sup> UN Guidelines for Consumer Protection (1985), Art II, 3, (e).

<sup>20</sup> J Stuyck, 1993 - *Twenty Years Later: The Evolution of Consumer Law in the European Union* (Intersentia 2013) 6.

<sup>21</sup> T Wilhelmsson, 'The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law' (2004) 27(3) *Journal of Consumer Policy* 317, 324.

<sup>22</sup> V Zeno-Zencovich and M-C Paglietti, 'Le droit processuel des consommateurs' (2014) 3 *Revue de Droit International et de Droit Comparé* 321, 327-328.

<sup>23</sup> *Ibid* 325.

- 17 In our belief, this relatively recent nature of consumer protection proceedings has two important implications. First, there is a close interconnection between substantive and procedure law (see 2.1.1.1). Second, procedural mechanisms that were already in place, have been specifically tailored or are now predominantly used to protect consumers (see 2.1.1.2).

#### 2.1.1.1 Interconnection between Substantive and Procedural Law

- 18 This interconnection between substantive and procedural law manifests itself on several fronts. For instance, specific procedural rules, such as those governing the burden of proof in consumer-business relations, are often laid down in laws that deal primarily with substantive issues. In the EU, for example, all reversals or modifications of the burden of proof are contained in directives regulating certain types of consumer contracts or protecting consumers against unfair practices (see below para 161–175). The same is true in the Canadian provinces, where the rules on the burden of proof are included in the rules of substantive law (see below para 178).
- 19 Another notable example concerns the role of national judges in the ex officio application of EU consumer law, which has evolved in response to the case law of the CJEU on substantive rules. In other words, in its efforts to give full effect to substantive consumer protection, the CJEU has changed the role of national judges, which is naturally a matter of procedural law.<sup>24</sup>

#### 2.1.1.2 Transformed Procedural Mechanisms

- 20 The best example of procedural mechanisms that were already in place, but that are now predominantly used for the benefit of consumers, are class actions in the US. In the United States, class actions were originally conceived to facilitate civil rights litigation (including school desegregation, welfare rights, and prison reform). However, with the rise of mass production, advertising, and merchandising, class actions have evolved to provide a valuable remedy for breaches of consumer protection laws. This is even more the case today, given the flexible legal framework for remedies (see below para 254).
- 21 Belgium, France, Luxembourg, and Quebec use a legal proof system to establish contracts with individuals. Consequently, businesses wishing to prove the existence of a contract with consumers must comply with this legal proof framework. This means, among other things, that the business must produce a written document signed by the parties to prove a transaction with a consumer, with different monetary thresholds in place in different jurisdictions: EUR 1,500 in France, CAD 1,500 in Quebec, EUR 2,500 in Luxembourg, or EUR 3,500 in Belgium. Notably, these rules were not originally designed for consumer cases (historical remnants dating back to the Ordonnance of Moulins in

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<sup>24</sup> S Menétrey, 'Des fonctions de la procédure dans le droit économique européen. Propos introductifs' (2015) 4 *Revue internationale de droit économique* 405, 408.

1566). Despite their non-consumer origins, consumers now benefit from these rules in an estimated 95% of cases (see below para 195).

### 2.1.2 Transcending National or State Law

- 22 Consumer protection proceedings often involve procedural rules that go beyond purely national or state law. This may be due to the fact that consumer protection is a relatively new field of law. As explained above, it was not until the 1990s that consumer law really began to develop. By that time, the legal systems of many jurisdictions were already much more complex and multi-layered than before. As a result, consumer law and its procedural aspects naturally share these characteristics.
- 23 Of course, the nature of the subject matter also plays a role. With the internet as the dominant platform for consumer transactions, there has been a rapid increase in cross-border transactions and a corresponding increase in consumer issues with a cross-border component. As the consumer society has become the service society and then the information society, services and information are being offered across borders even more easily, making this cross-border aspect even more important.<sup>25</sup>
- 24 In the area of procedural law, the international dimension warrants some nuanced consideration. Despite the globalization of markets and cross-border transactions, there remains an absence of a dedicated consumer protection enforcement body at the international level. Early attempts by the United Nations to establish such a body to deal with consumer law issues failed as early as the 1980s.<sup>26</sup>
- 25 Nevertheless, the (recent) inability of national legislation and administration to effectively protect citizens from harm caused by powerful market actors (eg, the excesses of the financial crisis and the diesel emission scandal) has once again demonstrated that, in an ideal world, international enforcement would be worthwhile.
- 26 However, turning our attention to regional contexts, we find some noteworthy developments. In the EU, for example, consumer protection is the area of law par excellence where the EU legislature has laid down procedural rules for the whole of the Union (eg, the Directive on Representative Actions), covering 27 Member States. Similarly, the CJEU plays an active role in providing judicial guidance on the enforcement of consumer law throughout the Union.
- 27 The same principle applies within federal states, where the enforcement of consumer rights extends beyond the state level to encompass federal action. In the US, this involves the participation of the judicial branch, comprising the US Supreme Court and

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<sup>25</sup> M Durovic and H-W Micklitz, *Internationalization of Consumer Law. A game changer* (Springer 2017) 72.

<sup>26</sup> Ibid 72.

the lower federal courts, alongside the influential role of federal agencies. Among these, the Federal Trade Commission (FTC) stands out as one of the most significant federal bodies charged with upholding the provisions of both the Magnuson-Moss Warranty Act<sup>27</sup> and the federal laws contained in the Consumer Credit Protection Act (CCPA). In fact, the FTC proudly refers to itself as ‘the nation's consumer protection agency’.<sup>28</sup>

- 28 However, both the US and the EU face the challenge of finding and maintaining an appropriate balance in the allocation of responsibilities between the central and constituent (member) state levels for the enactment and enforcement of consumer law.<sup>29</sup>

### 2.1.3 Sectoral Approach to Regulation

- 29 The approach to consumer protection is characterized by a pointillistic method of regulation. Lawmakers have developed separate pieces of legislation to address specific issues related to particular types of consumer contracts (such as the sale of goods, the supply of digital content, product liability, and consumer credit).<sup>30</sup> This is not only the case in the EU, where it is perhaps worse than elsewhere,<sup>31</sup> but it is visible all over the world.
- 30 This, combined with the above-mentioned tendency to integrate procedural rules into substantive instruments (see above para 18), leads to different procedural rules depending on the sub-area of consumer law in question. The risk is that we will end up with a tangled web of complexity. This is not so surprising, given that the legislature does not want to create a uniform procedural law, but simply wants to achieve its political objectives. A few examples can make this point clearer.
- 31 In the EU, there is no single definition of a consumer in a single directive that is universally referred to. However, the definitions of a consumer in the various directives and regulations are generally quite similar. This is different in the case of dual purpose contracts, where the contract has both professional and non-professional purposes. There, depending on whether a procedural or substantive consumer protection rule is applied, this could lead to a different outcome.

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<sup>27</sup> This Act establishes certain minimum standards for warranties on consumer products and, like the CCPA, contains provisions allowing for minimum harmonization and consumer redress.

<sup>28</sup> K Gutman, ‘The Development of Consumer Law in the US: Comparisons with the EU Experience’ (2012) 1(4) Journal of European Consumer and Market Law 212, 214-215.

<sup>29</sup> Ibid 222.

<sup>30</sup> V Zeno-Zencovich and M-C Paglietti, ‘Le droit processuel des consommateurs’ (2014) 3 Revue de Droit International et de Droit Comparé 321, 328.

<sup>31</sup> B Krans and A Nylund, ‘Aspects of Procedural Autonomy’ in B Krans and A Nylund (ed), *Procedural Autonomy Across Europe* (Intersentia 2020) 1, 9: ‘The sectoral approach of EU law, whether it is creating rules applicable only for rights based on EU law, for cross-border cases or for a certain area of law, causes incoherence and inconsistency in the procedural law of Member States’.

- 32 In particular, the CJEU's ruling in the *Gruber* case stated that individuals who enter into such dual purpose contracts cannot rely on the special protective rules of jurisdiction related to consumer contracts, unless the trade or professional purpose is 'so limited as to be negligible in the overall contract of the supply', 'the fact that the private element is predominant being irrelevant in that respect'.<sup>32</sup> Conversely, it has been argued that for substantive consumer law purposes, in the context of dual purpose contracts, a person should be considered a consumer 'as soon as the professional purpose is so limited as not to be predominant' in the overall context of the contract.<sup>33</sup> In summary, while the predominance of the private element is irrelevant for the purposes of determining whether a person is a consumer under procedural law, it is relevant for the application of substantive law (see below para 59).
- 33 This introduction has already referred to the CJEU's extensive powers to raise breaches of EU consumer law on its own initiative (see above para 3). However, this does not apply to all consumer law, but primarily to infringements in one specific area, namely violation of the Unfair Contract Terms Directive. In the *Bankia* judgment, the CJEU squashed assumptions of a general ex officio obligation based on the sole fact that consumers are in a procedurally disadvantaged position against their professional counterparts. Hence, it is unnecessary for a national court to raise and apply on its own motion the rules of unfair commercial practices, in order to give full effect to the Unfair Commercial Practices Directive (see below para 134).<sup>34</sup>
- 34 Similarly, regarding the adjustment of the burden of proof, the precise wording varies according to the sub-area of consumer law concerned (eg, sale of goods, misleading advertising, etc.). In the EU, the EU legislature chooses different approaches, although the underlying policy objective is always similar (ie, to restore the asymmetry between professionals and consumers and/or to ensure the effectiveness of consumer rights based on substantive law).
- 35 The Directive on Consumer Protection in Distance Contracts, for instance, opts for a straightforward reversal: 'As regards compliance with the information requirements, the

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<sup>32</sup> *Gruber v Bay Wa AG*, Case C-464/01 (CJEU), Judgment 20 January 2005 [ECLI:EU:C:2005:32] para 39.

<sup>33</sup> This perspective finds support in the Directive on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, 2011/83/EU of 25 October 2011 (EU), recital (17) (hereinafter, Consumer Rights Directive).

<sup>34</sup> For the sake of completeness, it should be noted that it is unclear whether this judgment is still leading case law. The Court relied, inter alia, on the consideration that 'solely on the basis of the provisions of that directive, a contractual term cannot be declared invalid even if it was agreed on between the parties to the contract on the basis of an unfair commercial practice' (para. 43). In the meantime, however, the Directive amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council regarding the better enforcement and modernization of Union consumer protection rules, 2019/2161 of 27 November 2019 (EU) has added a provision on remedies (Art. 11a) to the Unfair Commercial Practices Directive, so it is not certain that the Court would still rule in the same way.

burden of proof shall be on the trader'.<sup>35</sup> By contrast, the Consumer Sales Directive determines that in the case of a lack of conformity discovered within one or two years from the delivery of the goods, '[u]nless proved otherwise, any lack of conformity which becomes apparent within six months of delivery of the goods shall be presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity'.<sup>36</sup> This begs the question: why not simply say that 'the burden of proof of conformity at the time of delivery rests with the seller'? (see below para 162-175).

- 36 The observations made above on the sectoral approach are not limited to individual consumer litigation, but apply equally to other methods of enforcement. For instance, the so-called Representative Actions Directive (see below para 277),<sup>37</sup> which aims to ensure that collective redress actions for breaches of consumer rights are available in every Member State of the EU, applies exclusively to an exhaustive list of EU regulations and directives related to consumer protection (added as Annex I to the Directive); this leads to situations where some consumers are left unaddressed, in particular when they are victims of anti-competitive practices not included in the Annex to the Directive.<sup>38</sup> Likewise, the collective enforcement by public authorities involves different procedures and bodies for different sectors, such as air passengers, electricity, and gas (see below para 334). Similarly, in the out-of-court context, there are numerous ADR bodies, which may or may not be sector-specific depending on the case (see below para 364).

#### 2.1.4 Fragmentation of Enforcement Measures

- 37 There is a clear heterogeneity of enforcement mechanisms in the field of consumer protection. Enforcement of consumer rights manifests itself in a broad spectrum, encompassing individual and collective approaches, using private and administrative law mechanisms, and encompassing both judicial and non-judicial avenues (see no 1).
- 38 Where previously the emphasis was on individual enforcement, there has been a significant surge in the development of various forms of collective redress. This development, sometimes referred to as agentification (involving the emergence of agencies, both sectoral and political) and consumer dispute resolution (CDR), has become highly visible.<sup>39</sup> However, there are also drawbacks to this trend. The knowledge

<sup>35</sup> Directive on the protection of consumers in respect of distance contracts, 97/7/EC of 20 May 1997 (EU), Art 11(3)(a).

<sup>36</sup> Directive on certain aspects of the sale of consumer goods and associated guarantees, 1999/44/EC of 25 May 1999 (EU), Art 5(3).

<sup>37</sup> Directive on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, 2020/1828 of 25 November 2020 (EU).

<sup>38</sup> For a critical assessment: M J Azar Baud, 'L'obsolescence programmée d'une action collective spécifique au droit de la consommation' (2023) (2) *Revue européenne de droit de la consommation*, 429, 435.

<sup>39</sup> H-W Micklitz and G Saumier, 'Enforcement and Effectiveness of Consumer Law' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 3, 36.

needed to enforce consumer law, which used to come from court judgments, is now increasingly concentrated in regulatory action and ADR solutions, which are mostly not publicly available.<sup>40</sup>

- 39 Moreover, this proliferation of techniques for resolving consumer disputes has not yet overcome the challenge of effectively enforcing consumer rights. Recent comparative work arrives at disappointing conclusions: ‘Whatever form they take, small claims court or ADR system, consumer redress mechanisms are still unlikely to serve the interests of the most disadvantaged’,<sup>41</sup> and ‘Somewhat overstated, one might argue that the enforcement of consumer law is getting closer to “managing compliance” than to strictly applying the law’.<sup>42</sup> Moreover, the fragmentation and complexity contribute to a lack of consumer comprehension.<sup>43</sup>
- 40 Certainly, procedural developments in consumer protection proceedings are not over. Micklitz and Saumier conclude that ‘from the national reports one might gain the impression that in a number of countries, not only in South America, in Africa or in Asia, but also in Europe, enforcement remains symbolic rather than real’.<sup>44</sup> A Chinese scholar comes to a similar conclusion: although the legislation of the People’s Republic of China<sup>45</sup> explicitly recognizes a consumer’s right to obtain damages when his person and/or property are harmed by purchasing goods or receiving services, soaring legal costs combined with economic disadvantages are weakening consumers’ positions when they attempt to assert their legal rights.<sup>46</sup>

## 2.2 Rationale and Justification

- 41 Does substance drive procedure? We argue that it is not the substantive law itself that primarily influences procedure. Consumer protection law is essentially an advanced

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<sup>40</sup> Ibid.

<sup>41</sup> G Howells and R James, ‘Litigation in the Consumer Interest’ (2002) 9(1) *ILSA Journal of International & Comparative Law* 1, 10 (with reference to J Baldwin, ‘Small Claims in the County Courts in England and Wales: the Bargain Basement of Civil Justice’ (1997): ‘for the most part, small claims hearings involve well-to-do people suing other well-to-do people’). Likewise: H-W Micklitz and others, ‘Litigation, Redress and Enforcement’, in H-W Micklitz, J Stuyck and E Terryn (ed), *Cases, Materials and Text on Consumer Law* (Hart, 2010) 499, 503: ‘Ordinary court proceedings are also open to consumers whose rights have been infringed, but the number of consumers that actually find their way to the ordinary courts is very limited’.

<sup>42</sup> H-W Micklitz and G Saumier, ‘Enforcement and Effectiveness of Consumer Law’ in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 3, 36.

<sup>43</sup> S Law and V Richard, ‘Luxembourg Comparative Study on Consumer Law Enforcement’ in S Law and V Richard (ed), *Public and Private Enforcement of Consumer Law – Insights for Luxembourg* (Nomos 2021) 13, 21.

<sup>44</sup> H-W Micklitz and G Saumier, ‘Enforcement and Effectiveness of Consumer Law’ in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 3, 35.

<sup>45</sup> Consumer Rights and Interests Protection Law 1993 (China), Art 11.

<sup>46</sup> J Xu, ‘Who Will Protect Chinese Consumers? – The Past, Present and Future of Consumer Protection Legislation in China’ (2011) 24(1) *Loyola Consumer Law Review* 22, 22.

form of contract law with its own features, such as information requirements, withdrawal rights, and specific remedies. It does not require special technical expertise on the part of the court and lacks the complexity of hard decisions (eg, those involved in matters such as child custody). However, if by substance we mean the consumer, who is characterized as the weaker party, we argue that substance does play a significant role in driving litigation, at least in part (see 2.2.1). In addition, we identify two other reasons for the introduction of specific procedural norms and techniques: confronting problems of enforcement (see 2.2.2) and achieving political objectives (see 2.2.3).

### 2.2.1 Addressing the Substance: the Weaker Position of the Consumer

- 42 Consumer cases reveal a clear power imbalance between consumers and businesses. References to vulnerable groups and vulnerable individuals are particularly common in consumer law literature.<sup>47</sup> Beyond the legal literature, consumer behaviour research also sheds light on various consumer biases and disadvantages.<sup>48</sup> Importantly, it does not matter whether consumers are weaker in a particular case. In consumer law, the assumption of a weaker position is consistently applied when a person qualifies as a consumer, regardless of his or her actual circumstances. Even a consumer who is exceptionally wealthy or highly educated, and who may not necessarily need such protection, is in principle entitled to the benefits of consumer law.<sup>49</sup>
- 43 Specifically in relation to enforcement, this power imbalance can be described as procedural asymmetry.<sup>50</sup> At this level, there is a distinction between consumers and professionals in relation to two types of resources. In terms of information resources, consumers may not even be aware of their claim and will not think of securing evidence at the time of the transaction or when the damage occurs. The professional counterpart, on the other hand, may already be familiar with the procedure and may have access to crucial information that could be relevant for the consumer during the procedure, particularly with regard to the administration of evidence.<sup>51</sup> In terms of financial resources, given the relatively low value of consumer claims, consumers will not really be inclined to hire an attorney and to bring a case. The professional counterparty often

<sup>47</sup> Alongside criminal law and refugee and migration law, among others, see L. Waddington, 'Exploring vulnerability in EU law: an analysis of "vulnerability" in EU criminal law and consumer protection law' (2021) 45(6) *European Law Review* 779, 779-780.

<sup>48</sup> G Helleringer and A-L Sibony, 'European Consumer Protection through the Behavioral Lens' (2017) 23 *The Columbia Journal of European Law* 607.

<sup>49</sup> E Terryn, 'Consumers, by Definition, Include Us All...' But Not For Every Transaction' (2016) 24(2) *European Review of Private Law* 271; J Luzak, 'Consumers in European Private Law' in M Bartl, L Burgers and C Mak (ed), *Uncovering European private law. European private law handbook*. (Amsterdam Centre for Transformative private law 2022) 3.

<sup>50</sup> V Zeno-Zencovich and M-C Paglietti, 'Le droit processuel des consommateurs' (2014) 3 *Revue de Droit International et de Droit Comparé* 321, 324-325.

<sup>51</sup> S Deutch, 'Consumer class actions: are they a solution for enforcing consumer rights? The Israeli model' (2004) 27(2) *Journal of Consumer Policy* 179, 180; J Werbrout, *Doorwerking van het Europees consumentenrecht in het nationaal procesrecht* (Intersentia 2023) 204, para 152.

benefits from the support of a specialized legal department or is more willing to bear the costs of hiring a lawyer.<sup>52</sup>

### 2.2.2 Confronting Problems of Enforcement

- 44 While the power imbalance and the consumer as a weaker party provide an explanation for both the introduction of substantive and procedural consumer rights, the rationale discussed in the present subsection is unique to interventions in procedural law. These enforcement problems can be further categorized as a lack of interest on the part of consumers in exercising their rights (the so-called 'rational apathy') and shortcomings in the general procedural rules once consumers have decided to take action.
- 45 Consumers often face low-value claims. This means that the potential disparity between the effort required to pursue their claims and the individual benefits they would receive, even if successful, may discourage consumers from taking legal action. This phenomenon has been referred to as the 'rational apathy' problem, as consumers rationally lack the incentive to pursue such claims.<sup>53</sup>
- 46 This has been a persistent problem since the inception of consumer law. A study conducted in the United States in 1977 found that only 39.7% of consumers who had a problem with a purchase decided to complain to the company, report it to a third party, or take some form of action.<sup>54</sup> More recent research on the rational apathy problem in the EU, conducted in 2008, demonstrates comparable findings, albeit with variations in different Member States. At the time of this study it was estimated that the minimum amount for a consumer to bring a claim in Germany was between EUR 50 and EUR 250, whereas in other Member States consumers may be reluctant to bring a claim even for much higher amounts.<sup>55</sup> A 2011 survey on consumer empowerment, based on a sample of 55,000 consumers, concluded that the average amount consumers are willing to pay for a claim is EUR 1,000.<sup>56</sup> Finally, according to the 2023 Consumer Scoreboard, 25% of consumers encountered problems that warranted a complaint. However, a third did not

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<sup>52</sup> Ibid.

<sup>53</sup> R Van Den Bergh and L Visscher, 'The Preventive Function of Collective Actions for Damages in Consumer Law' (2008) 1 *Erasmus Law Review* 5; M Ioannidou, 'Compensatory Collective Redress for Low Value Consumer Claims in the EU: A Reality Check' (2019) 27(6) *European Review of Private Law* 1367, para 6.

<sup>54</sup> A Best and AR Andreassen, 'Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress' (1977) 11 *Law & Society Review* 701, 711-712. See also G Wagner, 'Private law enforcement through ADR: Wonder drug or snake oil?' (2014) 51(1) *Common Market Law Review* 165, 189-190: 'Even for people with low training and qualifications, it is more rewarding to wash their neighbours' cars than to spend two hours travelling to a lawyer's office and explaining the case to her. In other words, the apathy towards enforcing small claims is truly rational, not only in the descriptive, but also in the normative sense'.

<sup>55</sup> Civic Consulting and Oxford Economics, 'Evaluation of the Effectiveness and Efficiency of Collective Redress Mechanisms in the European Union' (Report prepared for DG SANCO, 2008).

<sup>56</sup> See European Commission, 'Consumer Empowerment in the EU' (Staff Working Paper) SEC (2011) 469 final, [ec.europa.eu/info/sites/info/files/consumer\\_empowerment\\_eu\\_2011\\_en.pdf](http://ec.europa.eu/info/sites/info/files/consumer_empowerment_eu_2011_en.pdf), paras 5, 11.

take action because of the length of the procedure, the small amounts involved, or a lack of confidence that a satisfactory solution would be found.<sup>57</sup>

- 47 This problem of rational apathy explains why initiatives have been taken worldwide to enforce consumer rights collectively rather than individually. This is done partly through private enforcement and partly through public enforcement. In contrast, trying to encourage consumers to overcome their apathy on an individual basis would impose costs on society that outweigh the benefits.<sup>58</sup>
- 48 In addition to the above considerations, policymakers want to ensure that once consumers have taken the step to enforce their rights, there are appropriate procedures available to them. For example, in 2003, before the significant emergence of public enforcement through agencies, consumer ADR, and collective redress in Europe, an EU study found that only 7% of consumer cases ended with a resolution in court or through an alternative procedure.<sup>59</sup>
- 49 Ensuring effective enforcement and a tangible impact on the market remain some of the major challenges of consumer law.<sup>60</sup> This explains why further initiatives in consumer litigation are expected in the coming years. For example, although the EU now has a framework for collective redress for consumer rights and damages actions for breaches of antitrust rules, European consumers still have no significant redress for anti-competitive behaviour.<sup>61</sup> The same applies to consumer ADR, which, despite an extensive landscape of quality ADR schemes in the EU, has not fully taken off due to issues such as dysfunctional consumer ADR architectures, the voluntary nature of participation, and a continuing lack of awareness and knowledge about ADR.<sup>62</sup>

### 2.2.3 Achieving Political Objectives

- 50 Finally, we believe that the existence of specific procedural rules in the field of consumer law (eg, the introduction of a framework for representative actions in the EU), as opposed to other special subject matters, is simply a result of momentum and the pursuit of policy objectives.

<sup>57</sup> See European Commission, 'New measures to simplify the resolution of disputes out of court and boost consumer right', [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_5049](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_5049).

<sup>58</sup> G Wagner, 'Private law enforcement through ADR: Wonder drug or snake oil?' (2014) 51(1) Common Market Law Review 165, 189-190.

<sup>59</sup> M Loos, 'Individual Private Enforcement of Consumer Rights in Civil Courts in Europe' (2010) 1 Centre for the Study of European Contract Law Working Paper Series 1, 5-7.

<sup>60</sup> S Weatherill, 'Collective redress in EU Consumer Law: How it is, how it could be' in X Kramer and others, *Delivering justice. A holistic and multidisciplinary approach* (Hart 2022) 101, 110.

<sup>61</sup> M Sousa Ferro, 'Consumer Antitrust Private Enforcement in Europe' (2022) 13(8) Journal of European Competition Law & Practice, 578.

<sup>62</sup> E van Gelder and S Voet, 'The EU ODR platform – A blessing in disguise' (2022) 26(3-4) Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement 31, 32.

- 51 Procedural law is used as a means to achieve policy objectives such as promoting the free movement of goods and services and fostering a favourable business environment.<sup>63</sup> Motivated by the idea that strengthening global consumer confidence through robust consumer protection will increase trade, specific interventions in consumer law aim to create a more efficiently functioning economy. This, in turn, is expected to lead to increased trade.<sup>64</sup> In particular, the cumulative damage caused by certain breaches of consumer law can be significant. Moreover, in sectors where thousands of consumers interact with the same company or supplier such as telecoms or energy, breaches of consumer law can potentially affect a significant proportion of the population and thus have an impact on the economy. In the EU context, the adoption of consumer protection rules is based on the idea that consumers are fundamental to the creation of the internal market and the pursuit of the EU's goal of maximizing welfare.<sup>65</sup>

### 2.3 The Concept of Consumer

- 52 Before delving into specific procedural issues dealing with consumer protection, it is necessary to briefly touch upon the consumer concept. Given the authors' legal backgrounds, this analysis will start from the EU perspective. However, as will be shown, the core elements to distinguish a consumer from a 'non-consumer' seem to be more or less similar all around the globe.
- 53 In the EU, consumer law is harmonized to a large extent. Through directives and regulations, the EU legislature draws the chalk lines of the normative consumer law framework. Those legislative instruments at the European level also include definitions of what a 'consumer' is. It has been nearly forty years since the EU legislature first gave a circumscription, which has more or less withstood the ravages of time. "Consumer" means a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession'.<sup>66</sup> Nearly the same definition can be found in Art 2 (b) of Directive 93/13/EEC,<sup>67</sup> be it that the legislature added the 'business-hypothesis', next to acting for purposes within or without a 'trade

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<sup>63</sup> AC van Schaick, *Asser Procesrecht 2: Eerste aanleg* (Wolters Kluwer 2022) para 6.

<sup>64</sup> J Werbrouck, *Doorwerking van het Europees consumentenrecht in het nationaal procesrecht* (Intersentia 2023) para 548.

<sup>65</sup> J Stuyck, *1993 - Twenty Years Later: The Evolution of Consumer Law in the European Union* (Intersentia 2013) 6.

<sup>66</sup> Council Directive to protect the consumer in respect of contracts negotiated away from business premises, 85/577/EEC of 20 December 1985 (EU), Art 2.

<sup>67</sup> Council Directive on unfair terms in consumer contracts, 93/13/EEC of 5 April 1993 (EU).

or profession'.<sup>68</sup> With the adoption of Directive 2005/29/EC,<sup>69</sup> acting for craft purposes was added to the negative circumscription of what a consumer is, thus resulting in a consumer being 'any natural person who is acting for purposes which are outside his trade, business, craft or profession'.<sup>70</sup>

- 54 These directives all lay down rules of substantive consumer law. However, directives and regulations relating to the enforcement of consumer law lay down identical circumscriptions. Art 3 (12) of the Regulation (EU) 2017/2394 dealing with the cooperation between national authorities responsible for the enforcement of consumer protection laws (hereinafter: 'CPC-Regulation') circumscribes a consumer as 'any natural person who is acting for purposes which are outside his trade, business, craft or profession'.<sup>71</sup> So does Art 4 (a) of Directive 2013/11/EU on alternative dispute resolution for consumer disputes ('ADR-Directive'),<sup>72</sup> to which Art 4.1 (a) of Regulation 524/2013 refers ('ODR-Regulation').<sup>73</sup> Also, legislative instruments concerning the applicable law and jurisdiction, recognition, and enforcement in cross-border matters provide for a very similar definition. According to Art 6.1 of Regulation 593/2008 (Rome I), a consumer is 'a natural person for a purpose which can be regarded as being outside his trade or profession'.<sup>74</sup> Also, the wording of Art 17 of Regulation 1215/2012 (Brussels I Recast Regulation) leaves little doubt.<sup>75</sup>
- 55 Although there are slight divergences, the core of all these European definitions is the same: a consumer is a natural person—thus excluding not only enterprises aiming to

<sup>68</sup> See in the same sense Directive on credit agreements for consumers and repealing Council Directive 87/102/EEC, 2008/48/EC of 23 April 2008 (EU), Art 3(a).

<sup>69</sup> Directive concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, 2005/29/EC of 11 May 2005 (EU), Art 2(a).

<sup>70</sup> See in the same sense Directive on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, 2011/83/EU of 25 October 2011 (EU), Art 2(1), and, more recently, Directive on certain aspects concerning contracts for the sale of goods, amending Regulation 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, 2019/771 of 20 May 2019 (EU), Art 2(2) and Directive on certain aspects concerning contracts for the supply of digital content and digital services, 2019/770 of 20 May 2019, Art 2(6).

<sup>71</sup> Regulation on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, 2017/2394 of 12 December 2017 (EU) (hereinafter: CPC-Regulation).

<sup>72</sup> Directive on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, 2013/11/EU of 21 May 2013 (EU).

<sup>73</sup> Regulation on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, 524/2013 of 21 May 2013 (EU).

<sup>74</sup> Regulation on the law applicable to contractual obligations, 593/2008 of 17 June 2008 (EU).

<sup>75</sup> Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 1215/2012 of 12 December 2012 (EU) (hereinafter: Brussels I recast Regulation).

gain profit, but also NGO's<sup>76</sup>—acting for purposes outside of<sup>77</sup> his professional occupations.<sup>78</sup> Hence, in order to determine whether someone qualifies as a consumer, a purposive criterion must be applied. As a result, whether a person qualifies as a consumer must be determined for each contract separately.<sup>79</sup>

- 56 By contrast, the knowledge level of 'the potential consumer' is entirely irrelevant. The fact that a person happens to be a lawyer specialized in credit contract law, for instance, does not prevent him from being a consumer himself in relation to the credit institution with whom he concluded a credit contract for the purpose of buying his private home.<sup>80</sup> The fact that the consumer's financial capacity is presumably higher than that of the trader is also irrelevant. An illustrative case involves an Australian buyer of a EUR 5.4 million yacht who may benefit from Dutch consumer protection rules that prevent consumers from being unambiguously bound by a jurisdiction clause.<sup>81</sup>
- 57 Put differently, the consumer notion is an objective one. Also, the amount of technical expertise a person may have, or his intention to gain profit from the conclusion of a certain contract, are *in se* not decisive to determine whether a person qualifies as a

<sup>76</sup> It is interesting to note that Directive 90/314/EC used to define a consumer as 'the person who takes or agrees to take the package ('the principal contractor'), or any person on whose behalf the principal contractor agrees to purchase the package ('the other beneficiaries'), or any person to whom the principal contractor or any of the other beneficiaries transfers the package ('the transferee')', thus also including companies and business travellers. For the sake of legal certainty, it is to be welcomed that Directive 2015/2302 (replacing Directive 90/314/EC) no longer uses the consumer concept, but defines a 'traveller' as 'any person who is seeking to conclude a contract, or is entitled to travel on the basis of a contract concluded, within the scope of this Directive', thus also including inter alia legal persons in the protective scope of said directive, without hijacking the consumer concept. See in the same vein MY Schaub, 'Wie is consument?' (2017) 1 Tijdschrift voor Consumentenrecht en handelspraktijken 30, 32.

<sup>77</sup> Therefore, the consumer definition is held to be a negative one (J Valant, 'Consumer protection in the EU – Policy overview', [www.europarl.europa.eu/thinktank/en/document/EPRS\\_IDA\(2015\)565904\\_4](http://www.europarl.europa.eu/thinktank/en/document/EPRS_IDA(2015)565904_4); R Mańko, 'The notion of 'consumer' in EU law', Library of the European Parliament 2013 (130477REV1), [/www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM\\_BRI\(2013\)130477\\_REV1\\_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI(2013)130477_REV1_EN.pdf), 1).

<sup>78</sup> It has also been noted that, for the purposes of consumer protection law, the conceptualization of a consumer is rather complex, particularly in comparison to the assumptions underlying the consumer notion in competition law and economic regulation. Whereas for the latter two a consumer is somewhat deemed to be a mathematician, with costs/benefit analyses being the sole incentive to make decisions, the consumer notion in consumer protection law is held to be more influenced by a mix of economic, legal, political, and sociological insights. See in that sense C Decker, 'Concepts of the consumer in competition, regulatory and consumer protection policies' (2017) 13(1) Journal of Competition Law & Economics 151, 154-155.

<sup>79</sup> *Benincasa v Dentalkit Srl*, Case C-269/95 (CJEU), Judgment 3 July 1997 [ECLI:EU:C:1997:337] para 16.

<sup>80</sup> *Costea v SC Volksbank România SA*, Case C-110/14 (CJEU), Judgment 3 September 2015 [ECLI:EU:C:2015:538] para 21.

<sup>81</sup> Case C/13/697598 (District Court Amsterdam, The Netherlands), Judgment 4 August 2021 [ECLI:NL:RBAMS:2021:4531].

consumer.<sup>82</sup> Should a natural person for instance sell an old timer to a specialized garage, the latter paying an incredible amount of money, this does not prevent said natural person from being qualified a consumer for the purposes of EU consumer law. The same goes for a natural person concluding complex derivative contracts (more precisely contracts for difference) on the international exchange market,<sup>83</sup> or a natural person who concluded a contract to play poker on the internet, even if that person plays the game for a large number of hours per day and receives substantial winnings from that game.<sup>84</sup>

- 58 Considering the foregoing, one would assume that to decide whether someone acts as a consumer is ever evident. Appearances may deceive, however. For instance, it is not entirely certain whether the aforementioned purposive criterion should be given a subjective, an objective, or an objectivized subjective understanding.<sup>85</sup> Consequently, the approaches throughout the Member States have varied. Even within one and the same Member State, views are sometimes different, as has for instance been reported from the Netherlands.<sup>86</sup> The CJEU, however, has shown itself to be sensitive to what a professional counterparty could reasonably assume based on the (potential) consumer's behaviour, thus pointing in the direction of an objectivized subjective understanding.<sup>87</sup> More recently, the CJEU explicitly stated that account may be taken of the impression created by a person's conduct on the part of the other contracting party. The particular case concerned a lack of a reaction on the part of the person relying on the status of consumer to the terms of the contract designating him or her as a trader, where that person has concluded that contract through an intermediary.<sup>88</sup>
- 59 Another delicate point is dual purpose contracts. These are contracts concluded for purposes which are partly outside and partly within the scope of professional purposes (eg, buying a car to visit potential customers, but also to take his family to the seaside at weekends). The question is whether that person could qualify as a consumer in the context of the purchase contract.
- 60 The CJEU seemingly provided a clear answer to that question more than twenty years ago. The Court in the *Gruber* case held that a person who concludes a contract intended

<sup>82</sup> *Komisia za zashtita na potrebitelite v Kamenova*, Case C-105/17 (CJEU), Judgment 4 October 2018 [ECLI:EU:C:2018:808] para 38.

<sup>83</sup> *Petruchová v FIBO Group Holdings Limited*, Case C-208/18 (CJEU), Judgment 3 October 2019 [ECLI:EU:C:2019:825].

<sup>84</sup> *A.B. & B.B. v Personal Exchange International Limited*, Case C-774/19 (CJEU), Judgment 10 December 2020, [ECLI:EU:C:2020:1015], para 50

<sup>85</sup> MY Schaub, 'Wie is consument?' (2017) 1 Tijdschrift voor Consumentenrecht en handelspraktijken 30, 35-37.

<sup>86</sup> MY Schaub, 'Wie is consument?' (2017) 1 Tijdschrift voor Consumentenrecht en handelspraktijken 30, 34.

<sup>87</sup> *Gruber v Bay Wa AG*, Case C-464/01 (CJEU), Judgment 20 January 2005 [ECLI:EU:C:2005:32], para 51.

<sup>88</sup> *JA v Wurth Automotive GmbH*, Case C-177/22 (CJEU), Judgment 9 March 2023 [ECLI:EU:C:2023:185], para 41.

for purposes which are partly within and partly outside his trade or profession may *not* rely on the special, protective rules of jurisdiction pertaining to consumer contracts, ‘unless the trade or professional purpose is so limited as to be negligible in the overall contact of the supply, the fact that the private element is predominant being irrelevant in that respect’.<sup>89</sup> This point of view was expressed in relation to the special jurisdiction rules laid down in the Brussels Convention, the predecessor of the Brussels I Recast Regulation. Since the consumer concept applied in the latter Regulation is (nearly) identical to the one laid down in the legislative instruments pertaining to substantive consumer law, one would expect it to be easily accepted that in the context of the latter instruments an identical viewpoint would apply towards dual purpose contracts.

- 61 However, this is not the case, as it has been argued that for the purposes of substantive consumer law, someone should in the context of dual purpose contracts be considered a consumer ‘as soon as the professional purpose is so limited as not to be predominant in the overall context of the contract’.<sup>90</sup> The latter view does not come from nowhere, but can be read literally in recital (17) of Directive 2011/83/EU (‘Consumer Rights Directive’). If it would actually be so that for the purposes of substantive consumer law, someone is a consumer as soon as the professional purpose of the conclusion of a contract is not ‘predominant’, this would necessarily mean that for dual purpose contracts a person would or would not be a consumer, depending on whether the context is one of substantive consumer law or relates to the enforcement of consumer law.<sup>91</sup>
- 62 A last point we want to touch upon in that regard concerns the potential ‘fluctuation’ of a person’s status over time. While it has been held in the past that whether someone qualifies as a consumer must be determined at the moment of the conclusion of a contract, thus denying any relevance to potential changes or occurrences after that moment, the CJEU has recently expressed a different viewpoint. According to the CJEU in (one of) its *Schrems* judgment(s), it is necessary to take into account—as far as

<sup>89</sup> *Gruber v Bay Wa AG*, Case C-464/01 (CJEU), Judgment 20 January 2005 [ECLI:EU:C:2005:32] para, 39.

<sup>90</sup> See in particular *Costea v SC Volksbank România SA*, Case C-110/14 (CJEU), Opinion of AG Cruz Villalón 23 April 2015 [ECLI:EU:C:2015:271], paras 37-43.

<sup>91</sup> It should be noted, however, that the CJEU held on multiple occasions that account must also be taken of the definition of ‘consumer’ in other rules of EU law in order to ensure that it is applied uniformly in all Member States, although the concepts used in separate legislative norms should be interpreted separately, by reference principally to the general scheme and objectives of those norms and in order to ensure compliance with the objectives pursued by the legislature of the European Union in the sphere of consumer contracts and the consistency of EU law,. See, *inter alia*, *Schrems v Facebook Ireland Limited*, Case C-498/16 (CJEU), Judgment 25 January 2018 [ECLI:EU:C:2018:37] para 28 and case law cited. This viewpoint, taken together with the cross-references made by the CJEU between case law relating to international private law and case law relating to substantive consumer law, has led some to argue that the CJEU is actually getting to the point where also in the context of substantive consumer law, the status of consumer in relation to dual purpose contracts must be decided on the basis of the Gruber criterion (i.e. professional use must be negligible) (see *supra*, no. 34). See in that vein S Bennis, ‘De consument van sociale netwerken en grensoverschrijdende collectieve consumentenvorderingen’ (2019) *Droit de la consommation* 95, 103.

concerns services of a digital social network which are intended to be used over a long period of time—subsequent changes in the use those services. This implies that someone can only rely on his consumer status if the intended non-professional purposes at the moment of the conclusion of the contract have not subsequently been replaced by professional circumstances.<sup>92</sup> Put differently, according to the court, someone may lose his consumer status should the purposes served by the contract change from being non-professional to professional. Once more, however, said interpretation was given in the context of international jurisdiction. Consequently, the same reservation can be made as in the former paragraph, concerning the potential (non-)transposability to the context of substantive consumer law.

- 63 Another misunderstanding could be that following the harmonization effect of EU law, the consumer notion is a uniform one throughout the Union. This, however, is not entirely true either.
- 64 First of all, it is important to understand that said harmonization effect does not prevent Member States from expanding the scope of the substantive provisions towards actors that do not qualify as a consumer as described above. Put differently, EU law only requires that consumers as described above can benefit from the substantive rules as laid down, but does not prevent Member States from providing in their national law that other legal subjects can also benefit from identical rules. Hence, where the Court of Justice has straightforwardly ruled that legal persons do not qualify as consumers in the sense of EU law,<sup>93</sup> some Member States, such as Austria<sup>94</sup> and Spain,<sup>95</sup> seem to have brought legal persons under the consumer notion if certain requirements are met.<sup>96</sup> Another approach, though with similar outcome, has taken in France. Where the notion

<sup>92</sup> *Schrems v Facebook Ireland Limited*, Case C-498/16 (CJEU), Judgment 25 January 2018 [ECLI:EU:C:2018:37] 37-38.

<sup>93</sup> *Cape Snc v Idealservice Srl*, Case C-541/99 (CJEU), Judgment 22 November 2001 [ECLI:EU:C:2001:625].

<sup>94</sup> Konsumentenschutzgesetz 1979 (Consumer Protection Act) (Austria), s 1(1) provides as follows: 'Dieses Hauptstück gilt für Rechtsgeschäfte, an denen 1. einerseits jemand, für den das Geschäft zum Betrieb seines Unternehmens gehört, (im folgenden kurz Unternehmer genannt) und 2. andererseits jemand, für den dies nicht zutrifft, (im folgenden kurz Verbraucher genannt) beteiligt sind', thus not limiting the *Verbraucher* (consumer) notion to natural persons.

<sup>95</sup> Real Decreto Legislativo por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias (Royal Legislative Decree approving the consolidated text of the General Law for the Defense of Consumers and Users and other complementary laws) of 16 November 2007 (Spain), Art 3.1 provides as follows: 'A efectos de esta ley, y sin perjuicio de lo dispuesto expresamente en sus libros tercero y cuarto, son consumidores o usuarios las personas físicas que actúen con un propósito ajeno a su actividad comercial, empresarial, oficio o profesión. Son también consumidores a efectos de esta norma las personas jurídicas y las entidades sin personalidad jurídica que actúen sin ánimo de lucro en un ámbito ajeno a una actividad comercial o empresarial', thus also legal persons.

<sup>96</sup> R Mañko, 'The notion of 'consumer' in EU law', Library of the European Parliament 2013 (130477REV1), [www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM\\_BRI\(2013\)130477\\_REV1\\_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI(2013)130477_REV1_EN.pdf), 1, under reference to the Austrian, Czech, Greek and Spanish legal system.

of '*consommateur*' is still reserved for natural persons,<sup>97</sup> a separate notion has been introduced for legal persons acting outside of their professional purposes ('*non-professionnel*'),<sup>98</sup> in order to provide them with a similar protection to the one consumers benefit from. Another example may be found in the German '*Verbraucher*' concept, which is described as '*jede natürliche Person, die ein Rechtsgeschäft zu Zwecken abschließt, die überwiegend weder ihrer gewerblichen noch ihrer selbständigen beruflichen Tätigkeit zugerechnet werden können.*'<sup>99</sup> Whereas at the European level doubts remain concerning the criterion to be applied in case of dual purpose contracts, the German definition seems to straightforwardly state that the professional purposes may not be predominant, in line with recital (17) of Directive 2011/83/EU.

- 65 Not every single aspect of consumer law is harmonized at the EU level. Although the European legislature has harmonized to a large extent, there remain certain areas of consumer law that are purely domestic. In those areas, nothing theoretically prevents Member States from adopting an entirely diverging consumer definition. It should be noted, however, that huge divergences seem unlikely, since this would lead to a serious fragmentation of national consumer law, thus also impairing legal certainty.<sup>100</sup>
- 66 To conclude, it is submitted that in the EU, the consumer notion is much less evident than what could be assumed on first sight. Also, the uniformity that could be presumed, given the harmonization effects of EU law, does not entirely comply with legal reality. Nevertheless, it is clear that whether a person qualifies as a consumer essentially relates to the question to what extent that person is handling for professional purposes.
- 67 Although the aim of this contribution is not to give an encompassing overview of the consumer concept around the world, it is still interesting to look at some consumer definitions outside the EU against the background of insights and criticisms formulated above. As already indicated at the beginning of the present section (see above para 53), browsing through other legal systems around the globe teaches that, in most of them, the key to determine whether a person qualifies as a consumer lies in the intended purposes of the contractual relation.
- 68 For instance, in New Zealand, a consumer is a person who acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption and does not acquire those goods or services for the purpose of

<sup>97</sup> According to the Code de la consommation 2016 (Consumer Code) (France), preliminary article, 1° a *consommateur* (consumer) is 'oute personne physique qui agit à des fins qui n'entrent pas dans le cadre de son activité commerciale, industrielle, artisanale, libérale ou agricole'.

<sup>98</sup> According to the Code de la consommation 2016 (Consumer Code) (France), preliminary article, 2°, a *non-professionnel* (non-professional) is 'toute personne morale qui n'agit pas à des fins professionnelles'.

<sup>99</sup> Free translation: 'any natural person who enters into a legal relation for purposes which are predominantly neither commercial nor self-employed'.

<sup>100</sup> MY Schaub, 'Wie is consument?' (2017) 1 Tijdschrift voor Consumentenrecht en handelspraktijken 30, 31.

resupplying them in trade, consuming them in the course of a process of production or manufacture, or—in the case of goods—repairing or treating in trade other goods of fixtures on land.<sup>101</sup>

- 69 A similar, shorter definition is embedded in Art 2 of the Moroccan Law 31-08 on consumer protection, circumscribing a consumer as ‘all psychical or moral persons who acquire or use products, goods or services, for purposes unrelated to work, for personal or familial use’, thus explicitly encompassing legal persons even NGOs or enterprises aiming at gaining profit. According to the Japanese Consumer Contract Act, a consumer is an individual, excluding one who becomes a party to a contract as a business or for business purposes.<sup>102</sup>
- 70 A final example may be found in the recitals of the Law of the Russian Federation on the protection of the consumers’ rights no 2300-1 of 7 February 1992, defining a consumer as an individual who orders, acquires, or uses them exclusively for personal, family, household, and other needs not relating to the pursuance of entrepreneurial activities. Given the explicit reference to exclusive use for personal, family, household, and other needs not relating to the pursuance of entrepreneurial activities, this may suggest that in case of dual purpose contracts a similar, a rather strict definition, like the one given in the *Gruber* case, applies (see above para 59).
- 71 The aforementioned definitions show that the concept of what a consumer is in the corresponding legal systems is more or less in line with what was established above from the ‘European perspective’. However, other approaches can be taken.
- 72 For instance, in Australia, there seems to be some relevance in the amount of money involved in the contract, as well as in the specific good concerned. A person is considered to have acquired particular goods as a consumer if, and only if, (i) the amount paid or payable for the goods did not exceed AUD 40,000 or a greater amount if this is provided for in a specific legal provision,<sup>103</sup> (ii) the goods were of a kind ordinarily acquired for personal, domestic, or household use or consumption, or (iii) the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads.<sup>104</sup> Thus, apparently, a transport firm purchasing cars or trucks for the purpose of the service provided by that firm will nevertheless be viewed as a consumer.

<sup>101</sup> Consumer Guarantees Act 1993 (New Zealand), s 2(1).

<sup>102</sup> Consumer Contract Act 2000 (Japan), s 2(1).

<sup>103</sup> The counter-example to such a \$40,000 limit to be considered a consumer is a court ruling in Amsterdam, where a buyer of a yacht worth EUR 5.4 million, an Australian living in Australia, could benefit from Dutch consumer protection rules requiring the inclusion of a clause giving the consumer the option to opt for the default court with jurisdiction (Case C/13/697598 (District Court Amsterdam, The Netherlands), Judgment 4 August 2021 [ECLI:NL:RBAMS:2021:4531]).

<sup>104</sup> Competition and Consumer Act 2010 (Australia), s 4(b) *juncto* Australian Consumer Law (Australia), s 3.

- 73 Another example can be found in India, where a ‘consumer’ is any person who buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose. Although this definition obviously adds weight to the question whether the purchase had a commercial purpose, thus in line with what was described above as the main distinctive criterion, it is interesting to note that further on the Indian legislature clarifies that ‘commercial purpose’ does *not* include use by a person of goods bought and used by him exclusively for the purpose of earning his livelihood by means of self-employment.<sup>105</sup> Hence, it is clear that, at least to some extent, entrepreneurs can qualify as consumers for contracts within the realm of their professional occupations.
- 74 South Africa takes another interesting approach, by defining a consumer, with respect to any goods or services, as a person to whom those particular goods or services are marketed in the ordinary course of the supplier’s business (Chapter 1, Part A of the Consumer Protection Act 2008 (Act no 68 of 2008)). Apparently, it is irrelevant whether the person concerned intends to use or apply the goods or services for professional purposes. The sole fact that he belongs to the marketing target audience of a good or service suffices to qualify as a consumer.<sup>106</sup>

### 3 INDIVIDUAL CONSUMER CLAIMS

- 75 A first type of consumer protection case is where consumers decide to enforce, or consider enforcing, their rights on an individual basis—although these cases are rare. In the United States, for example, it was recognized as early as 1993 that at federal level claims of a relatively low value, say under USD 25,000, practically required collective action for practical reasons.<sup>107</sup> Nevertheless, in the U.S., there are also very active small claims court at the state level for consumer actions.<sup>108</sup> The jurisdictional amount for small claims is generally USD 7,000.<sup>109</sup>

<sup>105</sup> Consumer Protection Act 2019 [preliminary chapter] (India), s 2(7).

<sup>106</sup> Consumer Protection Act 2008 (South Africa), s 1.

<sup>107</sup> G Hazard and M Taruffo, *American Civil Procedure; an introduction* (Yale University Press 1993), 159-160.

<sup>108</sup> A Best, *When Consumers Complain* (Columbia University Press 1986, 232 p. For a study showing that small claims courts may be paradigmatic of governmental responses to social problems (see A Best, D Zalesne, K Bridges & K Chenoweth, ‘Peace, Wealth, Happiness, and Small Claim Courts: A Case Study’ (1994) 21 Fordham Urb. L.J. 343, 344.

<sup>109</sup> For an overview of the maximum amount you can recover in a small claims court action in every state, see <https://www.nolo.com/legal-encyclopedia/small-claims-suits-how-much-30031.html>.

- 76 In continental Europe, Germany has long been regarded as one of the few countries where individual litigation was a viable option (partly because of the availability of legal expenses insurance and the possibility of anticipating lawyers' fees),<sup>110</sup> but even in this legal system individual consumer litigation is on the decline. According to the EU Justice scoreboard, the cost of initiating a procedure in a consumer case is currently the lowest in France and Belgium.<sup>111</sup> Of course, what happens in much more jurisdictions, and also falls into this category, is that professional counterparties take consumers to court (eg, for failure to repay their consumer credit), often resulting in default judgments. Throughout this chapter, the reader will observe a remarkable trend in which courts, where individual consumer disputes persist, are taking a proactive approach—actively addressing consumer law issues on their own initiative, intervening in subject matter and territorial jurisdiction, and adjusting the burden of proof.<sup>112</sup>
- 77 In this section, we will explore five themes related to individual consumer claims from which interesting comparative legal lessons can be drawn. These themes are jurisdiction (3.1), ex officio power of the court (3.2), evidence (3.3), special procedures (3.4) and costs and legal aid (3.5).

### 3.1 Jurisdiction

- 78 This section deals with jurisdiction rules relating to consumer protection. In what follows, the well-known *summa divisio* between subject matter (substantive) jurisdiction and territorial (geographical) jurisdiction will be maintained. Evidently, it is not our intention to give an exhaustive overview of all consumer protection-related jurisdiction rules in all legal systems worldwide. Rather, we aim to systematize different approaches (3.1.1 and 3.1.2), as well as give particular attention to so-called 'choice of forum-clauses', since these are of particular importance in consumer protection affairs (3.1.3).

#### 3.1.1 Subject Matter Jurisdiction

- 79 Concerning specific consumer protection-related rules regarding subject matter jurisdiction, a further division can be made. At one extreme, there are legal systems with specialized consumer courts or chambers, dealing with nothing other than consumer protection cases. At the other extreme, there might be legal systems where no specific jurisdiction rules pertaining to consumer protection law exist.

<sup>110</sup> S Law and V Richard, 'Luxembourg Comparative Study on Consumer Law Enforcement' in S Law and V Richard (ed), *Public and Private Enforcement of Consumer Law – Insights for Luxembourg* (Nomos 2021) 13, 22.

<sup>111</sup> European Commission, The 2023 EU Justice Scoreboard, [https://commission.europa.eu/document/download/db44e228-db4e-43f5-99ce-17ca3f2f2933\\_en?filename=Justice%20Scoreboard%202023\\_0.pdf](https://commission.europa.eu/document/download/db44e228-db4e-43f5-99ce-17ca3f2f2933_en?filename=Justice%20Scoreboard%202023_0.pdf).

<sup>112</sup> See also V Zeno-Zencovich and M-C Paglietti, 'Le droit processuel des consommateurs' (2014) 3 *Revue de Droit International et de Droit Comparé* 321, 337-338.

80 It should be pointed out at the outset, however, that most legal systems pend somewhere in between. More precisely, it appears that most legal systems have, to a varying degree, specific rules regarding subject matter in relation to consumer protection, without providing for specialized consumer protection courts or tribunals.<sup>113</sup> Moreover, many jurisdictions have small claims courts in which consumer cases are brought with little formality and less expense.<sup>114</sup> In that case, the question arises why it would still be important to have a special consumer protection court when there are available small claims courts that can meet the needs of consumer protection. Finally, the same can be said of the qualified entities in the European Union. These ADR bodies are not courts in the strict sense of the word, but serve as a functional equivalent of a court (see above para 4).

#### 3.1.1.1 Consumer Courts, Tribunals, or Chambers

- 81 In Turkey, actual specialized consumer courts exist, consisting of one judge. These courts are said to be costless, which is evidently beneficial from a consumeristic point of view, as legal costs may often be the determining turn-off factor for consumers. Also, the specialized courts are said to work swiftly, for which their degree of specialization may be a declaration.<sup>115</sup>
- 82 In Malaysia, the Consumer Claim Tribunal, established under Sec 85 of the Consumer Protection Act 1999, possesses jurisdiction over claims not exceeding MYR 10,000. The tribunal handles disputes pertaining to false or misleading conduct, false representation or unfair practice, safety of goods and services, consumer rights against suppliers regarding guarantees, and consumer rights against manufacturers concerning express guarantees.<sup>116</sup>
- 83 In some jurisdictions, although the ordinary courts and tribunals have jurisdiction for the majority of consumer disputes, a specialized tribunal has been established for very specific types of consumer litigation. In New Zealand, a specialized tribunal has been put into place to resolve disputes between consumers and motor vehicle traders, relating to amounts up to NZD 100,000 or more if both parties consent, provided that the disputes relates to a breach of the Consumer Guarantees Act, the Fair Trading Act, the Sale of

<sup>113</sup> See also H-W Micklitz and G Saumier, 'Enforcement and Effectiveness of Consumer Law' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 3, 18. Following their study covering 37 legal systems worldwide, the authors came to the conclusion that only a very limited number of these jurisdictions had actual 'consumer courts'.

<sup>114</sup> For US, see A Best, D Zalesne, K Bridges & K Chenoweth, 'Peace, Wealth, Happiness, and Small Claim Courts: A Case Study' (1994) 21 *Fordham Urb. L.J.* 343, 344.

<sup>115</sup> E Baş Sözel and E Erişir, 'Enforcement and Effectiveness of Consumer Law in Turkey' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 645, 653.

<sup>116</sup> J Juriah Abd and I Shahrul Mizan, 'Malaysia' in W Vandenbussche (ed), *International Encyclopedia of Laws – Civil Procedure* (Wolters Kluwer 2021) 58, para 157.

Goods Act, or the Contractual Remedies Act in the context of a consumer contract relating to a motor vehicle.<sup>117</sup>

- 84 Another very interesting development has been reported from Spain. Whereas in principle all consumer protection disputes are administered by the ordinary courts and tribunals, the European Court of Justice's *Gutiérrez Naranjo* judgment<sup>118</sup> gave rise to the creation of new Civil Instance Courts to deal with the tidal wave of civil claims on the nullity of floor clauses.<sup>119</sup> These are clauses according to which the consumer will continue to pay interest at the fixed minimum rate proposed by the bank, even if the reference index goes down. Thus, (very) specialized tribunals were established due to a judgment of the European Court of Justice.
- 85 Finally, it has been reported that, in Brazil, special consumer law chambers exist within the ordinary courts, following Art 5.IV of the Code of Consumer Protection and Defence.<sup>120</sup> Since these chambers appear to deal only with consumer protection law, the judges have the possibility to specialize, which in turn leads to decisions of higher quality and a higher consumer protection level in general.<sup>121</sup>

### 3.1.1.2 Specific Subject Matter Jurisdiction Rules

- 86 The fact that no specific consumer (chambers within) courts or tribunals exist does not necessarily mean that there are no specific subject matter jurisdiction rules relating to consumer protection.

<sup>117</sup> See Motor Vehicle Sales Act 2003 (New Zealand), s 89. See also T O'Sullivan, 'Enforcement and Effectiveness of Consumer Law in New Zealand' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 415, 421.

<sup>118</sup> In its judgment on 21 December 2016, the CJEU held that the Spanish Constitutional Court's point of view, according to which only repayment could be sought for sums paid (but undue) on the basis of floor clauses in consumer mortgage loans *after* said floor clauses were found to be unfair and thus contrary to the European law on unfair contract terms, was contrary to EU law. Hence, the CJEU's judgment opened the gates for claims for repayment going back in time further than what was possible under the Spanish Constitutional Court's judgment. (*Gutiérrez Naranjo*, joined Cases C-154/15, C-307/15 and C-308/15 (CJEU) Judgment 21 December 2016 [ECLI:EU:C:2016:980])

<sup>119</sup> M T Alonso Pérez, F de Elizalde Ibarbia and R Garcimartín Montero, 'An Interdisciplinary View of Enforcement and Effectiveness of Spanish Consumer Law' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 591, 603.

<sup>120</sup> Lei Nº 8.078 (Act Nº 8.078) of 11 September 1990 (Portugal), Art 5 reads as follows: 'For the execution of the National Policy for Consumer relations, the public power will, among others, perform the following tasks: IV. create Special Small Claims Courts and Specialized Sections for solving consumption-related litigations'.

<sup>121</sup> C Lima Marques and P Galindo da Fonseca, 'Consumer Protection in Brazil: The 2016 Report for the International Academy of Consumer Law' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 99, 106-107.

- 87 For instance, in Belgium, although there is no ‘general rule’ appointing all consumer protection cases to a specific (chamber within a) court or tribunal,<sup>122</sup> there are some specific rules of jurisdiction in the field of consumer protection which give jurisdiction to different courts depending on the exact nature of the dispute. Claims relating to consumer credit agreements fall under the specific jurisdiction of the Justice of the Peace.<sup>123</sup> The same goes for claims for payment against consumers for the provision of utility services.<sup>124</sup> However, as these disputes do not fall under the *exclusive* jurisdiction of the Justice of the Peace, it is perfectly possible for consumers and/or consumer credit institutions or utility suppliers to bring these kinds of disputes before the Tribunal of First Instance, since the latter is said to hold full general jurisdiction.<sup>125</sup> In addition, other courts do sometimes have jurisdiction. In the case of the execution of a consumer mortgage loan, an attempt at reconciliation must be made before the Attachment Judge.<sup>126</sup> Finally, the President of the Business Courts has exclusive subject matter jurisdiction to issue cease and desist orders in cases of unfair commercial practices or unfair contract terms by businesses.<sup>127</sup>
- 88 Also, in the Netherlands, specific consumer law jurisdiction matter provisions exist. For instance, the District Judge has jurisdiction for claims concerning consumer sales and consumer credit agreements, regardless of the value of the claim.<sup>128</sup> Thus, although these courts or tribunals also deal with (lots of) other issues, they are specifically deemed to be the ‘natural court or tribunal’ for some consumer protection related matters.
- 89 It also frequently occurs that, although subject matter jurisdiction provisions do not explicitly address consumer protection related disputes, their actual content and scope may indirectly have an important attributive effect. The most important criterion in this regard is the value of the claim. For example, in the small claims courts of the various US

<sup>122</sup> This may be regretted to some extent, as consumer protection law has grown to be a complex set of rules, requiring a certain degree of specialization. Not only does consumer law relate to the law of obligations, but it also encompasses issues on the verge of procedural and public law (eg, collective proceedings and administrative enforcement), as well as it requires—at least in Europe—a good understanding of the European legal system and its interaction with national legal systems.

<sup>123</sup> *Gerechtelijk Wetboek* (Judicial Code) (Belgium), Art 591, 21°.

<sup>124</sup> *Gerechtelijk Wetboek* (Judicial Code) (Belgium), Art 591, 25°. While enterprises may also decline payment for utility services, the jurisdiction of the Justice of the Peace under Belgian law is applicable only in cases involving non-paying consumers

<sup>125</sup> *Gerechtelijk Wetboek* (Judicial Code) (Belgium), Art 568, al 1. Put briefly, in Belgium there are three ‘kinds’ of subject matter jurisdiction: general, specific and exclusive. Only in the event of an exclusive jurisdiction matter of a court or tribunal other than the Tribunal of First Instance, it will be impossible to bring the claim before the Tribunal of First Instance. See on the Belgian law on jurisdiction more elaborate P Taelman and C Van Severen, ‘Belgium’ in W Vandenbussche (ed), *International Encyclopedia of Laws – Civil Procedure* (Kluwer 2021) 69.

<sup>126</sup> *Wetboek Economisch Recht* (Code of Economic Law) (Belgium), Art VII.147/24.

<sup>127</sup> *Wetboek Economisch Recht* (Code of Economic Law) (Belgium), Art XVII.9 and XVII.12. See L Claus and S Rutten, ‘Afdwingen van consumentenrechten in grensoverschrijdend verband’ in R Steennot and G Straetmans (ed), *Digitalisering van het recht en consumentenbescherming* (Intersentia 2019) 279, 281.

<sup>128</sup> *Wetboek Rechtsvordering* (Code of Civil Procedure) (the Netherlands), Art 93, c.

states, which are typically the place where consumers can take their case with little formality and expense, the maximum amount a consumer can recover in a single action is USD 7,000.<sup>129</sup>

- 90 In Belgium, the Justice of the Peace has general subject matter jurisdiction for claims with a value of no more than EUR 5,000.<sup>130</sup> Since consumer protection disputes often have a value not surpassing this threshold, Justices of the Peace are often the first point of contact for such claims. However, since this jurisdiction matter is not of an *exclusive* nature, it is also perfectly possible to take these same claims to the Tribunal of First Instance, given its full general jurisdiction.
- 91 In the Netherlands, the value threshold is even higher, as Art 93(a) of the Dutch Code of Civil Procedure attributes jurisdiction to the District Judge for claims with a value up to EUR 25,000.<sup>131</sup> France used to sail a course in between, by placing the threshold at EUR 10,000: anything up to and including EUR 10,000 would fall under the subject matter jurisdiction of the *Tribunal d'Instance*, whereas anything above EUR 10,000 was a matter for the *Tribunal de Grande Instance*.<sup>132</sup> However, as of 1 January 2020, the *Tribunal d'Instance* and *Tribunal de Grande Instance* have merged into a new type of court: the Tribunal Judiciaire. This means that the distinction between courts based on the value of the claim has become a thing of the past. Also, in New Zealand, it has been reported that 'the Disputes Tribunal is the most appropriate forum for resolving low value consumer disputes'.<sup>133</sup> Similar findings were made for Croatia<sup>134</sup> and Sweden.<sup>135</sup>
- 92 However, the point is that although the rules on jurisdiction may in themselves appear insensitive to the needs of consumer protection by not assigning (some categories of) consumer protection cases to specialized (chambers within) courts or tribunals, the coincidence of these rules with the nature of consumer protection proceedings may lead to the creation of consumer courts (or courts dealing to a large extent with cases concerning consumers and their rights).<sup>136</sup> Hence, even in legal systems where it has

<sup>129</sup> See <https://www.nolo.com/legal-encyclopedia/small-claims-suits-how-much-30031.html>.

<sup>130</sup> *Gerechtelijk Wetboek* (Judicial Code) (Belgium), Art 590.

<sup>131</sup> See also T Jongbloed, 'Burgerlijk procesrecht voor de individuele consument' in EH Hondius and V Mak (ed.), *Handboek consumentenrecht* (Paris 2020) 591, 592.

<sup>132</sup> *Code de l'organisation judiciaire* (Code of Judicial Organisation) (France), Art L.221-4.

<sup>133</sup> T O'Sullivan, 'Enforcement and Effectiveness of Consumer Law in New Zealand' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 415, 420.

<sup>134</sup> M Baretić and S Petrović, 'Enforcement and Effectiveness of Consumer Law in Croatia' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 203, 209 and 211.

<sup>135</sup> A Bakardjieva Engelbrekt, 'Effectiveness and Enforcement of Consumer Law in Sweden' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 613, 627.

<sup>136</sup> See also P Lewis, 'The consumer's court? Revisiting the theory of the small claims procedure' (2006) *Civil Justice Quarterly* 52, 54 and 68, dealing with small claims proceedings which appear to be not only open in case of a business-consumer relationship, but in case of 'any claim which has a financial value of not more than £5,000'. See also the Civil Procedure Rules 1998 (England & Wales), Pt. 27.

been reported that no specific jurisdiction rules relating to consumer protection were in place at all, such as Greece,<sup>137</sup> Singapore<sup>138</sup> and Slovenia,<sup>139</sup> the content of the general rules may still indirectly lead to de facto consumer courts.

### 3.1.2 Territorial Jurisdiction

- 93 Territorial jurisdiction rules define the geographical area in which a particular court or tribunal can exercise its jurisdiction. From the consumer's point of view, they indicate the specific court or tribunal which is geographically competent to hear his or her case. In what follows, we will only address the rules on territorial jurisdiction as such. In the next section (see 3.1.3), we will touch upon jurisdiction clauses, given their particular relevance in consumer protection litigation.

#### 3.1.2.1 At a National Level

- 94 At a purely national level, there again are differences in approach. In Belgium, for example, whether a person is a consumer is only of very limited relevance to the geographical jurisdiction of courts and tribunals. In fact, it is only with regard to the two specific rules of jurisdiction mentioned above (see above para 86), concerning claims relating to consumer credit agreements and claims for payment of utility services, that a complementary rule of territorial jurisdiction has been adopted. More specifically, these two types of claims can only be brought before the courts of the consumer's domicile.<sup>140</sup> On the contrary, for other types of claims relating to consumer protection law, the consumer does not have the right as a claimant to play a home game, at least not because of the fact that he or she is a consumer.
- 95 There seems to be a similar reluctance in Germany to attach particular importance to the fact that the dispute is a consumer protection dispute. An important exception, however, may be found in the statutory provision holding that, for cases concerning off-

<sup>137</sup> This has been reported for Greece, for instance. See A E Douga and V P Koumpli, 'Enforcement and Effectiveness of Consumer Law in Greece' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 307, 317. It should be noted that in Greece, the threshold for subject matter jurisdiction for Justices of the Peace and one-judge District Courts has been reported to lie at EUR 20,000. In absence of any other specific rules pertaining to subject matter jurisdiction in relation to consumer protection law, the extent to which the Justices of the Peace and one-judge District Courts qualify as de facto consumer courts seems rather limited.

<sup>138</sup> G Low, 'Singapore Consumer Law' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 531, 537, holding that 'as the sums involved tend to be modest, virtually all consumer disputes fall within the monetary jurisdiction of the State Courts. [...] Within the State Courts structure, the majority of disputes are dealt with in the Small Claims Tribunal (SCT, which deals with disputes of a value of up to S\$10,000).

<sup>139</sup> V Trstenjak and P Weingerl, 'Enforcement and Effectiveness of Consumer Law in Slovenia' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 547, 553.

<sup>140</sup> Gerechtelijk Wetboek (Judicial Code) (Belgium), Art 628, 8°, respectively 25°.

premises contracts, the courts and tribunals of the consumer's domicile (or, in lack thereof, habitual residence) shall have jurisdiction.<sup>141</sup>

- 96 This sharply contrasts with the Netherlands, for instance, where the Dutch Code of Civil Procedure provides that:

'[I]n cases concerning agreements concluded by, on one side, a party dealing for professional or business purposes and, on the other side, a natural person acting for purposes outside of his profession or business, the court or tribunal of the natural person's place of domicile or, in lack thereof, his or her place of residence also has jurisdiction'.<sup>142</sup>

- 97 Hence, in the event the consumer turns out to be the claimant, he can play a so-called home game if he wants to do so. A similar approach has been reported in Romania,<sup>143</sup> Sweden,<sup>144</sup> and Spain.<sup>145</sup>

- 98 In the event a claim is brought against a consumer, caution is once more needed. For instance, in the Netherlands, it is provided that, unless the law provides otherwise, the court or tribunal of the defendants domicile has jurisdiction to decide the case.<sup>146</sup> Taken together with the abovementioned rule of the same code, it means that the consumer can *always* play a home game. It should be noted, however, that the latter rule conferring jurisdiction on the court of the defendant's domicile is not 'consumer-specific' in the sense of a rule tailored to the needs of the consumer. Rather, it lays down a rule applying to all proceedings. As such, the Dutch rule differs, for instance, from Romanian law, where the Civil Procedure Code specifically provides that if a trader brings a claim against a consumer, it can only be brought before the courts and tribunals of the consumer's place of domicile.<sup>147</sup>

<sup>141</sup> Zivilprozessordnung (Code of Civil Procedure) (Germany), s 29c. See, more elaborately, Consumer Rights Directive, 2011/83/EU of 22 November 2011 (EU), Arts 6 *et seq.*

<sup>142</sup> Wetboek Rechtsvordering (Code of Civil Procedure) (the Netherlands), Art 101.

<sup>143</sup> Codul de procedură civilă al României 2010 (Civil Procedure Code) (Romania), Art 107. See C Toader, 'Enforcement and Effectiveness of Consumer Law in Romania' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 513, 520.

<sup>144</sup> Rättegångsbalk 1942 (Code of Judicial procedure) (Sweden), § 10:8a. See A Bakardjieva Engelbrekt, 'Effectiveness and Enforcement of Consumer Law in Sweden' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 613, 627, nuancing however that this (for the consumer) beneficial approach only counts in as far as the claim is of a relatively low value.

<sup>145</sup> Ley de Enjuiciamiento Civil (Civil Procedure Act) (Spain), Art 52(2). See M T Alonso Pérez, F de Elizalde Ibarbia and R Garcimartín Montero, 'An Interdisciplinary View of Enforcement and Effectiveness of Spanish Consumer Law' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 591, 603-604.

<sup>146</sup> Wetboek Rechtsvordering (Code of Civil Procedure) (the Netherlands), Art 99.1.

<sup>147</sup> See C Toader, 'Enforcement and Effectiveness of Consumer Law in Romania' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 513, 520.

- 99 In Belgium, on the other hand, there is not even a guarantee that the defendant-consumer will be sued in the court of his domicile, since the plaintiff can generally choose whether to sue the defendant before the court or tribunal of (i) the domicile of the defendant, (ii) the place where the obligation(s) giving rise to the dispute originated or where it has been, is being or should have been performed, (iii) the place chosen for the performance of the act, or (iv) the place where the bailiff spoke to the defendant in person, if the defendant's domicile in Belgium or abroad is not known.<sup>148</sup>

### 3.1.2.2 At a Cross-Border Level

- 100 It should be clear by now that consumer law throughout Europe is, to a large extent, influenced by EU law. This also applies to territorial jurisdiction. Since cross-border trade has always been one of the driving forces behind the European integration project, it is not surprising that the European legislature has adopted rules to regulate cross-border consumer litigation, which today can be found in Art 17-19 of the Brussels I recast Regulation.<sup>149</sup>
- 101 According to Art 18.1 of the Brussels I recast Regulation, in the event of a consumer bringing proceedings, he can choose to bring them before the courts of his own Member State (regardless of the professional counterparty's domicile) or before the courts of the Member State of the professional counterparty's domicile. Art 18.2 provides that, in the event a professional wants to bring proceedings against a consumer, he can only do so before the courts of the consumer's place of domicile.
- 102 Hence, Art 18 establishes the 'home game-principle' for consumers, although the consumer may also choose to bring proceedings in the courts of the Member State where the professional is domiciled. However, as legal proceedings in another Member State presumably bring along extra costs and difficulties, it is hard to imagine that a consumer would actually plan to do so. Concerning the possibility for the claimant-consumer to sue a professional counterparty before the courts of the consumer's place of domicile, it must be stressed that the place of domicile of the professional counterparty is deemed to be entirely irrelevant.<sup>150</sup> Hence, it is perfectly possible for an Italian consumer to bring proceedings against a Chinese enterprise before Italian courts, based on the Brussels I recast Regulation.
- 103 However, this finding must be qualified in light of the scope of application of the specific rules on jurisdiction for consumer contracts as laid down in the Brussels I recast Regulation. According to Art 17.1(c), the territorial jurisdiction provisions of Art 18 only apply insofar as the contract is concluded with a person who pursues commercial or

<sup>148</sup> *Gerechtelijk Wetboek* (Judicial Code) (Belgium), Art 624.

<sup>149</sup> Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), 1215/2012 of 12 December 2012 (EU).

<sup>150</sup> J Toro, 'DIP, protection des consommateurs et contrats' in C Verdure (ed), *Contrats et protection des consommateurs* (Anthemis 2016) 97, 104.

professional activities in the Member State of the consumer's place of domicile or, by any means, directs such activities to that Member State or to several Member States including that one, and the contract falls within the scope of such activities.<sup>151</sup>

- 104 In particular, the criterion of whether a professional directs his activities to the Member State of the consumer has given rise to practical problems and several rulings by the CJEU. This chapter is not the right place to go into this issue in detail.<sup>152</sup> It should be noted, however, that the mere fact that a company's website is accessible in the Member State of the consumer is not sufficient to establish that the company directs its activities towards that Member State. On the other hand, the explicit mention of the fact that a company directs its activities to a certain Member State necessarily leads to the conclusion that this is the case, as does the possibility offered on the company's website to have goods delivered in the Member States concerned. Other factors that may be indicative are the possibility of expressing the prices quoted in a currency other than that of the country in which the professional is established, the possibility of presenting the website in a language other than that of the country in which the professional is established, the use of a top-level domain name other than that of the Member State in which the professional is established, and the mention of telephone numbers with the international code.<sup>153</sup>

### 3.1.3 Choice of Forum Clauses

- 105 A choice of forum clause, also known as a forum selection clause, jurisdiction clause, or choice of court clause, is a contractual term which the parties include in their contract

<sup>151</sup> Art 17.1(a) provides that the protective provisions of the Brussels I recast Regulation also apply to contracts for the sale of goods on instalment credit terms. Art 17.1(b) provides that they also apply to contracts for a loan repayable by installments, or for any other form of credit, made to finance the sale of goods. An important exemption to the Regulation's scope of application is that it does not apply to a contract of transport, other than a contract which provides for a combination of travel and accommodation for an inclusive price (Art 17.3).

<sup>152</sup> See, more elaborate, B De Groote, 'Maletic and EU-jurisdiction rules for consumer contracts – How a seemingly internal holiday contract turns out to be international' (2016) 5(3) *Journal of European Consumer and Market Law* 138; J Toro, 'DIP, protection des consommateurs et contrats' in C Verdure (ed), *Contrats et protection des consommateurs* (Anthemis 2016) 97, 102-104.

<sup>153</sup> *Pammer and Hotel Alpenhof*, Joined Cases C-585/08 and C-144/09 (CJEU), Judgment 7 December 2010 [ECLI:EU:C:2010:740]. It may be mentioned in the margin that the CJEU ruled that the application of the special jurisdiction provisions in relation to consumer contracts does *not* require that a contract was concluded at distance. Thus, it is perfectly possible to apply the provisions if a consumer gets in touch with a professional party via the internet, and then physically goes to that professional party's Member State or third country to conclude the contract (*Mühlleitner*, Case C-190/11 (CJEU), Judgment 6 September 2012 [ECLI:EU:C:2012:542]). Even more consumer-friendly is the Court of Justice's case law according to which it is not even necessary that a causal link exists between the directing of activities towards a certain Member State and the conclusion of the contract. Thus, if a consumer towards whose Member State a professional party directs activities coincidentally passes by that professional party's store and buys something completely apart from the professional party's efforts towards the consumer's Member State, the consumer will still be able to sue the professional party before the courts of his own Member State, based on the Brussels I *bis*-regulation (*Emrek*, Case C-218/12 (CJEU), Judgment 17 October 2013 [ECLI:EU:C:2013:666]).

to determine in advance which court or tribunal will have jurisdiction (exclusive or alternative) in the event of a dispute arising in connection with the contract.

- 106 A good understanding of their content and validity is of paramount importance in the context of consumer protection. Not only do most consumer contracts contain jurisdiction clauses, but these clauses carry the risk of seriously hampering the consumer's right of access to justice by designating a competent court far away from the consumer's domicile (not only making it physically difficult to get there, but also discouraging the consumer from participating in the proceedings by making it seem necessary to incur costs). Forum selection clauses can have a serious impact on substantive consumer protection.<sup>154</sup> It is therefore not surprising that different legal systems have adopted specific rules on the validity of such clauses in consumer contracts. However, other jurisdictions have not, leaving the courts to assume some responsibility in this regard.

### 3.1.3.1 Specifically Tailored Rules

- 107 On the European level, the Brussels I recast Regulation is once again the key instrument. Art 19 provides that the parties may derogate from the provisions of Art 17 and 18 only by agreement (i) which is entered into after the dispute has arisen, (ii) which allows the consumer to bring proceedings in courts other than those indicated in the specific section of the Regulation on jurisdiction over consumer contracts, or (iii) which is entered into by the consumer and the other party to the contracts, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts and tribunals of that Member State, provided that such an agreement is not contrary to the law of that Member State.
- 108 Art 19 is complex and densely worded. Although there is some confusion, there are three non-cumulative alternatives.<sup>155</sup> First of all, the parties may derogate from the mandatory rules of the Brussels I recast Regulation after the dispute has arisen. In addition, there are two circumstances in which they are able to do so even before the dispute has arisen. This is the case where the forum clause provides the consumer with other fora for redress. In that case, the designated forum can only have an optional jurisdiction, in addition to those provided for in Art 18 of the Regulation,<sup>156</sup> thus only providing the consumer with *more* options than if the clause had not been included. Furthermore, a choice of forum clause may be agreed to in advance, provided that it confers jurisdiction on the courts of the Member State in which both the consumer and the other party to

<sup>154</sup> M Pavlovic, 'Contracting out of Access to Justice: Enforcement of Forum-Selection Clauses in Consumer Contracts' (2016) 62(2) McGill Law Journal 389, 393.

<sup>155</sup> G Van Calster, *Contrats et protection des consommateurs* (Hart 2021) 121, para 2.270.

<sup>156</sup> Compare *Société financière et industrielle du Peloux*, Case C-112/03 (CJEU), Judgment 12 May 2005 [ECLI:EU:C:2005:280] para 42.

the contract were domiciled or habitually held residence at the time of the conclusion of the contract giving rise to the dispute.

- 109 Another instrument to take into account when assessing choice of forum clauses in consumer contracts is the Unfair Contract Terms Directive.<sup>157</sup> According to Art 3.1, a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. Such terms will not bind the consumer, according to Art 6.1 of that Directive. Given the fact that consumer contracts are most often contracts of accession, thus not individually negotiated,<sup>158</sup> and given the potential impact of jurisdiction clauses on the consumer's right of access to justice as set out above, it does not require much further elaboration to understand that such clauses may be in breach of the Unfair Contract Terms Directive. In that regard, it must be stressed that the European Court of Justice has held in its *Océano Grupo* judgment that forum clauses submitting the consumer to a jurisdiction far away from his place of domicile have the effect of excluding or hindering the consumer's right to take legal action. This is also referred to under Annex 1(q) of the Unfair Contract Terms Directive, laying down an indicative and non-exhaustive list of clauses which *may* be regarded as unfair.<sup>159</sup>
- 110 In sum, at the EU level there is an abstract framework that is specifically tailored to the needs of consumers. These rules do not only benefit consumers by giving them *ex ante* predictable protection. For businesses, these abstract rules also have the advantage of being (relatively) clear in advance, thus ensuring that businesses more or less 'know what they are getting into' when concluding contracts with consumers.<sup>160</sup>

### 3.1.3.2 Discretionary Powers of Court

- 111 From this perspective, the EU approach contrasts sharply with what has been reported from Canada, for example, where the so called 'strong-cause test' is (said to be) applied to determine whether jurisdiction clauses will generate consequences. The strong-cause test consists of two separate, consecutive phases. In the first phase, the question is whether the forum selection clause is valid and enforceable from a contract law perspective. If it is, the evaluating court or tribunal will assess whether it will actually enforce the forum selection clause by staying its proceedings. The question in this second phase is whether there is a 'strong cause', or a proper reason, to leave the forum

<sup>157</sup> Council Directive on unfair terms in consumer contracts, 93/13/EEC of 5 April 1993 (EU).

<sup>158</sup> It should be noted, moreover, that some Member States (eg, Belgium) have dropped the condition that the provisions on unfair terms only apply insofar as the term has not been negotiated individually.

<sup>159</sup> Judgment of 27 June 2000, *Océano Grupo Editorial a.o.*, Joined Cases C-240/98 to C-244/98 (CJEU), [EU:C:2000:346] para 22.

<sup>160</sup> In this sense also, be it in the context of the Rome I-Regulation laying down the European rules on applicable law, J Healy, 'Consumer Protection Choice of Law: European Lessons for the United States' (2009) 19 *Duke Journal of Comparative & International Law* 535, 551-552.

selection clause unapplied nevertheless. In this second, discretionary phase, the encroachment of forum selection clauses into the public sphere is reflected.<sup>161</sup>

- 112 It has been reported that, until relatively recently, most Canadian courts and tribunals treated business and consumer contracts alike and thus did not pay particular attention to consumer protection interests when applying the strong-cause test.<sup>162</sup> Since the strong-cause test apparently only relatively rarely resulted in leaving a choice of forum clause unapplied, it has been held that in consumer contracts, these clauses shielded companies from liability.<sup>163</sup> However, in its *Douez v Facebook* judgment,<sup>164</sup> the Supreme Court of Canada seems to have indicated that it was time to shift the tide. More precisely, the Court held that:

(...) [C]ommercial and consumer relationships are very different. Irrespective of the formal validity of the contract, the consumer context may provide strong reasons not to enforce forum selection clauses. For example, the unequal bargaining power of the parties and the rights that a consumer relinquishes under the contract, without any opportunity to negotiate, may provide compelling reasons for a court to exercise its discretion to deny a stay of proceedings, depending on the other circumstances of the case.<sup>165</sup>

- 113 Hence, the Supreme Court held that, in applying the second phase of the strong-cause test, account has to be taken of—inter alia—the gross inequality of bargaining power between the consumer and his professional counterparty.
- 114 Although the *Douez* case has been welcomed as a positive development for consumer protection, it has also been criticized from a rather technical point of view. More precisely, it has been held that, although the Supreme Court *says* it is applying the strong-cause test, it is actually applying a completely different test.<sup>166</sup> The idea behind the strong-cause test is that parties must in principle adhere to the agreements they have made, and that only in exceptional cases a valid choice of forum clause should be left unapplied due to very specific reasons. The reorientation of the strong-cause test in

<sup>161</sup> See more elaborate on the strong-cause test: M Pavlovic, 'Contracting out of Access to Justice: Enforcement of Forum-Selection Clauses in Consumer Contracts' (2016) 62(2) McGill Law Journal 389, 396 *et seq.*

<sup>162</sup> M Pavlovic, 'Contracting out of Access to Justice: Enforcement of Forum-Selection Clauses in Consumer Contracts' (2016) 62(2) McGill Law Journal 389, 406; T Monastier, 'Forum Selection Clauses and Consumer Contracts in Canada' (2018) 36 Boston University International Law Journal 177, 184.

<sup>163</sup> T Monastier, 'Forum Selection Clauses and Consumer Contracts in Canada' (2018) 36 Boston University International Law Journal 177, 186.

<sup>164</sup> *Douez v Facebook Inc.*, Case 36616 (Supreme Court, Canada), Judgment 23 June 2017 [2017 SCC 33].

<sup>165</sup> *Douez v Facebook Inc.*, Case 36616 (Supreme Court, Canada), Judgment 23 June 2017 [2017 SCC 33], para 33.

<sup>166</sup> T Monastier, 'Forum Selection Clauses and Consumer Contracts in Canada' (2018) 36 Boston University International Law Journal 177, 186.

*Douez*, however, is said to boil down to placing public policy reasons above the binding nature of contractual agreements. Moreover, since one of the public policy reasons put to the fore by the Supreme Court of Canada is the unequal bargaining power that might be present in a consumer contract, and given the fact that most—if not all—consumer contracts are characterized by such an inequality, the result would be that choice of forum clauses in consumer contracts would as a matter of principle be left *unapplied*.

- 115 In any event, it should be noted from a comparative point of view that, due to the approach taken by the Canadian Supreme Court in *Douez v Facebook*, the prescribed test is now more in line with the test applied in the Brussels I recast Regulation, since the main point of relevance now seems to be a characteristic which (more or less) all consumer contracts share *in abstracto*, whereas previously, the strong-cause test implied a more case-by-case (*in concreto*) approach. Although it is true that the *in abstracto* approach has the advantage of predictability, it should be noted, however, that the strong-cause test as applied before the *Douez* judgment would have the advantage of being fit for custom-made work.

### 3.2 Ex Officio Powers of the Court

- 116 The debate about the division of tasks between courts or tribunals on the one hand and litigants on the other is a perennial one in legal doctrine. It more or less coincides with the (sometimes vague) boundaries between facts, evidence and law. In what follows, we will first of all briefly address the idea of adversarial and inquisitorial proceedings, and the consequences of the idea of ex officio application of consumer protection law (3.2.1). Next, we will elaborate more on the European ex officio doctrine in consumer protection law cases, strongly influenced—not created—by the CJEU (3.2.2), and the extent to which it is taken into account (3.2.3).

#### 3.2.1 The Nature of Legal Systems

- 117 Concerning this task distribution, legal systems have traditionally been categorised on a sliding scale, ranging from ‘completely adversarial’ to ‘completely inquisitorial’.
- 118 In a completely adversarial system, the court or tribunal’s role is limited to actually deciding the case based on what the parties have brought up. The court or tribunal does not engage in fact-finding or evidence-taking. Its role is limited to judging the parties’ claims and defenses, based on what has been brought to the court or tribunal’s desk. Visually, one could think of a Roman emperor’s *pollice verso* gesture: thumbs up would mean a well-founded claim, being granted; thumbs down would mean an unfounded claim, being rejected.
- 119 In a completely inquisitorial system, the court or tribunal is the master of the parties’ dispute. As soon a party decides to file a case, the court or tribunal takes over and handles it as it sees fit. An inquisitorial court or tribunal would actively engage in fact-

finding and evidence-taking, and would not be bound by what parties ask of it. Whereas an adversarial court or tribunal could be envisaged as a Roman emperor gesturing a *pollice verso*, an inquisitorial court or tribunal much more resembles a seaman-discoverer, setting sail to wherever he intends to go.

- 120 It should be noted that, given the inherent flaws of both systems in their purest form, most—if not all—legal systems are mixed systems. Hence, it is better to speak of ‘more inquisitorial’ or ‘more adversarial’ aspects of a certain legal system, since systems that are said to be inquisitorial in general might have characteristics that are more adversarial than what would be found in an adversarial system and vice versa.

### 3.2.1.1 More Adversarial

- 121 Traditionally, proceedings in legal systems rooted in the common law tradition (ie, the Anglo-American tradition), such as the United Kingdom, the United States, and Australia, are held to be more adversarial. Judges are said to be rather passive during trial, concerning fact-finding, evidence-gathering,<sup>167</sup> and law application.<sup>168, 169</sup>
- 122 The stated reason for this approach is efficiency. More specifically, Posner points to the motivation of private parties to prove that their claim has merit, either because their own interests are directly at stake in court (the parties in personam), or because it is their job to win cases and the functioning of the market would put them out of business if they didn’t (lawyers). Since the parties’ motivation is much higher than that of government-funded judges, it is best to leave as much as possible in their hands.<sup>170</sup> Another argument for a more adversarial approach relates to impartiality. An act in favour of one party (eg, gathering of evidence or suggesting an alternative legal ground) is an act against the other party. Finally, there are also concerns about courts and tribunals’ workload.
- 123 In any event, it would probably seem inconceivable to a lawyer trained in the Anglo-American tradition that courts or tribunals should be required or even permitted to invoke consumer protection law on their own motion (ie, ex officio), for example by

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<sup>167</sup> This is understood as the act of determining *what* must be brought forward in order to support a claim. Concerning the *monitoring* of evidence-gathering, courts and tribunals in Anglo-American legal systems appear to know less on the case than their continental counterparts. Moreover, their role in the context concerning evidence-gathering is not limited to an *ex post* judgment concerning whether a certain element of proof has been met in accordance with the law. For instance, in the United States, they may also be called upon to decide *ex ante* on the lawfulness of a request for the production of documents or statements during the phase of pretrial discovery (DS Clark, ‘Civil Procedure’ in DS Clark and T Ansay (ed), *Introduction to the Law of the United States* (Kluwer, 2002) 373, 402; W Pintens, *Inleidende tot de rechtsvergelijking* (Leuven University Press, 1998) 201).

<sup>168</sup> Concerning case-management and proper conduct of proceedings, however, common law courts and tribunals appear to be equally, if not more, active than their continental counterparts.

<sup>169</sup> F Gorlé, G Bourgeois, H Bocken, F Reyntjens, W De Bondt and K Lemmens, *Rechtsvergelijking* (Mechelen, Wolters Kluwer 2007) 280.

<sup>170</sup> R Posner, *Economic Analysis of Law – Fourth Edition* (Boston, Little, Brown and Company 1992) 520.

questioning the fairness of a term on which a company bases its claim if the opposing consumer does not raise any objection to its fairness.

### 3.2.1.2 More Inquisitorial

- 124 The continental European tradition, on the other hand, has traditionally been labelled as inquisitorial, especially by Anglo-American trained lawyers.<sup>171</sup> Although there is great diversity among the legal systems said to originate from the continental European tradition,<sup>172</sup> it appears that the freedom (or even the obligation) of courts and tribunals to apply the legal principles they consider appropriate to the facts presented by the parties is greater than in Anglo-American legal systems.
- 125 For example, the Belgian courts are *required* to assess the merits of the parties' claims not only from the legal point of view put forward by the parties, but also from any other legal point of view whose applicability is clearly imposed on them, in the light of the facts which the parties have specifically put forward in support of their claims.<sup>173</sup> On the other hand, they may apply legal grounds to facts which the parties have not specifically put forward in support of their claims.
- 126 Similar duties and possibilities rest upon the shoulders of French, German, and Dutch courts and tribunals. However, unlike in Belgium, the respective codes of civil procedure of these legal systems do contain provisions that define the division of tasks between the courts and the parties and provide for guidance.<sup>174</sup> The Belgian task formula for courts and tribunals relating to the substantive settlement of disputes is entirely made up by the Belgian Court of Cassation.
- 127 Be that as it may, these task formulas seem to leave many more possibilities (and even obligations) to the courts with regard to the ex officio application of consumer law. Apart from the fact that the Belgian, French, Dutch, and German legal systems all belong to the inquisitorial, continental European legal tradition when it comes to the role of courts and tribunals, they have something else in common: they are all Member States of the European Union. Given the far reaching European harmonization of consumer law, it is already well-known that the CJEU interferes with the application of consumer law by national courts and tribunals. It has done so by leading the way on substantive consumer protection, including by providing a uniform and autonomous interpretation of certain

<sup>171</sup> See eg, R Posner, *Economic Analysis of Law – Fourth Edition* (Boston, Little, Brown and Company 1992) 520.

<sup>172</sup> See for a brief overview JT Nowak, *Ambtshalve toepassing van EU-recht door de Belgische burgerlijke rechter* (unedited PhD Dissertation, KU Leuven 2021) 96-108, as well as B Allemeersch, *Taakverdeling in het burgerlijk proces* (Antwerpen, Intersentia 2007) 49-54.

<sup>173</sup> See eg, Case S.17.0010.N (Court of Cassation, Belgium), Judgment 3 October 2022; Case C.20.0321.N (Court of Cassation, Belgium), Judgment 18 June 2021.

<sup>174</sup> *Wetboek van Burgerlijke Rechtsvordering* (Code of Civil Procedure) (the Netherlands), Arts 23-25; *Code de procédure civile* (Code of Civil Procedure) (France), Arts 1-13; *Zivilprozessordnung* (Code of Civil Procedure) (Germany), ss 138-139.

concepts. But also, and most importantly, the Court of Justice has taken the lead in determining how national courts should apply consumer law, in effect prescribing their task formula. Given the importance of the Court's jurisprudence on this point, it deserves special attention.

### 3.2.2 The Ex Officio Application of EU Consumer Law

- 128 It has been more than 20 years since the CJEU gave the beginnings of what is by now known as the ex officio doctrine in consumer law cases.<sup>175</sup> In its *Océano Grupo* judgment (2000), the Court held that, as a matter of EU law, national courts and tribunals are *allowed* to assess whether a choice of forum clause is fair according to the Unfair Contract Terms Directive.<sup>176</sup> According to the Court, such a possibility of ex officio control flows from the principle of *effet utile* of EU law. It is considered an appropriate means of combating the use of unfair contract terms because of its dissuasive effect.
- 129 Uncertainty existed concerning how far the Court was willing to go with its reasoning as developed in *Océano Grupo*. The *Cofidis* judgment (2002) put an end to these doubts,<sup>177</sup> as the Court held that national courts and tribunals were also allowed to assess the (un)fairness of certain financial clauses. It was thus clear that all types of contractual clauses were covered by the European ex officio doctrine, which means that courts of EU Member States have the power, or even the duty, to apply consumer rights of their own motion, regardless of whether they concerned more procedural aspects (eg, choice of court clauses) or more substantive aspects of the contractual relationship.
- 130 The Court, however, was not yet finished with national courts and tribunals' European task description. In its paramount *Mostaza Claro* judgment (2006),<sup>178</sup> the CJEU not only reconfirmed the broad scope of application of the ex officio assessment of unfair terms, but it also, and more importantly, held as a matter of EU law that national courts and tribunals were *required* to assess on their own motion whether a contractual term is unfair. By doing so, the courts and tribunals of the Member States would compensate the imbalance existing between the consumer and his or her professional counterparty by replacing the formal contractual balance with an effective, substantive balance. Thus, whereas prior to *Mostaza Claro* it could be held that national courts and tribunals had the discretionary power to assess the fairness of clauses ex officio, after *Mostaza Claro*

<sup>175</sup> See, for a more profound analysis, A Beka, *The Active Role of Courts in Consumer Litigation – Applying EU Law of the National Courts' Own Motion* (Intersentia 2018); J Werbrouck, *Doorwerking van het Europees consumentenrecht in het nationaal procesrecht* (Intersentia 2023) 386-520; S Law, 'The Transformation of Consumer Law in Times of Crisis: The Ex Officio Control of Unfair Contract Terms' in A Uzelac and CH van Rhee (ed), *Transformation of Civil Justice – Unity and Diversity* (Springer 2018) 282.

<sup>176</sup> *Océano Grupo Editorial a.o.*, Joined Cases C-240/98 to C-244/98 (CJEU), Judgment 27 June 2000 [ECLI:EU:C:2000:346].

<sup>177</sup> *Cofidis SA v Jean-Louis Fredout*, Case C-473/00 (CJEU), Judgment 21 November 2002 [ECLI:EU:C:2002:705].

<sup>178</sup> *Elisa María Mostaza Claro v Móvil Milenium SL*, Case C-168/05 (CJEU), Judgment of 26 October 2006 [ECLI:EU:C:2006:675].

little doubts could remain that the courts and tribunals were under an actual obligation to do so.

- 131 The obligation to raise the potential unfairness of contract clauses ex officio was reaffirmed in the Court's *Pannon* judgment (2009).<sup>179</sup> However, from its reasoning in its *Tomášová* judgment (2016),<sup>180</sup> it may be inferred that the Court of Justice itself deemed the obligation only clear and certain enough for national courts and tribunals since *Pannon*.<sup>181</sup> On the other hand, the *Tomášová* judgment signaled that the ex officio obligation was not to be disregarded. In particular, the Court held that the failure of national courts to assess of their own motion the unfairness of contractual terms following the *Pannon* judgment could constitute a sufficiently serious breach of EU law to give rise to state liability.<sup>182</sup>
- 132 Whereas the Unfair Contract Terms Directive played a pioneering role in the development of the European ex officio doctrine, it has become clear that the obligation of national courts to assess compliance with European consumer law is not limited to this area. Also in relation to consumer credit law,<sup>183</sup> consumer sales law,<sup>184</sup> and the law concerning off-premises contracts concluded with consumers,<sup>185</sup> the Court of Justice acknowledged a European ex officio obligation.<sup>186</sup>

<sup>179</sup> *Pannon GSM Zrt. v Erzsébet Sustikné Győrfi*, Case C-243/08 (CJEU), Judgment of 4 June 2009 [ECLI:EU:C:2009:350].

<sup>180</sup> *Milena Tomášová v Slovenská republika - Ministerstvo spravodlivosti SR and Pohotovosť s.r.o.*, Case C-168/15 (CJEU), Judgment 28 July 2016 [ECLI:EU:C:2016:602].

<sup>181</sup> *Ibid*, paras 30 and 33.

<sup>182</sup> S Law, 'The Transformation of Consumer Law in Times of Crisis: The Ex Officio Control of Unfair Contract Terms' in A Uzelac and CH van Rhee (ed), *Transformation of Civil Justice – Unity and Diversity* (Springer 2018) 282, 304-305.

<sup>183</sup> *Max Rampion and Marie-Jeanne Godard, née Rampion v Franfinance SA and K par K SAS*, Case C-429/05 (CJEU), Judgment 4 October 2007 [ECLI:EU:C:2007:575]; *Ernst Georg Radlinger and Helena Radlingerová v Finway a.s.*, Case C-377/14 (CJEU), Judgment 21 April 2016 [ECLI:EU:C:2016:283]; *OPR-Finance s.r.o. v GK*, Case C-679/18 (CJEU), Judgment 5 March 2020 [ECLI:EU:C:2020:167].

<sup>184</sup> *Soledad Duarte Hueros v Autociba SA and Automóviles Citroën España SA*, Case C-32/12 (CJEU), Judgment 3 October 2013 [ECLI:EU:C:2013:637]; *Froukje Faber v Autobedrijf Hazet Ochten BV*, Case C-497/13 (CJEU), Judgment 4 June 2015 [ECLI:EU:C:2015:357].

<sup>185</sup> *Eva Martín Martín v EDP Editores SL*, Case C-227/08 (CJEU), Judgment 17 December 2009 [ECLI:EU:C:2009:792].

<sup>186</sup> See also *Radlinger*, Case C-377/14 (CJEU), Judgment 21 April 2016 [ECLI:EU:C:2016:283] para 62, where the Court held in general terms 'that the Court has recalled on a number of occasions the obligation of national courts to examine of their own motion infringements of EU consumer protection legislation' (see, to that effect, with regard to Directive 93/13, judgment of 4 June 2009 in *Pannon GSM*, C-243/08, EU:C:2009:350, paragraph 32); with regard to Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31), judgment of 17 December 2009 in *Martín Martín*, C-227/08, EU:C:2009:792, paragraph 29; and, with regard to 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 (OJ 1999 L 171, p. 12), judgment of 3 October 2013 in *Duarte Hueros*, C-32/12, EU:C:2013:637, paragraph 39'.

- 133 This has led some to argue that there is a general obligation to raise EU consumer law ex officio. At first sight, developments in the Court's case law would indeed seem to support such an assumption, as the scope of the ex officio doctrine appears to be expanding into other areas of EU consumer law. Moreover, in its *Radlinger* judgment, the Court stated in general terms 'that effective consumer protection could be achieved only if the national court were required, on its own motion, to examine compliance with the requirements which flow from EU law on consumer law'.<sup>187</sup>
- 134 However, in its *Bankia* judgment (2018) regarding unfair commercial practices,<sup>188</sup> the Court squashed the assumption of a general ex officio obligation based on the mere fact that consumers are in a procedurally disadvantaged position vis-à-vis their professional counterparts. According to the Court, the Unfair Commercial Practices Directive only prohibits the use of unfair commercial practices. Unlike, for example, the Unfair Contract Terms Directive, no private remedy has been provided at the EU level. This was therefore apparently sufficient for the Court to rule that, as a matter of EU law, it is not necessary for a national court to raise and apply on its own motion the rules of unfair commercial practices in order to give full effect to the Unfair Commercial Practices Directive.<sup>189</sup> Although the *Bankia* judgment has been criticized both for its outcome and for the Court's reasoning, it most certainly makes clear that there is no general ex officio obligation as a matter of EU law.<sup>190</sup>
- 135 Although the EU's ex officio obligation has a broad ambit, it is not absolute. In its case law, the Court of Justice has made it clear that there are certain limits that national courts may/must take into account. Firstly, totally passive consumers will not benefit from the ex officio obligation of national courts, as the Court held in its *Asturcom* judgment (2009).<sup>191</sup> The criterion to determine whether a consumer is totally passive in the sense of this case law, has been subject to debate. It appears that 'totally passive' must be seen as rather absolute. The Court thus made it clear that the mere fact that consumers do not appear in court (ie, in default proceedings) is not sufficient to deprive

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<sup>187</sup> *Radlinger*, Case C-377/14 (CJEU), Judgment 21 April 2016 [ECLI:EU:C:2016:283] para 66.

<sup>188</sup> *Bankia SA v Juan Carlos Mari Merino a.o.*, Case C-109/17 (CJEU), Judgment 19 September 2018 [ECLI:EU:C:2018:735].

<sup>189</sup> *Ibid*, para 34.

<sup>190</sup> However, assuming that the lack of a private remedy was really what kept the Court from ruling that the Unfair Commercial Practices Directive was also to be raised and applied ex officio, the tides may turn, since the so-called Omnibus-Directive (Directive amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, 2019/2161 of 27 November 2019 (EU)) introduced private remedies to said Directive.

<sup>191</sup> *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*, Case C-40/08 (CJEU), Judgment 6 October 2009 [ECLI:EU:C:2009:615].

them of the procedural protection afforded by consumer law, which is invoked and applied ex officio.<sup>192</sup>

- 136 Another limitation accepted by the Court is that consumers may waive the application ex officio, provided that they are well informed about the breach of consumer law.<sup>193</sup> Therefore, in practice, national courts or tribunals should ex officio invoke consumer law when they think/believe that it has been breached, inform the consumer (if present) of this fact and of the possible consequences, and leave it to the consumer to decide whether he or she wants EU consumer law to be applied.
- 137 In the context of choice of forum clauses, this limitation often serves its purpose. In case a consumer shows up at a court or tribunal appointed by such a clause, contrary to EU consumer law, that court or tribunal should raise that matter and inform the consumer of the fact that if he or she wants to have consumer law applied, the proceedings cannot go on there. Often, consumers will renounce the protection granted to them (ie, the non-bindingness of said choice of forum clause (Art 6 Unfair Contract Terms Directive)). After all, the application of consumer protection law would mean that they would have to spend another day in a different court or tribunal, while the substantive protection they would receive on the merits of their claims may appear to be the same.
- 138 A third (logical) limitation is that national courts and tribunals have to apply consumer protection law ex officio only if they have before them the legal and factual elements necessary for that task, according to the Court in *Pannon* (2009).<sup>194</sup> On the contrary, it appeared that if the court or tribunal would lack one (factual or legal) element to determine with certainty whether consumer law had been breached, the latter could be left unapplied as a matter of EU law.
- 139 However, only one year after *Pannon*, the Court made clear that it had something else in mind. In its *Pénzügyi Lízing* judgment,<sup>195</sup> it held that:

[T]he national court must investigate of its own motion whether a term conferring exclusive territorial jurisdiction in a contract concluded between a seller or supplier and a consumer, which is the subject of a dispute before it, falls within the scope of the Directive and, if it does, assess of its own motion whether such a term is unfair.

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<sup>192</sup> *Kancelaria Medius SA v RN*, Case C-495/19 (CJEU), Judgment 4 June 2020 [ECLI:EU:C:2020:431]. In *Asturcom*, the Court apparently found the consumer to be totally passive, since she did not undertake any action at any moment during both the arbitral proceedings, as well as the enforcement proceedings before the referring court.

<sup>193</sup> *Pannon GSM Zrt. v Erzsébet Sustikné Győrfi*, Case C-243/08 (CJEU), Judgment of 4 June 2009 [ECLI:EU:C:2009:350], para 33.

<sup>194</sup> *Ibid* para 32.

<sup>195</sup> *VB Pénzügyi Lízing Zrt. v Ferenc Schneider*, Case C-137/08 (CJEU), Judgment 9 November 2010 [EU:C:2010:659].

140 Whereas the English version of this judgment might leave some room for doubt, other language versions do not. For instance, the French, German, and Dutch versions make clear that national courts and tribunals must, as a matter of EU law, take measures of inquiry to determine whether consumer law applies in a case before them, and if so, apply EU consumer law on their own motion.<sup>196</sup> Recent case law has shown that this duty to investigate must be interpreted broadly.<sup>197</sup> Thus, while the availability of the necessary (factual and legal) elements initially seemed to act as a limit to the European ex officio obligation of national courts, the CJEU has turned it into an additional obligation to investigate the case beyond the case file.<sup>198</sup>

141 Finally, the ex officio obligation does not go so far as to require courts or tribunals to break the res judicata effect of other judgments. Therefore, if a potential breach of EU consumer law has already been brought before a court, EU law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would make it possible to remedy an infringement of a provision, regardless of its nature, contained in the Unfair Contract Terms Directive.<sup>199</sup>

142 Another important boundary that national courts and tribunals must take into account is that they must adhere to the object of a claim, be it that they may (and even must) look beyond the literal wording of the claims. In its *Banif Plus Bank* judgment,<sup>200</sup> the Court held that:

[T]he national court which has found of its own motion that a term is unfair should be able to establish all the consequences of that finding, without waiting for the consumer, who has been fully informed of his rights, to submit a statement requesting that that term be declared invalid.

143 Although this extract seems to suggest that national courts are very free as to the object of a claim, the Court's *Lintner* judgment shows that said object is a limitation of the court's powers. In *Lintner*, the Court ruled that:

<sup>196</sup> 'Des mesures d'instruction' (French), 'Untersuchungsmaßnahmen' (German), 'maatregelen van instructie' (Dutch).

<sup>197</sup> *Györgyné Lintner v UniCredit Bank Hungary Zrt*, Case C-511/17 (CJEU), Judgment 11 March 2020 [ECLI:EU:C:2020:188]; *Kancelaria Medius SA v RN*, Case C-495/19 (CJEU), Judgment 4 June 2020 [ECLI:EU:C:2020:431].

<sup>198</sup> See on the matter of measures of inquiry more elaborate J Werbrout and E Dauw, 'The National Courts' Obligation to Gather and Establish the Necessary Information for the Application of Consumer Law—The Endgame?' (2021) 46(3) *European Law Review* 225.

<sup>199</sup> *Pohotovost' s.r.o. v Iveta Korčkovská*, Case C-76/10 (CJEU), Order 16 November 2010 [ECLI:EU:C:2010:685]; *Banco Primus SA v Jesús Gutiérrez García*, Case C-421/14 (CJEU), Judgment 26 January 2017 [ECLI:EU:C:2017:60]; *Francisco Gutiérrez Naranjo a.o.*, Joined Cases C-154/15 and C-307/15 (CJEU), Judgment 21 December 2016 [ECLI:EU:C:2016:980].

<sup>200</sup> *Banif Plus Bank Zrt v Csaba Csipai and Viktória Csipai*, Case C-472/11 (CJEU), Judgment of 21 February 2013 [ECLI:EU:C:2013:88] para 28.

[I]t is within the limits of the subject matter of the dispute before it that the national court is called upon to examine of its own motion a contractual term.<sup>201</sup>

- 144 For example, if a consumer goes to court to challenge a potentially unfair term in a credit agreement, it is not for the court to question the consumer about the car that brought him to court, in order to establish whether there might be something wrong with the contract for the sale of that car.
- 145 Of course, the right to a fair trial, including companies' rights of defense, must also be taken into account.<sup>202</sup> Hence, in case a court or tribunal considers applying EU consumer law on its own motion (whereas it has not been raised earlier on during proceedings), it may not catch the enterprise and the consumer by surprise by ruling immediately without giving them a proper opportunity to debate the proposed application.<sup>203</sup>
- 146 While it was clear from the outset that the path the Court appeared to be taking would have serious implications for the enforcement of EU consumer law, the extent to which this ex officio doctrine would eventually take shape was probably not anticipated by anyone. By now, however, more and more courts and tribunals seem to be aware of the enormous impact of the Court of Justice and its case law on their workload. On the latter point, however, the Court made it clear that 'possible practical difficulties, linked to workload, cannot justify non-application of EU law'.<sup>204</sup> It may be clear that this statement, together with the fact that failure to raise and apply EU consumer law ex officio could give rise to state liability, places a heavy European burden on the shoulders of national courts and tribunals, and may require a shift in comparison with their own legal systems.<sup>205</sup>

### 3.2.3 Reception in the Member States and Beyond

- 147 As had righteously been held,<sup>206</sup> the contribution of the ex officio doctrine to effective consumer protection depends largely on the extent to which national courts comply with the obligations described above. Although the CJEU has been very clear that workload cannot be used as an argument for not applying EU consumer law, the reality is that only

<sup>201</sup> *Györgyné Lintner v UniCredit Bank Hungary Zrt*, Case C-511/17 (CJEU), Judgment 11 March 2020 [ECLI:EU:C:2020:188] para 32.

<sup>202</sup> See *inter alia Banif Plus Bank Zrt v Csaba Csipai and Viktória Csipai*, Case C-472/11 (CJEU), Judgment of 21 February 2013 [ECLI:EU:C:2013:88] paras 27-28.

<sup>203</sup> Note that that would not only go against the enterprise's rights of defense to catch it by surprise, but also the consumer would be deprived of his or her possibility to renounce protection.

<sup>204</sup> *"DSK Bank" EAD and "FrontEx International" EAD*, Case C-807/19 (CJEU), Order 26 November 2020 [ECLI:EU:C:2020:967] para 45.

<sup>205</sup> S Law, 'The Transformation of Consumer Law in Times of Crisis: The Ex Officio Control of Unfair Contract Terms' in A Uzelac and CH van Rhee (ed), *Transformation of Civil Justice – Unity and Diversity* (Springer 2018) 282, 302.

<sup>206</sup> Civic Consulting, *Study for the Fitness Check of EU consumer and marketing law – Final report* (Brussels, European Commission 2017) 90.

a fraction of the cases in which consumer law is, or should have been, applied make it to the *Plateau de Kirchberg*.

- 148 It would go too far to analyze, for each Member State, the extent to which national courts, tribunals, and legislatures are aware of and comply with the developments concerning the ex officio doctrine. Such an analysis has already been carried out on several occasions.<sup>207</sup>
- 149 It should be noted, however, that there is not one way in which the ex officio doctrine developed by the Court of Justice has been perceived. Some Member States have introduced provisions in their procedural or substantive law requiring ex officio applications.<sup>208</sup> The wording of these provisions appears to vary widely.
- 150 In France, for instance, the Consumer Code states that in general the judge may raise all provisions of said Code in disputes falling within its scope of application.<sup>209</sup> It is added that, after hearing the parties' observations, the judge rejects the application of a contractual term whose unfairness is clear from the elements in the case file.<sup>210</sup> In Spain, on the other hand, legislative changes appear to be more reactive to judgments handed down by the Court,<sup>211</sup> and relatively limited to what the Court requires (ie, limited to the context of unfair contract terms).
- 151 In other Member States, the matter was left to the judiciary.<sup>212</sup> This is the case, for example, in the Netherlands, where the Dutch Supreme Court in its *Heesakkers v Voets* judgment indicated that the ex officio doctrine should be taken seriously in the Netherlands.<sup>213</sup> Of particular interest is the report of the LOVCK&T (an advisory body within the Dutch judiciary) on how Dutch courts should apply consumer protection

<sup>207</sup> See B Hess and P Taelman, 'Consumer Actions before National Courts' in B Hess and S Law (ed) *Implementing EU Consumer Rights by National Procedural Law. Luxembourg Report on European Procedural Law* (Verlag C.H. Beck oHG 2019) 95 et seq; Civic Consulting, *Study for the Fitness Check of EU consumer and marketing law – Final report* (Brussels, European Commission 2017).

<sup>208</sup> See S Law, 'The Transformation of Consumer Law in Times of Crisis: The Ex Officio Control of Unfair Contract Terms' in A Uzelac and CH van Rhee (ed), *Transformation of Civil Justice – Unity and Diversity* (Springer 2018) 282, 300, under reference to Spain, Slovakia, the United Kingdom, Latvia, Lithuania and France.

<sup>209</sup> Code de la consommation (Consumer Code) (France), Art L141-4. Free translation of: 'le juge peut soulever d'office toutes les dispositions du présent code dans les litiges nés de son application'.

<sup>210</sup> Free translation of: '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'.

<sup>211</sup> For instance, the Court's judgment in *Aziz* led to major changes in the procedural rules concerning mortgage enforcement proceedings.

<sup>212</sup> See S Law, 'The Transformation of Consumer Law in Times of Crisis: The Ex Officio Control of Unfair Contract Terms' in A Uzelac and CH van Rhee (ed), *Transformation of Civil Justice – Unity and Diversity* (Springer 2018) 282, 300, referring to Ireland and Austria. Also in Belgium, the matter is left to the judiciary.

<sup>213</sup> *Heesakkers v Voets*, Case 12/00395 (Supreme Court, The Netherlands), Judgment of 13 September 2013 [ECLI:NL:HR:2013:691].

law.<sup>214</sup> This report provides the Dutch judiciary with a hundred pages of accessible and understandable information,<sup>215</sup> outlining exactly what they are expected to achieve. Although we do not have statistical data, it is reasonable to assume that such initiatives have a positive impact on the willingness and ability of national courts to comply with their obligations under EU law.

- 152 Finally, it has been reported that, in some Member States, the ex officio doctrine does not seem to be taking off.<sup>216</sup> In Slovenia, for example, the national courts are said to be unfamiliar with the case law of the Court of Justice, although there has been some improvement.<sup>217</sup>
- 153 In principle, the jurisdiction of the Court of Justice does not extend beyond the Member States of the European Union. However, it has been reported that the development of the ex officio doctrine in the Court's case law has also led to an academic debate in Norway on whether, and if so, to what extent, Norwegian judges are obliged to raise and apply (some parts of) consumer protection law on their own motion.<sup>218</sup> This is perhaps not too surprising as the main parts of European consumer law are also part of the European Economic Area Agreement and therefore apply in substance in Norway, Liechtenstein, and Iceland. Although it has been reported that the Norwegian judiciary does not apply the ex officio doctrine in practice, the question is how long this will remain the case.

### 3.3 Evidence

- 154 In principle, as is the case for other special subject matters, consumer protection proceedings are governed by the general rules of evidence. However, in almost all legal systems, a number of derogations have been created for the benefit of consumers regarding some aspects of the law of evidence. Generally speaking, those rules can be

<sup>214</sup> LOVCK&T, *Ambtshalve toetsing III* (2018) [www.rechtspraak.nl/SiteCollectionDocuments/rapport-at-III-31-juli-2018.pdf](http://www.rechtspraak.nl/SiteCollectionDocuments/rapport-at-III-31-juli-2018.pdf).

<sup>215</sup> It should be acknowledged that, given national courts and tribunals' working load on one hand and the specialistic nature of European consumer law and the Court of Justice's case law on that matter on the other, it is nearly impossible for national courts and tribunals to keep themselves up to date concerning every possible development at the European level.

<sup>216</sup> As has been reported for *inter alia* Croatia (M Baretić and S Petrović, 'Enforcement and Effectiveness of Consumer Law in Croatia' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 203, 209) and Cyprus (Civic Consulting, *Study for the Fitness Check of EU consumer and marketing law – Final report* (Brussels, European Commission 2017), 90).

<sup>217</sup> V Trstenjak and P Weingerl, 'Enforcement and Effectiveness of Consumer Law in Slovenia' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 547, 555; S Law, 'The Transformation of Consumer Law in Times of Crisis: The Ex Officio Control of Unfair Contract Terms' in A Uzelac and CH van Rhee (ed), *Transformation of Civil Justice – Unity and Diversity* (Springer 2018) 282, 300.

<sup>218</sup> H Haukeland Fredriksen and M Strandberg, 'Norwegian Civil Procedure Under the Influence of EU Law' in A Uzelac and CH van Rhee (ed), *Transformation of Civil Justice – Unity and Diversity* (Springer 2018) 41, 55-57.

divided into three categories: adjustments of the allocation of the burden of proof (3.3.1), rules regarding the available items of evidence (3.3.2), and restrictions of the freedom of parties to enter into agreements regarding the administration of evidence (see 3.3.3).

- 155 Leaving aside some rare exceptions, those rules are commonly included in consumer legislation along with substantive law provisions (such as in the Consumer Protection Act or the Consumer Code). Obviously, following the principle '*lex specialis derogat generalibus*', those specific rules take precedence over the general regime, but also vice versa, the general regime applies to all aspects for which consumer law did not provide for a derogation.<sup>219</sup> However, even in the latter case, some courts (especially the CJEU) decided on their own motion to mitigate or alleviate the general rules of evidence, due to the peculiarities of consumer law.
- 156 Even with the ex officio powers of the court (see above para 117 ff), the administration of evidence in consumer protection proceedings cannot be analyzed independently from the nature of the legal systems and the basic principles governing fact-finding in civil proceedings. As mentioned earlier, continental European legal systems are said to be more inquisitorial. Hence, the court will adopt a more 'inquisitorial' or 'investigative' role in relation to the facts and/or evidence. Although those rules are not specifically designed for consumers, experience shows that consumers most often take advantage of them.
- 157 However, even within the continental European legal systems, there exist huge differences. In some countries (such as Austria<sup>220</sup>, Poland, and Germany<sup>221</sup>), the court's inquisitorial role comprises the power to ask 'appropriate questions' and/or give 'necessary instructions' to the parties. In other countries, the court is taking up an active role in 'truth-finding' (such as in Romania) to prevent any error in finding the truth of the case, which may consist of requiring the parties to offer clarification and supplementing the parties' discussion with any legal or factual circumstances. In its most far-reaching form, the court's inquisitorial role comprises certain powers with respect to the production and means of evidence (for instance, by ordering, even ex officio, the

<sup>219</sup> For Belgium, see S Declercq, 'Hoe consumentenproof is het nieuwe bewijsrecht' (2021) 132(3) *Droit de la consommation – Consumentenrecht* 27, 28, para 3. For France, see G Lardeux, 'Droit probatoire et protection du consommateur : où la motivation explicite des arrêts de la Cour de cassation ne garantit pas leur bien-fondé' (2021) *Receuil Dalloz* 63, para 7.

<sup>220</sup> This is the so-called "extenuated principle of judicial investigation" (*Zivilprozessordnung* (Code of Civil Procedure) (Austria), s 182).

<sup>221</sup> The court will—by providing 'hints' and 'feedback'—guide the parties to assert relevant facts and related evidence, but it will not assist the party in gathering factual information as such (*Zivilprozessordnung* (Code of Civil Procedure) (Germany) s 139 (1)).

submission of certain documents, witness depositions, an official visit to the scene of the facts, the personal appearance of the parties in court, or an expert witness hearing).<sup>222</sup>

158 Importantly, the preamble of the soft law project prepared by ELI and Unidroit, the European Model Rules of Civil Procedure, states that the court's case management duty should also be deployed to promote a cost-effective process for consumer claims. This implies as a first step the avoidance of cost-intensive evidence-taking with several experts or witnesses or reliance on documents that are already in the parties' possession.<sup>223</sup>

### 3.3.1 The Allocation of the Burden of Proof

159 In all legal systems under study, the most commonly used method to support consumers in the administration of evidence consists of adjusting the allocation of the burden of proof. This, however, does not imply that the burden of proof is automatically reversed from the moment that a consumer is involved in a dispute. Such a rule is not to be found in any legal system. Instead, according to the basic principle '*actori incumbit probatio*', which is codified in many civil and procedural codes, each party carries the burden of proof for those elements that constitute the basis of its claim. This is no different for consumers.

160 Nevertheless, there exist plenty of derogations from the basic principles, mostly on an ad hoc basis. This means that under specific circumstances, a modified system of burden of proof is applied, either pursuant to statutory law (3.3.1.1, or sometimes even at the initiative of courts (3.3.1.2.

#### 3.3.1.1 Statutory Shift of the Burden of Proof

161 In a myriad of factual circumstances, lawmakers have introduced a statutory shift of the burden of proof in favor of consumers. Those derogations have the advantage of providing clarity and thus legal certainty to consumers. The main disadvantage is that it has to be assessed case-by-case whether the legislature provided for a shift of the burden of proof. This is particularly the case when it is limited to certain sub-areas of consumer law (3.3.1.1.1). However, some jurisdictions provide for a general reversal of the burden of proof in any dispute involving a consumer, regardless of the specific substance of the dispute (3.3.1.1.2). Whichever approach is adopted, another potential disadvantage of placing the burden of proof on professionals is that they may be more

<sup>222</sup> B Hess and P Taelman, 'Consumer Actions before National Courts' in B Hess and S Law (ed) *Implementing EU Consumer Rights by National Procedural Law. Luxembourg Report on European Procedural Law* (Verlag C.H. Beck oHG 2019) 95, 97-99, paras 10-17.

<sup>223</sup> Model European Rules of Civil Procedure 2020 (ELI / UNIDROIT), 18, para 36.

likely to protect themselves against possible future litigation by over-documenting the legal relationship.<sup>224</sup>

### 3.3.1.1.1 Sectoral Approaches to Shifts in the Burden of Proof

- 162 In continental Europe, the EU was a driving force behind the introduction of various derogations from the general principles of the burden of proof for the benefit of consumers.
- 163 As far as we could ascertain, a first step was set in 1984 in the field of misleading advertising, albeit that the purpose of that directive was not limited to protecting consumers. In fact, this special regime also aimed at safeguarding the rights of persons carrying on a trade or business or practicing a craft or profession and the interests of the public in general.<sup>225</sup> The EU obliged Member States to confer upon courts and administrative authorities the power '(a) to require the advertiser to furnish evidence as to the accuracy of factual claims in advertising' provided that such a requirement appears appropriate on the basis of the circumstances of the particular case, and '(b) to consider factual claims as inaccurate if the evidence demanded in accordance with (a) is not furnished or is deemed insufficient'.<sup>226</sup> This does not amount to a reversal of the burden of proof in its proper sense, because a trader does not have to demonstrate the (non-)misleading character of the advertisement, but only the accuracy of certain factual claims. If the trader fails to prove that the claims are correct, the court may still rule that the advertisement did not mislead the consumer.<sup>227</sup> This directive was recast in 2006 without a change being made to the alleviation of the burden of proof.<sup>228</sup>
- 164 A next step, this time exclusively focused on the protection of consumers, followed in 1997 with respect to distance contracts. It was provided that 'Member States may stipulate that the burden of proof concerning the existence of prior information, written confirmation, compliance with time-limits or consumer consent can be placed on the supplier'.<sup>229</sup> The optional nature of this derogation was left behind in 2011, when the EU

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<sup>224</sup> See also S Declercq, 'Hoe consumentenproof is het nieuwe bewijsrecht' (2021) 132 (3) *Droit de la consommation – Consumentenrecht* 27, 48, para 19.

<sup>225</sup> Council Directive relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, 84/450/EEC of 10 September 1984 (EU) (hereinafter: Directive concerning misleading advertising), Art 1.

<sup>226</sup> Directive concerning misleading advertising, Art 6.

<sup>227</sup> J Stuyck and B Keirsbilck, *Handels- en economisch recht. Deel 2 Mededingingsrecht. A. Handelspraktijken en contracten met consumenten* (Wolters Kluwer 2019) 450, para 449.

<sup>228</sup> Directive concerning misleading and comparative advertising, 2006/114/EC of 12 December 2006 (EU).

<sup>229</sup> Directive on the protection of consumers in respect of distance contracts, 97/7/EC of 20 May 1997 (EU), Art 11(3)(a).

directive was recast, dictating that ‘As regards compliance with the information requirements, the burden of proof shall be on the trader’.<sup>230</sup>

- 165 The same is true for the burden of proof regarding the supplier’s obligation to inform the consumer and the consumer’s consent to the conclusion of the contract in the case of financial services contracts concluded at a distance. The original 2002 Directive allowed Member States to stipulate that the burden of proof lay with the supplier.<sup>231</sup> The recast directive takes a different stance, providing that the burden of proof for compliance with the information and adequate explanation requirements shall be on the trader.<sup>232</sup>
- 166 Hence, the reversal of the burden of proof concerning the fulfilment of information duties for all types of distance contracts and off-premises contracts is now firmly established in the various Member States of the EU.<sup>233</sup> Yet this measure demonstrates the limitations of an ad hoc regime. Information obligations also apply when a consumer enters into a contract other than a distance or off-premises contract.<sup>234</sup> Nevertheless, for those other contracts, a statutory provision which puts the burden of proof on the professional is lacking.<sup>235</sup> In Belgium, for instance, this prompts legal debates. While scholars in various EU Member States argue that these rules for distance or off-premises contracts should be applied by analogy to all consumer contracts,<sup>236</sup> this view is not unanimously shared. Others consider that these other consumer contracts are covered

<sup>230</sup> Directive on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC, 2011/83/EU of 25 October 2011, Art 6(9).

<sup>231</sup> Directive concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, 2002/65/EC of 23 September 2002, Art. 15(1).

<sup>232</sup> Directive amending Directive 2011/83/EU as regards financial services contracts concluded at a distance and repealing Directive 2002/65/EC, 2023/2673 of 22 November 2023, Art. 1.

<sup>233</sup> For instance in *Wetboek Economisch Recht* (Code of Economic Law) (Belgium), Art VI.62 or *Code de Consommation* (Consumer Code) (France), Art L. 221-7.

<sup>234</sup> *Wetboek Economisch Recht* (Code of Economic Law) (Belgium), Art VI.2 and *Code de Consommation* (Consumer Code) (France), Art L. 221-5.

<sup>235</sup> Notwithstanding other provisions of EU law which specifically determine the allocation of the burden of proof for information obligations, such as Art 41 of the Directive on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, 2015/2366 of 25 November 2015 (hereinafter: *Payment Services Directive*): ‘Member States shall stipulate that the burden of proof lies with the payment service provider to prove that it has complied with the information requirements set out in this Title’ and Art 8 of the Directive on package travel and linked travel arrangements, 2015/2302 of 25 November 2015: ‘As regards compliance with the information requirements laid down in this Chapter, the burden of proof shall be on the trader’.

<sup>236</sup> H Jacquemin, ‘Droit de la preuve et protection des consommateurs’ (2020) 126 (3) *Droit de la consommation – Consumentenrecht* 3, 13, para 7. ; R Steennot, ‘De bescherming van de consument door het Hof van Justitie: een brug te ver?’ (2017) 1(1) *Tijdschrift voor Privaatrecht* 81, 144.

by the basic rules on the burden of proof and that the burden of proof should therefore lie with the consumer.<sup>237</sup>

- 167 In 1999, another derogation at the EU level was adopted, this time in the field of the sale of consumer goods and associated guarantees:

Unless proved otherwise, any lack of conformity which becomes apparent within six months of delivery of the goods shall be presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity.<sup>238</sup>

- 168 This legal presumption stems from the belief that where a lack of conformity becomes apparent only subsequent to the time of delivery of the goods, it is 'well-nigh impossible for consumers' to prove that this lack of conformity existed at the time of delivery. By contrast, it seems far easier for the professional to demonstrate that the lack of conformity was not present at the time of delivery and that it resulted, for example, from improper handling by the consumer.<sup>239</sup>

- 169 In 2019, a recast directive extended the time period within which the effect has to become apparent to one year (such as in Germany<sup>240</sup> and the Netherlands<sup>241</sup>), or even to two years if Member States decide to (such as Belgium<sup>242</sup>).<sup>243</sup> In Belgium, this presumption is considered the 'life line' of the guarantee regime for consumer goods. In the absence of that presumption, it would be very difficult, and in most cases even impossible, for the consumer to rely on its legal guarantee. A consumer does not have the technological knowledge or the necessary resources to detect the cause of a defect. Hence, the consumer would be obliged to seek the assistance of an expert who generally charges a high remuneration. In practice, this would mean that a consumer could no

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<sup>237</sup> A De Boeck, 'General Information Obligations in Belgian (and French) Law of Obligations versus Article 2 of Book VI on "Market practices and consumer protection" in the Belgian Economic Law Code' (2013) 3 *Revue européenne de droit de la consommation*, 399, 404; T Baes, 'Boek VI WER – Marktpraktijken en consumentenbescherming: streven naar een maximaal behoud van de WMPC' (2014) *Tijdschrift Belgisch Handelsrecht - Revue de Droit commercial*, 757, 776, para. 74;

<sup>238</sup> Directive on certain aspects of the sale of consumer goods and associated guarantees, 1999/44/EC of 25 May 1999 (EU), Art 5 (3).

<sup>239</sup> Explanatory memorandum to the proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees, COM(95) 520 final, 12.

<sup>240</sup> *Bürgerliches Gesetzbuch* (Civil Code) (Germany), s 477.

<sup>241</sup> *Burgerlijk Wetboek 1992* (Civil Code) (the Netherlands), Art 18a (2).

<sup>242</sup> *Burgerlijk Wetboek 1804* (Civil Code) (Belgium), Art 1649quater (4).

<sup>243</sup> Directive on certain aspects concerning contracts for the sale of goods, 2019/771 of 20 May 2019 (EU), Art 11.

longer assert his rights, notwithstanding his entitlement to a legal guarantee during a period of two years.<sup>244</sup>

- 170 Importantly, this presumption only concerns a partial reversal of the burden of proof. It is restricted to demonstrating the moment of the occurrence of the lack of conformity. In order to benefit from the presumption, the consumer must in the first place allege and furnish evidence that the goods sold are not in conformity with the relevant contract (for instance by demonstrating that the good does not have the qualities agreed on in that contract). This was already confirmed in 2004 by the German Supreme Court regarding the German provision transposing the EU Directive.<sup>245</sup> In that decision, the Supreme Court held that the reversal of the burden of proof does not relate to the question of whether the defect exists at all.<sup>246</sup> Later on, this was confirmed by the European Court of Justice in the *Froukje Faber* case.<sup>247</sup> Moreover, the consumer must establish that the lack of conformity in question became physically apparent within six months of delivery of the goods.<sup>248</sup> The latter requirement was the subject of a dispute about a motor vehicle with engine damage that ended up before the German Supreme Court. In the present case, the engine damage appeared shortly before the expiration of the—at that time—applicable six-month period. It was unclear whether the damage was due to a defective belt or to incorrect driving by the purchaser. The Supreme Court reiterated that the presumption did not discharge the buyer from the obligation to allege (*'darzulegen'*) and, if necessary, prove (*'zu beweisen'*) that the defect had become apparent in the purchased item within six months after the transfer of risk. As the buyer had not done this, the presumption could not apply.<sup>249</sup>
- 171 In 2005, another subdomain came on the radar of the EU: the unfair business-to-consumer commercial practices.<sup>250</sup> The reason for intervening in this domain was to give

<sup>244</sup> Memorie van Toelichting bij Wetsontwerp tot wijziging van de bepalingen van het oud Burgerlijk Wetboek met betrekking tot de verkopen aan consumenten, tot invoeging van een nieuwe titel VIbis in boek III van het oud Burgerlijk Wetboek en tot wijziging van het Wetboek van economisch recht (Explanatory Memorandum to the Bill amending the provisions of the old Civil Code with regard to sales to consumers, inserting a new title VIbis in Book III of the old Civil Code and amending the Code of Economic Law), 55-2355 [Parl.St. Kamer 2021-22] (Belgium), 29.

<sup>245</sup> Bürgerliches Gesetzbuch (Civil Code) (Germany), s 477 (previously s 476) states that: 'If a material defect becomes apparent within six months of the transfer of risk, it shall be presumed that the good was already defective at the time of the transfer of risk, unless this presumption is incompatible with the nature of the good or the defect'.

<sup>246</sup> Case VIII ZR 329/03 (BGH, Germany), Order 2 June 2004.

<sup>247</sup> Although, consumers are not required to prove the cause of that lack of conformity or to establish that its origin is attributable to the seller (see *Froukje Faber v Autobedrijf Hazet Ochten BV*, Case C-497/13 (CJEU), Judgment 4 June 2015 [ECLI:EU:C:2015:357], para 71-75).

<sup>248</sup> *Froukje Faber v Autobedrijf Hazet Ochten BV*, Case C-497/13 (CJEU), Judgment 4 June 2015 [ECLI:EU:C:2015:357], para 71-75.

<sup>249</sup> Case VIII ZR 150/18 (BGH, Germany), Order 9 September 2020 [ECLI:DE:BGH:2020:090920UVIII150.18.0].

<sup>250</sup> Directive concerning unfair business-to-consumer commercial practices in the internal market, 2005/29/EC of 11 May 2005 (EU) (hereinafter: Unfair Commercial Practices Directive).

consumers the same evidentiary advantage as they enjoy when filing a claim for misleading advertising (see above para 163).<sup>251</sup> The EU has not introduced an actual reversal of the burden of proof,<sup>252</sup> but as with misleading advertising, it has required Member States to enable courts and administrative authorities ‘to require traders to produce evidence as to the accuracy of factual claims they have made’ and ‘to consider factual claims as inaccurate if the evidence demanded is not furnished or is deemed insufficient’.<sup>253</sup> Although this provision relates to all commercial practices, it is being stressed that it is only relevant for misleading commercial practices, because it primarily relates to the provision of information.<sup>254</sup> Finally, with regard to the Dutch rules implementing the EU Directive, it has been submitted that those rules both apply where a consumer organization or a public authority files an action for a cease and desist order and where an individual consumer files a claim for damages.<sup>255</sup>

- 172 Also of note is the 2007 Payment Services Directive (subsequently revised in 2015) which introduced different rules on the burden of proof in three key areas. First and foremost is the burden of proof in relation to information obligations, where again there is notable evolution from a permissive ‘may’<sup>256</sup> to a mandatory ‘shall’ provision<sup>257</sup> (see above para 164).
- 173 In addition, a specific provision stipulates that in cases where a payment service user denies the authorization of an executed payment transaction or alleges an incorrect execution, it is incumbent upon the payment service provider to prove that the transaction was authenticated, accurately recorded, duly entered in the accounts, and not affected by a technical breakdown or some other deficiency.<sup>258</sup> This provision finds approval due to the specific nature of the issue, as it is considered more practical to place

<sup>251</sup> B Krans, ‘Europees recht en Nederlands bewijsrecht’ in A S Hartkamp and others (ed), *The influence of EU law on national private law. Deel II* (Wolters Kluwer 2014) 923, 926.

<sup>252</sup> Recital (21) of the Unfair Commercial Practices Directive even expressly states that ‘it is for national law to determine the burden of proof’.

<sup>253</sup> Unfair Commercial Practices Directive, Art 12.

<sup>254</sup> L Tigelaar, L and C Pavillon, ‘De bewijslastomkering bij oneerlijke handelspraktijken: Een jurisprudentie-onderzoek naar de toepassing van art. 6:193j lid 1 en 2 BW’ (2022) 4 Tijdschrift voor Consumentenrecht & Handelspraktijken 204, 205.

<sup>255</sup> Memorie van Toelichting bij het wetsvoorstel tot aanpassing van de Boeken 3 en 6 van het Burgerlijk Wetboek en andere wetten aan de richtlijn betreffende oneerlijke handelspraktijken van ondernemingen jegens consumenten op de interne markt (Explanatory Memorandum to the bill adapting Books 3 and 6 of the Civil Code and other laws to the directive on unfair business-to-consumer commercial practices in the internal market), 30 928, nr. 3 [Kamerstukken II 2006/07] (The Netherlands), 17.

<sup>256</sup> Directive on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, 2007/64/EC of 13 November 2007, Art. 33.

<sup>257</sup> Payment Services Directive, Art 41.

<sup>258</sup> Payment Services Directive, Art 72 (1).

the burden of proof for payment authentication on the service provider rather than on the consumer.<sup>259</sup>

- 174 A third provision concerns the liability of service providers for non-execution, defective execution, or late execution of payment transactions, exempting them from liability if they can prove that the payee's payment service provider received the amount of the payment transaction.<sup>260</sup> As explained in the preamble, this provision is motivated by the intention not to leave the payer unprotected in unlikely scenarios where it remains uncertain whether the payment amount was duly received by the payee's payment service provider.<sup>261</sup>
- 175 The last significant action was undertaken by the EU legislature in the field of consumer protection in 2019 by introducing the Digital Content Directive.<sup>262</sup> Various adjustments to the burden of proof were introduced. First, the trader bears the burden of proof with regard to whether the digital content or digital service was made accessible to the consumer, or to a physical or virtual facility chosen by the consumer for that purpose.<sup>263</sup> Second, the burden of proof is on the trader for whether the supplied digital content or digital service was in conformity at the time of supply, for a lack of conformity which becomes apparent within a period of one year from the time when the digital content or digital service was supplied where a contract provides for a single act of supply or a series of individual acts of supply.<sup>264</sup> In addition, where the contract provides for continuous supply over a period of time and a lack of conformity becomes apparent within that period, the burden of proof is on the trader with regard to whether the digital content or digital service was in conformity within the period of time during which the digital content or digital service was to be supplied under the contract.<sup>265</sup>
- 176 The reversal of the burden of proof is based on the assumption that the trader is likely to be in a better position than the consumer to know why the digital content or digital service is not supplied or is not in conformity. According to the EU legislation, this is due to the specific nature and high complexity of digital content and digital services, as well as the trader's better knowledge and access to know-how, technical information, and high-tech assistance. Hence, although it is for the consumer to establish that the digital content or digital service is not in conformity, the consumer does not have to prove that

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<sup>259</sup> B Krans, *Nederlands burgerlijk procesrecht en materieel EU recht* (Wolters Kluwer 2010) 71.

<sup>260</sup> Payment Services Directive, Art 89.

<sup>261</sup> Payment Services Directive,, recital (85).

<sup>262</sup> Directive on certain aspects concerning contracts for the supply of digital content and digital services, 2019/770 of 20 May 2019 (EU) (hereinafter: Digital Content Directive).

<sup>263</sup> Digital Content Directive, Art 12(1).

<sup>264</sup> Digital Content Directive, Art 12(2).

<sup>265</sup> Digital Content Directive, Art 12(3).

the lack of conformity existed at the time of supply of the digital content or digital service or, in the event of continuous supply, during the duration of the contract.<sup>266</sup>

- 177 Like the other exceptions to the burden of proof mentioned above, these rules seek to strike a balance between the rights of the consumer and the rights of the trader. Where the trader demonstrates that the consumer's digital environment is not compatible with the technical requirements, of which he informed the consumer in a clear and comprehensible manner before the conclusion of the contract, the consumer should have the burden of proving that the lack of conformity of the digital content or digital service existed at the time of supply of the digital content or digital service.<sup>267</sup> For that purpose, the consumer shall cooperate with the trader, to the extent reasonably possible and necessary, to ascertain whether the cause of the lack of conformity of the digital content or digital service lies in the consumer's digital environment. The obligation to cooperate shall be limited to the technically available means which are least intrusive for the consumer (for instance by providing the trader with automatically generated incident reports or with details of the consumer's internet connection).<sup>268</sup> Where the consumer fails to cooperate, and where the trader informed the consumer of such requirement in a clear and comprehensible manner before the conclusion of the contract, the burden of proof with regard to whether the lack of conformity existed at the time of supply, as applicable, shall be on the consumer.<sup>269</sup>
- 178 Next to those EU initiatives, various continental European systems provided for additional apportionment of the burden of proof, on the basis of their procedural autonomy. For instance, under Belgian law, when granting a mortgage or a consumer credit, the creditor has the burden of proof to demonstrate that he has fulfilled his obligation to obtain the information necessary to assess the creditworthiness of the consumer, to provide pre-contractual information and clarification, to search for the most appropriate credit, and finally, to assess the creditworthiness of the consumer.<sup>270</sup> In the Netherlands, if a consumer brings a claim for damages based on an unfair commercial practice, he or she can rely on a reversal of the burden of proof with respect to the (non-)attributability of the unlawful act to the trader.<sup>271</sup> More precisely, the trader

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<sup>266</sup> Digital Content Directive, recital (69).

<sup>267</sup> Digital Content Directive, Art 12(4).

<sup>268</sup> Only in exceptional and duly justified circumstances where, despite the best use of all other means, there is no other way possible, consumers may need to allow virtual access to their digital environment (see Digital Content Directive, recital (70)).

<sup>269</sup> Digital Content Directive, Art 12(5).

<sup>270</sup> Wetboek Economisch Recht (Code of Economic Law) (Belgium), Art VII.2, §4 *in fine*. Another example in Belgium is Wetboek Economisch Recht (Code of Economic Law) (Belgium), Art III.78: 'Every company has the duty to prove that the requirements laid down in Articles III.74 to III.77 are fulfilled and that the information supplied is correct'.

<sup>271</sup> L Tigelaar, C Pavillon, 'De bewijslastomkering bij oneerlijke handelspraktijken: Een jurisprudentie-onderzoek naar de toepassing van art. 6:193j lid 1 en 2 BW' (2022) 4 Tijdschrift voor Consumentenrecht & Handelspraktijken 204, 205.

shall be liable for the loss caused thereby, unless he or she proves that the loss is not his fault or is due to some other reason.<sup>272</sup>

- 179 This sectoral approach is also evident in other legal systems worldwide. For instance, within common law jurisdictions, the UK provides an illustrative example, where pursuant to Sec 19(14) of the Consumer Rights Act 2015, goods which do not conform to the contract within the first six months of purchase shall be presumed not to have conformed to it at the day of delivery, unless the retailer can prove otherwise. Of course, this derogation dates back to the time that the UK was still an EU Member State and is a former implementation of the Consumer Sales Directive (see above para 167).
- 180 Likewise, Canada features similar provisions. For example, in Ontario, under Sec 13 (4) of the Consumer Protection Act 2002, if a consumer is receiving goods or services on an ongoing or periodic basis and there is a material change in such goods or services, the goods or services shall be deemed to be unsolicited from the time of the material change forward, unless the supplier is able to establish that the consumer consented to the material change.<sup>273</sup>
- 181 Chinese law has a similar rule to the EU on the sale of goods (see above para 167), although it is restricted to durable goods (such as cars, computers, televisions, refrigerators, air conditioners or washing machines) or services (such as renovation and remodelling). According to Sec 23 of the Law on the Protection of Consumer Rights and Interests of the People's Republic of China, professionals bear the burden of proof for defects in such goods or services if consumers discover defects within six months.<sup>274</sup>

### 3.3.1.1.2 General Shifts in the Burden of Proof in Favor of Consumers

- 182 Interestingly, while the EU and continental European legal systems seem to adhere consistently to a sectoral approach, legislative interventions on other continents regarding the allocation of the burden of proof in favour of the consumer have a broader scope.
- 183 Of particular note is a provision in the Brazilian Code of Consumer Protection and Defense, identified as one of the 12 fundamental rights of consumers, which aims to facilitate the protection of consumers' rights by shifting the burden of proof in their favour. Under this provision, the judge in a civil case has the discretion to reverse the burden of proof if the consumer's allegation is deemed credible or if the consumer is in

<sup>272</sup> See Burgerlijk Wetboek (Civil Code) (the Netherlands), Art 193j(2). Some authors regret that the evidentiary advantage can only be invoked for non-contractual claims and not for other claims (see B Krans, 'Europees recht en Nederlands bewijsrecht' in A S Hartkamp and others (ed), *The influence of EU law on national private law. Deel II* (Wolters Kluwer 2014) 923, 926).

<sup>273</sup> Interestingly, exactly the same wording is used in Consumer Protection Act 2012 (Kenya), s 9 (4).

<sup>274</sup> Consumer Rights and Interests Protection Law 1993 (China), Art 23.

a disadvantaged position, taking into account the usual rules of experience.<sup>275</sup> This differs from the continental European approach in two ways. First, as mentioned earlier, it departs from the sectoral approach to consumer law, as this rule seems to apply to the whole spectrum of consumer rights. Secondly, the reversal of the burden of proof is not a priori established, rather, the judge may decide to make such a shift on the basis of generally applicable criteria, depending on the specific circumstances of the case.

- 184 A similar provision can be found in Argentina, which is often seen as an expression of the theory of dynamic evidence, meaning that whoever is in a better position to prove must do so:

‘Suppliers shall contribute to the process all the elements of evidence in their possession, according to the characteristics of the good or service, providing the necessary collaboration for the clarification of the issue debated in the trial’.<sup>276</sup>

- 185 Although it is not a shift in the burden of proof per se, but rather a lowering of the standard of proof, South African law is noteworthy in this context. It provides that in any proceedings before the Tribunal or a consumer court involving consumers, the standard of proof is the balance of probabilities.

### 3.3.1.2 Alleviation of the Burden of Proof Undertaken by Courts

#### 3.3.1.2.1 Product Liability

- 186 Worldwide, legal systems struggle with the question of what evidentiary requirements to impose on consumers seeking to hold a manufacturer liable for a defective product.<sup>277</sup> In most jurisdictions, consumers do not have to demonstrate the manufacturer’s fault. Instead, they are required to prove the defect, the damage, and the causal relationship between the defect and damage.<sup>278</sup> This is still considered a difficult burden and a significant barrier for injured parties to obtain recovery.<sup>279</sup> Hence, courts have made use of techniques that allow them to diminish the burden of proof on the part of the

<sup>275</sup> Código de Proteção e Defesa do Consumidor (Code of Consumer Protection and Defence) (Brazil), Art 6.VIII.

<sup>276</sup> Ley n° 24.240 de Defensa del Consumidor (Law n° 24, 240 on Consumer Protection) of 22 September 1993 (Argentina), s 53.

<sup>277</sup> For Taiwan, see CT Juang, ‘The Taiwan consumer protection law: Attempt to protect consumers proves ineffective’ (1997) 6 (1) Pacific Rim Law & Policy Journal 219, 241-242. For Quebec, see N Vezina and F Maniet, ‘Sécurité du consommateur au Québec...deux solitudes: mesures préventives et sanctions civiles des atteintes à la sécurité’ (2008) 49(1) Cahiers de Droit 57, 91.

<sup>278</sup> For the EU, see Council Directive on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products, 85/374/EEC of 25 July 1985 (EU) (‘Product Liability Directive’), Art 4.

<sup>279</sup> For Taiwan, see CT Juang, ‘The Taiwan consumer protection law: Attempt to protect consumers proves ineffective’ (1997) 6 (1) Pacific Rim Law & Policy Journal 219, 241-242.

consumer, without creating (strictly speaking) a reversal of the burden of proof on the part of the manufacturer.

- 187 In continental Europe, the CJEU upheld various solutions created by national legislatures and/or employed by national courts which were aimed at facilitating the burden of proof of consumers in product liability cases. For instance, in 2014, the CJEU held that the Product Liability Directive does not preclude a national law under which the victim has the right to obtain information on the adverse effects of a product, which may make it easier for that victim to present the requisite evidence enabling him to establish liability on the part of the manufacturer. However, such national legislation does not bring about a reversal of the burden of proof, which is for the victim to discharge.<sup>280</sup> In 2015, the CJEU interpreted the Product Liability Directive in the sense that, where it is found that products belonging to the same group or forming part of the same production series (such as pacemakers and implantable cardioverter defibrillators) have a potential defect, such a product may be classified as defective without there being any need to establish that this specimen has such a defect.<sup>281</sup>
- 188 In 2017, the CJEU was asked to rule on a French product liability case, which was brought by a consumer claiming that a vaccination against Hepatitis B has led to a diagnosis of multiple sclerosis. The French court had considered that the facts relied on by that person (his previous excellent state of health, the lack of family antecedents, and the close temporal connection between the vaccination and the appearance of the disease) constituted serious, specific, and consistent presumptions capable of proving the defect in the vaccine and the existence of a causal relationship between it and the disease. According to the CJEU, notwithstanding the finding that medical research neither establishes nor rules out the existence of a link between the administering of the vaccine and the occurrence of the victim's disease, a national court may consider that certain factual evidence relied on by a consumer constitutes serious, specific, and consistent evidence enabling it to conclude that there is a defect in the vaccine and that there is a causal link between that defect and that disease.<sup>282</sup> The court's rationale was that, in case the victim would be required to produce certain proof based on medical research of the existence of a causal link between the defect attributed to the vaccine and the appearance, such a high evidentiary standard would amount to excluding any method of proof other than certain proof based on medical research. This would make it excessively difficult or impossible in many situations for the consumer to establish producer liability.<sup>283</sup> The CJEU, however, tries to maintain a balance by holding that national courts must ensure that their specific application of those evidentiary rules does

<sup>280</sup> *Novo Nordisk Pharma GmbH v S*, Case C 310/13 (CJEU), Judgment 20 November 2014 [ECLI:EU:C:2015:357] para 27-28.

<sup>281</sup> *Boston Scientific Medizintechnik GmbH*, Joined Cases C-503/13 and C-504/13 (CJEU), Judgment 5 March 2015 [ECLI:EU:C:2015:148] para 43.

<sup>282</sup> *N W e.a. v Sanofi Pasteur MSD SNC e.a.*, Case C 621/15 (CJEU), Judgment 21 June 2017 [ECLI:EU:C:2017:176] para 43.

<sup>283</sup> *Ibid* para 36.

not result in the burden of proof being disregarded or the effectiveness of the system of liability introduced by the Product Liability Directive being undermined.<sup>284</sup>

Similar trends can be found in other jurisdictions. In Taiwan, companies are in principle strictly liable for defective products. As a result, consumers do not bear the burden of proving fault. Rather, the trader must prove that it is not at fault in order to mitigate its liability.<sup>285</sup> However, consumers should still prove causation.<sup>286</sup> Therefore, in practice, there are some court decisions that reduce the consumer's burden of proof in accordance with Article 277 of the Taiwan Civil Procedure Code, which states that a party bears the burden of proving the facts it asserts in its favour, unless the circumstances make it manifestly unfair.<sup>287</sup> For instance, in a decision of the Taiwan High of 2013, the court held that there was a disparity in resources and information between the two sides. To ensure that both parties are equally equipped, it was determined that the appellant-consumer should only bear the burden of proving the minimum facts related to the causal connection between the injury and the use of the disputed oil in ignition. Specifically, the burden of proof would be considered met if the evidence demonstrates a preponderance of the evidence or achieves a clear level of credibility.<sup>288</sup> In this case, although the court did not shift the burden of proof, it lowered the standard of proof to a preponderance rather than a high degree of certainty.

### 3.3.1.2.2 Other Types of Consumer Disputes

- 189 The same principle applies in other areas. Even where legislation does not provide for explicit shifts of the burden of proof, courts may exercise their discretion to reverse or reduce the burden of proof in favour of consumers. In continental Europe, for example, the CJEU has found national rules or even the application of basic principles on the burden of proof (see paragraph 154 above) to be incompatible with EU law. As a result, national courts are obliged to reverse the burden of proof when applying EU consumer law, even if this is not explicitly provided for in their national legislation.
- 190 In 2009, the CJEU held that the power of the Member States to determine the conditions and arrangements of the right of withdrawal within the framework of distance contracts may not adversely affect the efficiency and effectiveness of the consumer's right of withdrawal. Such would be the case, for example, if the provision of national law were to place on the consumer the onus of proving that he did not use those goods during the

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<sup>284</sup> Ibid para 42.

<sup>285</sup> Consumer Protection Law (Taiwan), Art 7 and 7-1.

<sup>286</sup> CT Juang, 'The Taiwan consumer protection law: Attempt to protect consumers proves ineffective' (1997) 6 (1) Pacific Rim Law & Policy Journal 219, 241-242

<sup>287</sup> Code of Civil Procedure (Taiwan), Art. 277.

<sup>288</sup> Case 2013 zhong shang geng 1 ze (High Court, Taiwan) no 36.

period for withdrawal in a manner which went beyond what was necessary to permit him to make effective use of his right of withdrawal.<sup>289</sup>

191 In 2014, a preliminary ruling was referred to the CJEU regarding the burden of proof of the fulfilment by the creditor of its obligations under the Consumer Credit Directive.<sup>290</sup> These obligations concern inter alia the duty to provide the consumer with adequate information and the duty to check the consumer's creditworthiness. The CJEU held that compliance with the principle of effectiveness would be undermined if the burden of proving the non-performance of the creditor's obligations were to lie with the consumer. The court's justification is that the consumer does not have the means at his disposal to enable him to prove that the creditor, first, did not provide him with the information required and, second, did not check his creditworthiness. Instead, according to the CJEU, the effective exercise of the rights awarded by the Consumer Credit Directive is ensured by a national rule according to which the creditor is, in principle, required to prove to the court that those pre-contractual obligations have been fulfilled. Such a rule aims to ensure the protection of the consumer without disproportionately interfering with the creditor's right to a fair trial. A diligent creditor must be aware of the need to gather and retain evidence showing that their obligations to provide information and explanations have been fulfilled.<sup>291</sup>

192 In 2021, the CJEU noted that the Unfair Contract Terms Directive contains no provision relating to the burden of proof regarding the plain and intelligible nature of a contractual term.<sup>292</sup> According to the CJEU, the principle of effectiveness and the attainment of the underlying objective of that directive, consisting of protecting consumers by rebalancing the asymmetry between the position of the seller or supplier and that of the consumer, could not be ensured if the burden of proving that a contractual term is plain and intelligible is borne by the consumer. If consumers were required to prove a negative fact, namely that the seller or supplier did not provide them with all the information necessary to satisfy the requirement of transparency, the effective exercise of the rights conferred by the Unfair Contract Terms Directive could not be ensured. On the contrary, consumer protection may be ensured where the seller or supplier is, in principle, required to prove the fulfilment of its pre-contractual and contractual obligations, without disproportionately interfering with the right of the seller or supplier to a fair

<sup>289</sup> *Pia Messner v Firma Stefan Krüger*, Case C-489/07 (CJEU), Judgment 3 September 2009, [ECLI:EU:C:2009:502] para 27.

<sup>290</sup> Directive on credit agreements for consumers and repealing Council Directive 87/102/EEC, 2008/48/EC of 23 April 2008 (EU).

<sup>291</sup> *CA Consumer Finance SA*, Case C 449/13 (CJEU), Judgment of 18 December 2014 [ECLI:EU:C:2014:2464] para 27-28.

<sup>292</sup> Council Directive on unfair terms in consumer contracts, 93/13/EEC of 5 April 1993 (EU) (hereinafter: Unfair Contract Terms Directive).

trial.<sup>293</sup> Hence, the CJEU concludes that the Unfair Contract Terms Directive must be interpreted as precluding the burden of proving that a contractual term is plain and intelligible from being borne by the consumer.<sup>294</sup>

193 Of course, the abovementioned court decisions have left legal scholars in various EU Member States behind in despair. Although those rulings each concerned a specific directive (eg, the Consumer Credit Directive or the Unfair Contract Terms Directive), it seems plausible to extend the CJEU's reasoning (ia, the consumer does not have the means at his disposal while the creditor is in a better position to provide evidence) to all other pre-contractual information duties stemming from EU law which are aimed at protecting consumers.<sup>295</sup> The French Court of Cassation has already done so on various occasions. For instance, in 2020, it decided regarding proof of delivery of the withdrawal form in consumer credit matters that it is for the creditor to demonstrate that he has fulfilled his pre-contractual obligations.<sup>296</sup> In that way, through the intervention of courts, consumer protection provisions of a substantive law nature (such as information duties) are further substantiated through procedural law.

### 3.3.2 *The Available Means of Evidence*

194 Regarding the means of evidence, the starting point is the same as for the allocation of the burden of proof. In principle, the same basic rules apply in consumer protection proceedings as in other types of proceedings. However, two observations can be made. Across various legal systems, one is more flexible regarding the evidence that can be used by the consumer against the company than vice versa (see 3.3.2.1). Professional

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<sup>293</sup> Some scholars question this finding. Whereas the CJEU reverses the burden of proof to avoid the consumer being placed in a position where he has to prove a negative fact, it seemingly accepts in one of the following paragraphs that professional parties on their turn should cope with proving negative facts: 'It should therefore be able to provide evidence that the documents at issue were not used or were no longer used at the date of conclusion of the agreement in order to prove that its pre-contractual and contractual obligations relating in particular to the requirement of transparency of contractual terms have been fulfilled' (para 88). See G Straetmans and J Werbrouck, 'Cases VB and Others v. BNP Paribas Personal Finance SA and AV and Others v. BNP Paribas Personal Finance SA and Procureur de la République (C-776/19 to C-782/19): New jurisprudential levers to combat unfair terms in B2C contracts' (2022) 2 European Journal of Consumer Law 183, 195-196.

<sup>294</sup> *BNP Paribas Personal Finance SA*, Joined cases C-776/19-C-782/19 (CJEU), Judgment 10 June 2021 [ECLI:EU:C:2021:470] para 89.

<sup>295</sup> For Belgium, see H Jacquemin, 'Droit de la preuve et protection des consommateurs' (2020) 126 (3) *Droit de la consommation – Consumentenrecht* 3, 10, para 6; R Steennot, 'De bescherming van de consument door het Hof van Justitie: een brug te ver?' (2017) 1(1) *Tijdschrift voor Privaatrecht* 81, 140, para 41. For the Netherlands, see FJP Lock, 'De verdeling van stelplicht en bewijslast tussen de consument en de tekortschietende kredietverstrekker: een Nederlands en Europees perspectief' (2016) 16(4) *Nederlands Tijdschrift voor Burgerlijk Recht* 114, 121.

<sup>296</sup> Case 19-18.971 (Court of Cassation, 1<sup>st</sup> Chamber, France), Judgment 21 October 2020 [D. 2021, 63, note G Lardeux]. See also Case 17-27.066 [Court of Cassation, 1<sup>st</sup> Chamber, France), Judgment 5 June 2019 [Dalloz 2019, 1746, note G Poissonnier].

counterparties are often obliged to provide consumers with evidence at the time of entering into an agreement (see 3.3.2.2).

### 3.3.2.1 Means of Evidence on Which a Consumer Can Rely

- 195 Belgium, France, and Quebec apply a system of legal proof for the demonstration of agreements between or against individuals.<sup>297</sup> Originally drafted without consumer protection in mind (as this special subject matter did not yet exist), these rules now favour the consumer in around 95% of cases (see above para 21). As a consequence, if an undertaking wants to prove the existence of a contract vis-à-vis a consumer, it is subject to that system of legal proof. This means that the undertaking has to produce a written document signed by the parties provided that the monetary value of the consumer contract is above EUR 1,500 in France,<sup>298</sup> CAD 1,500 in Quebec,<sup>299</sup> or EUR 3,500 in Belgium.<sup>300</sup> In case there is no written document, the undertaking will not be able to enforce the contract vis-à-vis the consumer, except if one of the exceptions applies (such as the moral impossibility of establishing a written contract or the presence of an incomplete written contract).
- 196 By way of contrast, a consumer can make use of all available means of evidence (including witness testimony and presumptions) to prove its allegations vis-à-vis an undertaking.<sup>301</sup> This is also expressly stated in the Consumer Protection Act of Quebec. The consumer may, if he exercises a right under this Act or wishes to prove that this Act has not been violated, give evidence by way of testimony, even to contradict or change the terms and conditions of a written contract.<sup>302</sup>

### 3.3.2.2 Duty to Provide Consumers with Documentary Evidence

- 197 Another observable trend is that legislatures are enacting laws that oblige businesses to provide the consumer with documents at the time of the conclusion of the contract. For instance, in Belgium, every business which provides services to a consumer shall, at the consumer's request (with some exceptions) deliver free of charge a document providing evidence of the contract. The consumer should not pay for the services as long as this document has not been supplied.<sup>303</sup> Likewise, in Argentina, those who provide services or commercialize their goods to consumers through the execution of preformulated standard agreements must deliver, to their commercial premises, without cost and

<sup>297</sup> See also, J H Herbots, 'Interpretation of contracts' in JM Smits (ed) *Elgar encyclopedia of comparative law* (Edward Elgar 2006) 433.

<sup>298</sup> Code civil 1804 (Civil Code) (France), Art 1359.

<sup>299</sup> Code civil 1991 (Civil Code) (Quebec), Art 2862.

<sup>300</sup> Burgerlijk Wetboek 2020 (Civil Code) (Belgium), Art 8.9.

<sup>301</sup> Code de commerce (Commercial Code) (France), Art L.110-3; Burgerlijk Wetboek (Civil Code) (Belgium), Art 8.11 (1).

<sup>302</sup> Loi sur la protection du consommateur 1978 (Consumer Protection Act) (Quebec), Art 263.

<sup>303</sup> Wetboek Economisch Recht (Code of Economic Law) (Belgium), Art VI.89.

before the execution of the agreement, a copy of the model of agreement to be executed by the consumer upon their request. In addition, they must publish on their website a copy of the terms and conditions of such an agreement and display, in a visible place in the commercial premises, a poster with the following wording (in Spanish): ‘A copy of the model of agreement that the company proposes to execute is available upon your request’.<sup>304</sup>

- 198 Such obligations also exist for specific consumer agreements. For example, in Belgium, where the delivery of the goods or the supply of services is deferred and down payment is made by the consumer, the business is obliged to deliver an order form to the consumer.<sup>305</sup> Likewise, the creditor or credit negotiator needs to submit to the consumer a credit application form or, where appropriate, an information request form in the form of a questionnaire containing a description of all the information required by the creditor and/or credit intermediary. It is even expressly provided that for the purposes of proof of obligations, the creditor shall be obliged to retain this form as long as the credit drawn down has not been repaid.<sup>306</sup>
- 199 Documentation requirements serve the beneficial purpose of forcing consumers to think carefully before entering into an agreement with a business. By imposing these obligations, consumers are encouraged to think twice and make informed decisions. In addition, these requirements play a crucial role in ensuring that consumers have access to written evidence in the event of a future dispute. However, the danger of these various measures lies in a far-reaching instrumentalization of the legal relationship between businesses and consumers.<sup>307</sup>

### 3.3.3 *Agreements Regarding the Administration of Evidence*

- 200 Finally, it is worth considering agreements regarding the administration of evidence, as agreements on procedural matters are a characteristic feature of litigations involving special subject matters.<sup>308</sup>
- 201 In continental European jurisdictions, there appears to be a practice for businesses to include clauses in consumer contracts regarding the administration of evidence. Although the validity of these clauses is a matter of substantive law, lawmakers have put

<sup>304</sup> Ley n° 24.240 de Defensa del Consumidor (Law n° 24, 240 on Consumer Protection) of 22 September 1993 (Argentina), s 38. See also GG Giglio, ‘Argentina: consumer law – transparency’ (2016) 27(12) International Company and Commercial Law Review 95.

<sup>305</sup> Wetboek Economisch Recht 2013 (Code of Economic Law) (Belgium), Art VI.88.

<sup>306</sup> Wetboek Economisch Recht 2013 (Code of Economic Law) (Belgium), Art VII.69 (2).

<sup>307</sup> Likewise : J-D Pellier, ‘Précisions sur la preuve de la remise du formulaire de retraction en matière de credit à la consommation’ (2020) Dalloz actualité du 16 novembre 2020, [www.dalloz-actualite.fr/flash/precisions-sur-preuve-de-remise-du-formulaire-de-retractation-en-matiere-de-credit-consommatio](http://www.dalloz-actualite.fr/flash/precisions-sur-preuve-de-remise-du-formulaire-de-retractation-en-matiere-de-credit-consommatio).

<sup>308</sup> R Feldbrin, ‘Procedural Categories’ (2021) 52(3) Loyola University Chicago Law Journal 707, 763.

restrictions on contractual freedom. The ratio is that such agreements could lead to manifest injustice where there is a significant imbalance in economic power and/or access to the available items of evidence.<sup>309</sup> At the EU level, the annex of the Unfair Contract Terms Directive includes among the terms of which may be considered unfair those which have the object or effect of imposing on the consumer a burden of proof which, according to the applicable law, should lie with another party to the contract.<sup>310</sup> In the same vein, the preamble to the Payment Services Directive warns that contractual terms and conditions relating to the provision and use of a payment instrument, the effect of which would be to increase the burden of proof on the consumer or to reduce the burden of proof on the issuer, should be considered null and void.<sup>311</sup>

- 202 In the same spirit, the CJEU held that the apportionment of the burden of proof following the presumption of non-conformity at the time of delivery under the Sale of Goods Directive is binding in nature for both of the parties, who may not derogate from it by means of an agreement.<sup>312</sup> Similar restrictions are to be found in domestic law. In Belgium, for instance, the statutory provisions which place the burden of proof on businesses for the benefit of consumers (see above para 178) are of an imperative nature, so that parties are not allowed to agree on clauses putting the burden of proof on consumers.<sup>313</sup>
- 203 In addition, analogous provisions restricting the ability to contract on the burden of proof can be found in other jurisdictions around the world. In particular, Argentina provides that clauses in contracts that shift the burden of proof to the detriment of the consumer are deemed not to have been agreed to, without affecting the validity of the contract as a whole.<sup>314</sup> Similarly, in Brazil, clauses shifting the burden of proof to the consumer are null and void.<sup>315</sup>

<sup>309</sup> See also Model European Rules of Civil Procedure 2020 (ELI / UNIDROIT), Comments under Rule 25, no. 8.

<sup>310</sup> For its implementation in domestic law, see Code de la consommation (Consumer Code) (France), Art R. 212-1, 12°, see Wetboek Economisch Recht (Code of Economic Law) (Belgium), Art VI.82, 21°, Burgerlijk Wetboek 1992 (Civil Code) (the Netherlands), art. 236(k). However, the scope of application of the Dutch rule is more limited than that of the EU provision, as the Dutch rule only applies to contractual terms which either contain a statement by the consumer on the (non-)conformity of the service owed by the professional or shift the burden of proof of the attributability of the shortcoming to the consumer (see B Krans, *Nederlands burgerlijk procesrecht en materieel EU recht* (Wolters Kluwer 2010) 48).

<sup>311</sup> Payment Services Directive, recital (72).

<sup>312</sup> *Froukje Faber v Autobedrijf Hazet Ochten BV*, Case C-497/13 (CJEU), Judgment 4 June 2015 [ECLI:EU:C:2015:357], para 55.

<sup>313</sup> Wetboek Economisch Recht (Code of Economic Law) (Belgium), Art VI.63, lid 1.

<sup>314</sup> Ley n° 24.240 de Defensa del Consumidor (Law n° 24, 240 on Consumer Protection) of 22 September 1993 (Argentina), s 37(c).

<sup>315</sup> Código de Proteção e Defesa do Consumidor (Code of Consumer Protection and Defence) (Brazil), Art 51.VI.

- 204 In consumer protection proceedings, there is regular discussion about the question of whether a professional has breached its duty to provide information to consumers.<sup>316</sup> Given the statutory rules putting the burden of proof on businesses (see above paras 164 and 178) and the tendency of some courts to reverse the burden of proof to the advantage of consumers (see above para 189), professionals want to secure themselves by including clauses in their contracts by which the consumer acknowledges that the professional counterparty has fully and properly fulfilled its pre-contractual obligations, or that the consumer has received the necessary information or appropriate explanations.
- 205 Within the framework of consumer credit agreements, the question has arisen of whether the inclusion of such a standard term in the agreement can be sufficient to prove that the creditor has correctly fulfilled its pre-contractual obligations to provide information. The CJEU ruled that such a standard term is a mere indication, which the creditor is required to substantiate with one or more relevant items of evidence. Furthermore, the consumer must always be in a position to state that it did not receive that form or that the form did not enable the creditor to fulfil its pre-contractual obligations to provide information. Hence, it is for the national court to ascertain whether the evidentiary value of the standard term undermines the possibility both for the consumer and for the court to call into question the correct performance of the creditor's pre-contractual obligations to provide information and to carry out creditworthiness checks.<sup>317</sup>
- 206 This ruling has been emulated by the French Court of Cassation for other aspects of consumer credit law, deciding that the acknowledgment by the creditor of the delivery of an information sheet<sup>318</sup> or a withdrawal form<sup>319</sup> is also a mere indication which has to be corroborated by the creditor with one or more additional elements. The combination of this case law with the reversal of the burden of proof to the detriment of creditors (see above para 189) has not been spared from criticism, for being too harsh on the creditor by presuming his bad faith.<sup>320</sup> In that perspective, scholars argue that consumers, having sometimes borrowed a considerable amount of money, might be supposed to keep a copy of the contract. Moreover, they question which further

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<sup>316</sup> R Steennot, 'Precontractuele informatieverplichtingen op grond van artikel VI.2 WER: inhoud, bewijslast en sanctionering' (2021) (11-12) *Tijdschrift voor Vrederechters* 562, 564.

<sup>317</sup> *CA Consumer Finance SA*, Case C 449/13 (CJEU), Judgment 18 December 2014 [ECLI:EU:C:2014:2464] para 29.

<sup>318</sup> Case 17-27.066 (Court of Cassation, 1<sup>st</sup> Chamber, France), Judgment 5 June 2019 [D. 2019. 1746].

<sup>319</sup> Case 19-18.971 (Court of Cassation, 1<sup>st</sup> Chamber, France), Judgment 21 October 2020 [D. 2021, 63, note G Lardeux].

<sup>320</sup> J-D Pellier, 'Précisions sur la preuve de la remise du formulaire de rétraction en matière de crédit à la consommation' (2020) *Dalloz actualité* du 16 novembre 2020, [www.dalloz-actualite.fr/flash/precisions-sur-preuve-de-remise-du-formulaire-de-retractation-en-matiere-de-credit-consommatio](http://www.dalloz-actualite.fr/flash/precisions-sur-preuve-de-remise-du-formulaire-de-retractation-en-matiere-de-credit-consommatio).

evidence could corroborate the written document signed by the borrower attesting that the creditor has fulfilled his information duties.<sup>321</sup>

- 207 Finally, the restriction on contractual freedom to make agreements regarding the burden of proof is not limited to continental Europe. For example, the Consumer Protection Act in Argentina stipulates that, without affecting the validity of the contract, any clause that imposes a reversal of the burden of proof to the detriment of the consumer will be considered as not agreed upon.<sup>322</sup>

### 3.4 Special Procedures

#### 3.4.1 Small Claims Procedures

- 208 Small claims procedures have been established in several jurisdictions to provide a simplified and streamlined approach to resolving disputes. Although these procedures are not exclusively limited to consumer law, they are particularly well suited to dealing with consumer disputes.
- 209 In England and Wales, the Small Claims Track within the County Court system provides a specific framework for dealing with low value disputes. Although not designed as a comprehensive simplified procedure, the Small Claims Track includes certain elements that differ from the ordinary procedure in order to speed up and reduce the cost of resolving disputes.<sup>323</sup> As a consequence, various rules of county court procedure, including those concerning disclosure and inspection, further particulars, offers to settle, and payments into court, do not apply to cases within the small claims track.<sup>324</sup> Presumably, this approach is designed to give the judges presiding over these cases maximum flexibility. In fact, the court is empowered to adopt any fair method of proceeding during a hearing, as long as it remains ‘informal’. Strict rules of evidence do not apply and the court has the discretion to limit cross-examination. Appeals can only be made if there is an error of law or a ‘serious irregularity affecting the proceedings’.<sup>325</sup>
- 210 Initially, when the Small Claims Track began operating in 1973, consumer claims were among the most common on this track. However, by 2004 it was observed that consumer

<sup>321</sup> G Lardeux, ‘Droit probatoire et protection du consommateur : où la motivation explicite des arrêts de la Cour de cassation ne garantit pas leur bien-fondé’ (2021) *Receuil Dalloz* 63, para 14.

<sup>322</sup> Ley n° 24.240 de Defensa del Consumidor (Law n° 24, 240 on Consumer Protection) of 22 September 1993 (Argentina), s 37, c.

<sup>323</sup> S Law and V Richard, ‘Luxembourg Comparative Study on Consumer Law Enforcement’ in S Law and V Richard (ed), *Public and Private Enforcement of Consumer Law – Insights for Luxembourg* (Nomos 2021) 13, 23.

<sup>324</sup> Civil Procedure Rules 1998 (England & Wales), pt 27.

<sup>325</sup> P Lewis, ‘The consumer’s court? Revisiting the theory of the small claims procedure’ (2006) 25 *Civil Justice Quarterly* 52, 53-54.

claims represented no more than 10% of the total small claims.<sup>326</sup> This reduction was attributed to the success of the procedure itself and the awareness of retailers of its effectiveness. It was therefore considered that the majority of consumers were able to obtain redress without resorting to formal court proceedings.<sup>327</sup>

- 211 Small claims courts in the US and Canada are another example. In the U.S., small claims courts operate exclusively at the state level (see above para 80 and 89), providing a venue for consumers to bring relatively small claims against businesses and others.<sup>328</sup> These courts offer a less formal setting, with relaxed procedural and evidentiary rules. Likewise, in Canada, small claims courts serve as a prominent forum for resolving legal disputes—particularly in Ontario, where it was reported in 2010 that over 63,000 claims were filed annually.<sup>329</sup> For many people, the small claims court is their only direct encounter with the legal system. This institution, established as a legislative initiative, plays a crucial role in facilitating access to justice—an essential and long-recognized fundamental right.<sup>330</sup>
- 212 The small claims procedure extends beyond national borders. A notable example at the supranational level is the EU Small Claims Procedure, which was introduced by the EU Regulation No 861/2007 of 11 July 2007.<sup>331</sup> This procedure seeks to improve and simplify procedures in cross-border cases in civil and commercial matters within, where the value of the claim does not exceed EUR 5,000. The small claims procedure is a purely written procedure that operates on the basis of standard forms, meant to be completed in a short time.<sup>332</sup>
- 213 Importantly, this instrument is not specifically targeted at consumer claims, but is used either by consumers as creditors or against consumers as defendants. The latter case is relatively rare, as today's business practice is to require the consumer to pay in advance by credit card or other payment instrument.<sup>333</sup> The jurisdiction is determined by the general rules of the Brussels I recast Regulation. Hence, in the case of a consumer claim

<sup>326</sup> The SCT is the normal track for (i) personal injury claims not exceeding GBP 5,000 where the claim for damages for pain, suffering and loss of amenity does not exceed £1,000; (ii) claims by tenants against landlords for repairs and other work not exceeding £1,000 where the financial value of any other claim for damages does not exceed GBP 1,000; and (iii) apart from the above claims, any claim which has a financial value of not more than GBP 5,000.

<sup>327</sup> N Madge, 'Small claims in the county court' (2004) 23(Jul) Civil Justice Quarterly 201, 208-209.

<sup>328</sup> <https://www.justia.com/consumer/enforcing-your-rights-as-a-consumer/small-claims-court-for-consumers/>.

<sup>329</sup> S McGill, 'Small claims court identity crisis: a review of recent reform measures' (2010) 49(2) Canadian Business Law Journal 213, 213.

<sup>330</sup> Ibid.

<sup>331</sup> Regulation establishing a European Small Claims Procedure, 861/2007 of 11 July 2007 (EU). See also: X.E. Kramer, 'European Small Claims Procedure: Striking the Balance between Simplicity and Fairness in European Litigation' (2008) 2 Zeitschrift für Europäisches Privatrecht 355.

<sup>332</sup> Recital 14 Regulation establishing a European Small Claims Procedure.

<sup>333</sup> N Reich, 'Adequate Standards – § 14.18 Judicial Protection', in N Reich, A Nordhausen Scholes and J Scholes (ed), *Understanding EU Internal Market Law* (Intersentia 2015) 474.

fulfilling the conditions of Art 17 of the Brussels I recast Regulation, the consumer may bring proceedings against the other party either to his home jurisdiction or to the jurisdiction of the defendant (see above para 100 ff). This rule makes it easier for consumers to enforce claims of restitution or compensation against traders who have violated their rights.

- 214 The EU Small Claims Procedure has not been an unqualified success, as evidenced by its limited use in countries such as Belgium.<sup>334</sup> There seems to be a very limited awareness of the existence and functioning of the procedure: citizens, legal practitioners, and some courts are not yet well informed about the existence and the procedures of the European Small Claims Regulation.

### 3.4.2 Procedures for Debt Collection

- 215 Another noteworthy category of procedures, bearing similarities and occasional overlap with the small claims procedure, are the special procedures established for debt recovery. In the field of consumer disputes, particular attention is drawn to the area of consumer credit, where creditors use these procedures to recover outstanding debts.
- 216 The fact that there is occasional overlap with the above category of small claims procedure is exemplified by the Small Claims Track in the County Courts in England and Wales. It is claimed in the literature that business has hijacked the Small Claims procedure. Originally designed as a forum for dealing with consumer complaints, these procedures have been adopted by businesses as a convenient means of collecting debts. Businesses now use these procedures regularly and have become adept at maximizing their benefits.<sup>335</sup> By contrast, a different trend emerged in the United States. The development of small claims courts in the early twentieth century did not initially stem from consumer protection concerns. Instead, these courts were primarily established to provide workers and small businesses with a more accessible and efficient avenue for enforcing their debts, as traditional civil proceedings were deemed too time-consuming and costly.<sup>336</sup>
- 217 At supranational level, the European order for payment should be mentioned, which was created by the European Parliament and the Council in Regulation (EC) No 1896/2006 of

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<sup>334</sup> In Belgium, the transfer to ordinary civil proceedings has not been specifically regulated. As a result, it is unclear how a court has to deal with a claim that is outside the scope of the Regulation (Art 4(3)), or if the defendant claims that the value of a non-monetary claim exceeds the limit of EUR 5,000 (Art 5(5)), or if the counterclaim exceeds that value (Art 5(7)). Other uncertainties concern: (i) the evidence that has to be submitted (cfr. Art 4(1): a description of evidence supporting the claim and be accompanied, *where appropriate*, by *any relevant supporting documents*); and (ii) the conditions for review: it remains unclear to what extent re-litigation (on facts and legal assessments) is possible.

<sup>335</sup> P Lewis, 'The consumer's court? Revisiting the theory of the small claims procedure' (2006) 25(jan) Civil Justice Quarterly 52, 55.

<sup>336</sup> Ibid 56.

12 December 2006.<sup>337</sup> This order for payment aims to simplify and speed up litigation concerning uncontested claims in cross-border cases and to reduce costs. It applies to civil and commercial matters, whatever the nature of the court or tribunal, by means of a uniform written procedure that operates on the basis of standard forms. It is clear that the European payment order procedure is not intended to particularly protect consumers, as it is mostly used against them.<sup>338</sup>

- 218 Jurisdiction is determined by reference to the rules of the Brussels I recast Regulation.<sup>339</sup> However, Art 6(2) of Regulation (EC) No 1896/2006 contains a rule specifically aimed at consumers, according to which an order against a consumer can only be sought in the court of the consumer's domicile. Normally the consumer should be sufficiently protected by the obligation of the court to examine *ex officio* its jurisdiction (by excluding claims for which it has no jurisdiction). The powers of the court may be limited considering that this examination may take the form of an automated procedure.<sup>340</sup> Although it is a written procedure, the defendant, including the consumer, may oppose the order by lodging a statement of opposition with the court of origin within 30 days of service of the order.

### 3.5 Costs and Legal Aid

- 219 Taking legal action inevitably involves costs. After court fees and the cost of serving a summons, lawyers' fees are undoubtedly the highest cost. Given the relatively low value of an individual consumer case in general, the high cost of litigation and the uncertainty of the outcome, consumers may often refrain from taking any action or settle for less than they deserve.<sup>341</sup> Taken together, the issue of litigation costs—not least lawyers' fees—can pose a serious threat to consumers' right of access to justice. More generally,

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<sup>337</sup> Regulation creating a European Order for Payment Procedure, 1896/2006 of 12 December 2006 (EU). It entered into force on 12 December 2008 for all at that time EC Member countries except Denmark.

<sup>338</sup> N Reich, 'Adequate Standards – § 14.18 Judicial Protection', in N Reich, A Nordhausen Scholes and J Scholes (ed), *Understanding EU Internal Market Law* (Intersentia 2015) 474.

<sup>339</sup> Regulation creating a European Order for Payment Procedure, 1896/2006 of 12 December 2006 (EU), Art 6(1).

<sup>340</sup> *Ibid*, Art 8 *in fine*.

<sup>341</sup> K Tokeley, 'Access to justice' in G Howells, I Ramsay and T Wilhelmsson (ed), *Handbook of Research on International Consumer Law – Second Edition* (Cheltenham, Edward Elgar 2018) 413, 415. See in this regard also D Wei, 'Enforcement and Effectiveness of Consumer Law in the People's Republic of China' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 173, 188; V Tang, 'Enforcement of Consumer Law in Hong Kong' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 331, 347; G Law, 'Singapore Consumer Law' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 531, 537 and A Bakardjieva Engelbrekt, 'Effectiveness and Enforcement of Consumer Law in Sweden' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 613, 629.

substantive consumer protection might be hampered, since ‘prohibitively expensive justice, means no justice’.<sup>342</sup>

220 Of course, policymakers have not been blind to this problem. Firstly, initiatives have been taken to cover lawyers’ fees and other legal costs in advance in order to guarantee the consumer’s right of access to justice (3.5.1). Equally important is the apportionment of costs, which determines ex post who ultimately bears the burden of litigation (3.5.2). For both questions, it is important to note that there are hardly any different or special rules on legal costs for consumer disputes in most jurisdictions. It should therefore be noted at the outset that some of the findings below often relate not specifically to consumer protection law but to access to justice in general.

### 3.5.1 *Ex Ante – Advancing Legal Costs*

221 In most jurisdictions, each party to a court case must, in principle, advance its own legal costs in the course of the proceedings. Given that lawyers’ fees are often high and the value of individual consumer cases is often low, this imbalance may result in consumers not enforcing their substantive rights because the path to substantive justice is simply too expensive.<sup>343</sup> In addition, the consumer claimant will initially have to warrant the costs of bringing the case (such as the cost of serving a summons or court fees).

222 To ensure that these costs do not discourage parties from initiating court proceedings, jurisdictions have sought for solutions, three of which we will discuss below: legal aid schemes (3.5.1.1), contingency fees (3.5.1.2), and exemptions from court fees (3.5.1.3). The scope of these solutions is often not limited to consumer disputes, but we will focus below on the exceptional cases where the rules are aimed at consumers or where consumers are best placed to make use of them.

#### 3.5.1.1 Legal Aid Schemes

223 Several schemes have been set up to address the issue of high lawyers’ fees and their negative impact on access to justice. The best known are legal aid schemes, whereby the cost of legal representation for the needy is (partly or wholly) borne by the scheme, which is administered by the government or the bar association. In most legal systems, a scheme with such a function exists.<sup>344</sup>

<sup>342</sup> See *North East Pylon Pressure Campaign Ltd a.o.*, Case C-470/16 (CJEU), Opinion of Advocate General M Bobek 19 October 2017 [ECLI:EU:C:2017:781] para 34.

<sup>343</sup> K Tokeley, ‘Access to justice’ in G Howells, I Ramsay and T Wilhelmsson (ed), *Handbook of Research on International Consumer Law – Second Edition* (Cheltenham, Edward Elgar 2018) 413, 413.

<sup>344</sup> It has been reported that in Singapore, no legal aid scheme exists for civil law cases. See G Low, ‘Singapore Consumer Law’ in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 531, 537. Low points out that litigating in Singapore is relatively cheap.

- 224 For EU Member States, the establishment of a legal aid system is even obligatory, since Art 47 of the Charter of Fundamental Rights of the European Union stipulates that ‘legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice’.<sup>345</sup>
- 225 This provision focuses on domestic cases. In addition, the EU legislature has created specific rules on legal aid in cross-border cases through Directive 2003/8/EC.<sup>346</sup> Natural persons involved in a dispute covered by that Directive shall be entitled to receive appropriate legal aid in order to ensure their effective access to justice.<sup>347</sup> This directive covers all civil matters, including employment and consumer protection. Legal aid is considered to be appropriate when it guarantees (i) pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings, (ii) legal assistance and representation in court, (iii) exemption from, or assistance with, the cost of proceedings of the recipient, including the costs relating to interpretation, and (iv) translation and travel costs and the fees to persons mandated by the court to perform acts during the proceedings.<sup>348</sup> In Member States in which a losing party is liable for the costs of the opposing party, if the recipient loses the case, the legal aid shall cover the costs incurred by the opposing party if it would have covered such costs had the recipient been domiciled or habitually resident in the Member State.<sup>349</sup>
- 226 The specific functioning of legal aid systems varies widely. There are differences in the type of proceedings that fall within the scope of the legal aid scheme. In some legal systems, the legal aid scheme has a general scope of application providing for potential legal aid irrespective of the subject matter of the civil proceedings, thus including consumer disputes (eg, Belgium and the Netherlands). In other jurisdictions, the availability of the system is subject to high thresholds (eg, England and Wales<sup>350</sup>), very

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For example, consumer disputes with a value between SGD 5,000.01 and SGD 10,000.01 only require a lodgement fee of SGD 20. Information on how to commence claims and to enforce judgments is readily available in electronic and hardcopy format. Information on how to bring claims and enforce judgments is readily available in electronic and paper format. Most, if not all, judgments are made without legal representation, which keeps costs down.

<sup>345</sup> The EU is not the only place where legal aid is considered a fundamental right. Mention may also be made of the Brazilian Constitution, providing for the fundamental right to legal aid (Constituição Federal 1988 (Federal Constitution) (Brazil) Art 134).

<sup>346</sup> Directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, 2003/8/EC of 27 January 2003 (EU). P Rott, ‘The EU Legal Framework for the Enforcement of Consumer Law’, in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 249, 271.

<sup>347</sup> Directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, 2003/8/EC of 27 January 2003 (EU), Art 3(1).

<sup>348</sup> Ibid, Art 3(2)(a) and (b).

<sup>349</sup> Ibid, Art 3(2)(b).

<sup>350</sup> In England and Wales, in civil cases, meeting specific financial criteria is a prerequisite for applicants, yet under certain circumstances, legal aid may be denied even if these criteria are satisfied (M H Lease, ‘Legal Aid in England and Wales’ (1988) 71(6) *Judicature* 345, 345).

unlikely to be awarded (eg, Quebec),<sup>351</sup> or only available for family law disputes (eg, Manitoba and Saskatchewan, in Canada) or a few other types of disputes (eg, US<sup>352</sup>), thus excluding consumer cases.

- 227 Significant differences also exist concerning the eligibility criteria for legal aid. All legal systems where legal aid schemes exist seem to attach important relevance to the applicants' income and assets. This is not surprising, as legal aid systems exist precisely because of the concern that the disadvantaged would be denied justice simply because they are disadvantaged. Hence, in case an applicant turns out to have the necessary income and/or assets to pay (in full) for lawyers' fees, there is no good reason to provide him or her legal aid.
- 228 However, there are other eligibility criteria that seem to be generally accepted, even if mostly in combination with an income criterion. The most important seems to be the likelihood of success. In Australia<sup>353</sup> and Hong Kong,<sup>354</sup> an applicant would also<sup>355</sup> have to pass a 'merits-test', which would include an account of these prospects. Similarly, in New Zealand, the Netherlands, and Belgium, legal aid is in principle not granted if the claim the applicant wishes to bring has no reasonable prospect of success. Thus, while applicants would be entitled to legal aid if only their income and assets were taken into account, other criteria (such as the prospects of success) may lead to a refusal of legal aid. On the other hand, additional criteria not related to income or assets could also extend the scope of legal aid. For example, in Quebec, an applicant who would not be eligible for legal aid on the basis of income could still be granted legal aid in exceptional circumstances where the denial of legal aid would be likely to cause irreparable harm to the applicant.<sup>356</sup>
- 229 It is clear from the above that in most legal systems,<sup>357</sup> legal aid schemes do not provide for specific rules for consumer protection disputes. However, it has been reported that

<sup>351</sup> H-W Micklitz and G Saumier, 'Enforcement and Effectiveness of Consumer Law, in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 3, 18, para 4.2.

<sup>352</sup> In the US, the National Legal Services Corporation (LSC), as well as state IOLTA funds support legal services lawyers in their representation of indigent clients in housing, labor, welfare, family law cases.

<sup>353</sup> K Tokeley, 'Access to justice' in G Howells, I Ramsay and T Wilhelmsson (ed), *Handbook of Research on International Consumer Law – Second Edition* (Cheltenham, Edward Elgar 2018) 413, 423.

<sup>354</sup> V Tang, 'Enforcement of Consumer Law in Hong Kong' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 331, 335.

<sup>355</sup> I.e. next to an income criterium.

<sup>356</sup> Act respecting legal aid and the provision of certain other legal services (Quebec), s 4.3. It has been reported on the other hand that in Quebec, legal aid is not granted for monetary claims. See M Lacoursère and S Poulin, 'L'application et l'effectivité du droit québécois de la consommation' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 479, 497.

<sup>357</sup> Eg, Bulgaria (A Bakardjieva Engelbrekt, 'Effectiveness and Enforcement of Consumer Law in Bulgaria' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 123, 138), Greece (A E Douga and V P Koumpli, 'Enforcement and Effectiveness of Consumer Law in

some local Chinese courts have adopted special rules to provide legal aid to consumers.<sup>358</sup>

### 3.5.1.2 Contingency Fees

- 230 Another mechanism put in place to meet the risk of people not pursuing their rights because of not being able to pay high lawyers' fees, is what is commonly known as a contingency fee system or a contingent-fee arrangement. A contingency fee has been accurately described as a fee for legal services which must only be paid to the lawyer in the event of successful litigation. Should the case fail, the client will not have to pay any fee to his or her lawyer. Should the case succeed, however, the payable fee will most likely be higher in comparison to what would be the case if the client were charged on a non-contingency basis.<sup>359</sup>
- 231 In the US and Canada, contingency fees have been commonly accepted and used for years. In multiple other legal systems, contingency fees have for a long time been prohibited or have been held unenforceable, mostly because of moral objections. However, there seems to be an evolution ongoing towards a more tolerant approach for such 'price arrangements'.<sup>360</sup> More specifically, ideas seem to have evolved from a belief that contingency fees are inherently unethical to an understanding that contingency fees can be a useful tool to ensure access to justice. For instance, in Germany, claims management companies (eg, acting on behalf of air passengers) are allowed to work on a contingency fee basis for low-value claims of up to EUR 2,000 (see below para 18318).<sup>361</sup>
- 232 It is clear that the inherent link between the fee and the value of the claim seems to necessarily lead to the conclusion that in individual consumer cases, given the relatively low value of consumer claims in general, the level of improvement based on the use of contingency fees is rather limited. It is clear, therefore, that the contingency fee model

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Greece' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 307, 318), Sweden (A Bakardjieva Engelbrekt, 'Effectiveness and Enforcement of Consumer Law in Sweden' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 613, 630) and the Netherlands (V Mak, 'Enforcement and Effectiveness of Consumer Law: The Netherlands' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 391, 408).

<sup>358</sup> See D Wei, 'Enforcement and Effectiveness of Consumer Law in the People's Republic of China' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 173, 185.

<sup>359</sup> G Hazard and M Taruffo, *American Civil Procedure; an introduction* (Yale University Press 1993) 96; K Tokeley, 'Access to justice' in G Howells, I Ramsay and T Wilhelmsson (ed), *Handbook of Research on International Consumer Law – Second Edition* (Cheltenham, Edward Elgar 2018) 413, 425.

<sup>360</sup> K Tokeley, 'Access to justice' in G Howells, I Ramsay and T Wilhelmsson (ed), *Handbook of Research on International Consumer Law – Second Edition* (Cheltenham, Edward Elgar 2018) 413, 425.

<sup>361</sup> Rechtsanwaltsvergütungsgesetz (Law on compensation of attorneys) (Germany), s 4(a).

is particularly suited to collective consumer claims where the overall stakes of the case make it lucrative for lawyers to act on a contingency fee basis (see below para 287).

### 3.5.1.3 Exemption from Court Fees

233 It is also interesting to note that with regard to court fees, some legal systems have adopted specific ‘consumeristic’ arrangements. In Romania<sup>362</sup> and in Chile,<sup>363</sup> for instance, no court fee is said to be due for consumer protection cases, insofar as the applicant is a consumer or a consumer protection association.<sup>364</sup> In Spain, the question of whether a court fee must be paid is determined on the basis of the value of the claim. Below EUR 2,000, no court fee is said to be due.<sup>365</sup> By contrast, in other legal systems such as Belgium, no special arrangements relating to court fees exist.

### 3.5.2 *Ex Post* – Cost Allocation

234 As became clear from the above, initiatives to cover lawyers' fees and other legal costs are relevant from an *ex ante* point of view for guaranteeing access to justice. However, equally important, but from an *ex post* perspective, is the question of cost allocation.

235 For a defendant consumer, the risk of having to reimburse the company's costs if the company is found to be the successful party (under the ‘loser pays’ principle) may be enough to induce him to give in to unfounded claims. For a claimant consumer, this threat could be an incentive not to bring a claim in order to avoid legal proceedings and the potential costs involved.

236 Most legal systems make use of the ‘loser pays’ principle. The litigant whose claim or defense turns out to be unfounded at the end of proceedings will not only have to carry the burden of his or her own costs, but will also have to reimburse the costs made by his or her counterparty to pursue the enforcement of the latter's rights in court. Once more, lawyers’ fees are a central point of attention in this regard. It goes without saying that companies can put a millstone around consumers' necks simply by ‘threatening’ to use very expensive lawyers to take their claims to court.

<sup>362</sup> Ordonanței de urgență a Guvernului privind taxele judiciare de timbre (Government Ordinance regarding the judiciary fees) 80/2013 (Romania), Art 29(1)(f).

<sup>363</sup> Ley nº 19.496 (Act nº 19.496) (Chile), Art 50E.

<sup>364</sup> For Romania, see C Toader, ‘Enforcement and Effectiveness of Consumer Law in Romania’ in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 513, 522. For Chile, see R Momberg, ME Morales and A Pino-Emhart, ‘Enforcement and Effectiveness of Consumer Law in Chile: A General Overview’ in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 151, 158.

<sup>365</sup> MT Alonso Pérez, F de Elizalde Ibarbia and R Garcimartín Montero, ‘An Interdisciplinary View of Enforcement and Effectiveness of Spanish Consumer Law’ in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 591, 611.

- 237 However, to address this, legal systems such as Belgium and the Netherlands implement a lump-sum system. In Belgium, for instance, this implies that the compensation for lawyers' fees that the winning party could obtain has been completely disconnected from the actual costs of a lawyer. Rather, the lump sum awarded to the successful party to cover their lawyer's fees is determined according to a statutory fee table based on the value of the claim. For instance, for claims with a value ranging from EUR 5,000.01 to EUR 10,000, the winning party who was assisted by a lawyer will in principle get EUR 1,350 to cover his or her lawyers' costs, irrespective of whether the actual lawyers' fees he or she has to pay are (far) below or above that amount.
- 238 Such a system is far from perfect, not least because it may happen that the lump sum is not high enough to cover the actual legal costs of a successful party. On the other hand, it may help to limit potential excesses, precisely because a successful party will know in time that he or she will only receive a lump sum to cover his or her legal costs, thus avoiding sky-high legal fees.
- 239 The 'loser pays' principle can also apply to out-of-court costs incurred in pursuing a party's claims. When a company seeks payment from a consumer, it usually starts with reminders and may use debt collection or out-of-court services provided by lawyers. Mediation or arbitration could also be considered instead of litigation. The problem is not the attempt by the business to obtain payment outside the court system, but the subsequent recovery of these costs from the consumer. Specifically, the company argues that the costs incurred in attempting to collect payment constitute damage causally linked to the consumer's fault (ie, non-payment).
- 240 In some legal systems, costs for out-of-court attempts to collect debts are subject to specific legislation. In Germany, for example, debt collection services and their associated costs are covered by a specific law.<sup>366</sup> The same applies to Belgium, which has had a relatively strict legal framework for debt collection services since 2002,<sup>367</sup> and which was further strengthened in 2023.<sup>368</sup> However, for most out-of-court enforcement costs, there is no specific legislation dealing with the passing on of these costs to consumers. In the absence of such specific legislation, it seems perfectly feasible for companies to recover these costs in full from consumers once the initiatives underlying these costs have proved useless. Some authors have therefore called for the introduction of a general 'utility test' for the recovery of costs from consumers, whereby a company would only be entitled to recover enforcement costs where the initiatives

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<sup>366</sup> Rechtsdienstleistungsgesetz (the Act on out-of-court legal services) (Germany). See G Mitsching, 'Die Titulierung überhöhter Rechtsverfolgungskosten im Mahnverfahren – Verbraucherschutz de lege lata und de lege ferenda' (2015) *Verbraucher und Recht* 48, 50.

<sup>367</sup> Wet betreffende de minnelijke invordering van schulden van de consument (Law concerning the out-of-court collection of consumer debts) of 20 December 2002 (Belgium).

<sup>368</sup> Wet houdende invoeging van boek XIX "Schulden van de consument" in het Wetboek van economisch recht (Law introducing Book XIX "Consumer debts" into the Belgian Code of Economic Law) of 4 May 2023 (Belgium).

underlying those costs had a reasonable benefit and prospect of success.<sup>369</sup> For instance, costs relating to a second or third reminder would not pass this utility test, if the consumer would prove that he already contested the enterprise's claim after the first notice.

- 241 Importantly, cost allocation in consumer litigation should not be seen only as an obstacle to access to justice. While it is often viewed negatively, courts and tribunals can actually use cost allocation to steer<sup>370</sup> the procedural and even substantive behaviour of companies towards consumers.<sup>371</sup>
- 242 Firstly, cost allocation can be used to counter the reluctance of consumers to take legal action for fear of having to pay the company's costs. For example, a Dutch court ruled that a consumer did not have to pay the legal costs of his professional adversary even though he had lost on the merits of his case in the Court of Appeal.<sup>372</sup> The court based its decision on Art 47 of the Charter of Fundamental Rights.<sup>373</sup> More precisely, the court exercised its discretion under the national rules on the apportionment of costs. Its final objective was to reduce the obstacles to the consumer's access to justice in the relevant proceedings, taking into account the consumer's legitimate position on the merits of his claim.<sup>374</sup>
- 243 Secondly, costs could remain at the expense of the party who incurred them, even if that party is ultimately successful in its claim. This aspect of cost allocation is closely related to the above mentioned utility test to determine whether certain costs should be borne by the consumer (see above para 238). Examples from the Netherlands illustrate this. In one case, a debt collector had to pay the costs of bringing court proceedings because its decision to bring the case to court was considered premature, even though he was successful on the merits. More precisely, the court felt that if the company had properly explained the claim and its basis to the consumer before serving a summons, it could have prevented the case from going to court.<sup>375</sup> In another example, a consumer

<sup>369</sup> G Mitsching, 'Die Titulierung überhöhter Rechtsverfolgungskosten im Mahnverfahren – Verbraucherschutz de lege lata und de lege ferenda' (2015) *Verbraucher und Recht* 48, 48.

<sup>370</sup> Cfr. the title of a Dutch doctoral dissertation: P Sluijter, *Sturen met proceskosten – Wie betaalt de prijs van verstoring procesgedrag?* (Deventer, Kluwer 2011) (free translation: 'Steering with procedural costs – Who pays the price of disturbing litigating behaviour?').

<sup>371</sup> See, more elaborate, A Van Duin, 'Wie betaalt de rekening? De kostenveroordeling in de context van het EU-consumentenrecht' (2018) 4 *Tijdschrift voor Consumentenrecht & Handelspraktijken* 177.

<sup>372</sup> Case *NJF* 2018/159 (Hof 's-Hertogenbosch, The Netherlands), Judgment 1 February 2018 [NL:GHSHE:2018:363].

<sup>373</sup> The court thereby potentially even went against the *Hoge Raad* (the highest court in the Netherlands)'s settled case law.

<sup>374</sup> A Van Duin, 'Wie betaalt de rekening? De kostenveroordeling in de context van het EU-consumentenrecht' (2018) 4 *Tijdschrift voor Consumentenrecht & Handelspraktijken* 177, 179.

<sup>375</sup> Case 6047810 UC EXPL 17-7856 BEv/35170 (Rb. Midden-Nederland), Judgment of 20 December 2017 [NL:RBMNE:2017:6335]. Compare with identical Belgian case law, albeit in relation to other

challenged a default judgment. During the opposition proceedings, the court found that the company had initiated the proceedings without reasonable grounds in order to take advantage of a default judgment in its favour. The company was ordered to pay the legal costs of both the default proceedings and the opposition proceedings.<sup>376</sup> These examples show how cost allocation can be used to discourage premature or unfounded litigation against consumers.

244 Thirdly, cost allocation could even be used to sanction infringements of substantive consumer law. The prevailing view in the EU is that sanctions and remedies for breaches of EU law must be effective, proportionate, and dissuasive.<sup>377</sup> It could therefore be argued that the latter requirement of deterrence could be reason enough to condemn a business to pay the highest possible lump sum to cover the consumer's legal costs, for example, if it is found that a business has based a claim on an unfair contract term.<sup>378</sup> By doing so, the cost allocation and condemnation might not only help to guarantee procedural justice, but also substantive justice.

245 However, the presence of an unfair term in a contract does not automatically mean that the company should be ordered to pay the legal costs in all circumstances. This is clear from the CJEU's *Cajasur* judgment. This case concerned national legislation in Spain under which, where a consumer has not taken any steps prior to bringing proceedings against a seller or supplier with whom he or she has concluded a contract containing an unfair term, that consumer must bear his or her own costs relating to the legal proceedings which he or she has instituted against that seller or supplier. The CJEU clarified that the Unfair Contract Terms Directive, read in light of the principle of effectiveness, does not preclude such national legislation. For this to be permissible, the competent national court must be able to take into account the existence of settled national case law on similar terms and the potentially unfair conduct of the seller or supplier in order to conclude that the seller or supplier has acted in bad faith and, where appropriate, to order him to pay those costs.<sup>379</sup>

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special subjects: Court of Cassation, Judgment 24 April 1978 [BE:CASS:1978:ARR.19780424.1]; Justice of the Peace Zandhoven, Judgment of 5 September 2000 [RW 2000-01, 850]; Justice of the Peace Roeselare, Judgment of 27 March 2003 [RW 2002-03, 1676].

<sup>376</sup> Rb. Limburg, Judgment 26 July 2017 [NL:RBLIM:2017:7453].

<sup>377</sup> See more elaborate F Cafaggi and P Iamiceli, 'The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions' (2017) 3 *European review of private law* 575.

<sup>378</sup> See also A Van Duin, 'Wie betaalt de rekening? De kostenveroordeling in de context van het EU-consumentenrecht' (2018) 4 *Tijdschrift voor Consumentenrecht & Handelspraktijken* 177, 182, argues that sanctioning through the allocation of litigation costs may be a more viable way of ensuring compliance with consumer law than sanctioning, for example, by denying a company any right to interest if an interest clause is found to be unfair, which could undermine the idea that there is no punitive rationale behind the award of damages. See on that matter also ME Storme and J Werbrouck, 'Invloed van het Europees recht op het Belgische contractenrecht en (in)consistentie van dat laatste met het eerste' (2022) 16 *Nederlands Tijdschrift voor Burgerlijk Recht* 120, 125-126.

<sup>379</sup> *Cajasur Banco*, Case C-35/22 (CJEU), Judgment 13 July 2023 [ECLI:EU:C:2023:569].

246 Overall, the possibilities discussed above make clear that cost allocation and condemnation should not exclusively be seen as negatively impacting the consumer's access to justice, but may equally serve as a means to positively influence consumer protection from a procedural and maybe even from a substantive point of view. However, it should be noted at once that the extent to which this 'positive story' is narrated strongly depends on the possibilities left by national legislation to national courts and tribunals on one hand, and the latter's willingness to narrate it on the other.

#### 4 COLLECTIVE DIMENSION

247 As explained earlier, for individual consumers who typically only have small claims, initiating court proceedings is expensive, time-consuming, and sometimes even irrational. Due to information asymmetry, consumers might even not be aware that an infringement has occurred.<sup>380</sup> Hence, very few consumers actually go to court to enforce their rights individually.<sup>381</sup> Nevertheless, the total harm caused by some infringements of consumer law might be considerable. Moreover, as thousands of consumers are sometimes dealing with the same company or the same provider (such as in the telecom or energy sectors), consumer law infringements may affect a large portion of the population and hence have an impact on the economy.<sup>382</sup>

248 If nothing were to be done about that, businesses would not restrain from committing consumer law infringements. Moreover, there is a global belief that high global consumer confidence leads to more trade, and thus to a better-functioning economy (see above para 50). Therefore, in almost all jurisdictions, the enforcement of consumer rights shows a collective dimension, which manifests itself both via a private enforcement system (eg, through collective proceedings) and a public enforcement system (eg, through the intervention of public authorities). Both system play an important function in enforcing consumer rights and giving a voice to the 'little guy' who could never seek redress through individual action.<sup>383</sup>

249 The relative weight of both approaches naturally varies from country to country. For instance, EU Member States are being said to have a strong administrative enforcement system, whereas this would not be the case in the US, which heavily relies on private

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<sup>380</sup> R Van den Bergh and L Visscher, 'The preventive function of collective actions for damages in consumer law' (2008) 2(2) *Erasmus Law Review* 5, 5.

<sup>381</sup> P Leupold, 'Enforcing Consumer Rights: Collective Redress in Austria and the European Union' (2019) 8(3) *Journal of European Consumer and Market Law* 121, 121; R Van den Bergh and L Visscher, 'The preventive function of collective actions for damages in consumer law' (2008) 2(2) *Erasmus Law Review* 5, 6.

<sup>382</sup> H-W Micklitz and G Saumier, 'Enforcement and Effectiveness of Consumer Law' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 3, 19.

<sup>383</sup> J I Shinder, 'In Praise of Class Actions' (2010) *Apr. 5 Nat'L L.J.* 39.

collective enforcement.<sup>384</sup> The explanation lies in the deeply rooted American distrust of an intrusive central government and its regulatory agencies.<sup>385</sup>

- 250 This conventional wisdom should be nuanced to some extent.<sup>386</sup> Even within the same legal tradition, there are remarkable differences. Within continental Europe, public enforcement has indeed been well established in some countries for some time. In contrast, other legal systems developed later. One example is the Netherlands, which, rooted in a private law tradition, introduced public enforcement under the influence of EU law.<sup>387</sup> Since 2007, the Authority for Consumers and Markets (ACM) has played a pivotal role in the administrative enforcement of rules on unfair commercial practices.<sup>388</sup> Germany still relies heavily on private enforcement of consumer law in many sectors. However, changes are afoot. One notable example is the Bundesanstalt für Finanzdienstleistungen (BaFin), the financial supervisory authority, which was given the mandate to protect the collective interests of consumers in the financial services sector in 2015. Initially, BaFin's newly acquired powers were perceived as largely symbolic, which led to initial inactivity. Over time, however, BaFin began to assert its authority by issuing formal orders to banks, rather than engaging in informal discussions.<sup>389</sup>
- 251 In the EU, the prevailing view is to strengthen both public and private enforcement. For example, one of the actions resulting from the so-called New Deal for Consumers, which the EU Commission presented on 11 April 2018, was to increase the level of penalties for breaches of EU consumer law.<sup>390</sup> In the same vein, the Commission aspired to ensure that, both at the EU and national levels, at least one effective and efficient procedural mechanism for representative actions for injunctive measures and for redress measures would be available to consumers in all Member States.<sup>391</sup>

<sup>384</sup> F Cafaggi and H-W Micklitz, 'Collective Enforcement of Consumer Law: A Framework for Comparative Assessment' (2008) 16(3) *European Review of Private Law* 391, 391.

<sup>385</sup> A Uzelac and S Voet, 'Collectivization of European Civil Procedure: Are We Finally Close to a (negative) Utopia' in A Uzelac and S Voet (ed), *Class Actions in Europe. Holy Grail or a Wrong Trail?* (Springer 2021) 97, 111-12.

<sup>386</sup> As will be shown (see *infra*, paras 157 and 163), in the US, there is quite some work being done by bodies such as the Federal Trade Commission (see also G Howells and R James, 'Litigation in the Consumer Interest' (2002) 9(1) *ILSA Journal of International & Comparative Law* 1, 41-42).

<sup>387</sup> P Rott, 'The EU Legal Framework for the Enforcement of Consumer Law' in H-W Micklitz and G Saumier, *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 249, 281.

<sup>388</sup> V van Druenen and C Jeloschek, 'Civielrechtelijke handhaving door concurrenten van de regels over oneerlijke handelspraktijken: nu en in de toekomst' (2020) 12 (2) *Tijdschrift voor internetrecht* 40, 42.

<sup>389</sup> P Rott, 'The balance in consumer protection between substantive law and enforcement' (2023) 31(4) *European Review of Private Law* 871, 881, para 14.

<sup>390</sup> European Commission, 'A New Deal for Consumers. Commission strengthens EU consumer rights and enforcement' (2018) Newsroom European Commission [https://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=620435](https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=620435).

<sup>391</sup> Directive on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, 2020/1828 of 25 November 2020 (EU), 1.

- 252 Traditionally, public enforcement focused on deterrence and the protection of public interest. It adopted the perspective of tackling the offender (eg, such as imposing punishment, sanctions, prohibitions, and orders), and changing illegal behavior. By contrast, private actions were aimed at the recovery of individual losses. It primarily took the perspective of the injured parties and the need to ameliorate their state of being hurt.<sup>392</sup>
- 253 However, in almost all legal systems, this strict distinction has been more and more abandoned.<sup>393</sup> In light of the objective to be more efficient and to lessen expenditure, enforcement mechanisms nowadays combine what was formerly viewed as separate aspects of ‘public’ and ‘private’ enforcement.<sup>394</sup> In the following discussion, two tendencies are clearly visible: on the one hand, public entities acting as representatives in private collective actions, and on the other hand, regulatory proceedings which do not limit themselves to market control, but also ensure that redress occurs.

#### 4.1 Collective Private Enforcement

- 254 As ‘collective proceedings’ are a different segment within the CPLJ project, this segment does not intend to present a comparative overview of all aspects of group actions or collective redress. Moreover, the question of collective redress has already been abundantly discussed in legal scholarship resulting in a wealth of comparative research.<sup>395</sup> Therefore, in this section, we will only address a number of points that specifically relate to consumer enforcement and fit within the broader set-up of this chapter. First, we analyze the scope of application (4.1.1). In this part, we pay particular attention to the question of whether the enforcement mechanism covers all types of subject matters or whether it is restricted to consumers and, in the latter case, what the implications are. Second, we will analyze who has standing to act collectively on behalf of consumers (4.1.2). In particular, we focus on three actors: consumers, consumer protection organizations, and public entities. At the end of this section, attention will be paid to claim companies. Although they are not, strictly speaking, holders of collective claims, in recent years they have increasingly asserted their role within the legal system.

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<sup>392</sup> C Hodges, ‘Mass Collective Redress: Consumer ADR and Regulatory Techniques’ (2015) 23(5) *European Review of Private Law* 829, 837.

<sup>393</sup> For EU, see E Terryn and P Verbiest, ‘De herziene CPC-verordening als oplossing voor grensoverschrijdend consumentenleed?’ (2018) 1 *Tijdschrift voor Consumentenrecht en handelspraktijken* 6, 15.

<sup>394</sup> C Hodges, ‘Mass Collective Redress: Consumer ADR and Regulatory Techniques’ (2015) 23(5) *European Review of Private Law* 829, 837.

<sup>395</sup> Particularly in the EU (see H-W Micklitz and G Saumier, ‘Enforcement and Effectiveness of Consumer Law’ in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 3, 19).

### 4.1.1 Scope of Application

#### 4.1.1.1 Uniform Mechanism with General Scope

255 In the first place, there are legal systems in which the rules on collective proceedings have a broad scope of application, going far beyond consumer protection litigation. The US class suits are the prototype of this category. Historically, class actions developed in equity and were primarily used in cases involving injuries to property rights.<sup>396</sup> The famous Rule 23 of the Federal Rules of Civil Procedure was introduced in 1938, which provided both for a class action suit for damages (under Rule 23(b)(3)) and a class action suit for an injunction (under Rule 23(b)(2)).<sup>397</sup> However, it was only after its revision in 1966 that class action litigation soared.<sup>398</sup> According to authoritative scholars, in its early years, the purpose of the regime was to facilitate civil rights litigation (covering school desegregation, welfare rights, and prison reform) rather than advancing consumer protection.<sup>399</sup> On this point, the development in the US is diametrically opposed to the one in the EU, where collective proceedings are primarily, or even exclusively, designed as an instrument for consumer litigation.

256 However, in an age where mass production, mass advertising, and mass merchandising were developing ever further, it was recognized that class actions also provided for a useful remedy for the violation of consumer protection laws.<sup>400</sup> More recently, it was even argued that class actions are preeminently a means to remedy mass small-scale consumer abuses (for instance, for consumers who overpaid for products because of anti-trust violations), taking into account the flexible remedy regime in the US. This means that class actions deliver damages to individuals and allow them to fully recover from businesses the profits they made, which makes them more suited to smaller consumer claims where aggregate damages make more sense than in litigation involving significant individual damages.<sup>401</sup>

257 Ensuring access to justice, controlling business behaviour, and even deterring wrongdoers are being put forward as arguments to maintain the system. The system, however, is not free from criticism. Courts became increasingly sceptical of class claims

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<sup>396</sup> G Hazard and M Taruffo, *American Civil Procedure; an introduction* (Yale University Press 1993) 159.

<sup>397</sup> *Ibid.*, 159-160.

<sup>398</sup> D Marcus, 'The History of the Modern Class Action, Part I: Sturm Und Drang, 1953–1980' (2013) 90 (3) *Washington University Law Review* 587, 588.

<sup>399</sup> D Hensler, 'The New Social Policy Torts: Litigation as a Legislative Strategy' (2001) 51(2) *DePaul Law Review* 493, 499; D Marcus, 'The public interest class action' (2016) 104(4) *Georgetown Law Journal* 777, 783-784.

<sup>400</sup> S Deutch, 'Consumer class actions: are they solution for enforcing consumer rights? the Israeli model' (2004) 27(2) *Journal of Consumer Policy* 179, 182.

<sup>401</sup> G Howells and R James, 'Litigation in the Consumer Interest' (2002) 9(1) *ILSA Journal of International & Comparative Law* 1, 36.

and the attorneys who bring them.<sup>402</sup> This was mainly because very few consumers actually recovered meaningful compensation, whereas attorneys-of-law recovered huge amounts of fees from defendants.<sup>403</sup>

- 258 The foregoing prompted Congress to take action. In 2005, Congress passed the Class Action Fairness Act ('CAFA'), which added Chapter 114 on Class Actions to the US Code. Although the legal text does not limit its scope of application to consumer class actions, the preparatory works referred to this chapter as 'a consumer class action bill of rights'.<sup>404</sup> Most importantly, CAFA made it easier to remove a class action filed in state court to federal court. This act expanded the jurisdiction of federal courts to hear nationwide class actions. In addition, this consumer bill of rights focused on three types of settlements. First, it set forth stricter rules for the review of coupon settlements, which are settlements in which plaintiffs are compensated with coupons rather than with monetary awards. Second, it raised the bar for a court's approval of settlements in which plaintiffs incurred an economic loss. Third, it banned settlements in which some plaintiffs receive a greater sum of damages merely because they live in greater proximity to where the action is filed.<sup>405</sup>
- 259 The Canadian systems of collective proceedings align with the US one. After Quebec enacted this type of legislation as the first Canadian province in 1978,<sup>406</sup> almost all other provinces followed in the next two decades.<sup>407</sup> Unlike in the US, the early goals of class proceedings were not primarily an aspiration toward a social mission.<sup>408</sup> Instead, in one of its early judgments, the Supreme Court of Canada stated that the rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs all contributed to the important role that class actions played.<sup>409</sup> None of the Canadian legislations limit the scope of application to consumer protection. However, like the Rule 23 (b)(3) class action suit for damages in the US (see above para 255), class actions are seen primarily as a

<sup>402</sup> CP Bartholomew, 'Redefining Prey and Predator in Class Actions' (2015) 80(3) Brooklyn Law Review 743, 743-744; G Howells and R James, 'Litigation in the Consumer Interest' (2002) 9(1) ILSA Journal of International & Comparative Law 1, 37-38.

<sup>403</sup> Exemplary is the case *Scott v Blockbuster* ((US District Court, Jefferson County) [D 162-535 (2001)]), a dispute about late fees imposed by video rental chain. Customers get a \$1 coupon off future rentals. Lawyers divide \$9.25 million fee award

<sup>404</sup> Class Action Fairness Act 2005 [Public Law 109-2 109th Congress] (US).

<sup>405</sup> See *i.a.* A Kanner and M Ryan Casey, 'Consumer Class Actions after CAFA' (2008) 56 (2) Drake Law Review 303, 305.

<sup>406</sup> Loi sur le recours collectif (Class Action Law) of 8 June 1978 (Quebec), c 8, a 3, now integrated in 'Titre III. Les règles particulières à l'action collective' of 'Livre VI. Les voies procédurales particulières' of the Code de procédure civile (Civil Procedure Code), c C-25.01.

<sup>407</sup> See for instance, in Ontario, the Class Proceedings Act 1992 [S.O. 1992] (Ontario, Quebec), c 6 (CPA). The sole remaining province without such legislation is Prince Edward Island.

<sup>408</sup> J Kalajdzic, 'Consumer (In)Justice: Reflections on Canadian Consumer Class Actions' (2011) 50 Canadian Business Law Journal 356, 358.

<sup>409</sup> *Western Canadian Shopping Centres Inc. v Dutton*, Case 27138 (Supreme Court, Canada), Judgment 13 July 2001 [[2001] 2 S.C.R. 534], 385, para 26.

litigation tool to resolve consumer claims..<sup>410</sup> Foreexample, an analysis of physical class action files introduced in Quebec between 1993 and 2017 shows that consumer protection cases are overwhelmingly present in the class action practice in Quebec (20.52%), followed by state liability (15.15%) and product liability (13.4%) cases.<sup>411</sup>

260 Finally, the prevailing framework for class actions in Brazil goes beyond consumer law as well. While the Code of Consumer Protection and Defense, in conjunction with the Public-Interest Civil Action Act, forms the basis of the microsystem of class actions in Brazil, the tool has a broader scope. More specifically, the procedural rules articulated in this Code apply to all class actions, going beyond the defense of consumer rights to encompass the protection of all homogeneous individual rights.<sup>412</sup>

#### 4.1.1.2 Variety of Mechanisms with Narrower Scope

261 The picture is quite different in the EU. Lawmakers in continental European systems seem to prefer a narrower and more restrictive approach to collective enforcement.<sup>413</sup> Although the EU has recently taken action to bring some harmonization regarding the collective enforcement of consumer rights (see below para 277), the rules traditionally differ between the various jurisdictions. Some countries limit the right to collective action to consumer protection or to a limited number of well-defined subject matters (such as environmental law, data protection, and anti-discrimination).

262 The fragmentation goes even further. In various legal systems, different techniques exist in the field of consumer protection, depending on what remedy is sought (for instance, injunctive relief or collective redress) and what consumers rights are at stake. French law is emblematic in that perspective, which currently provides for five types of collective actions addressing infringements of consumer protection: cease and desist orders for unfair practices, the elimination of unfair terms in consumer contracts, joint representative actions, actions for the compensation of damages caused to the collective interest of consumers, and group action allowing compensatory collective

<sup>410</sup> J Kalajdzic, 'Consumer (In)Justice: Reflections on Canadian Consumer Class Actions' (2011) 50 Canadian Business Law Journal 356, 358.

<sup>411</sup> C Piché, 'Andrà Tutto Bene/ Ça va bien aller: Critical Impressions of Collective Access to Justice in Model European Rules of Civil Procedure' (2021) 11(2) International Journal of Procedural Law 13, 21. See also M Lacoursière and S Poulin, 'L'application et l'effectivité du droit québécois de la consommation' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 479, 503.

<sup>412</sup> T A Alvim, W Queiroz dos Santos and B Dantas, 'Class Actions in Brazil' (2022)(1) International Journal of Procedural Law 114, 119-120.

<sup>413</sup> V Harsagi, 'Adequate response to Dieselgate? The latest reform of collective redress in Germany as viewed by an outsider' (2019) 9(2) International Journal of Procedural Law 281, 283; M Taruffo, 'Some Remarks on Group Litigation in Comparative Perspective' (2001) 11(2) Duke Journal of Comparative & International Law 405, 412.

redress.<sup>414</sup> In this section, we nevertheless aim to give an overview of some common trends in the various continental European systems under study.

#### 4.1.1.2.1 Injunctive Relief

263 Generally speaking, a first step that was set in various jurisdictions consisted of accepting injunctive relief or cease and desist orders in consumer protection matters. Thus, one of the two pillars of the U.S. class action was transplanted: specifically, the 23(b)(2) class action suit for injunctive relief (see above para 255). Such action does not envisage the recovery of monetary compensation, but has as its main objective to obtain an injunction by the court to stop unlawful practices harming the relevant interests of consumers. Injunctive relief only works for the future and does not provide already harmed consumers with remedies.

264 In various countries (such as in Germany and in Belgium), this technique was initially only available in the field of business law, allowing competitors, trade associations, and the chambers of commerce to combat unfair competition.<sup>415</sup> In Germany, however, consumer organizations fulfilling certain criteria were awarded standing in 1965 to act against commercial practices falling under the scope of the Unfair Competition Act.<sup>416</sup> In 1976, the rights of these organizations to take action were extended to actions aimed to put an end to the use of unfair standard contract terms.<sup>417</sup> In France, in 1988, consumer rights associations were given the right to file an action against businesses both to cease unlawful practices and to remove unfair terms from consumer contracts.<sup>418</sup> In Belgium, it was not until 1991 that actions for cease and desist orders were accepted in the field of unfair commercial practices and information and protection of consumers.<sup>419</sup>

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<sup>414</sup> MJ Azar-Baud, 'French group action lawsuits – Between tradition and modernity' (2020) 2020(2) *European Journal of Consumer Law* 233, 235.

<sup>415</sup> For Belgium, see Wet van 14 juli 1971 betreffende de handelspraktijken (the Trade Practices Act of 14 July 1971). See also J Stuyck, 'Belgium' in *International Encyclopedia of Laws - Commercial and Economic Law* (Alphen aan den Rijn 2015) 196, para 473.

<sup>416</sup> J Gurkmann 'Consumer Protection in Germany – the View of the Vzbv' (2019) *Journal of European Consumer and Market Law* 125, 125.

<sup>417</sup> Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (Act On the Regulation of the Law of Standard Terms and Conditions) of 9 December 1976 (Germany).

<sup>418</sup> Loi relative aux actions en justice des associations agréées de consommateurs et à l'information des consommateurs (Law relating to legal actions by approved consumer associations and to consumer information), n° 88-14, 5 January 1988 (France), Art 3.

<sup>419</sup> See Wet betreffende de handelspraktijken en de voorlichting en bescherming van de consument (Act on Trade Practices and the Information and Protection of the Consumer) of 14 July 1991 (Belgium). See also P De Vroede, 'De wet betreffende de handelspraktijken en de voorlichting en de bescherming van de consument' (1991) 55 (24) *Rechtskundig Weekblad* 793, 802, para 74.

According to the Belgian legislature, making this tool available to consumers would contribute to the health of the market and provide them with an effective weapon.<sup>420</sup>

- 265 The Netherlands is somehow peculiar, as the legislature codified in 1994<sup>421</sup> the case law of the Dutch Supreme Court endowing organizations with the possibility of bringing claims on behalf of the interests of other people to request a declaratory judgment, an injunction, or the publication of a court decision.<sup>422</sup> Unlike in France, Germany, and Belgium, all common interests of injured parties were protected, and not only those of consumers, if and insofar such an organization represents these interests pursuant to its articles of association.<sup>423</sup> Nevertheless, in line with those other continental European countries, there existed and still exist specific actions to cease infringements of consumer rights.<sup>424</sup> Besides, the Dutch rules went further than mere injunctive relief, but also allowed for a declaratory judgment. If claimants, however, wanted to recover their losses once a declaratory relief had been successfully obtained, they were still required to file an individual damage claim.<sup>425</sup>
- 266 In 1998, the EU interfered in this domain by adopting a Directive on injunctions for the protection of consumers' interests,<sup>426</sup> which was recast in 2009.<sup>427</sup> This Directive introduced an Intra-Community cease and desist procedure, which was similar to the existing domestic procedures, but which had a cross-border nature and had to be initiated by an 'authorized national entity' (in 2009 renamed 'qualified entities'). In addition, this Directive provided for a general legal framework that could be invoked for infringements of all the existing EU rules with regard to the protection of consumers' interests. Furthermore, this Directive introduced the concept of the 'collective interests of consumers'. These are defined as interests which do not include the cumulation of

<sup>420</sup> Memorie van Toelichting bij Ontwerp van wet betreffende de handelspraktijken en de voorlichting en bescherming van de gebruiker (Explanatory Memorandum to the Draft Law on Commercial Practices and Consumer Information and Protection), 947/1 [Parl.St., Senaat, 1984-85] (Belgium), 5.

<sup>421</sup> Wet tot regeling van de bevoegdheid van bepaalde rechtspersonen om ter bescherming van de belangen van andere personen een rechtsvordering in te stellen (Act regulating the authority of certain legal entities to bring legal proceedings to protect the interests of other persons) of 6 April 1994 [Stb. 1994] (The Netherlands), 269.

<sup>422</sup> IN Tzankova and XE Kramer, 'From Injunction and Settlement to Action: Collective Redress and Funding' in A Uzelac and S Voet (ed), *Class Actions in Europe. Holy Grail or a Wrong Trail?* (Springer 2021) 97, 100.

<sup>423</sup> WH Van Boom, 'Collective Settlement of Mass Claims in the Netherlands' in M Casper and others (ed) *Auf dem weg zu einer europäischen sammelklage?* (Sellier 2009) 171, 176.

<sup>424</sup> Such as the action which is regulated by Burgerlijk Wetboek (Civil Code) (The Netherlands), Art 6:240.

<sup>425</sup> IN Tzankova and XE Kramer, 'From Injunction and Settlement to Action: Collective Redress and Funding' in A Uzelac and S Voet (ed), *Class Actions in Europe. Holy Grail or a Wrong Trail?* (Springer 2021) 97, 101.

<sup>426</sup> Directive on injunctions for the protection of consumers' interests, 98/27/EC of 19 May 1998 (EU), 51–55,

<sup>427</sup> Ibid 30.

interests of individuals who have been harmed by an infringement.<sup>428</sup> While in some jurisdictions this concept has given rise to important debates (for instance, in France<sup>429</sup>), other jurisdictions barely pay attention to it (for instance, in Belgium).

#### 4.1.1.2.2 Actions for Harm Caused to the Collective Interest of Consumers

267 A peculiarity of French law, on which consumer associations can already rely as of 1973,<sup>430</sup> is the right to bring a civil action in response to facts that directly or indirectly harm the collective interest of consumers.<sup>431</sup> More precisely, this right authorizes consumer associations to seek compensation for harm caused by a criminal offense. The nature of these damages, however, remain unclear, since those damages are not intended to compensate the consumers themselves.<sup>432</sup>

#### 4.1.1.2.3 Model Cases

268 Over the years, both at the EU level and in the Member States, there was a growing conviction that merely providing for injunctive relief was not sufficient to address the challenges relating to the enforcement of consumer law. Hence, continental European jurisdictions started to introduce procedures somewhat akin to the US-style class actions, but with the aim of leaving out the alleged excesses that go along with it (such as the exorbitant lawyers' fees). Again, these initiatives were taken in diverse ways.

269 Austria and Germany were initially reluctant to install a full-fledged system of collective redress, and limited themselves to the introduction of a system of test cases.

270 In Austria, for instance, consumers could rely on a representative test case system,<sup>433</sup> which might lead to a court order requiring a company to perform a particular act. For that purpose, the consumer must assign his rights to a consumer protection association which files action on his behalf. The final judgment only has legal effects for the consumer who assigned his rights and who has suffered the respective damage.<sup>434</sup> By

<sup>428</sup> Directive on injunctions for the protection of consumers' interests, 2009/22/EC of 23 April 2009 (EU), recital (2).

<sup>429</sup> J-D Pellier, 'Précisions sur l'intérêt collectif des consommateurs' (2019) *Dalloz actualité*.du 16 décembre 2020, [www.dalloz-actualite.fr/flash/precisions-sur-l-interet-collectif-des-consommateurs](http://www.dalloz-actualite.fr/flash/precisions-sur-l-interet-collectif-des-consommateurs).

<sup>430</sup> Loi d'orientation du commerce et de l'artisanat (Commerce and crafts orientation law), n° 73-1193, 27 December 1973 (France) ('Loi Royer'), Art 46.

<sup>431</sup> Code de la Consommation (Consumer Code) (France), Art L.621-1.

<sup>432</sup> Some scholars therefore wonder whether the damages are not, in fact, private penalties, masked under the appearance of compensation (J-D Pellier, 'Précisions sur l'intérêt collectif des consommateurs' (2019) *Dalloz actualité* du 16 décembre 2020, [www.dalloz-actualite.fr/flash/precisions-sur-l-interet-collectif-des-consommateurs](http://www.dalloz-actualite.fr/flash/precisions-sur-l-interet-collectif-des-consommateurs)).

<sup>433</sup> Zivilprozessordnung (Code of Civil Procedure) (Austria), s 502(5) in connection with of the Konsumentenschutzgesetz (Consumer Protection Act) (Austria), s 29.

<sup>434</sup> H-W Micklitz and others, 'Chapter 8: Litigation, redress and enforcement' in H-W Micklitz, J Stuyck, E Terry (ed), *Cases, Materials and Text on Consumer Law* (Hart Publishing 2010) 499, 533-534.

way of this mechanism, the Austrian legislature wanted to recognize the value of strategic litigation by consumer organizations and the importance of leading cases for legal development as well as the coherent construction of consumer law. It was allegedly successful in a number of cases, for example, against banks for charging excessive interest rates on consumer loans.<sup>435</sup> The Austrian system, however, has some considerable drawbacks: it does not allow the seeking of declaratory judgments for the purpose of clarifying legal issues, it cannot accomplish collective redress, it has no time-barring effect on the non-assigned claims, and the judgment does not create binding effect for other consumers.<sup>436</sup>

- 271 In 2018, in the aftermath of the diesel emission scandal, Germany introduced a model declaratory action for consumers (*'Musterfeststellungsklage'*)<sup>437</sup> which is—as opposed to an earlier mechanism which was limited to capital markets—not restricted to a specific sector.<sup>438</sup> The aim of this procedure is to collectively establish standardized facts and legal questions, which in turn could provide for a legal basis for the claim of individual consumers. The model case should be brought by a consumer protection association, but consumers can join the claim by enrolling in a claims register. The latter action has the effect of suspending the limitation period for their claims. Once the case has been decided, the finding is binding for all registered consumers as if they had brought the claim themselves. This procedure does not lead to individual relief, but allows consumers to establish the general requirements for obtaining the relief in a later procedure. In that way, they benefit from the advantage of a cost-free preliminary clarification of their possible claims.<sup>439</sup>

#### 4.1.1.2.4 Collective Redress

- 272 The adoption of the Representative Actions Directive (see below para 277) has forced each EU Member State to establish a collective redress mechanism to protect the collective interests of consumers, including legal systems that initially resisted such a development (such as Germany and Austria). However, some continental European legal systems (such as France, Belgium, and the Netherlands) had already taken steps to create such form of collective redress for the benefit of consumers. In view of the different approaches adopted (whether or not limited to consumer law), we will first examine how these collective redress mechanisms for consumers have been introduced at national level (4.1.1.2.4.1). We then examine the genesis and key aspects of the Representative Actions Directive (4.1.1.2.4.2). Finally, we highlight some of the

<sup>435</sup> P Leupold, 'Enforcing Consumer Rights: Collective Redress in Austria and the European Union' (2019) 8(3) *Journal of European Consumer and Market Law* 121, 122.

<sup>436</sup> *Ibid* 122-123.

<sup>437</sup> *Zivilprozessordnung* (Code of Civil Procedure) (Germany), s 606-615.

<sup>438</sup> V Harsagi, 'Adequate response to Dieselgate? The latest reform of collective redress in Germany as viewed by an outsider' (2019) 9(2) *International Journal of Procedural Law* 281, 291.

<sup>439</sup> A Stohr, 'The Implementation of Collective Redress - A Comparative Approach' (2020) 21(8) *German Law Journal* 1606, 1612.

consequences that the implementation of the Directive has had in various Member States, insofar as they are already apparent at the time of finalizing this chapter (4.1.1.2.4.3).

#### 4.1.1.2.4.1 Introduction at a National Level

- 273 The French legislature introduced group actions (*'actions de groupe'*) in consumer and competition-related matters in 2014.<sup>440</sup> In fact, a somewhat similar mechanism already existed as of 1992.<sup>441</sup> Those actions for the joint representation of consumers (*'actions en représentation conjointe'*) showed an important disadvantage, which inhibited their success.<sup>442</sup> More precisely, they required an express mandate of at least two individuals who had suffered damage resulting from the same cause.
- 274 By contrast, the group action, which was created in 2014, enables authorized associations to claim compensation for the loss or damage resulting from breaches of consumer law on an opt-in basis. Yet the group action did not cover all possible infringements of consumer rights, as its scope of application was limited to losses arising out of a breach of legal or contractual obligations in the context of the sale of goods or the provision of services, anti-competitive practices, or the rental of a real estate.<sup>443</sup> Moreover, compensation could only be sought for material losses,<sup>444</sup> leaving aside physical, psychological, and moral injuries.<sup>445</sup>
- 275 In France, consumer protection was clearly a pioneering subject-matter in the field of the collective redress. Since 2014, the group action was successively extended to health and product liability, environmental liability, anti-discrimination, and data protection. Whereas the French legislature installed a common procedural framework in 2016 to organize the procedure of all other group actions before both the judicial and the administrative courts,<sup>446</sup> consumer group actions are still governed by the French Consumer Code. This also has the consequence that group actions for the benefit of consumers are exempted from some legal requirements. For instance, all group actions, except those introduced within the framework of consumer law (and health and product

<sup>440</sup> Loi relative à la consommation (Act relating to consumption), n° 2014-344, 17 March 2014 (France). See for a more thorough analysis, MJ Azar-Baud, 'L'introduction d'une action de groupe en droit de la consommation' (2013) 256 Gazette du Palais 16, 16-19.

<sup>441</sup> Code de la Consommation (Consumer Code) (France), Art L.622-1.

<sup>442</sup> MJ Azar-Baud, 'French group action lawsuits – Between tradition and modernity' (2020) 2020(2) European Journal of Consumer Law 233, 235.

<sup>443</sup> Code de la Consommation (Consumer Code) (France), Art L623-1.

<sup>444</sup> Code de la Consommation (Consumer Code) (France), Art L623-2.

<sup>445</sup> MJ Azar-Baud, 'French group action lawsuits – Between tradition and modernity' (2020) 2020(2) European Journal of Consumer Law 233, 235.

<sup>446</sup> Loi de modernisation de la justice du XXI<sup>e</sup> siècle (Act on the modernization of justice for the 21<sup>st</sup> century), n° 2016-1547, 18 November 2016 (France).

liability), must be preceded by a prior formal notice requiring the alleged defendant to desist from the illegal practices or to offer compensation for the loss suffered.<sup>447</sup>

- 276 Belgian law shows some important similarities to French law, as the Belgian legislature also made an action for collective redress available for consumer law disputes as of 2014.<sup>448</sup> The procedure is laid down in the Code of Economic Law.<sup>449</sup> It allows a class representative to introduce an action for collective redress where a group of consumers has suffered harm resulting from a company's breach of contract or violation of certain specified statutory provisions and EU regulations (amongst others, on product liability, consumer protection, insurance, banking and finance, energy, payment and credit services, intellectual property, privacy protection, travel, and transport).<sup>450</sup> In 2018, the procedure was expanded to disputes between small and medium-sized enterprises (SMEs) and businesses.<sup>451</sup> Unlike in France, the scope has not been extended to other special subject-matters. According to the Minister in control of the adoption of the act, consumer law disputes were particularly suited for an action for collective redress. Those disputes often involve a multitude of small claims and allow for an individual recovery that is easy to estimate. Although the door was kept open to extend the mechanism to other subject-matters, this has not yet happened.<sup>452</sup> The only parallel mechanism that has been created in the meantime is a representative action in the field of data protection (in implementation of Art 80 para 1 of the General Data Protection Regulation).<sup>453</sup> This action allows representative entities to claim compensation, but requires an express mandate of data subjects.<sup>454</sup>

<sup>447</sup> MJ Azar-Baud, 'French group action lawsuits – Between tradition and modernity' (2020) 2020(2) European Journal of Consumer Law 233, 255.

<sup>448</sup> See for a thorough analysis: S Voet, 'Belgium's new consumer class action' in V Harsagi and CH Van Rhee (ed), *Multi-party redress mechanisms in Europe: squeaking mice?* (Intersentia 2014) 95; S Voet, 'Class Actions in Belgium: Evaluation and the Way Forward' in A Uzelac and S Voet (ed), *Class Actions in Europe. Holy Grail or a Wrong Trail?* (Springer 2021) 131, 134.

<sup>449</sup> Wetboek Economisch Recht (Code of Economic Law) (Belgium), Art XVII.35-70.

<sup>450</sup> Wetboek Economisch Recht (Code of Economic Law) (Belgium), Arts XVII.36, 1° and XVII.37.

<sup>451</sup> Loi portant modification, en ce qui concerne l'extension de l'action en réparation collective aux P. M.E., du Code de droit économique (Modification act concerning the expansion of the scope of application of the class action in the code of economic law) of 30 March 2018 (France).

<sup>452</sup> Commissieverslag bij Wetsontwerp tot invoeging van titel 2 "Rechtsvordering tot collectief herstel" in boek XVII "Bijzondere gerechtelijke procedures" van het Wetboek van economisch recht en houdende invoeging van de definities eigen aan boek XVII in boek I van het Wetboek van economisch recht (Committee report on draft law inserting Title 2 "Collective redress" in Book XVII "Special judicial proceedings" of the Economic Code and inserting the definitions specific to Book XVII in Book I of the Economic Code) 53 3300/004 (Belgium).

<sup>453</sup> Regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, 2016/679 of 27 April 2016 (EU), Art 80.

<sup>454</sup> Wet betreffende de bescherming van natuurlijke personen met betrekking tot de verwerking van persoonsgegevens (Act on the Protection of Individuals with regard to the Processing of Personal Data) ('Belgian Data Protection Act') of 30 July 2018 (Belgium), Art 220.

277 Dutch law shows some distinguishing features, compared to Belgian and French law. Already in 2005, a tool was developed to facilitate the collective settlement of mass damages claims: the so-called 'WCAM'. This procedure enables defendants and representatives to file a request at the Amsterdam Court of Appeal to declare a settlement binding on an opt-out basis on all injured parties. Although this mechanism was promoted internationally,<sup>455</sup> it was also criticized for being a defendant-friendly device. It could only be relied on if the alleged defendant was willing to settle.<sup>456</sup> Therefore, to increase the defendants' openness to look for a negotiated solution, a new mechanism was approved allowing representative organizations to file a claim for monetary damages on behalf of injured parties. The so-called 'WAMCA' entered into force on 1 January 2020.<sup>457</sup> Most importantly, none of these mechanisms is restricted to consumer protection. Instead, the 'WCAM' focuses on the compensation for damages caused by 'an event or similar events'.<sup>458</sup> Likewise, the 'WAMCA' is applicable to 'claims relating to an event or events' which have given rise to common factual and legal questions.<sup>459</sup>

#### 4.1.1.2.4.2 The EU Intervention

278 Simultaneously with the developments in the various legal systems outlined above, the EU developed initiatives to address the challenges relating to the collective enforcement of consumer law. A first step was made in February 2011, when the Commission published a consultation paper, 'Towards a coherent European approach to collective redress', identifying a first set of common legal principles which should apply to any new initiative in this area. Subsequently, in 2013, the Commission issued a non-binding Recommendation prescribing some common principles for injunctive and compensatory collective redress. The Recommendation's scope was not limited to consumer law. Instead, it suggested a horizontal approach, meaning that it could be applied horizontally and equally in all areas where collective claims for violations of the rights granted under EU law would be relevant (including but not limited to consumer protection,

<sup>455</sup> See for instance, JS Kortmann, 'The Netherlands: a "hotspot" for class actions?' 2011 4(1) Corporate Governance Law Review 13, 13-17; B Krans, 'The Dutch Class Action (Financial Settlement) Act in an international context: The Shell case and the Converium case' (2012) 31 (2) Civil Justice Quarterly 141, 141-150.

<sup>456</sup> T Hartlief, 'Massaschaderecht in ontwikkeling' (2019) Tijdschrift voor Privaatrecht 451, 457, para 12; IN Tzankova and XE Kramer, 'From Injunction and Settlement to Action: Collective Redress and Funding' in A Uzelac and S Voet (ed), *Class Actions in Europe. Holy Grail or a Wrong Trail?* (Springer 2021) 97, 101-102.

<sup>457</sup> Wet tot wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken (Act amending the Civil Code and the Code of Civil Procedure in order to enable the settlement of mass damages in a collective action ) of 20 March 2019 (Belgium).

<sup>458</sup> Burgerlijk Wetboek (Civil Code) (The Netherlands), Art 7:907, para 1.

<sup>459</sup> Wetboek Burgerlijke Rechtsvordering (Code of Civil Procedure) (France), Art 1018c, para 1(a) and (c).

competition, environment protection, protection of personal data, financial services legislation, and investor protection).<sup>460</sup>

- 279 By contrast, the EU's first hard law on collective redress is limited to consumer protection. On 25 November 2020, the EU legislature adopted Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers.<sup>461</sup> This Directive repealed Directive 2009/22/EC, which was confined to injunctive relief (see above para 265). It aimed to guarantee that, at the Union and national levels, at least one effective and efficient procedural mechanism for representative actions for injunctive and redress measures is available to consumers in all Member States. The rationale is many-sided: to improve deterrence of unlawful practices, to reduce consumer detriment in an increasingly globalized and digitalized marketplace, to empower consumers to exercise their rights, to contribute to fairer competition, and to create a level playing field for traders operating in the internal market.<sup>462</sup> In terms of scope, the Directive applies to an exhaustive but comprehensive list of regulations and directives (Annex I to the Directive), covering general consumer protection rules (such as the rules on unfair terms in consumer contracts, unfair commercial practices, and misleading advertising) as well as sector-specific consumer rules in various areas (such as financial services, travel and tourism, energy, telecommunications, and medical devices).<sup>463</sup> However, Member States remain competent to make provisions of the Directive applicable to areas additional to those falling within its scope in Annex I.<sup>464</sup>
- 280 With this initiative, the European Union has taken a notably more comprehensive approach compared to other special subject matters. For instance, with regard to the right to compensation for damages arising from infringements of EU and national competition law, the preamble of the EU Directive expressly indicated that 'it did not require Member States to introduce collective redress mechanisms'.<sup>465</sup> Moreover, infringements of the antitrust rules are excluded from Annex I to the Representative Actions Directive. One author rightly finds this ironic, as the reform of EU consumer redress was set in motion by the 2005 and 2008 Green and White Papers on damages

<sup>460</sup> Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, 2013/396/EU of 11 June 2013 (EU), recital (6) and (7).

<sup>461</sup> Directive on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, 2020/1828 of 25 November 2020 (EU).

<sup>462</sup> Directive on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, 2020/1828 of 25 November 2020 (EU), recital (5) and (6).

<sup>463</sup> For a critical assessment: M J Azar Baud, 'L'obsolescence programmée d'une action collective spécifique au droit de la consommation' (2023) (2) *Revue européenne de droit de la consommation*, 429, 435.

<sup>464</sup> Directive on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, 2020/1828 of 25 November 2020 (EU), recital (18).

<sup>465</sup> Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 2014/104/EU of 26 November 2014 (EU), recital (13).

actions for breaches of antitrust rules.<sup>466</sup> This has led to a situation where European consumers, as opposed to businesses, have so far not been compensated for anti-competitive behaviour in any meaningful way.<sup>467</sup>

- 281 In the same vein, although the General Data Protection Regulation (GDPR) included a provision on the representation of data subjects (see above para 275), a representative entity may not be allowed to claim compensation on a data subject's behalf independently of the data subject's mandate.<sup>468</sup> In contrast to the EU antitrust rules, the GDPR is explicitly included in Annex I to the Representative Actions Directive. As a result, it will be possible to bring a collective redress action for breaches of the GDPR in any Member State, although uncertainties have now arisen regarding the interaction between these two EU instruments.<sup>469</sup>
- 282 One can only guess why the EU has taken the step of introducing collective redress actions specifically in the field of consumer protection. Scholars argue that consumer and civil society groups have lobbied for stronger and collective enforcement mechanisms while business representatives have had a strong voice against EU harmonization.<sup>470</sup> Hence, it might have something to do with a political agenda—for instance, as large-scale personal injury problems could then be seen as having less of a political dimension.<sup>471</sup> However, there are few rational arguments to justify restricting the system of collective redress to consumer law alone.<sup>472</sup> To illustrate, the diesel emissions scandal goes beyond its impact on consumers and involves issues beyond the scope of consumer law. Purchasers of fleets of vehicles, whether for private or public companies, who have fallen victim to the cheating devices are also affected by the scandal.<sup>473</sup>

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<sup>466</sup> M Sousa Ferro, 'Survey: Consumer antitrust private enforcement in Europe' (2022) 13(8) *Journal of European Competition Law & Practice*, 578, 578.

<sup>467</sup> *Ibid.*

<sup>468</sup> Regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, 2016/679 of 27 April 2016 (EU), recital (142).

<sup>469</sup> For an overview, see W Vandenbussche, 'Representatieve vorderingen ingesteld door consumentenorganisaties voor inbreuken op de gegevensbescherming: beschouwingen bij de Meta-uitspraak' (2023) 86(33) *Rechtskundig Weekblad* 1298, 1304.

<sup>470</sup> IN Tzankova and XE Kramer, 'From Injunction and Settlement to Action: Collective Redress and Funding' in A Uzelac and S Voet (ed), *Class Actions in Europe. Holy Grail or a Wrong Trail?* (Springer 2021) 97, 123.

<sup>471</sup> G Howells and R James, 'Litigation in the Consumer Interest' (2002) 9(1) *ILSA Journal of International & Comparative Law* 1, 31. Although those authors mention that their position is not so black and white. Some large-scale personal injury cases certainly have a political agenda.

<sup>472</sup> Azar Baud even considers this as an act of planned obsolescence (see M J Azar Baud, 'L'obsolescence programmée d'une action collective spécifique au droit de la consommation' (2023) (2) *Revue européenne de droit de la consommation*, 429, 435).

<sup>473</sup> *Ibid.*, 435.

#### 4.1.1.2.4.3 Ramifications of the EU Intervention

- 283 Importantly, the EU Directive was not intended to replace existing national procedural mechanisms for the protection of collective or individual consumer interests. It mentions that it takes into account the legal traditions of Member States and leaves it to their discretion how to design the procedural mechanism for representative actions required by the Directive. The Directive also expressly states that it does not prevent Member States from adopting laws on actions seeking declaratory decisions by a court (which exist in Germany and Austria; see above para 268), even though it does not provide for rules on such actions.<sup>474</sup>
- 284 At the time this chapter was finalized, the Directive had not yet been transposed in several jurisdictions, although the deadline for implementation was 25 June 2023. In Belgium and Austria, for example, no draft law had been published. In France, the proposal was still being debated in parliament. However, the legislative proposal reveals the French legislature's intention to replace the existing sector-specific rules (see above para 272) with a general regime covering shortcomings relating to all legal or contractual obligations committed by any person acting in the course of or in connection with his or her professional activity, by any legal person governed by public law, or by any body governed by private law entrusted with the management of a public service.<sup>475</sup> This definition, which brings together several previously existing definitions, has the consequence that the scope of the French collective action will cover almost all areas of law (such as operation of public services, climate, transport, energy supply, and defense of local communities).
- 285 In Germany, however, the Directive has already been transposed. The legislature incorporated the previously existing system of model declaratory actions into a new law, the Consumer Rights Enforcement Act (*'Verbraucherrecht durchsetzungsgesetz'*), thus allowing claims to be brought either in the form of a model action for declaratory relief or in the form of an action for damages.<sup>476</sup> Furthermore, the German law is not limited to actions for breach of the EU consumer protection laws listed in Annex I of the Directive. Instead, it applies to all the claims and legal relationships of a large number of consumers against a trader.<sup>477</sup> The scope is also broader than the Directive, as small businesses (those with less than 10 employees or less than EUR 2 million annual turnover) can benefit from representative actions in addition to consumers.<sup>478</sup>

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<sup>474</sup> Directive on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, 2020/1828 of 25 November 2020 (EU), recital (11).

<sup>475</sup> Proposition de loi relative au régime juridique des actions de groupe (Bill on a legal regime for group actions) n°2154, art. 1.

<sup>476</sup> Verbraucherrecht durchsetzungsgesetz (Consumer Rights Enforcement Act) 8 October 2023 (Germany), s 1, para 1.

<sup>477</sup> Ibid, s 1, para 2.

<sup>478</sup> Ibid, s 1, para 2.

286 Finally, the Netherlands was one of the first jurisdictions to implement the Directive. The Dutch WAMCA regime already had a broader scope than consumer law (see above para 276) and this has not changed. However, since the transposition of the Representative Actions Directive into Dutch law, there are certain WAMCA rules that are limited to claims in the collective interest of consumers, such as an additional requirement regarding the independence of the funding of the group representative<sup>479</sup> or the exclusion of the possibility to ask the court to apply an ‘opt-out’ for non-Dutch consumers.<sup>480</sup> This demonstrates that, even in legal systems with a transversal approach to collective redress, a form of consumer procedural law can emerge.<sup>481</sup>

#### 4.1.2 Holders of the Right of Action

287 Within the framework of this chapter, it is also interesting to look at who has the right to take collective action on behalf of consumers. Depending on the answer to this question, some scholars make a distinction between different models of collective litigation: the private initiative model, whereby individual consumers are entitled to claim, the consumer organization claim model, and the administrative authority model.<sup>482</sup> However, it will be shown that in some legal systems, this modelling clearly falls short (especially in continental Europe), as sometimes—and in the light of the sought remedy—individual consumers, consumer associations, and public entities each have the right to act.

##### 4.1.2.1 Individual Consumers

288 In some jurisdictions, individual consumers can launch a collective claim on behalf of other consumers.<sup>483</sup> The US is the leading example of a system in which a named consumer or a group of named consumers can file suit on behalf of a proposed class that has suffered a common injury.<sup>484</sup> This model obviously implies that the actual initiative is in the hands of private counsel operating on a contingency fee basis,<sup>485</sup> which makes

<sup>479</sup> Burgerlijk Wetboek 1992 (Civil Code) (the Netherlands), Art 305a(2)(f).

<sup>480</sup> Wetboek Rechtsvordering (Code of Civil Procedure) (the Netherlands), Art 1018f(6).

<sup>481</sup> For a critical assessment, see W Vandenbussche, ‘Zijn afwijkende procedureregels voor consumenten steeds nodig?’ (2023) 8 *Nederlands Tijdschrift voor Burgerlijk Recht* 289, 295.

<sup>482</sup> S Deutch, ‘Consumer class actions: are they solution for enforcing consumer rights? the Israeli model’ (2004) 27(2) *Journal of Consumer Policy* 179, 181.

<sup>483</sup> H-W Micklitz and G Saumier, ‘Enforcement and Effectiveness of Consumer Law’ in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 3, 10.

<sup>484</sup> ML Rosenberg, ‘Class Actions for Consumer Protection’ (1972) 7(3) *Harvard Civil Rights-Civil Liberties Law Review* 601, 605.

<sup>485</sup> G Howells and R James, ‘Litigation in the Consumer Interest’ (2002) 9(1) *ILSA Journal of International & Comparative Law* 1, 40.

some scholars wonder whether consumer class actions actually result in significant economic advantages to the litigants.<sup>486</sup>

- 289 Likewise, in the Canadian common law provinces (such as Ontario<sup>487</sup>), the right to commence proceedings in court belongs to one or more named consumers. Even as in the US, the driving forces behind the class action system are the class counsel. They will locate representative plaintiffs and launch an action to which the class's claims will eventually be appended.<sup>488</sup> Quebec is somewhat different, as both individual consumers and consumer protection associations have the right to initiate class proceedings.<sup>489</sup> Other jurisdictions around the world that authorize a member of the class to act include Israel, Australia, New Zealand, and Argentina.<sup>490</sup>
- 290 Even so, in some continental European systems, individual consumers may exceptionally launch claims with a collective dimension. For instance, in Belgium, each interested party, and hence also individual consumers, may file an action for a cease and desist order for a violation of consumer law.<sup>491</sup> There are, however, very few incentives for consumers to bring such claims, especially since no monetary compensation can be obtained. Moreover, the consumer still needs to have a personal and direct interest in bringing the action, which is not absolutely straightforward.<sup>492</sup> Nevertheless, there are some precedents in which a cease and desist order was granted at the request of a consumer.<sup>493</sup> In Germany, by contrast, an individual consumer cannot demand that a professional cease and desist from using certain standard terms or certain commercial practices.<sup>494</sup>

<sup>486</sup> BJ Smit, 'Are Class Actions for Consumer Fraud a Fraud on the Consumer' (1971) 26 (4) *The Business Lawyer* 1053, 1053.

<sup>487</sup> Class Proceedings Act 1992 (CPA) [S.O. 1992] (Ontario, Quebec), c. 6, s 2(1).

<sup>488</sup> GM Zakaib and JM Martin, 'International Class Actions in the Canadian Context: standing, Funding, Enforceability and Trial' (2012) 79(3) *Defense Counsel Journal* 296, 304-305.

<sup>489</sup> Code de Procédure civile (Code of Civil Procedure) (Quebec), Art 571. See also M Lacoursière and S Poulin, 'L'application et l'effectivité du droit québécois de la consommation' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 479, 503.

<sup>490</sup> M. J. Azaud-Baud, 'Regard comparatiste sur l'introduction d'un recours collectif en droit luxembourgeois' (2020) *Ann. Dr. Lux.* 327, 344.

<sup>491</sup> Wetboek Economisch Recht (Code of Economic Law) (Belgium), Art VII.7, 1°.

<sup>492</sup> L Claus and S Rutten, 'Afdwingen van consumentenrechten in grensoverschrijdend verband' in R Steennot and G Straetmans (ed), *Digitalisering van het recht en consumentenbescherming* (Intersentia 2019) 279, 282.

<sup>493</sup> R Steennot and S Dejonghe, *Handboek Consumentenbescherming en Handelspraktijken* (Intersentia 2007) 303, para 586.

<sup>494</sup> CA Kern and others, 'Standing of the individual consumer. Germany' in B Hess and S Law, *Implementing EU Consumer Rights by National Procedural Law. Luxembourg Report on European Procedural Law* (Verlag C.H. Beck oHG 2019) 280, 280; J Gurkmann 'Consumer Protection in Germany – the View of the Vzbv' (2019) *Journal of European Consumer and Market Law* 125, 125; R Podszun, C Busch and F Henning-Bodewig, 'Consumer Law in Germany: A Shift to Public Enforcement?' (2019) 8(2) *Journal of European Consumer and Market Law* 75, 77.

291 Although this was not the path that the EU wanted to take,<sup>495</sup> some jurisdictions (such as Sweden) even go a step further and allow individual consumers to initiate a group action for redress before the courts.<sup>496</sup> Similarly, the Luxembourg bill on a collective redress procedure also suggests that such a mechanism can be initiated by an individual consumer.<sup>497</sup> The authors of the bill wanted to open up the action while providing the necessary safeguards to avoid the pitfalls of the consumer associations' monopoly, which is one of their criticisms of the choices made by the Belgian and French legislatures. In the author's opinion, preventing consumers from taking action would constitute an unjustified restriction of citizens' initiative and access to justice.<sup>498</sup> However, this bill has not yet been adopted in parliament, and the proposal to allow an individual consumer to act as representative of the group was precisely one of the points on which the proposal was strongly criticized by the Luxembourg Council of State—because of the risks involved for the consumer.

#### 4.1.2.2 Consumer Associations

292 In several jurisdictions, consumer associations have standing to file collective actions. Individual consumers who pay higher prices or suffer losses as a result of breaches of consumer protection rules are often unaware that such breaches have taken place.<sup>499</sup> By contrast, consumer associations have the benefit of being able to acquire better information on consumer rights infringements.<sup>500</sup> A recurring issue in various systems is, however, the funding of those associations and ability to provide them with incentives to act on behalf of consumers with only small claims.<sup>501</sup>

293 Therefore, consumer organizations benefit from public funding in some countries. In Germany, for instance, this is prompted by the important role that consumer associations play in market surveillance as they serve as a substitute for a public

<sup>495</sup> Directive on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, 2020/1828 of 25 November 2020 (EU), recital (36): '*Member States should be free to provide individual consumers concerned by the representative action with certain rights within the representative action. Nevertheless, those individual consumers should not be claimant parties in the proceedings*'.

<sup>496</sup> Lagen om grupprättegång (Group Proceedings Act) 2002:599 (Sweden), s 4 .

<sup>497</sup> Projet de loi portant introduction du recours collectif en droit de la consommation (Bill introducing collective action in consumer law) n° 7650 (Luxembourg), Art L. 511-4.

<sup>498</sup> Ibid 36.

<sup>499</sup> DR Hensler, 'Using class actions to enforce consumer protection law' in G Howells (ed) *Handbook of research on international consumer law* (Edward Elgar Pub Inc 2018) 445, 446.

<sup>500</sup> R Van den Bergh and L Visscher, 'The preventive function of collective actions for damages in consumer law' (2008) 2(2) *Erasmus Law Review* 5, 5.

<sup>501</sup> G Howells and R James, 'Litigation in the Consumer Interest' (2002) 9(1) *ILSA Journal of International & Comparative Law* 1, 40.

consumer agency.<sup>502</sup> Hence, German consumer associations are clearly distinguishable from what some authors call ‘organic grassroots organizations that exist in most of the common law world’.<sup>503</sup> Moreover, there is an effective coordination among the consumer rights associations which are sometimes active on different levels. In 2000, the Federation of German Consumer Organizations (*‘Verbraucherzentrale Bundesverband’* or *‘vzbv’*) was established, which is a non-governmental organization acting as an umbrella for 42 German consumer protection associations (*‘Verbraucherschutzzentralen’*). Its aim is to represent, protect, and empower consumers in public and vis-à-vis legislators, the private sector, and civil society. This is done by lobbying and campaigning at national and EU levels, but also by taking legal action on behalf of consumers and by ensuring that its message receives broad media coverage.<sup>504</sup> The German consumer associations and Federation would file around 1,000 new lawsuits per year.<sup>505</sup>

#### 4.1.2.2.1 Lack of Standing

294 In the US and most Canadian provinces, consumer protection associations only have standing to file collective actions provided that they have members who have actually suffered an injury. The only and natural exception is Quebec, where two different mechanisms are available for consumer protection bodies. First, provided that the consumer organization has been incorporated for at least one year, it may request an injunction from the court to cease a prohibited trading practice or to stop a business from using unfair contract terms.<sup>506</sup> Second, although this is not expressly provided for in statutory law,<sup>507</sup> not-for-profit consumer protection agencies (such as the *‘Union des Consommateurs’* or *‘Option Consommateurs’*) regularly initiate a class action as part of their mandate to defend and promote the interests of consumers.<sup>508</sup>

<sup>502</sup> J Gurkmann ‘Consumer Protection in Germany – the View of the Vzbv’ (2019) *Journal of European Consumer and Market Law* 125, 126; H-W Micklitz and G Saumier, ‘Enforcement and Effectiveness of Consumer Law’ in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 3, 10.

<sup>503</sup> G Howells and R James, ‘Litigation in the Consumer Interest’ (2002) 9(1) *ILSA Journal of International & Comparative Law* 1, 42-43.

<sup>504</sup> J Gurkmann, ‘Consumer protection in Germany - the View of the Vzbv’ (2019) *Journal of European Consumer and Market Law* 125, 125.

<sup>505</sup> *Ibid* 126.

<sup>506</sup> *Loi sur la Protection des Consommateurs* (Act on the Protection of Consumers) (Quebec), Art 316.

<sup>507</sup> According to *Code de Procédure civile* (Code of Civil Procedure) (Quebec), Art 571, the collective action is a procedural means which allows ‘a person’ to act on behalf of and represent all the members of a group of which it is a member, without a mandate.

<sup>508</sup> M Lacoursière and S Poulin, ‘L’application et l’effectivité du droit québécois de la consommation’ in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 479, 500-501; G M Zakaib and JM Martin, ‘International Class Actions in the Canadian Context: standing, Funding, Enforceability and Trial’ (2012) 79(3) *Defense Counsel Journal* 296, 304-305.

#### 4.1.2.2.2 Representative Entities

- 295 In all continental European legal systems, consumer protection organizations may qualify as a representative entity eligible to bring collective actions. Yet, this does not imply that every consumer organization may act as a group representative under all circumstances. Collective proceedings are only available for organizations which fulfill certain requirements, which often even differ depending on what remedy is sought (injunctive relief, model declaratory judgment, or collective redress). Unsurprisingly, the criterion related to the non-profit character of the entity is present in all legal systems. Continental European legal systems want to avoid a situation where, in the representative action, entities and their lawyers get enormous fees, while the actual claimants get token payments.
- 296 Once again, the EU has played a pioneering role. With the Directive on injunctions for the protection of consumers' interests (see above para 265), the EU has introduced the abstract notion of 'qualified entities' to refer to any body or organization which, being properly constituted according to the law of a Member State, has a legitimate interest in ensuring that various rules on consumer protections are complied with. With the Representative Actions Directive, it has even established six well-defined criteria that group representatives must meet to be entitled to bring cross-border representative actions. A cross-border representative action is one in which a qualified entity brings a representative action in a Member State other than the one in which it is designated. More precisely, in that case, qualified entities (a) should be properly constituted in accordance with national law of the Member State and have at least 12 months of actual public activity in the field, (b) should have a legitimate interest in protecting consumer interests demonstrated by their statutory purpose, (c) should have a non-profit-making character, (d) may not be the subject of insolvency proceedings, (e) should be independent, which is, *ia*, shown by established procedures to prevent influence by persons other than consumers and to prevent conflicts of interest, and (f) should make some information publicly available on their website.<sup>509</sup>
- 297 As far as domestic representative actions (actions brought by a qualified entity in the Member State in which it is designated) are concerned, the EU leaves it to the Member States to decide to whom they want to grant legal standing, but the criteria should be consistent with the objectives of the Directive.<sup>510</sup> Besides, Member States may decide that the abovementioned criteria also apply to the designation of qualified entities for the purpose of bringing domestic representative actions.<sup>511</sup> In any case, the EU lawmakers attach great importance to the active role consumer organizations should play in ensuring that consumer protection law is complied with. In the preamble of the

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<sup>509</sup> Ibid Art 4, para 3.

<sup>510</sup> Ibid Art 4, para 4.

<sup>511</sup> Ibid Art 4, para 5.

Directive, it is literally stated that they should ‘all be considered well placed to apply for the status of qualified entity in accordance with national law’.<sup>512</sup>

- 298 Importantly, not only the EU legislature, but also the CJEU was also instrumental in broadening the field of action of the consumer protection organizations. In two cases, the Court held that consumer protection associations, such as the German Federation (see above para 286), may also file representative actions in the field of data protection, even if the interests they defend are primarily consumer protection and fair competition.<sup>513</sup>
- 299 It is interesting to see how the EU legal systems discussed in this chapter differ in their approach to letting consumer associations act as group representatives. This analysis shows that each jurisdiction places different emphases, often grappling with the relationship between imposing specific requirements on representative bodies acting in the field of consumer law and the broader applicability of these criteria to all collective actions.
- 300 Following the EU Directive on injunctions for the protection of consumers’ interests (see above para 265), German law uses the abstract notion of ‘qualified entities’ to refer to the unions and associations which are entitled to bring collective action on behalf of consumers.
- 301 To be able to seek injunctive relief against an enterprise violating consumer protection laws,<sup>514</sup> the association must be included on a list of qualified entities which is held by the Federal Ministry of Justice (*‘Das Bundesamt für Justiz’*). To that end, the association: (1) has the statutory task of promoting consumer interests through non-commercial information and advice; (2) must either be an umbrella organization for more than three member associations (*‘Verbände’*) that pursue the same purpose or must have at least 75 members that are natural persons; and (3) must be included as a qualified entity for at least one year in the register and have performed its statutory tasks for one year. Furthermore, it must be certain that the association will continue to fulfill its statutory tasks effectively and appropriately in the future and that it will not assert its claims primarily to generate income for itself. Finally, members may not be granted any benefits from the association's assets and persons working for the association may not be favoured by inappropriately high remuneration or other benefits.<sup>515</sup> In addition,

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<sup>512</sup> Ibid recital (24).

<sup>513</sup> *Meta Platforms Ireland Limited v Bundesverband*, Case C-319/20 (CJEU), Judgment of 28 April 2022 [ECLI:EU:C:2022:322], para 65; *Fashion ID GmbH & Co. KG v Verbraucherzentrale NRW eV*, Case C-40/17 (CJEU), Judgment of 29 July 2019 [ECLI:EU:C:2019:629], para 63.

<sup>514</sup> Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen (Act on injunctions for consumer rights and other violations) (Germany), s 3(1); Gesetz gegen den unlauteren Wettbewerb (Unfair competition law) (Germany), s 8(3).

<sup>515</sup> Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen (Act on injunctions for consumer rights and other violations) (Germany), s 4.

qualified entities from other EU Member States which are included in the list drawn up by the European Commission may bring an action for a cease and desist order.<sup>516</sup>

- 302 In order to be able to bring an action for declaratory relief or collective redress under the Consumer Rights Enforcement Act (see above para 284), there is an additional requirement. The association may not receive more than 5% of its budget from corporate donations.<sup>517</sup> In case of doubt, disclosure of financial resources can be ordered. Importantly, there is an irrebuttable presumption that consumer associations which are predominantly supported by public funds comply with this requirement.<sup>518</sup>
- 303 Unlike the CJEU, which seems to have opened the doors of the courtroom to consumer organizations willing to act on behalf of consumers (see above para 295), the German Supreme Court has taken the opposite stance in the past.<sup>519</sup> Specifically, when only the model declaratory action existed (see above para 268), the Supreme Court interpreted the requirements in a very restrictive manner, making the German criteria (which was already quite strict) even more restrictive and resulting in the first model declaratory action case brought before the Court being declared inadmissible. While the qualified entity concerned had more than 350 members, a majority of its members did not have voting rights. Against the prevailing opinion in literature, the Supreme Court held that the notion of members only refers to members that have the power to influence the association's actions, which implies that they have voting rights. Furthermore, the Court confirmed that a qualified claimant cannot rely on anonymized members lists to prove the number of its members. Finally the Court found that between 97% and 99% of the entity's income in the relevant period came from judicial and extrajudicial enforcement of claims, which exceeded the income from membership fees many times over.<sup>520</sup> It later reiterated that internet membership without voting rights was not sufficient to reach the required number of members.<sup>521</sup>
- 304 In Belgium, where a proposal for transposing the Directive had not even been published at the time of finalizing this contribution, different criteria are currently applied depending on whether injunctive relief or collective redress is sought. Consumer rights organizations can seek injunctive relief on behalf of consumers if they have legal personality, and are represented in the Special Consultative Consumer Commission

<sup>516</sup> Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen (Act on injunctions for consumer rights and other violations) (Germany), s 3(1).

<sup>517</sup> Verbraucherrechtsetzungsgesetz (Consumer Rights Enforcement Act) 8 October 2023 (Germany), s 2 (1) 1, b).

<sup>518</sup> Ibid, s 2 (2) and (3).

<sup>519</sup> *Peter Röthemeyer, Anmerkung*, Case XI ZR 171/19 (BGH, Germany), Order 17 November 2020 [NJW 2021], 1014.

<sup>520</sup> Case VIII ZB 55/21 (BGH, Germany), Order 7 February 2023 [ECLI:DE:BGH:2023:300323UVIIZR10.22.0].

<sup>521</sup> Case XI ZR 171/19 (BGH, Germany), Order 17 November 2020 [NJW 2021], 1014

(which is the central advisory body for consumer issues) or have been recognized by the Minister for Economic Affairs.<sup>522</sup>

- 305 The requirements for class representatives in an action for collective redress show similarities to the above, but are not the same.<sup>523</sup> Again, consumer rights organizations which have legal personality and are represented in the Special Consultative Consumer Commission have standing to bring such an action. Additionally, the Minister has recognized five non-profit organizations meeting certain criteria (such as a minimum of three years of legal capacity, direct relation between the statutory aim and the collective damage, and not pursuing an economic interest in a sustainable manner). Following a ruling of the Constitutional Court,<sup>524</sup> representative bodies from other Member States of the European Union and the European Economic Area can also act as a group representative if they met the requirements set forth in paragraph 4 of the Commission Recommendation 2013/396/EU of 11 June 2013 (on common principles for injunctive and compensatory collective redress mechanisms in the member states concerning violations of rights granted under union law).
- 306 In France, in contrast to Belgium and Germany, the same requirements apply when a consumer organization wishes to bring a collective action on behalf of consumers, regardless of whether an action for injunctive relief for harm caused to the collective interests of consumers, an action for joint representation, or a group action is filed. French law did not apply the abstract notion of 'qualified entities' but, following the EU Injunctions Directive, it also allowed those bodies to bring an action for injunctive relief if they can justify their inscription on the list drawn up by the European Commission and published in the Official Journal of the EU.<sup>525</sup> As a result of the implementation of the Directive on representative actions, the same 'qualified entities' will now be able to bring collective actions in France.
- 307 Both under the legislative framework that existed since 2014 and under the legislative proposal on a legal regime for group action (see above para 283), which was launched in implementation of the Representative Action Directive, French law employs the concept of accredited associations (*'associations agréées'*).<sup>526</sup> Since 2014, to be accredited, consumer associations must have been in existence for at least one year, must have executed effective and public action to protect consumers' interests during that one year, and must meet the minimum number of individual members (10,000 members for associations active at national level, or a sufficient number of members for local,

<sup>522</sup> Wetboek Economisch Recht (Code of Economic Law) (Belgium), Art XVII.7, 4°.

<sup>523</sup> Wetboek Economisch Recht (Code of Economic Law) (Belgium), Art XVII.39.

<sup>524</sup> Case 41/2016 (Constitutional Court, Belgium), Judgment 17 March 2016.

<sup>525</sup> Code de la consommation 2016 (Consumer Code) (France), Art L-621-7.

<sup>526</sup> Ibid Art L-811-1.

departmental, or regional associations in the overseas departments).<sup>527</sup> In addition, the organization must be independent of any form of professional activity.<sup>528</sup>

308 Remarkably, some of these criteria (ie, the time the entity has been in existence) deviated for consumer protection in comparison with other subject matters which allowed for group action (see above para 272). Under the ‘common framework’, only associations that had been duly declared for at least five years were also entitled to engage a group action, while for consumer organizations, one year was the minimum duration.<sup>529</sup> The legislative proposal seeks to replace the fragmented requirements for group representatives with a single set of requirements inspired by those in the Directive (such as non-profit status, effective and public activities for an uninterrupted period of 12 months, statutory objectives that include the defense of the infringed interests, no involvement in insolvency proceedings, independence and immunity from influence by persons with economic interests, and an obligation to provide information to the public).<sup>530</sup>

309 Like France, the Netherlands does not use the concept of ‘qualified entities’ to determine who can act on behalf of injured parties. As the scope of application is not limited to consumer law, any foundation or association with legal capacity (either ad hoc or existing) can request the court to order injunctive and monetary relief on behalf of a group of persons. When the Dutch legislature introduced the WAMCA regime in 2020 (see above para 276), a number of requirements were already laid down, more or less in line with—but sometimes more detailed than—the ones of Representative Actions Directive. Such requirements included having the proper and effective means to involve those represented in the decision-making process, having sufficient means to bear the costs of initiating the proceedings, disposing of a publicly accessible internet page (providing information on ia, the salaries of its directors, and the calculation of the contributions by the represented parties, if applicable), and showing possession of the experience and expertise to bring such an action.<sup>531</sup> When it comes specifically to collective redress actions for the protection of consumer interests, there is an additional requirement following the transposition of the Directive. The group representative may not dispose of litigation funding that originates from a funder that is a competitor of the party targeted by the collective action or from a funder dependent on the party against

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<sup>527</sup> Ibid Art R-811-1.

<sup>528</sup> Ibid Art R-811-7. See also : MJ Azar-Baud, ‘French group action lawsuits – Between tradition and modernity’ (2020) 2020(2) European Journal of Consumer Law 233, 233; E Jeuland, ‘Other than individual consumers. France’ in B Hess and S Law, *Implementing EU Consumer Rights by National Procedural Law. Luxembourg Report on European Procedural Law* (Verlag C.H. Beck oHG 2019) 285, 290.

<sup>529</sup> Loi n° 2016-1547 (Law n° 2016-1547) of 18 November 2016 (France), Art 63, and Code de Justice Administrative (Code of Administrative Justice) (France), Art L. 77-10-4.

<sup>530</sup> Proposition de loi relative au régime juridique des actions de groupe (Bill on a legal regime for group actions) n°2154, art. 1bis.

<sup>531</sup> Burgerlijk Wetboek (Civil Code) (The Netherlands), Art 3:305a, para 2.

whom the action is targeted.<sup>532</sup> This again demonstrates that even in legal systems with a transversal approach to collective redress, a form of consumer procedural law can emerge.<sup>533</sup>

#### 4.1.2.3 Public Authorities

- 310 A third category of actors that can take action on behalf of consumers is public authorities. This is the most exceptional category as it exemplifies the overlap between public and private enforcement; it is also the rarest, as it is used in only a handful of jurisdictions.
- 311 Within continental Europe, one first thinks of Nordic countries (such as Denmark, Sweden, and Finland), where infringements of collective consumer interests are typically brought before the courts by the Consumer Ombudsman.<sup>534</sup>
- 312 In Sweden, the Consumer Ombudsman is the director general and head of the Swedish Consumer Agency ('*Konsumentverket*'). The Ombudsman is a highly reputed government-appointed public official, who is entrusted to bring proceedings in defense of consumer interests under various consumer protection statutes.<sup>535</sup> For instance, the Ombudsman is the primary actor for bringing injunctive actions under the Consumer Contract Terms Act.<sup>536</sup> Only if the Ombudsman decides not to pursue a case may other actors such as consumer organizations seek injunctions. In addition, the Swedish Consumer Agency was the only Swedish qualified entity that could bring actions for cross-border infringement of consumer interests under the EU Injunctions Directive. Finally, the Consumer Ombudsman is the designated public authority for consumer disputes to bring a so-called public group action.<sup>537</sup> Such a public group action should only be commenced if either a private or organization group action is not likely to be brought and there is a particular public interest in starting a public group action.
- 313 Likewise, the Danish Consumer Ombudsman has standing to bring a collective action seeking compensation for all consumers affected.<sup>538</sup> Unlike collective actions being filed by an individual consumer or a private organization, the Consumer Ombudsman may

<sup>532</sup> Burgerlijk Wetboek 1992 (Civil Code) (the Netherlands), Art 3:305a, para 2, f).

<sup>533</sup> For a critical assessment, see W Vandenbussche, 'Zijn afwijkende procedureregels voor consumenten steeds nodig?' (2023) 8 *Nederlands Tijdschrift voor Burgerlijk Recht* 289, 295.

<sup>534</sup> L Ervo, 'Group Actions in East-Nordic Legal Culture' in A Uzelac and S Voet (ed), *Class Actions in Europe. Holy Grail or a Wrong Trail?* (Springer 2021) 177, 177; C Hodges, 'Mass Collective Redress: Consumer ADR and Regulatory Techniques' (2015) 23(5) *European Review of Private Law* 829, 844-845.

<sup>535</sup> A Bakardjieva Engelbrekt, 'Effectiveness and Enforcement of Consumer Law in Sweden' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 613, 620.

<sup>536</sup> Lag om avtalsvillkor i konsumentförhållanden (Consumer Contract Terms Act) 1994:1512 (Sweden), s 4.

<sup>537</sup> Lagen om grupprättegång (Group Proceedings Act) 2002:599 (Sweden), s 6.

<sup>538</sup> Retsplejeloven (Administration of Justice Act) (Denmark), s 254 c(3).

request to the court that the suit be conducted on an opt-out basis. Moreover, the Ombudsman will fund the public action out of public funds.<sup>539</sup>

- 314 In other European countries, such as Belgium, public authorities are also entitled to play a role in the private collective enforcement of consumer rights, but to a more limited extent. For instance, the Belgian Minister for Work, Economic Affairs and Consumer Affairs and the Director-General of the Directorate-General for Economic Inspection can bring an action for a cease and desist order in the collective interests of consumers against a trader.<sup>540</sup> An analysis of the published case law suggests that those authorities only exceptionally make use of this power.<sup>541</sup> Nevertheless, a case in which the Belgian Minister and the Director-General brought proceedings against online resellers of event tickets, led to an important judgment of the CJEU. First, the CJEU held that the Belgian authorities, in the same way as interested parties and consumer protection associations, can apply to the court for a finding that the relevant national legislation has been infringed and for the making of a cessation order.<sup>542</sup> Second, and more importantly, according to the CJEU, the fact that the Belgian authorities used their own reports and findings of State inspectors as evidence in a court action does not amount to the exercise of public powers. Merely collecting and compiling complaints or evidence, as a trade or consumer association could do, cannot amount to the exercise of such powers.<sup>543</sup>
- 315 At the EU level, under the Injunctions Directive, it was left to the Member States to decide whether they wanted to grant legal standing to consumer organizations and/or one or more independent public bodies.<sup>544</sup> The same goes for the Representative Actions Directive. In the initial proposal, public bodies were featured more prominently, but the actual text favors private entities such as consumer protection organizations.<sup>545</sup> Apparently, this change was being lobbied for by some Member States (such as Germany) which do not primarily rely on enforcement of consumer rights by independent public bodies dealing and France, where consumer authorities were

<sup>539</sup> C Hodges, 'Mass Collective Redress: Consumer ADR and Regulatory Techniques' (2015) 23(5) *European Review of Private Law* 829, 845.

<sup>540</sup> *Wetboek Economisch Recht* (Code of Economic Law) (Belgium), Art VII.7, 2°.

<sup>541</sup> For some rare examples, see Pres. Commercial Court Liège, judgment of 16 December 2003 (2003) *Jb. Handelspraktijken & Mededinging* 732, noot F. Longfils; Pres. Commercial Court Namur, judgment of 22 April 1998 (1998) *Jb. Handelspraktijken & Mededinging* 393, noot F. Domont-Naert.

<sup>542</sup> *Belgische Staat and Directeur-Generaal van de Algemene Directie Controle en Bemiddeling van de FOD Economie, K.M.O., Middenstand en Energie v Movis BV and Others*, Case C-73/19 (CJEU), Judgment 16 July 2020 [ECLI:EU:C:2020:568], para 47-48.

<sup>543</sup> *Ibid* para 58.

<sup>544</sup> Directive on injunctions for the protection of consumers' interests, 2009/22/EC of 23 April 2009 (EU), Art 3.

<sup>545</sup> Cf. Directive on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, 2020/1828 of 25 November 2020 (EU), Art 4(2): 'Member States shall ensure that entities, in particular consumer organisations, including consumer organisations that represent members from more than one Member State, are eligible to be designated as qualified entities'.

unwilling to play a larger role.<sup>546</sup> Nonetheless, the Representative Actions Directive acknowledges that, depending on national legal traditions, public bodies could also play an active role in ensuring that relevant provisions of EU consumer law are complied with.<sup>547</sup> Therefore, Member States may designate public bodies as qualified entities for the purpose of bringing representative actions.<sup>548</sup>

316 In the US, the Rule 23(b)(2) class action suit for injunctive relief often involves a public interest organization or agency, rather than an individual representing a particular class interest (see above para 255). In that regard, it is worth mentioning that the Federal Trade Commission (FTC) can seek various forms of relief on behalf of consumers through civil litigation.<sup>549</sup> Similarly, state attorneys general can initiate consumer protection actions. In fact, many state attorney general's offices have a consumer protection division which can bring civil cases in court. They derive much of their enforcement authority from state consumer protection laws, which often give them primary enforcement responsibility.<sup>550</sup> In addition, attorneys general may bring actions under *parens patriae* authority and federal statutes.<sup>551</sup> Since this is part of their powers as a regulatory agency, this will be discussed in the next section.<sup>552</sup>

#### 4.1.2.4 Claim Companies

317 Although claim companies do not fall under the definition of 'holders of the right to action', they actually do play an increasingly important role in the collective enforcement of consumer rights, especially in continental Europe.<sup>553</sup> This model finds favour not only in Member States such as Austria or Germany, whose legal systems offer limited access to collective redress, but also in Member States with relatively comprehensive procedural rules on collective redress (such as the Netherlands and France).

<sup>546</sup> L Hornkohl, 'Up- and Downsides of the New EU Directive on Representative Actions for the Protection of the Collective Interests of Consumers' (2021) (5) Journal of European consumer and market law 189, 191-192.

<sup>547</sup> Directive on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, 2020/1828 of 25 November 2020 (EU), recital (24).

<sup>548</sup> Directive on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, 2020/1828 of 25 November 2020 (EU), Art 4(7).

<sup>549</sup> K Gutman, 'The Development of Consumer Law in the US: Comparisons with the EU Experience' (2012) 1(4) Journal of European Consumer and Market Law 212, 215.

<sup>550</sup> <https://www.naag.org/issues/consumer-protection/consumer-protection-101/>.

<sup>551</sup> C Provost, 'The Politics of Consumer Protection: Explaining State Attorney General Participation in Multi-State Lawsuits' (2006) 59(4) Political Research Quarterly 604, 609.

<sup>552</sup> Cf. 'The power to seek and obtain injunctive relief is often understood or expressed as a form of collective redress in many of the reports. When undertaken by the public enforcement body, this form of collective redress rarely allows for compensation to be paid directly to affected consumers' (H-W Micklitz and G Saumier, 'Enforcement and Effectiveness of Consumer Law' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 3, 14).

<sup>553</sup> For France, see MJ Azar-Baud, 'French group action lawsuits – Between tradition and modernity' (2020) 2020(2) European Journal of Consumer Law 233, 236.

- 318 Claim companies are organizations that support consumers in identifying potential legal claims and help them to file and pursue such claims. Those companies often rely on legal technology tools such as case management systems or other types of software that can help to organize and manage the process of bundling claims. By assigning their claim to such a company, consumers transfer their right of action to that company, which will subsequently file an action in its own name.<sup>554</sup> Alternatively, consumers might also give a mandate or proxy to an association to act on their behalf.<sup>555</sup>
- 319 The majority of the claim companies that have emerged in Europe over the last years focus on seeking redress from airlines on the basis of the Regulation No 261/2004.<sup>556</sup> This Regulation provides for a flat-rated compensation for denied boarding, cancellation, and flight delays. This highly standardized and objectivized nature of compensation contributes to the technological efficiency, and hence explains the interest of legal tech companies.<sup>557</sup> However, the use of legal tech has also facilitated the mass processing of similar claims, such as those arising from the diesel emissions scandal or antitrust violations.<sup>558</sup> (P. Rott, “The balance in consumer protection between substantive law and enforcement”, ERPL 2023, vol. 31, nr. 4, 871, 871).
- 320 These companies mostly work on a contingency basis, meaning that they only receive payment if they are successful in securing compensation for the consumer. For instance, Germany changed its law in 2021 to also allow law firms to work on a contingency fee basis for low-value claims of up to EUR 2,000.<sup>559</sup> Until then, claim companies had one crucial advantage over the legal profession.<sup>560</sup>
- 321 Obviously, debtors—most often airlines—have tried to oppose this model of assigning claims or giving mandates. In Germany, the Federal Court of Justice (*‘Bundesgerichtshof’*,

<sup>554</sup> H Boularbah, ‘Le Code judiciaire est-il adapté (en l’état actuel) aux actions tendant à la réparation d’un préjudice de masse’ in J Englebert (ed), *Questions de droit judiciaire inspirées de l’«affaire Fortis»* (Larcier 2011) 81, 107; L Claus and S Rutten, ‘Afdwingen van consumentenrechten in grensoverschrijdend verband’ in R Steennot and G Straetmans (ed), *Digitalisering van het recht en consumentenbescherming* (Intersentia 2019) 279, 306, para 56.

<sup>555</sup> A famous case in France is the AFER case, whereby the Association Française ‘Epargne et de Retraite (AFER) obtained a mandate from its 55,000 subscribers in 2011 and successfully recovered around EUR 30 million on their behalf in 2019. (MJ Azar-Baud, ‘French group action lawsuits – Between tradition and modernity’ (2020) 2020(2) European Journal of Consumer Law 233, 236).

<sup>556</sup> L Claus and S Rutten, ‘Afdwingen van consumentenrechten in grensoverschrijdend verband’ in R Steennot and G Straetmans (ed), *Digitalisering van het recht en consumentenbescherming* (Intersentia 2019) 279, 306, para 56.

<sup>557</sup> F de Elizalde, ‘Legal Tech in Consumer Relations and Small-Value Claims. A Survey’ in LA DiMatteo and others (ed), *The Cambridge Handbook of Lawyering in the Digital Age* (Cambridge University Press 2021) 159, 171.

<sup>558</sup> P Rott, ‘The balance in consumer protection between substantive law and enforcement’ (2023) 31(4) European Review of Private Law 871, 881, para 14.

<sup>559</sup> Rechtsanwaltsvergütungsgesetz (Law on compensation of attorneys) (Germany), s 4(a).

<sup>560</sup> P Rott, ‘The balance in consumer protection between substantive law and enforcement’ (2023) 31(4) European Review of Private Law 871, 879, para 12.

‘BGH’) upheld such a collection model that bundled the claims of several consumers into one action by way of assignment to a legal services provider. In that ruling, it expressly held that a debt collection license empowers the license holder not only to collect outstanding debts out-of-court, but extends to cases where it is clear from the beginning that the claim would have to be enforced in court.<sup>561</sup> While several lower courts have adhered to the assignment model as endorsed by the BGH,<sup>562</sup> there have been isolated instances where lower courts did not adopt its solution.<sup>563</sup>

- 322 In Belgium and the Netherlands, lower courts had to decide on the prohibition on assignment or mandate in the general terms and conditions of companies. Under Belgian and Dutch private law, such prohibition of assignment by contract is in principle allowed. Whereas some courts have nevertheless set aside such prohibitions (eg, contrary to a rule of public policy, null and void under the Unfair Contract Term Directive),<sup>564</sup> other courts consider them to be legitimate.<sup>565</sup>
- 323 Finally, the CJEU held in the *Schrems* judgment that the special grounds for jurisdiction over consumer contracts, which allows consumers to bring proceedings in the courts for the place where the consumer is domiciled, does not extend to assigned claims. According to the Court, this special system is inspired by the concern with protecting the consumer as the party deemed to be economically weaker and less experienced in legal matters than the other party to the contract. Hence, the consumer is protected only insofar as he is, in his personal capacity, the plaintiff or defendant in proceedings. Consequently, an applicant who is not himself a party to the consumer contract in question cannot enjoy the benefit of the jurisdiction relating to consumer contracts.<sup>566</sup>

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<sup>561</sup> Case II ZR 84/20 (BGH, Germany), Order 13 July 2021. See also C Kruger and A Weitbrecht, ‘Bundling of Claims by Way of Assignment in Germany’ (2021) 2 Mass claims 107, 112.

<sup>562</sup> Such as Case 2 O 526/20 (LG Rottweil, Germany), Order 13 September 2021, BeckRS 2021, 35910; Case 16 U 421/21 (OLG Celle, Germany), Order 30 September 2021, BeckRS 2021, 43537; Case 12 U 1432/20 (OLG Nürnberg), Order 20 October 2021, BeckRS 2021, 33454; Case 14 U 4415/21 (OLG München, Germany), Order 20 January 2022, BeckRS 2022, 9391.

<sup>563</sup> Such as Case 7 U 130/21 (OLG Schleswig, Germany), Order 11 January 2022, BeckRS 2022, 385; *Rundholz-Kartell*, Case 30 O 176/19 (LG Stuttgart), Order 20 January 2022, BeckRS 2022, 362, Case 1 U 36/21 (LG Schleswig, Germany), Order 22 April 2022, BeckRS 2022, 8271; Case 30 O 17/18 (LG Stuttgart, Germany), Order 28 April 2022, BeckRS 2022, 10278. The Landgericht Dortmund has referred a preliminary question to the CJEU on the question of the assignment model and whether the effet utile of EU law requires it: Case 8 O 7/20 (LG Dortmund, Germany), Order 13 March 2023, see also case C-253/23 of the CJEU.

<sup>564</sup> For the Netherlands, see Case 200.250.564\_01 (Hof ‘s-Hertogenbosch, The Netherlands), Judgment of 12 January 2021 [ECLI:NL:GHSHE:2021:30], para 4.10.

<sup>565</sup> For the Netherlands, see Case 6771233 / 18-2417 (Rb. Oost-Brabant, The Netherlands), Judgment 29 August 2019 [ECLI:NL:RBOBR:2019:5010], para 5.9-5.14.

<sup>566</sup> *Maximilian Schrems v Facebook Ireland Limited*, Case C-498/16 (CJEU), Judgment 25 January 2018 [ECLI:EU:C:2018:37], para 44.

## 4.2 Enforcement via Public Authorities

- 324 The enforcement landscape of consumer law is not limited to individual or group actions before civil courts. Public authorities (such as non-judicial institutions, government agencies, or other public bodies) also play a role in the enforcement of consumer protection. These authorities might serve the interests of the most disadvantaged and the most uninformed, because, in contrast to all other enforcement procedures, whatever form they might take (small claims procedures, collective actions, ADR), they do not suppose a proactive stance of the consumer or an interest group involved and not even the occurrence of any loss.<sup>567</sup>
- 325 Where private collective enforcement might lead to high-cost litigation, public enforcement of consumer law can be effective in countries where professional expertise, consistent application of law, and cost minimization are highly valued.<sup>568</sup> Hence, to steer the behaviour of businesses which supply consumer markets, this method of enforcement requires a sufficiently strong and wealthy state apparatus, which can rely on capable staff, sufficient resources, full governmental commitment, and public support.<sup>569</sup> In situations where enforcement resources are limited, such as in many African countries, choices have to be made. In such cases, proponents advocate for prioritizing proactive enforcement to prevent consumer abuse and for conducting awareness campaigns, particularly targeting low-income and rural consumers.<sup>570</sup> Other drawbacks of this enforcement method are interest group lobbying, personal interest, and fiscal constraints on government budgets.<sup>571</sup>
- 326 As mentioned above (see above para 253), collective private enforcement and enforcement by public bodies are not mutually exclusive. Collective private enforcement can fill gaps that public enforcement leaves and vice versa. Therefore, many legal systems in the world have supplemented (either individual or collective) private enforcement in the second half of the twentieth century with criminal and/or administrative law enforcement, often through national or local agencies.<sup>572</sup> The establishment of those agencies often coincided with an intensification of consumer

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<sup>567</sup> G Howells and R James, 'Litigation in the Consumer Interest' (2002) 9(1) *ILSA Journal of International & Comparative Law* 1, 10.

<sup>568</sup> DR Hensler, 'Using class actions to enforce consumer protection law' in G Howells (ed) *Handbook of research on international consumer law* (Edward Elgar Pub Inc 2018) 445, 463.

<sup>569</sup> S Deutch, 'Consumer class actions: are they solution for enforcing consumer rights? the Israeli model' (2004) 27(2) *Journal of Consumer Policy* 179, 179-180; C Scott, 'Enforcing consumer protection laws' in G Howells (ed) *Handbook of research on international consumer law* (Edward Elgar Pub Inc 2018) 466, 466

<sup>570</sup> T Naude, 'Fragmentation Versus Convergence of Consumer Law Within One Legal System and Across Legal Systems: An African Perspective' (2020) 43(1) *Journal of Consumer Policy*, 18.

<sup>571</sup> DR Hensler, 'Using class actions to enforce consumer protection law' in G Howells (ed) *Handbook of research on international consumer law* (Edward Elgar Pub Inc 2018) 445, 463.

<sup>572</sup> C Scott, 'Enforcing consumer protection laws' in G Howells (ed) *Handbook of research on international consumer law* (Edward Elgar Pub Inc 2018) 466, 466.

protection legislation (amongst others regarding false and misleading practices and defective products).<sup>573</sup>

327 At the supranational level, both methods of enforcement have received due attention as well. The EU first committed to the coordination of public enforcement, and only more recently added a framework for collective redress. As a consequence, questions are currently being raised about the juxtaposition of administrative and judicial means for enforcement of collective claims, more precisely regarding their coordination and integration.<sup>574</sup> Outside of Europe, it is noteworthy that cooperation is structured through the OECD, rather than the United Nations.<sup>575</sup>

328 As this project focuses on the law of civil procedure, an in-depth analysis of all aspects of the enforcement of consumer law by way of public authorities is outside the scope of this chapter. However, to give a complete picture, we should also include this method of enforcement. Therefore, we will provide a high-level overview of this enforcement method, focusing mainly on the interference with civil litigation (focusing for instance on public bodies acting before civil courts and the extent to which public entities provide dispute resolution services to individual consumers). First, we will highlight the organizational framework in different countries (4.2.1). Subsequently, we will discuss the nature and scope of the investigation and enforcement powers of those public bodies (4.2.2).

#### 4.2.1 Organizational Framework

##### 4.2.1.1 Main Authorities

329 Over the years, many countries have established a main authority in the field of consumer protection with broad competences. The US was a forerunner in this field, as the Federal Trade Commission (FTC) was already created in 1914 by the Federal Trade Commission Act. In the early years, the FTC's focus was primarily on antitrust enforcement, but gradually, the agency had begun to take on a more active role in consumer protection.<sup>576</sup> It combines responsibilities for monitoring markets with the power to make rules as secondary legislation and enforce them directly against businesses.<sup>577</sup> Today, the US also have the Federal Consumer Financial Protection

<sup>573</sup> H-W Micklitz and G Saumier, 'Enforcement and Effectiveness of Consumer Law' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 3, 14.

<sup>574</sup> A Uzelac and S Voet, 'Collectivization of European Civil Procedure: Are We Finally Close to a (negative) Utopia' in A Uzelac and S Voet (ed), *Class Actions in Europe. Holy Grail or a Wrong Trail?* (Springer 2021) 97, 111-12.

<sup>575</sup> H-W Micklitz and G Saumier, 'Enforcement and Effectiveness of Consumer Law' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 3, 36.

<sup>576</sup> K Gutman, 'The Development of Consumer Law in the US: Comparisons with the EU Experience' (2012) 1(4) *Journal of European Consumer and Market Law* 212, 214-215.

<sup>577</sup> C Scott, 'Enforcing consumer protection laws' in G Howells (ed), *Handbook of research on international consumer law* (Edward Elgar Pub Inc 2018) 466, 473.

Bureau, alongside consumer protection divisions within various state attorney general offices (see above para 316).

- 330 The UK followed sometime later. After the adoption of various measures targeting unsafe product and misleading trade practices in the 1960s, the Office of Fair Trading was created in 1973 (later renamed the Competition and Markets Authority). This authority is designated as a general enforcer of consumer law.<sup>578</sup>
- 331 In continental Europe, almost every country has its own agency with a varying degree of independence within the national government. In Belgium, the Directorate-General for Economic Inspection (DGIE) of the Federal Public Service (FPS) for the Economy, SMEs, Self-Employed and Energy is the main agency responsible for consumer policy. Even so, in France, the Ministry of Economy is competent for the enforcement of consumer protection, more precisely Directorate General on Competition, Consumer Law and Fraud (*'Direction générale de la concurrence, de la consommation et de la répression des fraudes'*, *'DGCCFR'*).<sup>579</sup>
- 332 In the Netherlands, a new Consumer Authority was established in 2006 and later renamed the Authority for Consumers and Market (*'Autoriteit Consument en Markt'*, *'ACM'*). It was equipped to complement the existing civil law at that time and self-regulatory mechanisms to uphold consumer protection, and was provided with administrative law instruments which have further supplemented the toolbox of consumer protection law mechanisms.<sup>580</sup>
- 333 Germany is one of the rare countries in continental Europe where such main authority is lacking, although in more recent years, the Federal Cartel Office (*'Bundeskartellamt'*) and the German Financial Supervision Authority (*'Bundesamt für Finanzdienstleistungsaufsicht'*, *'BAFin'*) have been afforded some powers for the enforcement of consumer law.<sup>581</sup> There is a growing debate on whether the German legislature should add more public enforcement tools to the private enforcement system.

<sup>578</sup> Enterprise Act 2002 (UK), s 213(1). See also C Hodges, 'Mass Collective Redress: Consumer ADR and Regulatory Techniques' (2015) 23(5) *European Review of Private Law* 829, 854.

<sup>579</sup> E Jeuland, 'Competent regulatory authorities. France' in B Hess and S Law, *Implementing EU Consumer Rights by National Procedural Law. Luxembourg Report on European Procedural Law* (Verlag C.H. Beck oHG 2019) 263, 263.

<sup>580</sup> MA Heldeweg, 'Supervisory governance. The case of the Dutch consumer authority' (2006) 1(2) *Utrecht Law Review* 67, 67.

<sup>581</sup> CA Kern and others, 'Competent regulatory authorities. Germany' in B Hess and S Law (ed), *Implementing EU Consumer Rights by National Procedural Law. Luxembourg Report on European Procedural Law* (Verlag C.H. Beck oHG 2019) 257, 264; R Podszun, C Busch and F Henning-Bodewig, 'Consumer Law in Germany: A Shift to Public Enforcement?' (2019) 8(2) *Journal of European Consumer and Market Law* 75, 75.

- 334 At the supranational level, a milestone in the development of public enforcement in the EU was the Regulation on Consumer Protection Cooperation, which was adopted in 2006<sup>582</sup> and recast in 2017.<sup>583</sup> This Regulation established a network of national authorities responsible for enforcing consumer protection laws and allows for the exchange of information and the coordination of enforcement activities between these authorities. Each EU Member State is responsible for designating one or more national authorities that are responsible for enforcing consumer protection laws, which are called ‘competent authorities’. How the actual enforcement proceeds is left to the discretion of the respective Member States. For instance, in Germany, the Federal Ministry of Justice and Consumer Protection (*‘Bundesministerium der Justiz und für Verbraucherschutz’*, *‘BMJV’*) serves as a liaison authority,<sup>584</sup> but passes on cases to leading consumer associations for private enforcement.<sup>585</sup>
- 335 Overall, the CPC-Regulation aims to create a consistent level of consumer protection throughout the EU and to ensure that consumers are treated fairly and ethically in the marketplace. It therefore makes a distinction between three types of infringements: ‘intra-Union infringement’, ‘widespread infringement’, or ‘widespread infringement with a Union dimension’, depending on whether any act or omission contrary to Union laws does or is likely to do harm to the collective interests of consumers residing in two Member States, at least three Member States, or at least two-thirds of the Member States. Importantly, cooperation is limited to so-called mutual assistance (for intra-Union infringements) and coordinated investigation and enforcement (for widespread infringements or widespread infringements with a Union dimension). A central enforcement body, however, remains absent. Even in the case of a widespread infringement, public enforcement remains a matter of cooperation between national authorities, albeit with enhanced coordination by the Commission. As a result, cross-border infringements remain more complex to enforce than purely national infringements.<sup>586</sup>

#### 4.2.1.2 Specialized Agencies

- 336 Along with the establishment of general enforcers, legal systems worldwide started to set up more specialized agencies or regulatory bodies in particular sectors,<sup>587</sup> notably in

<sup>582</sup> Regulation on cooperation between national authorities responsible for the enforcement of consumer protection laws, 2006/2004 of 27 October 2004 (EU).

<sup>583</sup> Regulation on cooperation between national authorities responsible for the enforcement of consumer protection laws, 2017/2394 of 12 December 2017 (EU) (hereinafter: “CPC-Regulation”).

<sup>584</sup> Verbraucherschutzdurchsetzungsgesetz (Consumer Protection Enforcement Act) (Germany), s 2(1)(a).

<sup>585</sup> R Podszun, C Busch and F Henning-Bodewig, ‘Consumer Law in Germany: A Shift to Public Enforcement?’ (2019) 8(2) *Journal of European Consumer and Market Law* 75, 82.

<sup>586</sup> E Terryn and P Verbiest, ‘De herziene CPC-verordening als oplossing voor grensoverschrijdend consumentenleed?’ (2018) 2018(1) *Tijdschrift voor Consumentenrecht en handelspraktijken* 6, 15.

<sup>587</sup> C Scott, ‘Enforcing consumer protection laws’ in G Howells (ed) *Handbook of research on international consumer law* (Edward Elgar Pub Inc 2018) 466, 473.

financial services, utilities,<sup>588</sup> food, medicines, and health products.<sup>589</sup> While these bodies were primarily installed to safeguard competition, the need to also play an active role in protecting consumers was quickly recognized.<sup>590</sup> In particular, their added value would be in the protection of vulnerable consumers, who could benefit from the greater experience and expertise of those regulatory bodies with the particularities of the market, including regarding the relationship between traders and consumers.<sup>591</sup>

- 337 In various countries, those agencies have been given the same competences as the main authorities. For instance, in the UK, not only the general enforcers, but also a large number of specialized authorities (such as Trading Standards Services Britain, Ofcom, Ofwat, Ofgem, Phonepay Plus, the Information Commissioner, Office of Rail Regulation, and the Financial Conduct Authority) were accorded a wide and flexible range of powers, much broader than just the ability to cease infringements (see below para 354).<sup>592</sup>
- 338 In addition, those specialized authorities might also be instrumental in ensuring consumers receive compensation (for instance, Belgian law allows the competent supervisory authority for financial services to reach settlements with firms under its authority, which include as part of the settlement the payment of compensation to consumers).<sup>593</sup> Nevertheless, in some sectors, the support that specialized agencies can provide to ensure consumers receive compensation has been curtailed. For instance, for air passengers in the EU,<sup>594</sup> the CJEU has decided that, notwithstanding the obligation of the regulatory bodies to take the measures necessary to protect the rights of passengers,

<sup>588</sup> For the EU, see Directive concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, 2009/73/EC of 13 July 2009 (EU), Art 39 (hereafter: Gas Directive) and Directive concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, 2009/72/EC of 13 July 2009 (EU), Art 35 (hereafter: Electricity Directive).

<sup>589</sup> For instance, in Belgium, there is the Federal Agency for Medicines and Health Products, which is the Belgian regulator responsible for the quality and safety of medicines and health products (P Taelman, S Voet and J Nowak, 'Competent regulatory authorities. Belgium' in B Hess and S Law (ed), *Implementing EU Consumer Rights by National Procedural Law. Luxembourg Report on European Procedural Law* (Verlag C.H. Beck oHG 2019) 257, 258; J Nowak, 'Public and Private Enforcement of Consumer Law in Belgium' in S Law and V Richard (ed), *Public and Private Enforcement of Consumer Law – Insights for Luxembourg* (Nomos 2021) 113, 145-146).

<sup>590</sup> For the EU, see for instance, Gas Directive, Art 40(g); Electricity Directive, Art 36(g).

<sup>591</sup> P Rott, 'The EU Legal Framework for the Enforcement of Consumer Law' in H-W Micklitz and G. Saumier, (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 249, 272-273.

<sup>592</sup> Enterprise Act 2002 (UK), s 13(5A). See also C Hodges, 'Mass Collective Redress: Consumer ADR and Regulatory Techniques' (2015) 23(5) *European Review of Private Law* 829, 854-855.

<sup>593</sup> H De Wulf, 'Class action in Belgium' in BT Fitzpatrick and RS Thomas (ed) *The Cambridge Handbook of Class Actions* (Cambridge University Press 2021) 194, 210.

<sup>594</sup> See Regulation establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long flight delays, and repealing Regulation (EEC) No 295/91, 261/2004 of 11 February 2004 (EU), Art 16: 'Each Member State shall designate a body responsible for the enforcement of this Regulation as regards flights from airports situated on its territory and flights from a third country to such airports'. In Belgium, the Belgian Civil Aviation Authority (BCAA) is responsible for monitoring air passenger rights.

such a body is not required to take enforcement actions against a carrier that is refusing to pay compensation to an individual consumer.<sup>595</sup>

#### 4.2.2 Competences and Powers

339 Two categories of powers of administrative agencies are worth mentioning within the framework of this chapter: the investigation powers and the enforcement powers. Some bodies (such as the FTC in the United States) have been given the authority of rulemaking as well, which means that they can issue regulations addressing a wide range of business practices, such as advertising, labelling, and marketing.<sup>596</sup> The same goes for the consumer protection divisions within various state attorney general offices. As this rulemaking competence does not directly relate to consumer law proceedings, we will not give it any further consideration.

##### 4.2.2.1 Investigation Powers

340 A first aspect of the investigative powers relates to the question of where and when to intervene in the consumer market (for instance, only in response of consumer complaints or following self-initiated investigations of a particular segment of the industry).<sup>597</sup> Some legal systems have specific policies on this. One example is Quebec, where the office for the protection of consumers (*'Office de la protection du consommateur', 'OPC'*) can determine its own surveillance agenda and prioritize its actions.<sup>598</sup> The same goes for the specialised agency in charge of enforcement of consumer law in Argentina, the Dirección Nacional de Defensa del Consumidor. Pursuant to section 45 of the Consumer Protection Act, it shall initiate administrative proceedings for presumed infractions of this law, its regulations, and resolutions, either ex officio, upon complaint by an interested party, or through communication from an administrative or judicial authority.<sup>599</sup>

341 These investigative powers are an important tool for public authorities to achieve their objectives in the field of consumer protection. Of course, initial indications of infringements (for instance, of the misleading nature of prices or the unsafe nature of

<sup>595</sup> *K Ruijsseenaars, A Jansen, JH Dees-Erf v Staatssecretaris van Infrastructuur en Milieu*, Joined Cases C-145/15 and C-146/15 (CJEU), Judgment 17 March 2016 [ECLI:EU:C:2016:187], para 38.

<sup>596</sup> K Gutman, 'The Development of Consumer Law in the US: Comparisons with the EU Experience' (2012) 1(4) *Journal of European Consumer and Market Law* 212, 214-215.

<sup>597</sup> H-W Micklitz and G Saumier, 'Enforcement and Effectiveness of Consumer Law' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 3, 13.

<sup>598</sup> M Lacoursière and S Poulin, 'L'application et l'effectivité du droit québécois de la consommation' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 479, 481.

<sup>599</sup> Ley n° 24.240 de Defensa del Consumidor (Law n° 24, 240 on Consumer Protection) of 22 September 1993 (Argentina), s 45.

products) may come from consumer complaints, but to denounce infringements, agencies will need to follow up to collect evidence.<sup>600</sup>

342 How far the investigative powers reach depends of course on what competences the law of a given country confers on a specific agency. Almost everywhere, consumer protection authorities have the power of access to relevant documents, data, or information related to an infringement, which might be kept by a trader or a third party.<sup>601</sup> Other powers which are typically given involve the right to inspect premises, to make sample purchases, and to purchase goods or services as test purchases under a cover identity.<sup>602</sup> However, inciting traders to engage in illegal activities is deemed unacceptable.

343 For instance, in Belgium, officials of the DGIE have, following a formal designation by the Minister for the Economy, SMEs, Self-Employed and Energy,<sup>603</sup> general competences to detect and establish violations of the rules on consumer protection.<sup>604</sup> These include wide-ranging investigative powers, such as carrying out home visits, hearing witnesses, accessing documents and/or IT-systems, and taking samples in accordance with prescribed standards.<sup>605</sup> Moreover, depending on the nature of the infringement concerned, DGIE-officials might be entrusted with some additional specific powers. For instance, in the event of an infringement of the rules relating to public auction to consumers, they may prohibit or halt such an auction and seize these goods. Likewise, to safeguard compliance with the rules on payment and credit services, those officials may approach a company by pretending to be clients or potential clients without communicating their actual capacity.<sup>606</sup>

#### 4.2.2.2 Enforcement Powers

344 According to the research conducted by Micklitz and Saumier, the most significant difference between administrative agencies pertains to the nature and scope of their

<sup>600</sup> C Scott, 'Enforcing consumer protection laws' in G Howells (ed) *Handbook of research on international consumer law* (Edward Elgar Pub Inc 2018) 466, 477.

<sup>601</sup> OECD, *Consumer protection enforcement in a global digital marketplace* (OECD Digital Economy Papers No. 266, OECD Publishing 2017) 13.

<sup>602</sup> C Scott, 'Enforcing consumer protection laws' in G Howells (ed) *Handbook of research on international consumer law* (Edward Elgar Pub Inc 2018) 466, 477. See also CPC-Regulation, Art 9, para 3, (c) and (d).

<sup>603</sup> Wetboek Economisch Recht (Code of Economic Law) (Belgium), Art XV.2.

<sup>604</sup> J Stuyck, 'Belgium' in *International Encyclopedia of Laws - Commercial and Economic Law* (Alphen aan den Rijn 2015) 228-229.

<sup>605</sup> Wetboek Economisch Recht (Code of Economic Law) (Belgium), Art XV.3.

<sup>606</sup> Wetboek Economisch Recht (Code of Economic Law) (Belgium), Art XV.17. This is often identified as mystery shopping (see A De Boeck, B Keirsbilck and Raf Van Ransbeeck, *Mystery Shopping* (Intersentia 2017)).

enforcement powers.<sup>607</sup> Specifically, the central question concerns the ability to impose sanctions directly on offenders or whether referral to an administrative or civil court is required.<sup>608</sup> It should be noted that there are also intermediate forms, where some ‘sanctions’ can be imposed directly while others require referral to a court or competent authority, or where the authority has a choice between initiating its own administrative process or going to court. In terms of the scope of enforcement powers, administrative fines are often used, but a key issue is the extent to which public authorities can use their enforcement powers to enable consumers to obtain redress.

- 345 The term sanctions obviously covers a wide range of measures. It is still worth pointing out that in various countries, public authorities can rely on an *ex ante* measures, which might also contribute to protection of consumers even before they have suffered any losses. For instance, in Belgium, DGIE-officials may issue an official warning to the offender and order him to stop the harmful actions.<sup>609</sup> According to parliamentary reports, this warning procedure has demonstrated its usefulness and efficiency, certainly in cases where only a small infringement occurred.<sup>610</sup> Likewise, in the US, the FTC can make use of educational and warning letters to warn traders that their conduct is likely unlawful and might provoke serious legal consequences if they do not immediately cease that activity. Sending letters is no formal enforcement action, but might be followed by an FTC action.<sup>611</sup>

#### 4.2.2.2.1 Direct Application of Sanctions

- 346 The seemingly most efficient model is where a public authority has so-called judicial or quasi-judicial functions so that it can impose sanctions directly. The FTC in the United States is considered a leading example of this model, although the application of sanctions by the FTC still involves an administrative process.<sup>612</sup> It is possible that, following a complaint or investigation, the FTC has ‘reason to believe’ that consumer law is being or has been violated.<sup>613</sup> In that case, it may issue a complaint setting forth its

<sup>607</sup> H-W Micklitz and G Saumier, ‘Enforcement and Effectiveness of Consumer Law’ in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 3, 12.

<sup>608</sup> C Scott, ‘Enforcing consumer protection laws’ in G Howells (ed) *Handbook of research on international consumer law* (Edward Elgar Pub Inc 2018) 466, 477.

<sup>609</sup> Wetboek Economisch Recht (Code of Economic Law) (Belgium), Art XV.31, § 1, al. 1.

<sup>610</sup> Memorie van Toelichting bij Wetsontwerp houdende invoering van boek XV, “Rechtshandhaving” in het Wetboek van Economisch Recht (Explanatory Memorandum to the Bill inserting Book XV, “Law Enforcement” into the Code of Economic Law) 53-2837/001 [Parl. St. Kamer 2012-13], 32.

<sup>611</sup> Federal Trade Commission, ‘About FTC Warning Letters’, [www.ftc.gov/news-events/topics/truth-advertising/about-ftc-warning-letters](http://www.ftc.gov/news-events/topics/truth-advertising/about-ftc-warning-letters). For instance, in 2017, the FTC sent ninety educational letters and twenty-one follow-up warning letters to influencers regarding disclosure of ‘material connection’ to marketers. See M Krawiec and others, ‘FTC Trends in Consumer Protection’ (2019) 31 (2) *Loy Consumer Law Review* 225, 239.

<sup>612</sup> DF Solomon, ‘Summary of Administrative Law Judge Responsibilities’ (2011) 31 (2) *Journal of the National Association of Administrative Law Judiciary* 475, 499-500.

<sup>613</sup> Code of Federal Regulations (US), title 16, s 1.98.

charges.<sup>614</sup> If the respondent decides to contest the charges, the FTC will bring an administrative action. The prosecution will be conducted by FTC complaint counsel, who are staff from the relevant bureau or regional office. The action will be heard by an administrative law judge (ALJ), who is also an official to whom the FTC has delegated the initial performance of statutory fact-finding functions and initial rulings.<sup>615</sup> After having conducted a full adversarial evidentiary hearing, possibly preceded by the resolution of discovery and evidentiary and procedural disputes, the ALJ issues an initial decision in which he can order the trader to cease the illegal activity.<sup>616</sup> Either one or both parties may appeal the initial decision to the full Commission, which will render a final decision.<sup>617</sup> Importantly, The FTC must still seek the assistance of a court to obtain civil penalties or consumer redress for violations of its cease and desist orders for the benefit of consumers.<sup>618</sup> Even so, the final decision of the Commission may also be appealed to a US court of appeals, like a district court decision.<sup>619</sup> Hence, even in the US, there is no public enforcement of consumer law completely separate from the court system. Indeed, the courts have power to review agency decisions.

347 Elsewhere in the world, some time ago, in only few legal systems did consumer protection agencies have the power to issue an order to cease action or to impose fines upon traders without court intervention.<sup>620</sup> In continental Europe, a number of European directives have helped to make the direct application of formal sanctions by agencies more common.<sup>621</sup> For example, the EU directive concerning unfair business-to-consumer commercial practices required Member States to lay down penalties—which had to be effective, proportionate, and dissuasive—for infringements of national

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<sup>614</sup> Federal Trade Commission, 'A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority' (2021) [www.ftc.gov/about-ftc/mission/enforcement-authority](http://www.ftc.gov/about-ftc/mission/enforcement-authority).

<sup>615</sup> Code of Federal Regulations (US), title 16, s 0.14.

<sup>616</sup> DF Solomon, 'Summary of Administrative Law Judge Responsibilities' (2011) 31(2) *Journal of the National Association of Administrative Law Judiciary* 475, 500.

<sup>617</sup> Federal Trade Commission, 'A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority' (2021) [www.ftc.gov/about-ftc/mission/enforcement-authority](http://www.ftc.gov/about-ftc/mission/enforcement-authority).

<sup>618</sup> *Ibid.*

<sup>619</sup> DF Solomon, 'Summary of Administrative Law Judge Responsibilities' (2011) 31(2) *Journal of the National Association of Administrative Law Judiciary* 475, 499-500.

<sup>620</sup> In their general report, Micklitz and Saumier refer to Bulgaria, China, France, Hungary, Italy, Serbia, Spain, the Netherlands and Turkey (H-W Micklitz and G Saumier, 'Enforcement and Effectiveness of Consumer Law' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 3, 13).

<sup>621</sup> C Scott, 'Enforcing consumer protection laws' in G Howells (ed) *Handbook of research on international consumer law* (Edward Elgar Pub Inc 2018) 466, 477.

provisions adopted in application of this directive, and to take all necessary measures to ensure that these are enforced.<sup>622</sup>

348 In the Netherlands, the consumer authority (later renamed ACM) was given the power to impose fines when it was set up in 2006. It considers this to be one of its most important instruments, which it used in the *Volkswagen Dieselgate* case to impose a maximum fine of EUR 450,000.<sup>623</sup> In 2014, the French legislature expanded the powers of the Directorate General on Competition, Consumer Law and Fraud (DGCCRF) by enabling it to impose administrative sanctions. In addition, this administration was granted the power to order any business to comply with their orders, to desist from all unlawful action, or to remove any unlawful clause within a reasonable period.<sup>624</sup> In other Member States (such as Belgium), the legislature decided at that time to provide for criminal, instead of administrative, sanctions for infringements of unfair trade practices vis-à-vis consumers.<sup>625</sup>

349 Another important step, which led to even more countries giving authorities the power to impose administrative fines in the EU, was the recast of the CPC Regulation in 2017.<sup>626</sup> This Regulation required that competent authorities had at least the power to impose penalties, such as fines or periodic penalty payments, for infringements covered by the Regulation and for the failure to comply with any decision, order, interim measure, trader's commitment, or other measure adopted pursuant to the Regulation.<sup>627</sup> Although, strictly speaking, the EU legislature only required this for these specific categories of cross-border infringements which fall under the scope of the CPC Regulation (see above para 332), some Member States have decided to grant these enhanced powers for national consumer law infringements as well. In Belgium, for example, the DGIE has been given the power to impose administrative fines since 2020.<sup>628</sup>

<sup>622</sup> Directive concerning unfair business-to-consumer commercial practices in the internal market, 2005/29/EC of 11 May 2005 (EU), Art 13. See also Consumer Rights Directive, 2011/83/EU of 22 November 2011 (EU), Art 24.

<sup>623</sup> Autoriteit Consument & Markt, 'Besluit van 18 oktober 2017 tot het opleggen van een boete aan Volkswagen AG', ACM/17/003870, [www.acm.nl/sites/default/files/documents/2017-11/acm-beboet-volkswagen-ag-voor-oneerlijke-handelspraktijken-28-11-2017.pdf](http://www.acm.nl/sites/default/files/documents/2017-11/acm-beboet-volkswagen-ag-voor-oneerlijke-handelspraktijken-28-11-2017.pdf).

<sup>624</sup> Loi relative à la consommation (Act relating to consumption), n° 2014-344, 17 March 2014 (France), Art 76-133. See also HS Bernheim-Desvaux and P Foucher, 'L'effectivité du droit français de la consommation' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 287, 303.

<sup>625</sup> Article 102 of the – at the time applicable – Wet betreffende de handelspraktijken en de voorlichting en bescherming van de consument (Act on Trade Practices and the Information and Protection of the Consumer) of 14 July 1991 (Belgium) was amended to include also unfair trading practices vis-à-vis consumers.

<sup>626</sup> E Terry and P Verbiest, 'De herziene CPC-verordening als oplossing voor grensoverschrijdend consumentenleed?' (2018) 2018(1) Tijdschrift voor Consumentenrecht en handelspraktijken 6, 15.

<sup>627</sup> CPC-Regulation, Art 9(4)(h).

<sup>628</sup> Wetboek Economisch Recht (Code of Economic Law) (Belgium), Art XV.60/1.

- 350 The EU's most recent notable move in this area has been a significant increase in the level of fines. The EU Commission reported in 2017 that the available penalties for infringements of consumer law would be very different across the Member States and would often be set at a low level.<sup>629</sup> Moreover, the Commission considered that sanctions for consumer law infringements are an important part of the enforcement system, as they have an impact on the degree of deterrence provided by public enforcement.<sup>630</sup> The assumption that higher sanctions will deter companies and individuals, and will lead to fewer infringements of consumer rights, is regularly called into question by legal scholarship.<sup>631</sup> This view, however, is not universally shared. Other authors argue that fines for consumer law infringements comparable to those for competition and data protection infringements certainly lead to a higher level of compliance with consumer law by traders. They illustrate this with a national court decision from 2019 which concluded that Ryanair's baggage policy was in breach of consumer law, while Ryanair simply stated that it would not comply with the court's decision.<sup>632</sup>
- 351 In any case, in a directive which was adopted in 2019, the EU lawmaker decided that when penalties are to be imposed for widespread infringements (with or without a Union dimension), the maximum amount of such fines would be at least 4% of the trader's annual turnover in the Member State(s) concerned.<sup>633</sup> Although these increased fines only apply to the specific categories of cross-border infringements that fall within the scope of the CPC Regulation (see above para 332), some Member States have again extended it to domestic breaches of consumer law.<sup>634</sup> Moreover, the fines should be *at least* 4%, which allows countries to set the maximum threshold a lot higher. For example, the Belgian legislature has increased the maximum fines for both consumer law infringements covered by the CPC Regulation and purely domestic infringements to 6%

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<sup>629</sup> For example, breaches of the Consumer Right Directive were punishable in Cyprus by up to 5% of the annual turnover or up to EUR 200,000, in Latvia by up to 10% of the annual turnover with a cap of EUR 100,000 and in the Netherlands by up to 1% of the annual turnover or up to EUR 900,000 (European Commission, *Report on the Fitness Check on Directive 2005/29/EC, Council Directive 93/13/EEC, Directive 1999/44/EC Directive 2009/22/EC and Directive 2006/114/EC* (SWD 2017) 209 final, 30).

<sup>630</sup> European Commission, *Report on the Fitness Check on Directive 2005/29/EC, Council Directive 93/13/EEC, Directive 1999/44/EC Directive 2009/22/EC and Directive 2006/114/EC* (SWD 2017) 209 final, 30-31.

<sup>631</sup> EAG van Schagen, 'Naar een meer responsieve handhaving van het Nederlands recht inzake algemene voorwaarden: denkrichtingen voor Europese betere handhaving' (2019) 4 *Tijdschrift voor Consumentenrecht en handelspraktijken* 161, 161.

<sup>632</sup> M Durovic, 'Bright Future for EU Consumer Law' (2019) 8(6) *Journal of European Consumer and Market Law* 217, 218.

<sup>633</sup> Directive as regards the better enforcement and modernisation of Union consumer protection rules, 2019/2161 of 27 November 2019 (EU), Art 1, Art 2(6) and Art 4(13).

<sup>634</sup> In Belgium, the parliamentary works explain that the alignment of cross-border ('European') and national infringements serves to create maximum equality in the protection of Belgian and foreign consumers (Wetsontwerp houdende wijziging van boeken I, VI en XV van het Wetboek van economisch recht (Bill amending Books I, VI and XV of the Code of Economic Law) 55-2473/1 [*Parl.St.* Kamer 2020-2021], 44).

of the company's annual turnover in Belgium and in the countries where the infringement took place (or a maximum of EUR 2 million if the company's annual turnover is not available).<sup>635</sup>

- 352 In the case of administrative fines, the recast of the CPC Regulation has also encouraged Member States to introduce other sanctions that can be directly applied by the authorities in the EU Member States. For instance, competent authorities have been granted the power, as a last resort and to mitigate the risk of significant harm to the collective interests of consumers, to remove content or restrict access to an online interface. Furthermore, they can order a hosting service provider to remove, disable, or restrict access to an online interface. Additionally, when deemed appropriate, these authorities possess the authority to direct domain registries or registrars to delete a fully qualified domain name and to permit the concerned competent authority to register it.<sup>636</sup>
- 353 More important for the subject of this chapter, authorities have been given the power to receive from the trader so called 'additional remedial commitments' for the benefit of consumers that have been affected by an alleged infringement.<sup>637</sup> This mechanism, which involves negotiations between public authorities and traders, was welcomed in legal scholarship. The possibility to adopt this strategy would alter the EU's approach to public enforcement and enable regulatory bodies to utilize their legal authority to obtain compensation of consumers.<sup>638</sup> However, the shift towards obtaining recovery for consumers was only halfhearted. While the possibility for a trader to initiate recovery commitments is now present, there is a notable absence of financial incentives ensuring the willingness to make such commitments. In contrast to other jurisdictions such as the United States, the current EU framework did not grant authorities the power to impose or seek redress.<sup>639</sup>
- 354 Indeed, in the US, the possibility for the FTC to initiate administrative (see above para 344) or civil proceedings (see below para 355) serves as a big push to force traders to settle the charges. If the trader decides to accept a consent agreement, he consents to the entry of final order—without admitting liability—and waives all right to judicial

<sup>635</sup> Wetboek Economisch Recht (Code of Economic Law) (Belgium), Art XV.60/20. See N Cobbaert, 'Commenbaar bij Art. XV.60/20 WER' in X, *Handels- en economisch recht. Commentaar met overzicht van rechtspraak en rechtsleer* (Wolters Kluwer 2022) 3.

<sup>636</sup> CPC-Regulation, Art 9(4)(g). For the transposition in Belgian law, see Wetboek Economisch Recht (Code of Economic Law) (Belgium), Art XV.5/1, § 1.

<sup>637</sup> CPC-Regulation, Art 9(4)(c).

<sup>638</sup> E Terryn and P Verbiest, 'De herziene CPC-verordening als oplossing voor grensoverschrijdend consumentenleed?' (2018) 2018(1) *Tijdschrift voor Consumentenrecht en handelspraktijken* 6, 15.

<sup>639</sup> *Ibid*; L Claus, S Rutten, 'Afdwingen van consumentenrechten in grensoverschrijdend verband' in R Steennot and G Straetmans (ed), *Digitalisering van het recht en consumentenbescherming* (Intersentia 2019) 279, 306.

review.<sup>640</sup> Many of the FTC's complaints are effectively resolved through such consent agreements, which often include consumer redress. For instance, in 2016, USD 11.98 billion was paid in damages and unlawfully obtained profits in FTC-involved cases.<sup>641</sup> Obviously, a large portion of this amount came from the settlement between the FTC and Volkswagen AG and related entities, in which Volkswagen (amongst others) offered consumers a buyback and lease termination for nearly 500,000 diesel vehicles sold or leased in the US and committed to fund projects across the country that would reduce emissions and to invest in green vehicle technology.<sup>642</sup>

#### 4.2.2.2 Intervention of Courts

355 In some countries, the actual legal enforcement and the issuance of administrative sanctions (in particular administrative fines) still depend on orders made by courts, following proceedings which are brought either by the agency itself or through the intervention of a separate public prosecutor's office.<sup>643</sup>

356 In the UK, civil courts play an important role in enforcing consumer protection laws by imposing measures at the request of both general enforcers (such as the Competition and Markets Authority) and the designated specialized enforcers (such as the Office of Communications and the Office of Rail and Road). The range of measures an enforcer can apply for in civil courts was significantly expanded by the Consumer Protection Act of 2015, which introduced the so-called 'Enhanced Consumer Measures' or 'ECMs'.<sup>644</sup> An enforcer is not restricted to seeking an injunction to stop a business from engaging in deceptive or unfair practices, but has a much wider range of measures at his disposal, allowing him to consider the best way to deal with an infringement on a case-by-case basis.<sup>645</sup> There are three categories of ECM: the redress category (including measures offering compensation or other redress to consumers and the option to terminate the contract), the compliance category (including measures intended to prevent or reduce the risk of the occurrence or repetition of the conduct), and the choice category (including measures that enable consumers to choose more effectively between persons

<sup>640</sup> Federal Trade Commission, 'A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority' (2021) [www.ftc.gov/about-ftc/mission/enforcement-authority](http://www.ftc.gov/about-ftc/mission/enforcement-authority).

<sup>641</sup> Federal Trade Commission, 'Stats & Data 2016', [www.ftc.gov/node/1205233](http://www.ftc.gov/node/1205233).

<sup>642</sup> Federal Trade Commission, 'Volkswagen to Spend up to \$14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles' (2016) [www.ftc.gov/news-events/news/press-releases/2016/06/volkswagen-spend-147-billion-settle-allegations-cheating-emissions-tests-deceiving-customers-20](http://www.ftc.gov/news-events/news/press-releases/2016/06/volkswagen-spend-147-billion-settle-allegations-cheating-emissions-tests-deceiving-customers-20).

<sup>643</sup> H-W Micklitz and G Saumier, 'Enforcement and Effectiveness of Consumer Law' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 3, 13; C Scott, 'Enforcing consumer protection laws' in G Howells (ed) *Handbook of research on international consumer law* (Edward Elgar Pub Inc 2018) 466, 477.

<sup>644</sup> P Cartwright, 'Redress compliance and choice: enhanced consumer measures and the retreat from punishment in the consumer rights act' (2016) 75(2) *Cambridge Law Journal* 271, 272.

<sup>645</sup> Department for Business and Trade, 'Enhanced Consumer Measures - Guidance for Enforcers of Consumer Law' (GOV.UK 2015), para 23-24.

supplying or seeking to supply goods or services).<sup>646</sup> Those measures can be imposed either individually or in combination. This is important because they all have specific objectives and address different weaknesses in the enforcement system. For instance, it may be appropriate to order a trader to pay compensation, to change its behaviour and to publish details of its infringements.<sup>647</sup>

- 357 It is important to stress that the direct application of sanctions and the intervention of the courts are alternative options. For instance, in the US, although there is an administrative process in place (see above para 345), whenever the FTC has reason to believe that any party is violating or is about to violate a provision of law enforced by the FTC (including consumer protection regulation), it can decide to initiate an enforcement action using the judicial process.<sup>648</sup> This means that the FTC challenges a given practice directly in court, without first having to make a final agency determination of an allegedly unlawful conduct. In that case, the FTC can seek injunctive relief.<sup>649</sup> This can be done in a preliminary manner, ie, pending completion of an FTC administrative proceeding, or in proper cases, even permanently. However, the FTC's right of action is limited to injunctive relief and does not extend to obtaining redress measures.<sup>650</sup> In 2021, the US Supreme Court held unanimously that Sec 13(b) does not give the FTC the power to seek equitable monetary relief such as disgorgement or restitution. The Supreme Court rejected the FTC's argument concerning the policy-related importance of allowing it to use Sec 13(b) to obtain monetary relief, by deciding that 'it [the FTC] is, of course, free to ask Congress to grant it further remedial authority'.<sup>651</sup>
- 358 In a number of countries, criminal proceedings are available for serious breaches of consumer law.<sup>652</sup> The possibility of criminal prosecution should have a greater deterrent or dissuasive effect and create the possibility of linking the offenses found with other existing criminal records.<sup>653</sup> Some jurisdictions (such as France and Czech Republic) have

<sup>646</sup> Enterprise Act 2002 (UK), s 219A. See also C Hodges, 'Mass Collective Redress: Consumer ADR and Regulatory Techniques' (2015) 23(5) *European Review of Private Law* 829, 855.

<sup>647</sup> P Cartwright, 'Redress compliance and choice: enhanced consumer measures and the retreat from punishment in the consumer rights act' (2016) 75(2) *Cambridge Law Journal* 271, 280.

<sup>648</sup> Federal Trade Commission Act (US), s 13(b); U.S. Code, Title 15, s 53(b).

<sup>649</sup> K Gutman, 'The Development of Consumer Law in the US: Comparisons with the EU Experience' (2012) 1(4) *Journal of European Consumer and Market Law* 212, 215.

<sup>650</sup> C Scott, 'Enforcing consumer protection laws' in G Howells (ed) *Handbook of research on international consumer law* (Edward Elgar Pub Inc 2018) 466, 473.

<sup>651</sup> *AMG Capital Management LLC v Federal Trade Commission* (Supreme Court, United States), Judgment 22 April 2021 [593 US \_\_ (2021)].

<sup>652</sup> DR Hensler, 'Using class actions to enforce consumer protection law' in G Howells (ed) *Handbook of research on international consumer law* (Edward Elgar Pub Inc 2018) 445, 445; P. Rott, 'The EU Legal Framework for the Enforcement of Consumer Law', in H.-W. Micklitz and G. Saumier, (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 249, 281.

<sup>653</sup> N Cobbaert, 'Commentaar bij art. XV.60/1 WER' in X, *Handels- en economisch recht. Commentaar met overzicht van rechtspraak en rechtsleer* (Wolters Kluwer 2022) 3-4.

a long tradition of criminal sanctions in consumer law.<sup>654</sup> Belgium, for its part, introduced criminal sanctions for unfair commercial practices against consumers in 2007. The Belgian legislature clearly indicated that its aim was to ensure compliance and deter businesses from breaching consumer protection laws.<sup>655</sup> The legislature also emphasized that in cases that have not been subject to criminal sanctions in the past (such as misleading advertising), actions for cease and desist orders often failed to achieve their objectives.<sup>656</sup> Even Germany, which avoids the public enforcement route as much as possible, applies criminal sanctions case of serious infringements of certain rules (eg, for cold calling or unfair trade practices<sup>657</sup>).

359 However, criminal sanctions for consumer law infringements are only seldom applied. They require that state officials or prosecutors first decide to prosecute, which is exceptional. This is understandable, given that criminal courts focus their limited resources on the most serious forms of crime.<sup>658</sup> In various countries, the legal framework already takes this into account. For instance, in Belgium, in introducing criminal sanctions, the legislature already anticipated that an infringement should not necessarily lead to criminal prosecution, but primarily to administrative measures.<sup>659</sup> In practice, once an infringement has been established, the DGIE-officials will often—under certain conditions—propose that the infringer voluntarily pay a sum of money in order to drop the criminal proceedings.<sup>660</sup> Only if this offer is not accepted, or if payment is refused, will the case be referred to the public prosecutor for criminal proceedings. If

<sup>654</sup> H-W Micklitz and others, 'Chapter 8: Litigation, redress and enforcement' in H-W Micklitz, J Stuyck, E Terry (ed), *Cases, Materials and Text on Consumer Law* (Hart Publishing 2010) 499, 537.

<sup>655</sup> Memorie van Toelichting bij Wetsontwerp tot wijziging van de wet van 14 juli 1991 betreffende de handelspraktijken en de voorlichting en bescherming van de consument (Explanatory Memorandum to the Bill amending the Act of 14 July 1991 on commercial practices and consumer information and protection) 2983/001 [Parl.St. 2006-07] (Belgium), 42. See also Memorie van Toelichting bij de wet van 6 april 2010 op de marktpraktijken en de consumentenbescherming (Explanatory Memorandum to the Act of 6 April 2010 on market practices and consumer protection) 52-2340/001 [Parl.St. Kamer 2009-10] (Belgium), 42.

<sup>656</sup> Ibid.

<sup>657</sup> Gesetz gegen den unlauteren Wettbewerb (Unfair Competition Law) (Germany), s 16-19. See also R Podszun, C Busch and F Henning-Bodewig, 'Consumer Law in Germany: A Shift to Public Enforcement?' (2019) 8(2) *Journal of European Consumer and Market Law* 75, 75.

<sup>658</sup> N Cobbaert, 'Commentaar bij art. XV.60/1 WER' in X, *Handels- en economisch recht. Commentaar met overzicht van rechtspraak en rechtsleer* (Wolters Kluwer 2022) 3-4; DR Hensler, 'Using class actions to enforce consumer protection law' in G Howells (ed) *Handbook of research on international consumer law* (Edward Elgar Pub Inc 2018) 445, 445.

<sup>659</sup> Memorie van Toelichting bij Wetsontwerp tot wijziging van de wet van 14 juli 1991 betreffende de handelspraktijken en de voorlichting en bescherming van de consument (Explanatory Memorandum to the Bill amending the Act of 14 July 1991 on commercial practices and consumer information and protection) 2983/001 [Parl.St. 2006-07] (Belgium), 42.

<sup>660</sup> This is the so-called 'transactie' or 'transaction' (see Wetboek Economisch Recht (Code of Economic Law) (Belgium), Art XV.61).

the public prosecutor does not follow up on an official report, the administrative route may be pursued, which could lead to an administrative fine.<sup>661</sup>

## 5 PRIVATIZATION AND ALTERNATIVE DISPUTE RESOLUTION

360 In its broadest sense, alternative dispute resolution (ADR) is used to describe the process of resolving disputes outside the traditional court system. Increasingly, a digital dimension is being added to ADR, commonly referred to as Online Dispute Resolution (ODR). As other subtopics of this chapter, ADR is covered by another segment of the CPLJ project (Segment 16). However, the present chapter on consumer proceedings would be incomplete if ADR were completely ignored. Given the existing weaknesses in private individual enforcement of consumer law, many jurisdictions have sought to address this through the use of non-judicial means of private dispute resolution.<sup>662</sup> Moreover, ADR in the field of consumer law has certain specific characteristics, to the extent that some refer to it as consumer ADR (cADR) or consumer ODR (cODR).<sup>663</sup>

361 The broader purpose of this chapter is to consider how consumer law differs from other areas of law in relation to ADR. When comparing consumer ADR to the role ADR plays in other special subject matters, two aspects deserve further attention: (i) the control over consumer ADR, and (ii) the underlying motives driving consumer ADR.

### 5.1 The Control Over Consumer ADR

362 The ADR movement originated in the United States in the 1970s and has grown in popularity worldwide over the past three decades.<sup>664</sup> Interestingly, it has developed differently in countries other than its birthplace. In the United States, ADR and ODR fall under the almost exclusive initiative of businesses (see hereunder, 5.1.1). In many other jurisdictions, ADR was initially organized on an ad hoc basis by private actors operating largely outside the regulatory framework. However, there has been a significant shift towards state control, particularly in the area of consumer ADR. This trend can be seen not only in the European Union, with the implementation of the ADR Directive and the ODR Regulation, but also in other jurisdictions such as Taiwan (see hereunder, 5.1.2).

<sup>661</sup> Wetboek Economisch Recht (Code of Economic Law) (Belgium), arts XV.60/2 and XV.69/1. See N Cobbaert, 'Commentaar bij art. XV.60/1 WER' in X, *Handels- en economisch recht. Commentaar met overzicht van rechtspraak en rechtsleer* (Wolters Kluwer 2022) 4.

<sup>662</sup> H-W Micklitz and G Saumier, 'Enforcement and Effectiveness of Consumer Law' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 3, 10.

<sup>663</sup> See *i.a.* C Hodges, 'Mass Collective Redress: Consumer ADR and Regulatory Techniques' (2015) 23(5) *European Review of Private Law* 829, 837.

<sup>664</sup> SB Goldberg, FEA Sander, NH Rogers, *Dispute Resolution: Negotiation, Mediation and Other Processes* (Little Brown and Co 1992) 3; E Plapinger and D Stienstra, *ADR and Settlements in the Federal District Courts: A Sourcebook for Judges and Lawyers* (Federal Judicial Center and CPR Institute for Dispute Resolution 1996), 3.

### 5.1.1 *The US Model*

363 In the United States, ADR and later ODR have gained prominence through business-led initiatives. These efforts are based on the belief that consumer redress in the courts is hampered by cost and delay. Consumer ADR is being promoted to ensure efficiency, accessibility and convenience.<sup>665</sup> For its part, ODR could promote access to justice at the speed of technology and encourage innovation. It would allow individuals to resolve disputes quickly and cheaply, without the cost or inconvenience of travelling or taking time off work to go to court.<sup>666</sup> As we will see in the next section, there is more to it than simply providing a better solution.

364 Key examples of consumer ODR in the US include e-commerce platforms such as Amazon and eBay, which try to gain customer loyalty by providing efficient online mechanisms for resolving purchase disputes.<sup>667</sup> However, the implementation of ODR can take various forms, including automated decision making, online negotiation, mediation, arbitration, community courts, and their variants. Unlike other forms of ODR, Online Arbitration (OArb) provides a final decision by a neutral third party. Other forms that rely on voluntary agreements are said to often fall short when faced with disputes, whereas OArb avoids derailing dispute resolution with anger or delay tactics, thus providing a more satisfactory alternative to non-binding processes.<sup>668</sup>

### 5.1.2 *State Interference in Consumer ADR*

365 In many other jurisdictions, the state has become increasingly involved in consumer ADR.<sup>669</sup> First, extensive regulation has been introduced, focusing on both promotion and quality control. In addition, a number of jurisdictions have even established their own ADR bodies or developed dedicated platforms for consumer dispute resolution. This trend reflects the shift towards state intervention in the management and oversight of consumer ADR processes.

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<sup>665</sup> JJ Resnik, 'A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations' (2018) 96 North Carolina Law Review 101, 129; LE Teitz, 'Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of On-line Dispute Resolution' (2001) 70 Fordham Law Review 100.

<sup>666</sup> AJ Schmitz, 'Access to Consumer Remedies in the Squeaky Wheel System' (2012) 39(2) Pepperdine Law Review 323.

<sup>667</sup> AJ Schmitz, 'Expanding Access to Remedies Through E-Court Initiatives' (2019) 67 Buffalo Law Review 89, 91.

<sup>668</sup> *Ibid* 91.

<sup>669</sup> For the sake of completeness, it should be noted that in the United States, some states also require consumer ADR providers to disclose information on their use. In California, for example, a statute enacted in 2002 and amended in 2014 requires arbitration providers to make relevant information accessible on the web in a computer-searchable format (J Resnik, 'A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations' (2018) 96 North Carolina Law Review 101, 144).

### 5.1.2.1 State Promotion and Regulation of ADR

- 366 The EU has established a number of initiatives to promote the use of ADR for consumer disputes, two of which stand out: the Directive on Consumer ADR and the Regulation on Consumer ODR. These EU initiatives are described as ‘excellent examples of the progressive privatization of consumer protection’.<sup>670</sup> According to some scholars, the long term goal of these initiatives is not only to supplement, but also to substitute the civil litigation system and eventually remove consumer disputes from the realm of the civil courts.<sup>671</sup> Alternatively, courts would evolve into a venue where access is only possible once all alternative remedies have been exhausted.<sup>672</sup>
- 367 The EU’s real commitment to promoting alternative dispute resolution for consumers is reflected in the European Commission’s adoption of a proposal for a Directive amending the Consumer ADR Directive on 17 October 2023. This initiative is taken to better address disputes arising from evolving consumer market trends, such as increased online shopping (including from non-EU traders). The proposed recast Directive aims to adapt the ADR framework to digital markets, to increase the use of ADR in cross-border disputes by providing tailored support to consumers and traders, and to simplify ADR procedures for the benefit of all parties, including by reducing reporting obligations for ADR bodies.<sup>673</sup>
- 368 The foundations of the Directive on Consumer ADR, which largely remain unchanged in the proposed Recast, consist of several principles aimed at ensuring the quality of the system: the independence and impartiality of the various ADR entities, the transparency and effectiveness of the system, and the fairness of the proceedings. Besides, ADR proceedings may not deprive consumers of the protection afforded to them by provisions that cannot be derogated from by agreement. In other words, ADR bodies are obliged to apply mandatory consumer law, at least when they propose a mandatory settlement.<sup>674</sup>
- 369 In general, the Consumer ADR Directive, and more generally the idea of regulating ADR, was warmly welcomed—although some critical comments were made. A first example

<sup>670</sup> S Menétrey, ‘Des fonctions de la procédure dans le droit économique européen. Propos introductifs’ (2015) 4 *Revue internationale de droit économique* 405, 410.

<sup>671</sup> B Hess, ‘The State of the Civil Justice Union’ in B Hess, M Bergström and E Storskrubb (ed), *EU Civil Justice: Current Issues and Future Outlook* (Hart Publishing, 2015) 1, 7. See also ‘For others, it is seen as merely providing second class justice for the poor’ (G Howells and R James, ‘Litigation in the consumer interest’ (2002) 9(1) *ILSA Journal of International & Comparative Law* 4-5).

<sup>672</sup> V Zeno-Zencovich and M-C Paglietti, ‘Le droit processuel des consommateurs’ (2014) 3 *Revue de Droit International et de Droit Comparé* 321, 336.

<sup>673</sup> Proposal for a Directive of the European Parliament and of The Council amending Directive 2013/11/EU on alternative dispute resolution for consumer disputes, as well as Directives (EU) 2015/2302, (EU) 2019/2161 and (EU) 2020/1828.

<sup>674</sup> Directive on alternative dispute resolution for consumer disputes, 2013/11/EU of 21 May 2013 (EU), Art 6-11.

of the downside of regulating ADR can be seen in France, where reports indicate a relatively high rate of inadmissible requests for consumer mediation. The main reason for this seems to be that consumers turn to mediators without first lodging a written complaint with customer services, even though this step is mandatory. This highlights the challenge of ensuring compliance with procedural requirements and the need to raise consumer awareness of the proper channels for dispute resolution.<sup>675</sup> In addition, despite the presence of the ADR Directive, some ADR methods retain a degree of mistrust. Concerns have been raised about the limited attention given to basic procedural safeguards in ADR. It is feared that this could lead to a 'second-class justice' system where consumers receive less compensation than they are legally entitled to.<sup>676</sup> Other disadvantages highlighted include the limited impact of their outcomes, akin to justice behind closed doors, which can only minimally influence business policy and behaviour.<sup>677</sup>

370 The trend towards regulating consumer ADR is not unique to the EU, as the situation in Taiwan illustrates. If a consumer dispute arises between consumers and traders over goods or services, the law allows consumers to lodge a complaint with traders, consumer associations, or consumer service centres, and their branches. In addition, traders are given a fixed period of 15 days to properly deal with consumer complaints.<sup>678</sup>

#### 5.1.2.2 The Role of Public ADR Bodies or ODR Platforms

371 This title should not give the misleading impression that, in the EU for example, government platforms and public ADR schemes are the only providers available. This is not the case. As far as consumer ODR is concerned, there are also cODR providers and internal ODR processes offered by online intermediary marketplaces.<sup>679</sup> In addition, under the ADR Directive, some EU Member States either entrust ADR entirely to private

<sup>675</sup> V Richard, 'Public and Private Enforcement of Consumer Law in France' in S Law and V Richard (ed), *Public and Private Enforcement of Consumer Law – Insights for Luxembourg* (Nomos 2021) 37, 101.

<sup>676</sup> B Hess, 'Prozessuale Mindestgarantien in der Verbraucherschlichtung' (2015) *Juristenzeitung* 548, 551.

<sup>677</sup> H-W Micklitz and G Saumier, 'Enforcement and Effectiveness of Consumer Law' in H-W Micklitz and G Saumier (ed), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 3, 36.

<sup>678</sup> Consumer Protection Law (Taiwan), Art 33-35. See also CT Juang, 'The Taiwan consumer protection law: attempt to protect consumers proves ineffective' (1997) 6(1) *Pacific Rim Law & Policy Journal* 219, 233.

<sup>679</sup> E van Gelder and S Voet, 'The EU ODR platform – A blessing in disguise' (2022) 26(3-4) *Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement* 31, 31-32.

sector schemes (as in the Netherlands)<sup>680</sup> or use a combination of public and private ADR schemes (such as in Belgium<sup>681</sup> or France<sup>682</sup>).

372 However, it is worth noting that, unlike other jurisdictions such as the US, the EU has taken the initiative to develop an EU-run consumer ODR platform. Alongside the implementation of the Consumer ADR Directive in 2013, the EU introduced a related and complementary instrument: the Regulation on Online Dispute Resolution for Consumer Disputes.<sup>683</sup>

373 This Regulation provides for the establishment of an ODR platform to offer consumers and businesses a single entry point for out-of-court settlement of online disputes. This will be done through ADR schemes notified to the European Commission by the competent authorities in accordance with the Consumer ADR Directive. These ADR schemes are connected to the platform and offer ADR through high quality ADR schemes. This platform has been made available in each of the 23 official languages of the EU.<sup>684</sup> Businesses selling goods or services online must inform consumers of the availability of the scheme and the possibility of using the ODR platform to resolve their disputes.<sup>685</sup> Importantly, although ODR can be used to resolve both offline and online disputes, the Regulation does not apply to disputes between consumers and businesses arising from sales or service contracts concluded offline.<sup>686</sup>

374 However, the future of the European ODR Platform is uncertain. Alongside the proposal for the recast of the ADR Directive of 17 October 2023 (see above para 364), a proposal for a Regulation with regards to the discontinuation of the European ODR Platform has also been introduced.<sup>687</sup> The European Commission's rationale is rooted in its acknowledgment of the lack of effectiveness of the current ODR system, where the success rate of complaints submitted appears to be disproportionately low despite the resources allocated to this initiative.

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<sup>680</sup> K Nijgh, 'Versterking alternatieve geschilbeslechting in consumentenzaken door richtlijn ADR en verordening ODR' (2015) *Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement* 4; CMDs Pavillon, 'Geschillencommissies en dwingend recht' (2015) 5 *Tijdschrift voor consumentenrecht & handelspraktijken* 239, 244.

<sup>681</sup> S Voet, 'The Implementation of the Consumer ADR Directive in Belgium' in P Cortes (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 1, 9-10.

<sup>682</sup> V Richard, 'Public and Private Enforcement of Consumer Law in France' in S Law and V Richard (ed), *Public and Private Enforcement of Consumer Law – Insights for Luxembourg* (Nomos 2021) 37, 95.

<sup>683</sup> Regulation on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, 524/2013 of 21 May 2013 (EU), 1–12.

<sup>684</sup> See [ec.europa.eu/consumers/odr/main/index.cfm?event=main.home.chooseLanguage](http://ec.europa.eu/consumers/odr/main/index.cfm?event=main.home.chooseLanguage).

<sup>685</sup> Regulation on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, 524/2013 of 21 May 2013 (EU), Art 14(2).

<sup>686</sup> *Ibid* Art 2(1) and recital (15).

<sup>687</sup> Proposal for a Regulation of the European Parliament and of the Council repealing Regulation (EU) No 524/2013 and amending Regulations (EU) 2017/2394 and (EU) 2018/1724 with regards to the discontinuation of the European ODR Platform, COM(2023) 647 final.

375 Even before the entry into force of the Consumer ODR Regulation, some jurisdictions provided for a digital portal on ADR and ODR. In Belgium, for example, this online platform, managed by the FPS for the Economy, SMEs, the Self-Employed and Energy, is called Belmed. It aims to promote the use of out-of-court options by consumers and businesses. Belmed consists of two pillars: the provision of information on ADR and the provision of ODR for consumers and professionals.<sup>688</sup>

## 5.2 The Underlying Motives Behind Consumer ADR

376 There also seems to be a dichotomy between the US and the rest of the world in terms of the reasons for choosing the consumer ADR route. In the EU and other countries, the reasons for the growth of consumer ADR are well known: it offers expediency, cost reduction, and less contentiousness.<sup>689</sup> It serves as a substitute for court proceedings with their high costs, delays, and formalities which can deter consumers.<sup>690</sup> As part of the specific safeguards to ensure fair and accessible ADR procedures for consumers, restrictions have been placed on the use of pre-dispute agreements. The aim is to prevent consumers from being diverted from the courts against their will.

377 In the US, arbitration clauses have been commonplace for more than 20 years, not only in commercial business-to-business contracts, but also in consumer contracts. This development has been controversial.<sup>691</sup> These clauses prevent consumers from collectively enforcing their rights and instead force them to resort to private dispute resolution systems dictated by companies.

378 Proponents of such arbitration clauses and class action bans, often referred to as ‘class action waivers’, argue that class actions can lead to publicity-driven tactics that force companies into unfair settlements. On the other hand, opponents see it as a strategic move to prevent small individual claims from being heard collectively, even though they could be significant when aggregated.<sup>692</sup> Despite the proliferation of arbitration mandates in consumer contracts, the actual number of arbitrations filed remained relatively low among millions of consumers and employees. As Judge Richard Posner has observed, the alternative to class actions is not a multitude of individual claims, but in many cases no individual claims at all.

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<sup>688</sup> S Voet, ‘The Implementation of the Consumer ADR Directive in Belgium’ in P Cortes (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 1, 21.

<sup>689</sup> V Zeno-Zencovich and M-C Paglietti, ‘Le droit processuel des consommateurs’ (2014) 3 *Revue de Droit International et de Droit Comparé* 321, 332-333.

<sup>690</sup> G Howells and R James, ‘Litigation in the Consumer Interest’ (2002) 9(1) *ILSA Journal of International & Comparative Law* 1, 9-10.

<sup>691</sup> A Schmitz and C Rule, ‘2023: The Year of OArb’ (Ohio State Legal Studies Research Paper No. 754) 1.

<sup>692</sup> JJ Resnik, ‘A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations’ (2018) 96 *North Carolina Law Review* 606, 609.

- 379 The use of these clauses has triggered a chain of events, starting with the introduction of class arbitrations. Companies responded by excluding them from their contracts,<sup>693</sup> leading consumer-friendly states (such as California) to make class action bans unenforceable. In the midst of this ongoing battle, the Supreme Court's decision in *AT&T Mobility LLC v Concepcion* was key.<sup>694</sup> In that case, the Supreme Court held that the Federal Arbitration Act preempts 'state law rules that stand as an obstacle to the accomplishment of the FAA's purposes'. As a result, despite Americans' reverence for their traditional 'day in court', US courts strictly enforce arbitration clauses, demonstrating a preference for contractual freedom and efficiency.<sup>695</sup>
- 380 A similar trend has emerged in Canada, where companies once used arbitration clauses to prevent class actions. However, in 2011, the Supreme Court of Canada ruled in a narrow 5-4 decision in *Seidel v TELUS Communications Inc.* that companies can no longer prevent class actions by including arbitration clauses in their standard consumer contracts.<sup>696</sup>

## 6 CONCLUSION

- 381 The aim of this chapter has been to illustrate that consumer protection proceedings have, in recent years, developed into an autonomous legal discipline that deserves its own focus within the study of procedural law for specific subject matters. Indeed, 'consumer procedural law' shares characteristics with other areas of law with distinct procedural rules.
- 382 As with other special subjects, it is clear that only certain aspects of the procedure (such as specific rules on evidence or jurisdiction) depart from the general procedural norms. These are typically spread across several legal sources. This observation also applies to the specific procedural rules governing consumer protection proceedings (consider, for example, territorial jurisdiction rules favouring the courts and tribunals of the consumer's domicile, or exemptions from court costs for consumers).
- 383 In addition, the freedom of the parties to contractually deviate from procedural rules is restricted. A consumer will only be bound by a forum clause under specific conditions, and not every agreement regarding the burden of proof is deemed permissible. Moreover, in many jurisdictions, even in the absence of specific procedural rules, judges use their discretion to intervene actively in favour of consumers. A striking example is the doctrine developed by the CJEU concerning the ex officio application of consumer

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<sup>693</sup> JM Glover, 'Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements' (2006) 59 Vanderbilt Law Review 1735, 1741.

<sup>694</sup> *AT&T Mobility LLC v Concepcion* (US Supreme Court) [563 US 333 (2011)].

<sup>695</sup> AJ Schmitz, 'American Exceptionalism in Consumer Arbitration' (2013) 10(1) Loyola University Chicago International Law Review 81, 81-82.

<sup>696</sup> *Seidel v TELUS Communications Inc* (Supreme Court Canada) [2011 SCC 15 (2011)].

law, which illustrates a proactive attitude of the judiciary in protecting the interests of consumers.

- 384 In addition to the characteristics common to most special subject matters with distinct procedural rules, consumer litigation has some unique features. First, it is a relatively recent phenomenon, having emerged in the wake of the development of substantive consumer law. Despite the current ubiquity of consumer rights, the concept of consumer protection only emerged in the 1960s. Procedural consumer law developed even later in many jurisdictions.
- 385 This modernity is evident in the fact that enforcement rules extend beyond individual claims in civil courts. This development emphasizes the centrality of different enforcement mechanisms, resulting in a heterogeneity of enforcement mechanisms. For example, in some jurisdictions, collective redress mechanisms are only available for breaches of consumer law, to the exclusion of rights under other areas of law. Moreover, the enforcement of consumer rights does not rely solely on private initiative, but also on the active involvement of public authorities. Private enforcement still requires a degree of active involvement by consumers, such as registration or filling in a complaint form. In contrast, public enforcement by public authorities does not require such active involvement and can potentially protect the interests of the most vulnerable and least informed consumers without relying on their direct and proactive involvement. Furthermore, the contemporary nature of consumer procedural law is evident in the significance placed on alternative dispute resolution (ADR). In its initial phase, ADR represented an unregulated system entirely controlled by private entities. In many legal systems, this conflict resolution technique has progressively become subject to regulation, especially in the field of consumer protection.
- 386 Finally, the sectoral approach stands out. Frequently, procedural rules are not established for the entire realm of consumer law but rather for specific sub-domains, such as consumer sales, product liability, or unfair trade practices. This introduces additional complexity and potentially results in unequal treatment of situations that may, in essence, be similar.

## ABBREVIATIONS AND ACRONYMS

ADR	Alternative Dispute Resolution
ALI	American Law Institute
Art	Article/Articles
BGH	<i>Bundesgerichtshof</i> (Federal Court of Justice) [Germany]
CEPEJ	<i>Conseil de l'Europe Commission européenne pour l'efficacité de la justice</i> (Council of Europe European Commission for the efficiency of justice)
cf	<i>confer</i> (compare)
ch	chapter
CJEU	Court of Justice of the European Union
ECLI	European Case Law Identifier
ECtHR	European Court of Human Rights
ed	editor/editors
edn	edition/editions
eg	<i>exempli gratia</i> (for example)
ELI	European Law Institute
etc	et cetera
EU	European Union
EUR	Euro
ff	following
fn	footnote (external, ie, in other chapters or in citations)
GDPR	General Data Protection Regulation (EU)
ibid	<i>ibidem</i> (in the same place)
ICT	Information and Communication Technologies
ie	<i>id est</i> (that is)
MYR	Malaysian Ringgit
n	footnote (internal, ie, within the same chapter)
no	number/numbers
NZD	new zealand dollar
para	paragraph/paragraphs
PD	Practice Direction
pt	part
s	Section/Sections
supp	supplement/supplements
trans/tr	translated, translation/translator
UK	United Kingdom
UNIDROIT	<i>Institut international pour l'unification du droit privé</i> (International Institute for the Unification of Private Law)
UP	University Press

US / USA	United States of America
USD	United States Dollar
v	versus
vol	volume/volumes

## LEGISLATION

### International/Supranational

Council Directive relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, 84/450/EEC of 10 September 1984 (EU)

Council Directive on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products, 85/374/EEC of 25 July 1985 (EU)

Council Directive on unfair terms in consumer contracts, 93/13/EEC of 5 April 1993 (EU)

Directive on the protection of consumers in respect of distance contracts, 97/7/EC of 20 May 1997 (EU)

Directive on certain aspects of the sale of consumer goods and associated guarantees, 1999/44/EC of 25 May 1999 (EU)

Directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, 2003/8/EC of 27 January 2003 (EU)

Directive concerning unfair business-to-consumer commercial practices in the internal market, 2005/29/EC of 11 May 2005 (EU)

Regulation creating a European Order for Payment Procedure, 1896/2006 of 12 December 2006 (EU)

Directive concerning misleading and comparative advertising, 2006/114/EC of 12 December 2006 (EU)

Regulation establishing a European Small Claims Procedure, 861/2007 of 11 July 2007 (EU)

Directive on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, 2007/64/EC of 13 November 2007 (EU)

Directive on credit agreements for consumers and repealing Council Directive 87/102/EEC, 2008/48/EC of 23 April 2008 (EU)

Directive on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC, 2011/83/EU of 25 October 2011 (EU)

Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 1215/2012 of 12 December 2012 (EU)

Directive on certain aspects concerning contracts for the sale of goods, amending Regulation 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, 2019/771 of 20 May 2019 (EU)

Directive on certain aspects concerning contracts for the supply of digital content and digital services, 2019/770 of 20 May 2019 (EU)

Directive on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, 2020/1828 of 25 November 2020 (EU)

Model European Rules of Civil Procedure 2020 (ELI / UNIDROIT)

### **National**

Ley nº 19.496 (Act nº 19.496) (Chile)

Loi sur la protection du consommateur 1978 (Consumer Protection Act) (Quebec)

Constituição Federal 1988 (Federal Constitution) (Brazil)

Código de Proteção e Defesa do Consumidor 1990 (Code of Consumer Protection and Defence) (Brazil)

Ley nº 24.240 de Defensa del Consumidor (Law nº 24, 240 on Consumer Protection) of 22 September 1993 (Argentina)

Consumer Rights and Interests Protection Law 1993 (China)

Civil Procedure Rules 1998 (England & Wales)

Consumer Protection Act 2002 (Ontario, Canada)

Class Action Fairness Act 2005 [Public Law 109–2 109th Congress] (US).

Loi sur le recours collectif (Class Action Law) of 8 June 1978 (Quebec)

Ordonanței de urgență a Guvernului privind taxele judiciare de timbre (Government Ordinance regarding the judiciary fees) 80/2013 (Romania)

Competition and Consumer Act 2010 (Australia)

Consumer Protection Act 2012 (Kenya)

Consumer Protection Act 2019 (India)

Consumer Protection Act 2008 (South Africa)

Civil Procedure Code 2010 (Codul de procedură civilă al României) (Romania)

Code of Civil Procedure (Code de procédure civile) (France)

Code of Judicial procedure 1942 (Rättegångsbalk) (Sweden)

- Civil Procedure Act (Ley de Enjuiciamiento Civil) (Spain)
- Civil Procedure Code (Code de la consommation) (France)
- Civil Code (Code civil) (France)
- Civil Code (Code civil) (Quebec)
- Commercial Code (Code de commerce) (France)
- Consumer Protection Act 1978 (Loi sur la protection du consommateur) (Quebec)
- Civil Code 2020 (Burgerlijk Wetboek) (Belgium)
- Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering) (the Netherlands)
- Civil Procedure Code (Zivilprozessordnung) (Germany)
- Consumer Rights and Interests Protection Law 1993 (China)
- Wetboek Economisch Recht (Code of Economic Law) (Belgium)
- Gerechtelijk Wetboek (Judicial Code) (Belgium)
- Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (Act On the Regulation of the Law of Standard Terms and Conditions) (Germany)
- Loi relative aux actions en justice des associations agréées de consommateurs et à l'information des consommateurs (Law relating to legal actions by approved consumer associations and to consumer information), n° 88-14, 5 January 1988 (France)
- Wet betreffende de minnelijke invordering van schulden van de consument (Law concerning the out-of-court collection of consumer debts) of 20 December 2002 (Belgium)
- Wet betreffende de handelspraktijken en de voorlichting en bescherming van de verbruiker (Act on Trade Practices and Consumer Information and Protection) (Belgium)
- Wet houdende invoeging van boek XIX "Schulden van de consument" in het Wetboek van economisch recht (Law introducing Book XIX "Consumer debts" into the Belgian Code of Economic Law) of 4 May 2023 (Belgium)
- Wet tot regeling van de bevoegdheid van bepaalde rechtspersonen om ter bescherming van de belangen van andere personen een rechtsvordering in te stellen (Act regulating the authority of certain legal entities to bring legal proceedings to protect the interests of other persons) of 6 April 1994 [Stb. 1994] (The Netherlands)
- Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen (Act on injunctions for consumer rights and other violations) (Germany)
- Gesetz gegen den unlauteren Wettbewerb (Unfair competition law) (Germany)

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*Cofidis SA v Jean-Louis Fredout*, Case C-473/00 (CJEU), Judgement of 21 November 2002 [ECLI:EU:C:2002:705].

*Elisa María Mostaza Claro v. Centro Móvil Milenium SL*, Case C-168/05 (CJEU), Judgement of 26 October 2006 [ECLI:EU:C:2006:675].

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*Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira*, Case C-40/08 (CJEU), Judgement of 6 October 2009 [ECLI:EU:C:2009:615].

*Eva Martín Martín v EDP Editores SL*, Case C-227/08 (CJEU), Judgment 17 December 2009 [ECLI:EU:C:2009:792].

*Pohotovosť s.r.o. v Iveta Korčkovská*, Case C-76/10 (CJEU), Order 16 November 2010 [ECLI:EU:C:2010:685].

*Banif Plus Bank Zrt v Csaba Csipai and Viktória Csipai*, Case C-472/11 (CJEU), Judgment of 21 February 2013 [ECLI:EU:C:2013:88].

*Soledad Duarte Hueros v Autociba SA and Automóviles Citroën España SA*, Case C-32/12 (CJEU), Judgment 3 October 2013 [ECLI:EU:C:2013:637].

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*Novo Nordisk Pharma GmbH v S*, Case C 310/13 (CJEU), Judgment 20 November 2014 [ECLI:EU:C:2015:357].

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